EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms A Pekel	**v**	Smile Clinic Group Holdings Limited Staffa Lodge Dental Group Limited

Heard at: Bury St Edmunds **On:** 8 June 2022

Before: Employment Judge S Moore

Appearances
For the Claimant: Ms Bewley, counsel
For the Respondent: Mr Williams, solicitor

JUDGMENT ON PRELIMINARY ISSUES

The Claimant was not a worker within the meaning of s. 13 Employment Rights Act 1996 and the claim for unpaid wages is dismissed.

REASONS

Introduction

1. On 21 December 2020 the Claimant brought a claim for unlawful deduction of wages under s. 13 of the Employment Rights Act 1996 (ERA) against both Respondents, referred to, respectively, as Smile Clinic and Staffa Lodge. This Open Preliminary Hearing was subsequently listed to determine whether the Claimant was, as she contends, a worker within the meaning of s.13 as defined by s.230(3) ERA.

2. The Claimant provided a short witness statement and was subject to brief cross examination by Mr Williams. The Claimant's husband did not give

evidence. The owner operators of the Respondents (Drs Jinesh & Jiten Vaghela and Dr Kishan Patel) did not attend the hearing because they were at a conference in Spain, and I was not asked to have regard to any witness statement produced by them. Ms Christine Read, Practice Manager and Company Secretary for Staffa Lodge, attended the hearing and produced a short witness statement. She was subject to cross-examination but had no knowledge of most areas of factual dispute. There was also a bundle of comprising 279 pages, however the majority of documents were not referred to by either the witnesses or the parties' legal representatives. I further record that although the claim is made in the context of the provision of NHS dentistry services, there was no evidence before me explaining how that provision is organized, the nature of the contractual arrangements dental practices make with the NHS, the use made of Associate Contracts (of the kind it appears the Claimant had with the Respondents) or as to how agreed Units of Dental Activity (UDA) (the apparent measure of NHS dental output) are regulated as between the dental practice and the NHS.

3. Accordingly, the findings of fact made below are necessarily particular to and restricted by the limitations of the evidence before me.

The Facts

4. The Claimant and her husband are dentists. Sometime in mid-February 2020, they met in a pub with Dr Jinesh Vaghela (JV) and someone named Ali to talk about the Claimant being engaged by the Respondents as an "Associate Dentist". The Claimant's husband was, by this time, already engaged by the Respondents as an "Associate Dentist". At that meeting the Claimant stated she could achieve 700-800 UDAs per month in the provision of NHS dental services. This is a relatively high figure, according to Ms Reid other dental surgeons at the Respondents' practices achieve as an approximate average 500 UDAs per month. It was agreed the Claimant would be engaged between the two practices and would be paid £12.50 per UDA by Staffa Lodge and £13 per UDA by Smile Clinic.

5. The Claimant began at the Smile Clinic on 3 March 2020 and began to practise from that clinic two and half days per week. She began at Staffa Lodge on 4 March 2020 and practised from that clinic for three full days on 4 March, 5 March and 17 March 2020, and for a morning on 18 March 2020.

6. On 23 March 2020 the UK went into lockdown because of the Coronavirus Pandemic. The Claimant continued to provide dental services at the Smile Clinic throughout the pandemic, although the volume and extent of dental service provided during that period was necessarily restricted by health and safety concerns, and Government guidance and regulations. The Claimant did not provide any dental services at Staffa Lodge after 18 March 2020.

7. On 26 May 2020 JV emailed the Claimant and her husband "standard associate contracts" (SAC) for both Smile Clinic and Staffa Lodge. The Claimant replied by email on 27 May 2020 stating "we have just finished reading the new associate contracts you've sent us. There are many points which we don't agree with therefore we need time and take maybe advices upon this matter. We think it's better to talk at the beginning of next week…"

8. Throughout, the SAC refers to the relevant clinic as the Provider and to the Claimant as the Performer, and contained the following provision in respect of Locums:

"7.1 In the event of the Performer failing to make use of the Facilities for a continuous period of more than 20 working days or an aggregate period of more than 25 days during any period of four months the Performer shall appoint a Locum acceptable to the PCO and the Provider to make use of the Facilities. If the Performer fails to appoint such a Locum within 7 days of an absence referred to in this sub-clause the Provider shall have authority to appoint such a Locum on behalf of the Performer.

7.2 Any such Locum shall be treated as the servant or agent of the Performer who will be liable for his costs and shall ensure and hereby warrants that the Locum will provide services in accordance with the terms of this Agreement. The Performer will be responsible for obtaining and checking the Locum's references and registration status and ensuring that the Locum is on the Performer's list of a PCO before the appointment is made and will furnish the Provider with the relevant information to this effect.

7.3 The Provider and the Performer will agree on the Locum's method of payment and the Provider will notify the PCO that the Locum is acting as a Performer of the Practice.

7.4 If the Performer fails to pay the Locum the Provider may pay the Locum on behalf of the Performer and deduct the amount paid from any amounts otherwise due to the Performer under this Agreement.

