EMPLOYMENT TRIBUNALS

Claimant: Mrs J Naylor

Respondent: BH Dental Care Limited

Heard at: Manchester (by CVP) **On:** 22 November 2024

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mr K Ali, counsel
Respondent: Miss M Martin, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a worker for the respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

2. The claimant was an employee of the respondent within the meaning of section 83 of the Equality Act 2010.

3. The claimant worked under a contract of employment and therefore was an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996.

4. The claimant's continuous period of employment with the respondent commenced on 25 August 2020.

REASONS

Introduction

1. This was a preliminary hearing to determine questions regarding the claimant's employment or worker status with the respondent and when it was that her continuous period of employment began. The claimant had been first engaged by Lonsdale Dental Ltd as a dental therapist and hygienist by Dr Rimmer from 25 August 2020. There was a dispute about her status from when she was first engaged. A company operated by her, Naylor Made Smile Ltd was paid for her

services from approximately April 2022. The claimant resigned on notice on 26 August 2022, albeit there was a dispute about what occurred thereafter. The employees of Lonsdale Dental Ltd transferred under TUPE to the respondent in December 2022 when it took over the relevant practice. The claimant was engaged by the respondent from 23 December 2022 until 15 December 2023. There was a dispute about her status during that engagement.

Claims and Issues

2. A preliminary hearing was conducted by Employment Judge Greer on 19 August 2024. He identified the issues to be determined at this hearing. At the start of this hearing, the parties agreed that the case management order accurately recorded the issues to be determined. Those issues are set out below.

1.1 Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.2 Was the claimant an employee of the respondent within the meaning of section 83 of the Equality Act 2010 in that the claimant worked under a contract of employment, a contract of apprenticeship, or a contract personally to do work?

1.3 If not an employee, was the claimant a worker for the respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996 in that:

1.3.1 he/she worked under a contract whereby the claimant undertook to do or to perform personally any work or services for the respondent, and

1.3.2 the respondent was not by virtue of that contract a client or customer of any profession or business undertaking carried on by the individual?

1.4 If the Claimant was an employee of the Respondent, when did her continuous employment start?

Procedure

3. Both parties were very ably represented by counsel at the hearing. The hearing was conducted remotely by CVP remote video technology, with both parties and all witnesses attending by video. I conducted the hearing from Manchester Employment Tribunal. The hearing lasted the day for which it was listed.

4. An agreed bundle of documents was prepared in advance of the hearing, with 294 pages. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle. I read only the documents in the bundle to which I was referred, including in witness statements or as directed by the parties.

5. I was also provided with witness statements from each of the witnesses called to give evidence at the hearing. After an initial discussion with the parties, I read the witness statements and the documents referred to.

6. I heard evidence from the claimant, who was cross examined by the respondent's representative, before I asked her questions. Her evidence was heard during the remainder of the morning, following reading.

7. For the respondent, I heard evidence from: Dr Barry Rimmer, a director of Lonsdale Dental Ltd and an associate engaged by the respondent; and Dr Benjamin Harrison, the director of the respondent and previously an associate engaged by Lonsdale Dental Ltd. They each gave evidence during the afternoon, were cross-examined, and I asked questions.

8. After the evidence was heard, each of the parties was given the opportunity to make submissions. Both counsel had prepared a skeleton argument prior to the hearing. Each of the representatives also made additional oral submissions.

9. It was agreed at the start of the day for which the hearing was listed, that the time allocated was not generous for the issues to be heard and determined. I was grateful to the representatives for ensuring that the evidence and submissions were able to be appropriately and fully heard within the time allocated. There was insufficient time for me to also reach a decision in the day allocated and, therefore as a result, I reserved my decision. This document contains my Judgment any my reasons for reaching that Judgment.

Facts

10. The claimant had previous experience working as a dental nurse, but her engagement by Lonsdale Dental Ltd was her first engagement as a dental therapist and hygienist following University. Her engagement commenced on 25 August 2020. Dr Rimmer and Mrs Rimmer are the directors of Lonsdale Dental Ltd. That company owned and ran the practice at which the claimant worked.

11. I was provided with the document which was agreed and signed by the claimant when her engagement with Lonsdale Dental Ltd commenced (55). That was described as a consultancy agreement. It was dated 25 August 2020. It was agreed between the claimant personally (defined as the Consultant) and Lonsdale Dental practice Ltd (defined as the Client). It stated that the claimant would provide consultancy services during the term of the agreement and defined those services as "*The services to be performed by the Consultant in the course of their appointment hereunder as set out in the Schedule to this Agreement, such services to be provided using reasonable skill and care"*. There was no schedule appended to the version of the agreement provided to me.

12. The agreement contained a number of provisions common to such agreements, and I will not re-produce them all in this agreement, but did consider the agreement in its entirety. Of particular note was the following:

a. The agreement did not define the times to be worked;

b. It was said that "*The Consultant is retained on a non-exclusive basis but will not during the appointment undertake any additional activities or accept any other engagements which lead or might lead to any conflict of interest between the Consultant and the best interests of the Client*";

c. An hourly fee rate was included, which it was stated would be paid without any deductions for income tax or national insurance contributions, and such fee was to be paid monthly in arrears within ten days of receipt of the Consultant's invoice;

d. The Consultant was required to provide her own adequate professional risks indemnity cover and was to provide evidence upon request of that cover as well as of GDC registration. The agreement also required the Consultant to maintain public liability insurance cover and produce evidence on request;

e. It said that "*The Consultant is not an employee of the practice and consequently not entitle to paid holidays, sick pay or maternity pay. It is also accepted that the Consultant will not have the right to claim unfair dismissal or redundancy payment in the event that the agreement is terminated*";

f. It provided that it could be terminated by either party on three months written notice;

g. In relation to tax, it said "*The Client and the Consultant declare and confirm that it is the intention of the parties that the Consultant shall have the status of a self-employed person and shall be responsible for all income tax liabilities and National Insurance or similar contributions in respect of their fees and accordingly the Consultant hereby agrees to indemnify the Client in respect of any claims that may be made by the relevant authorities against the Client in respect of income tax and National Insurance or similar contributions (including penalties and interest), and against the Client's costs of dealing with such demands, relating the Consultant's services under this Agreement";*

h. Under a heading of "*No Employment*" it said "*The Consultant is an independent contractor and nothing in this Agreement shall render or be deemed to render the Consultant an employee, worker or agent of the Client. This Agreement does not create any mutuality of obligation between the Consultant and the Client*"; and

i. There was nothing in the agreement that provided that the Consultant could provide a substitute (or which set out what would occur if she did or any provisions about who she could provide).

13. It was Dr Rimmer's evidence, that the company employed nurses and receptionists and engaged others including lab technicians and Dr Harrison as an associate dentist. Dr Rimmer has considerable experience in running dental

practices. When she worked, the claimant worked alongside a dental nurse employed by the practice.

14. In her witness statement, the claimant stated, "*Whilst I accept that the initial understanding with Barry Rimmer was that I would be engaged on a self-employed basis, I do not believe that the reality of the relationship reflected that*".

15. At the start of the engagement, Mrs Rimmer asked the claimant to provide copies of her passport, indemnity, GDC certificate, DRB certificate, immunisation record, and qualifications (53).

16. At the start of her engagement, the claimant was paid at a set hourly rate. Dr Rimmer increased that rate during the engagement and also introduced a bonus which was paid to the claimant. He was adamant that the bonus introduced for the claimant was specific to her and she was not included as part of the general staff bonus, as her bonus was paid monthly based upon her own performance. Following the change in practice ownership (as explained in more detail below), the arrangements for payment changed to a percentage payment.

17. If a patient cancelled, they were charged a cancellation fee. That was less than the full appointment fee. It was the claimant's evidence, that she was paid her hourly rate regardless of no shows or cancellations (until the change to percentage payment).

18. It was the claimant's evidence, that she arranged for and paid for her own GDC registration and indemnity insurance. It was also her evidence, that it was not uncommon for employed dental therapists to do so.

19. It was the claimant's evidence, that following her engagement she was told that Lonsdale Dental Ltd would provide her with unform. The uniform was scrubs, with the company's aim to have staff (or, at least, specific categories of staff) wearing a consistent colour. The scrubs provided were not branded. In fact, it was the claimant's evidence, that she was only provided one pair of scrubs and so she frequently attended work in her own scrubs in her own choice of colour, for washing reasons. Dr Rimmer's evidence was, that she always wore her own scrubs. After the practice transferred, the chosen colour of scrubs changed, but the claimant continued to frequently work in her own scrubs in her own chosen colour.

20. The vast majority of the claimant's work was seeing patients referred to her by the practice's dentists or which the practice gained by word of mouth. She was able to see patients who she introduced herself. The evidence I heard was that the claimant introduced four patients. The claimant also treated members of her family at no cost. Patients were booked through the practice's reception.

21. The claimant initially worked one day per week. Soon after she started, that increased to two days per week. For a very limited period, it increased to three days, but for the vast majority of the time it was two days. Those days were set. The claimant's hours were 9.30 to 5 and patients were booked in to see her over those hours. It was Dr Rimmer's evidence, that the claimant frequently finished early on a Friday. The times worked were dictated by patient bookings. It was the claimant's evidence, that she had very limited flexibility in changing her hours and she was told

by Dr Harrison on one occasion that if she wished to reduce her hours she would need to shorten her lunch break (81). There was no dispute that the claimant's diary was busy and booked up well in advance, and therefore the inability to flex hours (particularly at short notice) was primarily dictated by patient bookings.

22. It was the claimant's evidence, that the agreement did not allow her to send a substitute, nor was she ever asked to do so. During a period of ill health, when she was absent for three months, the claimant did not provide a substitute nor was she asked to arrange cover for her patients. The claimant was not paid any sick pay during her absence. The claimant received payments from her own income protection policy.

23. The fees charged to patients for standard work were set by the practice.

24. The practice offered some training courses to the claimant for which she was not required to pay. The claimant also undertook training which she arranged. On one occasion the claimant declined to attend a training course which the practice had arranged, as she was unable to attend as she was undertaking work elsewhere and was booked to see patients.

25. The practice provided the claimant with the equipment required and she did so in the room provided by the practice. On one occasion, the claimant purchased some of her own equipment because it was offered as a bargain at a training course, but she regretted doing so soon after.

26. The claimant initially provided Lonsdale Dental Ltd with invoices raised in her own name for payment to herself personally. The claimant incorporated a company on 8 April 2022, Naylor Made Smile Ltd. Thereafter, her company was paid by Lonsdale Dental Ltd for her services. Invoices were produced by the company. The claimant's evidence was that she set up the company following advice from her accountant and nothing else about the working relationship changed when the company began raising the invoices.

27. The claimant was invited to social events by Dr Rimmer, including a Christmas party. Dr Rimmer's evidence was that he invited not only employees but also the other contractors engaged by the practice, as well as partners of the team and self-employed laboratory technicians.

28. Whilst working for Lonsdale Dental Limited, the claimant also undertook work for two other dental practices. She provided maternity cover for one practice for a limited period with variable amounts of work. She later undertook regular work for another practice on a day when she was not required to work for the practice relevant to this claim. It was the claimant's evidence, that she was paid for her work at that second practice via her company (Naylor Made Smile Ltd).

29. I was provided with an exchange of messages between Dr Rimmer and the claimant exchanged on 23 August 2022 (67). Dr Rimmer asked if the claimant was working elsewhere, and the claimant said she was and had been working there for about four months. Within the messages Dr Rimmer said:

> "*You informed me you only wanted to work at practice and asked for more hrs which I gave you and I have accommadated you many times and kept your job open during you illness I was also looking to increase your hrs Whilst I appreciate you have a different outlook you have taken up a new job when you returned to work and have given me no notice of this"*

30. In the messages, Dr Rimmer said that would need to be discussed, and he went on to say that the claimant had not informed him that she was working elsewhere, there might be a conflict, and he would have expected out of courtesy to have been informed. The claimant responded by explaining that a serious health event had changed her outlook on life and went on to say, "*Being self employed I thought I can work where I like*".

31. There followed further messages exchanged, as part of which the claimant provided further information about the other work she had undertaken. Dr Rimmer quoted the claimant's contract and later went on to say:

> "*I think it is more than reasonable to expect you to inform me when taking a position. You appear to be saying you can decide whether there is a conflict of interest and my view has no bearing* …
>
> [in a later message] *The issue is not working at another practice per se, its not giving me the curtesy of informing me and not allowing me to determine a potential conflict of interest on matters you would not be aware of"*

32. During his evidence in the Tribunal hearing, Dr Rimmer explained the conflict by reference to a particular patient who had moved practices, confidentiality, and litigation.

33. The claimant resigned as she was upset by the messages which she had received from Dr Rimmer. It appeared that she did so on 26 August 2022. She was required to give three months' notice and accordingly she continued to work for that notice period.

34. I was provided with what was described as a note of an emergency staff meeting which took place on 26 August 2022 (73). That note referred to the claimant as having resigned that day. The claimant was not in attendance. It was recorded that Dr Rimmer told the attendees that it was clear that the claimant had been in breach of contract by taking another job without informing him and he said that by keeping that information from him (when others had been aware) she had caused unease and upset in the team. It was very clear from what was recorded, that Dr Rimmer had been very aggrieved by what had occurred and had made that clear to the attendees at the meeting.

35. It was the claimant's evidence, that she agreed to retract her notice in September 2022. I was provided with an exchange of messages with Dr Harrison on 14 September 2022 (75) in which the claimant said, "*I will retract my resignation notice on the condition that more scalers and compatible tips are brought for which ever room I am working in … Understand if you have already made provisions for a new Therapist just let me know as soon as possible*". Dr Harrison replied "*Glad*

you've reconsidered, until I take over it's in Barry's hands with the equipment. It's best you speak to him".

36. The claimant messaged Dr Rimmer on 1 November asking him if he wanted her to work on 29 November as she said her last working day was the 25 November and she said, "*you haven't told me if you want me to stay or not?*" (208). Dr Rimmer replied by saying that the claimant had shown no wish to rescind her resignation and had shown no (what he described as) insight. However, he went on to say:

> "*However, Ben has asked me to allow you to stay on. Out of respect to him and to avoid further disruption to staff and patients I have agreed to his request. However if the process is prolonged or doesnt go through I will need to reappraise the situation*"

37. The message was referring to Dr Harrison and his wish that the claimant be allowed to stay on. It was Dr Harrison's evidence, that the process of purchasing the practice took a long time. As with any such transaction, it was possible that it could not have gone ahead at any time before the purchase was concluded. He emphasised that, at that time, he was someone who worked alongside the claimant at the premises, he was not the owner.

38. The claimant replied that "*Barry I told you I wanted to retract my notice when I spoke to you in your surgery*", to which Dr Rimmer replied "*I must not have been in the same meeting. I cannot recall you asking to retract your resignation*". It was Dr Rimmer's evidence that, if the purchase had not gone through, he believed that continuation of the relationship had become untenable.

39. It was not in dispute that the claimant continued to provide services to patients at the same practice following this exchange. She worked up to the date of the sale of the practice and continued to work after the practice was sold. It was the claimant's evidence, that patients continued to be booked in for her to see and there was no break in those arrangements when the practice was sold.

40. Included in the bundle were two exchanges between the claimant and Dr Harrison about post-purchase arrangements. In an exchange on 14 June 2022 (66) the claimant asked whether Dr Harrison had spoken to Dr Rimmer about a percentage yet. Dr Harrison responded, "*I'm happy to talk about a % split you want to change over to when I'm owner*". There was also an undated exchange of messages between the claimant and Dr Harrison (135) about payment to the claimant. Dr Harrison said that he had a lot on with buying the practice but said that paying a percentage was not a big factor and the claimant replied by saying she would rather swap to a percentage rather than hourly pay, quoting the percentage figure she received from the other practice for which she worked.

41. On 23 December 2022 the relevant practice was taken over by respondent, being a company of which Dr Harrison was the sole director. Dr Rimmer remained engaged to work at the practice, but it was no longer his company which ran the practice. Those employed within the practice transferred to the respondent under TUPE.

42. Neither the claimant nor her company, were provided with a new written contract when the practice was taken over by the respondent. Following the respondent taking over the practice, the way in which the claimant/her company was paid was changed. The claimant was paid a percentage of the amount paid by the patients which she saw, rather than the hourly rate and bonus as previously. The claimant agreed in evidence that being paid a percentage was more in line with self-employed status. I was not shown any documents which recorded the change or what was agreed in relation to it. One impact of that change was that where there was a cancelation or no-show, the claimant would receive only her percentage of the reduced fee paid by the patient (albeit she would still receive some money for those patients), rather than receiving the same rate (as had occurred whilst she was hourly paid). Dr Harrison's evidence in his witness statement, was that a new contract was agreed at the start of January 2023 for Naylor Made Smiles Ltd to provide dental therapy services, but I was not provided with any evidence about the practicalities of how it was he said that such unwritten contract was agreed.

43. The claimant's company raised invoices for the amounts payable with the respondent from the time when the practice was purchased by the respondent. It was Dr Harrison's evidence, that the invoices were often incorrect, and the respondent would pay only the amount that it deemed was payable. I was provided with an exchange of messages between the claimant and Dr Harrison on 31 May 2023 (119) when he told the claimant not to send invoices because there had been errors in the previous ones. He said that the practice manager would work it out and said "*Just as you're on a split an invoice seems pointless if there are errors. You can compare obviously to see if it corresponds*". After that request, the claimant (and her company) ceased to provide invoices to the respondent, but she continued to be paid.

44. The claimant took annual leave from the practice. There was no defined amount of leave which she could take, and she was not paid when she took leave. She was, however, required to inform the practice in advance and, in practice, to obtain agreement for the leave. On one occasion she was told not to take leave. Dr Rimmer explained the requirement with reference to the need for the practice to operate and provide services to patients on the dates arranged.

45. On 22 November 2023 there was an exchange of messages regarding the claimant's time off. The claimant had booked a day off due to her husband having surgery. The claimant messaged to say that the surgery had been moved to 12 December which she would also need to book off, but she would still need the 28 November off for another reason. The response provided was "*Ben says you can only have 1 off so which do you want*".

46. It was the claimant's evidence, that she was closely monitored by the respondent at all times and was subjected to performance reviews. It was her evidence that Dr Rimmer spoke to her frequently about matters, but it was not recorded in writing. I was provided with the record of one such review meeting on 5 September 2023 with Dr Harrison (88). That recorded Dr Harrison raising issues regarding the scope of practice, medical history, boundaries, individual cases, and other points. Within other points, Dr Harrison was recorded as informing the claimant about wanting to maintain a team culture through the practice and advising the claimant about avoiding conflicts and being careful with her tone of voice. The note

also listed a number of patients, with points which were discussed about each of them. One of those patients had complained about the amount charged for work undertaken by the claimant and, as a result, he had received a partial refund. I would consider the note to reflect a fairly detailed performance review having been undertaken with the claimant, during which she was clearly subjected to instruction and direction by Dr Harrison.

47. In his evidence, Dr Harrison said that the claimant sub-contracted work such as intra-oral digital scans to be carried out by another member of staff. He also said that the respondent charged Naylor Made Smiles a fee for utilising a staff member to do a scan. I heard some evidence about what occurred. The claimant charged the patient a set rate for a treatment. The treatment required a scan to be undertaken. On the one occasion, as the claimant was not present or able to do so, another member of staff undertook the scan. The respondent received payment from the patient. The respondent did not pay the claimant the full rate applicable for the treatment, as it deducted a sum from the payment made to the claimant/her company for the scan. In an exchange of messages, the claimant said had that had upset her a bit (122). The claimant did not make any payment to another person for the work undertaken. Rather, the respondent reduced the sum it paid to the claimant/her company to reflect the cost or value it placed on the other person employed or engaged by the practice undertaking the scan (a component of the treatment). I did not consider what I heard to have been in any genuine way an example of what could accurately be described as the claimant having sub-contracted work, nor did I find that it could accurately be described as the respondent charging the claimant's company for work undertaken. I did not find that what occurred was genuinely an example of substitution.

48. In his witness statement, Dr Harrison said that the claimant would have been able to send a substitute in her place, but that had not materialised. I did not regard that statement as accurate or as genuinely reflecting the agreement in place. It was clear to me that the arrangements made required the claimant to attend and undertake the therapy and hygienist work arranged. There was no genuine evidence (save for the assertion by Dr Harrison which I did not find to be accurate) that the claimant would have been able to arrange for someone else to turn up and see the patients which it had been arranged she would see.

49. It was also Dr Harrison's evidence, that there were no fixed hours that the claimant had to discharge. Obviously, the flexibility was in reality limited by the patients booked. It was, however, Dr Harrison's evidence that he scrutinised attendance times less than Dr Rimmer had done, and it appeared to be unchallenged that the claimant had a greater flexibility in attendance after the respondent purchased the practice with regard to being on the premises for start and finish times (where patients were not booked at those times).

50. Both Dr Rimmer and Dr Harrison gave evidence, that the claimant sold her own work or actively marketed her services. Dr Harrison's example was that she advised and carried out tooth whitening procedures and made full clinical decisions about what she could do within certain lengths of time. Whilst I heard only limited evidence about such matters, it was not my understanding that the claimant marketed to the practice's patients services which she provided outside the practice.

51. For a period in 2023, the claimant also worked on a Thursday. That was intended to correspond with the clinic of a newly appointed dentist. In October 2023 the claimant suggested cancelling Thursdays until the relevant appointments were up and running. Dr Harrison said that he did not want the claimant attending for bits and pieces and not what he described as a proper diary (125). The claimant agreed and asked for a day rate for that day of work. Following further messages, the claimant said that the first Thursday was all cleans which was not what she had agreed to do (this related to the claimant's wish to undertake more therapist work and less routine hygienist work). As a result, it appeared that Thursdays stopped (the claimant said that they had not worked out).

52. The claimant's engagement was terminated with the provision of three months' notice by the respondent on 15 December 2023. I was provided with the transcript of a meeting on 19 December 2023 at which notice was discussed (131). In that meeting, Dr Harrison stated, in response to the claimant asserting that as soon as she had left the building, she was allowed to approach her patients, that they were her patients.

53. The claimant was offered an agreement signed by Dr Harrison on behalf of BH Dental Care Limited (133) which provided for notice to be paid rather than the claimant needing to work it (it also addressed matters such as patients and confidentiality). She accepted it. The claimant's evidence was that she did not take legal advice on it and signed it impulsively (she linked that to her ADHD). The agreement was stated to be between "*BH Dental care Limited/Ben Harrison (referred to as BH) and Naylor Made Smiles Limited/Jeni Naylor (referred to as JN)*". The engagement terminated on 21 December 2023.

54. It was the claimant's evidence, that she was replaced with a dental therapist who was given an employment contract by the respondent.

55. I heard a lot of evidence. This Judgment does not seek to address every point about which I heard or about which the parties disagreed. It only includes the points which I considered relevant to the issues which I needed to consider in order to decide if the claims succeeded or failed. If I have not mentioned a particular point, it does not mean that I have overlooked it, but rather I have not considered it relevant to the issues I needed to determine and necessary to state when providing reasons.

The Law

56. Section 230 of the Employment Rights Act 1996 says:

> *"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."*
>
> *"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."*
>
> "*In this Act "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"

"In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or where the employment has ceased, was) employed."

"In this Act "employment" –

(a) In relation to an employee, means … employment under a contract of employment, and

(b) In relation to a worker, means employment under his contract; and "employed" shall be construed accordingly"

57. Section 83(2) of the Equality Act 2010 says:

"*"Employment" means –*

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

58. The key starting point in determining whether someone is an employee is the Judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433, where he said:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …."

59. The right approach is to weigh up all the factors. None are necessarily determinative. In her skeleton argument, the respondent's counsel said that the following were a non-prescriptive checklist to be applied:

a. A contract between the individual and the alleged employer. This may be express (oral or in writing) or implied;

b. The respondent's control over the claimant and the claimant's work;

c. Personal service;

d. Mutuality of obligations to provide and complete work;

e. Services not provided to a client or customer; and

f. Other factors consistent or inconsistent.

60. She also provided a list of other relevant factors, to which I would add some other important matters, which means that a non-exhaustive list of key relevant factors includes:

- How the parties themselves describe the relationship, which is potentially a significant factor, but is not determinative;
- The amount of remuneration and how it was paid – regular wage tends to point towards a contract of employment;
- Was the worker tied to one employer or free to deliver work for others;
- What were the arrangements for income tax and NI;
- What were the arrangements regarding risk;
- Is the individual required to work set hours;
- What is agreed regarding sick pay and holiday pay;
- Is the individual integrated into the organisation and how is she presented to the outside world; and
- Custom and practice of the specific industry.

61. In interpreting the agreement between the parties, including any documents which record the relationship, the question I must ask is what was the true agreement between the parties? The terms of any written agreement can assist in determining that, but sometimes in employment the terms do not reflect the reality. The respondent's counsel highlighted that did not mean that the terms of any written agreement should be ignored. In the decision of the Supreme Court in **Autoclenz Ltd v Belcher** [2011] IRLR 820*,* Lord Clarke said*:*

> "*So 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 and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

62. With regard to control, the respondent's representative cited the following from the decision of the Supreme Court in **Catholic Child Welfare Society v Various claimants** [2012] UKSC 56:

> "*Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employ does, not how he does it"*

63. With regard to personal service, the respondent's counsel relied upon what was said in the **Ready Mix Concrete** case, in **Pimlico Plumbers v Smith** [2018] UKSC 29, and in **Town and Country Glasgow Ltd v Munro** EATS 0035/18. An unfettered right to substitute another person to do the work is inconsistent with employment. A conditional right to send a substitute may not be inconsistent, depending upon the precise contractual arrangement and the fetter on the right to send a substitute.

64. In her skeleton, the respondent's counsel also provided a detailed explanation of what is meant by mutuality of obligation and of the relevant case law. I do not need to reproduce that in this judgment.

65. With regard to worker status, I must determine the question by applying the wording of section 230(3)(b) of the Employment Rights Act 1996. I must consider whether the claimant carried on a profession or business undertaking. I must consider whether the status of the respondent was, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the claimant. I must decide whether the work done for the respondent was in the course of such profession or business. In reaching my decision I must have regard to all the relevant facts and circumstances of the particular case. Guidance can be found in **Pimlico Plumbers v Smith** [2018] UKSC 29. Lord Wilson's Judgment in the Supreme Court dealt with the question of whether someone was a client or customer, and he highlighted the difficulty with the worker provision:

> "*It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a particular status. It usually attempts to define positively what the attributes of the category should be. In Byrne Bros (Formwork) Ltd v Baird [2002] IRLR 96 (para 16) Mr Recorder Underhill QC (as Underhill LJ then was) described as clumsily worded the requirement that the other party be neither a client nor a customer. It is hard to disagree*."

66. In **Clyde & Co LLP v Bates Winkelhof** [2014] UKSC 32 Lady Hale agreed that there was no single key to unlocking the words of the statute in every case, and she emphasised that there was no substitute for applying the words of the statute to the individual case. She said there was no magic test.

67. The respondent's counsel submitted that factors to consider would include the degree of control exercised by the employer, the exclusivity of the engagement, its duration, the method of payment, what equipment if any is supplied, the level of risk undertaken, whether there is freedom of work for others, tax status, and the structure of payments. She relied upon **Byrne Brothers (Formwork) Ltd v Baird** [2022] ICR 667, **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, **Hospital Medical Group v Westwood** [2012] EWCA Civ 1005 (an authority provided by the claimant's counsel, which did have some broad comparability to this

case), and **Jivraj v Haswani** [2011] UKSC 40. In **Westwood** it was said that there was no single key to unlock the words of the statute in every case.

68. As well as providing and relying upon **Westwood**, the claimant's counsel also provided a copy of and relied upon **Sejpal v Rodericks Dental Ltd** [2022] EAT 91, a case in which the Employment Appeal Tribunal substituted a finding that an Associate dentist was a worker, for the Tribunal's decision that she was not.

69. The definition of employment in the Equality Act 2010 is broader than the definition in the Employment Rights Act 1996. I did ask both representatives whether they agreed that the outcome of the question whether the claimant was a limb (b) worker and whether she was an Equality Act employee must be the same. The respondent's counsel agreed that it would be. The claimant's counsel indicated that if she was a limb (b) worker, she would certainly be an employee under the Equality Act 2010, but he submitted that the category of employee under the Equality Act 2010 was broader than that of limb (b) workers. I am unconvinced that the claimant's counsel was right, but in practice I did not need to consider whether one category was broader than the other.

70. I did also raise with the representatives the Transfer of Undertakings (Protection of Employment) Regulations 2006 (which I have referred to as TUPE). It is not necessary for me to set out the law as it applies under TUPE and neither counsel relied upon any particular element of TUPE (or case law relating to it) during their submissions. It was not in dispute that somebody employed in the undertaking immediately prior to the transfer must transfer under TUPE.

71. In his submissions, the claimant's counsel indicated that his view of the law did not significantly differ from that put forward by the respondent's counsel in her skeleton argument.

Conclusions – applying the Law to the Facts

72. The respondent's counsel submitted that there was no contract between the claimant and the respondent at all and therefore she was neither an employee nor a worker. In doing so, she emphasised that the respondent paid Naylor Made Smile Ltd, and she contended that the contract was between the respondent and that company.

73. I did not accept the respondent's submission on the parties to the arrangement in place. It was important and necessary for me to consider the relationship between the parties in the context of the history of the arrangement which had been in place. It was notable that the arrangements in place evolved and changed over time. At the outset of the claimant working at the practice, the contract which was agreed was between the claimant personally and the company running the practice at the time (Lonsdale Dental Ltd). That was clearly recorded in the document agreed between the parties. I considered it to be important that, at the outset of the claimant's engagement, a party to the agreement (as written) was the claimant personally. The engagement did not commence as one entered into by Naylor Made Smile Ltd (which did not technically exist at that time).

74. I needed to consider and determine whether the party to the contract had changed at a later date. There was, in my view, no evidence that there had been any change to the parties to the contract at the time when the claimant began raising invoices from Naylor Made Smile Ltd rather than personal invoices, save for the fact that invoices were raised by that company and the company received the payments. I noted the change in payment arrangements, but I did not find that the change in the arrangements for payment as they occurred in this case based upon the evidence about what occurred, showed that the parties to the contract had changed. What changed was the payment mechanism or arrangement.

75. For the reasons I have given, I did not accept the respondent's counsel's submission that there was no contract whatsoever in place between the claimant and the respondent.

76. Turning to the issue of employment status. As part of her submissions, the respondent's counsel highlighted seven factors which she said were relevant and showed that the claimant was not an employee or worker (I accept this was a non-exhaustive list):

a. From a financial point of view, the claimant took the risk if there was a quiet day when there was not a full booking of patients;

b. There was no obligation on the respondent to ensure that the claimant had patients;

c. The claimant was only paid if the respondent was paid, and the payment of a percentage was consistent with contract for services;

d. A limited company was paid for the costs, the claimant and the respondent were at arms-length;

e. The claimant had her own income protection policy and did not receive sick pay;

f. The claimant was responsible for her own tax and national insurance and had her own accountant; and

g. The claimant worked for other practices, and she worked for at least one of those through her limited company.

77. All of those factors pointed towards the claimant not being engaged as an employee. I have set out below the factors as I considered them, identifying the factors which I considered pointed towards an employment contract, those which pointed against such a contract, and (for a limited few) explaining why certain factors did not greatly assist me either way.

Factors supporting a finding that there was an employment relationship

78. The terms upon which the claimant was engaged were for her to undertake work at the engager's premises and to be paid for the work undertaken.

79. The claimant in practice worked for the respondent for fixed periods identified in advance. That is, she worked for one day, two days, or, for a short period, three days per week. She was expected to attend work when patients had been booked at the times agreed, and patients were in practice booked in for the vast majority of that time. The timing of her work was indicative of, and consistent with, an employment relationship.

80. I found that there was no genuine ability for the claimant to send a substitute. It was my finding that the respondent engaged the claimant to undertake the work personally. That was the effect of what was said in the consultancy agreement. The true arrangement was evidenced by what occurred during the claimant's extended period of ill-health when she did not provide a substitute and was not expected to do so. The requirement for personal service was broadly supportive of an employment arrangement, but in any event meant that an employment relationship was not precluded by it.

81. The source of the patients seen by the claimant were primarily through the practice or its dentists. The evidence was that only a very small handful of patients were genuinely sourced directly by the claimant. The vast majority of the patients were referred by the dentists (or were patients who used that practice), being more indicative of an employment relationship than not.

82. Standard fees were broadly indicative of an employment relationship (albeit it was noted that the claimant could determine the time required for some treatments and the fees payable for certain matters).

83. I found that the practice provided the claimant with the equipment required to do the job (with only one exception).

84. I noted what was said in the **Catholic Child Welfare Society** case from which I have quoted with regard to control. The claimant's skill and expertise meant that she was not controlled whilst actually seeing patients in terms of fulfilling her professional role. However, I did find that the claimant was subjected to control by the respondent in terms of what the claimant did. That was most clearly evidenced by the performance management meeting on 5 September 2023 with Dr Harrison, but was also supported by the claimant's evidence of conversations with Dr Rimmer, by Dr Rimmer's messages of 23 August 2022, and also by the arrangements around work such as the message sent including Dr Harrison's instruction on 28 November 2023 regarding days off. I found that the respondent's control in this case pointed towards employment status.

85. Linked to control (as I have said), I found Dr Rimmer's reaction to finding out the claimant was working for another practice was not consistent with a genuine independent contractor relationship. This was of less importance than some other factors, as I accepted that in part his objection arose from not being told and potential confidentiality, but those concerns alone did not fully explain his response, which was more reflective of employment.

86. In general terms, the claimant would have been perceived to have been an integrated part of the practice, indicated by the fact that appointments were booked through the practice receptionist, and she was supported by a practice nurse.

87. At the end of the claimant's engagement by the respondent, she was no longer required to produce and provide invoices, which was a relevant (albeit not overly significant) factor.

Factors supporting a finding that there was not an employment relationship

88. It was very clear that the parties to the initial engagement (the claimant and Lonsdale Dental Ltd) considered that they were entering into a contract which was not one of employment. That was what the express terms of the document recording the agreement said. It was also supported by the claimant's own evidence about her initial understanding of the engagement, and what the claimant said in her message to Dr Rimmer of 23 August 2022 where she referred to herself as being self-employed. The views of the parties were a significant factor but were not in and of themselves determinative.

89. The fact that the claimant paid her own tax and National Insurance and was required to do so, was relevant, albeit in reality something that followed from the views of the parties.

90. The fact that the claimant obtained her own insurance and was required to do so, was a relevant factor.

91. The fact that the claimant was not paid holiday pay or sick pay was a relevant factor, as was the fact that the claimant could take the amount of annual leave she wished. The fact that the claimant had her own income protection and was paid under it during sickness absence, was relevant.

92. The fact that the claimant was paid via a company from approximately April 2022 was indicative of an independent contractor relationship.

93. By the end of the claimant's engagement, she was paid a proportion of the income the respondent received from patients. The claimant took a degree of risk, as if there were no patients she was not paid and, if a patient cancelled, she received a lesser sum. The claimant accepted that the percentage payment arrangement was more in line with self-employed status.

Some factors in this case which did not materially indicate one way or the other

94. I was not persuaded that the norms of the dental industry supported the argument one way or the other. It was clear that there was not a universal practice in place for the engagement of dental therapists and hygienists.

95. There was no element of risk in the initial period of the engagement, as the claimant was paid for her time irrespective of whether or not patients attended or were booked. Those arrangements were indicative of an employment relationship. However, by the end of the relationship with the respondent that was no longer the arrangement and therefore it had no relevance to determining the relationship at that time.

96. The fact that the claimant worked for other practices during her engagement and (at least for one of them) received payment through her limited company, could

have been seen as broadly supportive of the fact that she was an independent contractor, but I did not consider that to have much (if any) relevance in this case arising as it did from the fact that the claimant worked only part-time for the respondent, and as the claimant's working arrangements could be equally seen as reflective of a part-time employee with two jobs.

97. The arrangements in place regarding uniforms did not assist me. The position was somewhat confused, with a limited number of coloured scrubs being provided (indicative of employment), but the fact they were simply coloured scrubs and that the claimant in fact often wore her own in her own chosen colours, was not so indicative.

98. Other evidence such as that around the Christmas party, training courses, or promoting teeth-whitening (by the claimant in the practice), did not genuinely indicate the true relationship one way or the other.

Employment status under the Employment Rights Act 1996

99. I did not find the decision about whether or not the claimant was an employee under the definition in section 230 of the Employment Rights Act 1996, to be straight-forward. It was, in practice, one which was very finely balanced. Weighing all of the factors I have described in the balance, including looking at the reality of the relationship, the claimant's integration into the practice, and control (as I have explained it), I found that the claimant was an employee working under a contract of employment (even though there were factors pointing the other way such as the views of the parties). Standing back and considering the relationship and the reality of the claimant's integration into the practice, the consistent pattern of work, and the patients who she saw, I found it to have been an employment relationship. I understood that the payment of a proportion of the sum received from patients was an indicator towards self-employment but considered that variable payment can exist in an employment relationship and, in the reality of this practice with largely fully booked diaries for the claimant, the element of risk was not as significant as it may have been in other situations.

100. As a result, I found that the claimant was employed by the respondent under a contract of employment and as an employee, applying the definitions under section 230 of the Employment Rights Act 1996.

Worker status

101. As a result of my finding that the claimant was an employee under the Employment Rights Act 1996, the claimant must also be found to have been a worker. Nonetheless, as I heard submissions and as I reached a decision, I would confirm that even had I not found that the claimant was an employee when balancing the factors I have outlined, I would in any event have found that the claimant was a worker. I did not find that question to be nearly as finely balanced as that regarding employment status.

102. I have already recorded that I did not find that there was a right of substitution, and I found that the claimant was personally contracted to perform the work required.

103. I did not find that in any genuine sense whatsoever was the respondent a customer or client of any profession or business undertaking carried on by the claimant. That was not the reality of the arrangement under which the claimant was engaged. The fact that she undertook work for one or two other practices whilst engaged by the respondent (or Lonsdale Dental Ltd) reflected a part-time worker having more than one engagement, it did not show the claimant as being someone for whom the respondent and her other practices were clients or customers. The claimant's counsel contrasted the claimant's position with that of a barrister or a window-cleaner and their relationship with a solicitor or customer, and he submitted that the suggestion that the respondent was a client or customer of the claimant was simply far-fetched. I agreed with him that was not genuinely the relationship in place.

104. I have been mindful that there is no magic test or single key to unlocking the test as to who is a worker. However, I found that when considering the arrangement that the claimant had in place with Lonsdale Dental Limited and then the respondent, it was not one in which the other company or the respondent could or would genuinely be described as a client or customer of hers or her business. Taking into account the relevant factors which I have described when determining employment status and applying them to the definition of worker, I found that the claimant was a worker engaged by the respondent.

Employment status under the Equality Act 2010

105. For the reasons which I have already explained, and consistent with the claimant having been found to have been both an employee and (if not) a limb (b) worker, I also found that the claimant was an employee working under a contract of employment, within the meaning of section 83 of the Equality Act 2010.

When did continuous employment start

106. The final question which I needed to determine, was when it was that the claimant's continuous period of employment started?

107. For the reasons I have already explained, I found that the claimant was an employee when she was first engaged by Lonsdale Dental Ltd from 25 August 2020 (and at that time there was a standard hourly rate, meaning that it was more clearly an employment relationship than it was by the time of the end of the claimant's engagement by the respondent). The claimant therefore remained employed until (at least) her resignation.

108. I heard evidence and argument about the claimant's resignation and whether or not it was retracted. The respondent's contention was that it had not been retracted, because the agreement to retract was sent only to Dr Harrison who was not in control of the practice at the time. It was not necessary for me to determine the technicalities of retraction or to determine what might have been the situation regarding notice if the respondent had not taken over the practice. I found that the situation was that: the claimant resigned on notice; she in reality remained engaged and working after the notice period had expired, with some form of agreement between the parties that she should remain; she was employed (as I have found) by Lonsdale Dental Ltd immediately prior to the transfer; she therefore transferred under TUPE; and, neither the claimant nor the respondent acted thereafter in any

way which suggested that the resignation remained effective. In any event, I found that neither the act of resigning, nor the events thereafter, broke the claimant's continuity of employment.

109. Shortly after the claimant transferred to the respondent, there was an agreement reached to vary what the claimant would be paid. She was to be paid a percentage rather than an hourly rate (the bonus would also end). I cannot see any reason why that agreement should have broken the claimant's continuity of employment. In those circumstances, the claimant's continuity of employment with the respondent dated from 25 August 2020 when she was first employed by Lonsdale Dental Limited, with continuity being retained when she transferred under TUPE to the respondent (albeit that none of those involved acknowledged that as being a TUPE transfer at the time). The claimant continued to work for the practice without a break at the time of the acquisition, with appointments which had been booked taking place; and the respondent's counsel did not in practice endeavour to argue that the claimant had not transferred if she was found to have been employed by Lonsdale Dental Ltd immediately before the transfer.

Summary

110. For the reasons explained above, I found that the claimant was an employee of the respondent for the purposes of the Employment Rights Act 1996 and the Equality Act 2010, and she was also a worker under the former Act (even had she not been an employee). She had continuity of employment with the respondent from 25 August 2020.

111. In the case management order made following the previous preliminary hearing (case management) it was identified that a further preliminary hearing (case management) would be required after this preliminary hearing. At the end of the hearing, the parties agreed that a further preliminary hearing (case management) would be required following my Judgment (unless my findings were entirely in favour of the respondent). I have, accordingly, requested that a further preliminary hearing (case management) be arranged to discuss the future conduct of the claim and to list it for a further hearing (or hearings).

Employment Judge Phil Allen

6 December 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 December 2024

FOR THE TRIBUNAL OFFICE

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