7.5 If a Locum is engaged the Performer agrees to maintain the Average Monthly Contribution to the Practice according to the calculations below:

7.5.1 If the Locum provides 90% or more of the Performer's Average Monthly Contribution – No reimbursement from the Performer;

7.5.2 If the Locum provides 80-90% or more of the Performer's Average Monthly Contribution – 10% reimbursement from the Performer;

7.5.3 The Performer's reimbursement will increase by 10% for each additional 10% that the Locum falls short of the Performer's Average Monthly Contribution."

9. On 29 May 2020 the Claimant emailed JV with a list of amendments and discussion points in relation to the contracts. As regards Locums, she stated "if any locum is needed, to expect and be responsible for them to hit target as I do".

10. On 30 May 2020, the Claimant, her husband, and JV held a Zoom meeting.

11. On 1 June 2020 JV sent the Claimant's husband an email "to confirm what we discussed". On the Locum point the email simply said, "as discussed".

12. On 2 June 2020 the Claimant's husband sent JV a further email stating "we are happy with the adjustments you sent us and would like to go over some of the points in a little bit more detail". The email then refers to not wanting to be held responsible for bad debt or be sanctioned for underperformance of UDA, not being able to guarantee UDA targets, wanting a commitment (or earliest termination) date of 31 March 2021, not being penalised for not using the surgery the weekly minimum hours, working hours, and querying a compliance contribution of £200. As regards Locum provision the email also states: "we discussed and decided that when we go on holiday or are absent due to long term sickness or similar serious situation, if required you will find the locum and will be in charge of all the requirements, obligations, payments and procedures in relation to appointing and hiring a locum and we would have nothing to do with this engagement between the locum and the practice or the NHS".

13. It is clear from the context of the email, and the frequent references to "we" and "you" within it, that "we" is referring to the Claimant's husband and the Claimant (rather than the Claimant's husband and JV).

14. On 9 June 2020 JV replied to this email stating:

    "Trust you are well. Sorry for the delay in getting back to you. As you can appreciate it has been very busy in the lead up to re-opening. We will need to include the following in your contract:

    Bad Debt
    Locum
    UDA Target

    I have just downloaded an Associate Contract from the BDA site this morning for your reference. It includes the same points as our contracts. As you can appreciate we need to keep the contract in line with our policy otherwise it will be unfair for our other associates. Please let me know how you would like to proceed regarding these points and the contract."

15. The Claimant's husband replied on 11 June 2020:

"We had an initial zoom on 30 May 2020 where we explicitly discussed about diversity of several clauses in the contract, where we then came to an initial agreement about those which we wanted to have changed and those which you said you can't have changed. On 1 June 2020 you sent us an email about the altered version of the contract and finally in the email I sent you as response on 2 June 2020 I went over all those points in more detail specifically where it was stated "as discussed". I would appreciate if the contract is adjusted to what we had [blank space] alternatively if you wish to keep it as it is I would like an additional page attached to the contract stating what we talked and agreed regarding bad debt, locum and underperformance matters. Commitment date, UDA figures and working hours are already stated/ agreed as I understand."

16. There was no response to this email.

17. In the light of these exchanges Ms Bewley submitted that the Claimant had not agreed to clause 7 of the SAC, and instead the agreement between the parties in respect of Locums was as set out in the email from the Claimant's husband of 2 June 2020. While the Respondent's position initially appeared to be uncertain, Mr Williams eventually submitted that that the Claimant was bound by clause 7 of the SAC.

18. Despite Ms Bewley's cogent submissions, I cannot accept the evidence supports them.

19. It appears from the emails of 29 May 2020 and 1 June 2020 there was a discussion between the Claimant, her husband and JV as to whether, if a Locum was needed, the Respondent would expect and be responsible for them to hit the Claimant's UDA target (which perhaps is not surprising given the financial penalties the Claimant would incur pursuant to clause 7.5 of the contract in the event of a Locum not doing so). In the email of 2 June 2020, the Claimant's husband then refers to changing the contract so that the Respondents, rather than the Claimant, are responsible for finding a Locum, but in his email of 9 June 2020 JV rejects that proposition, stating the provisions of the contract need to remain the same in respect of "Bad Debt", "Locum" and "UDA target" to keep the contract in line with the Respondents' policy and maintaining consistency with other associates. The further email from the Claimant's husband of 11 June 2020 does not change that position, namely that the position in respect of Locums was as set out in the SAC, since the reference to attaching a separate page "stating what we talked and agreed regarding bad debt, locum and underperformance" is phrased as a request "if you wish to keep the contract as it is".

20. Furthermore, that interpretation of events is consistent with the Claimant's own evidence as set out in her witness statement. At paragraphs 14-15 she states:

"Up to 26 May 2020, I was not given a written contract. The owners emailed me, and my husband written contracts on 26 May 2020. I, my husband, Jin and Kish negotiated this contract on zoom meeting. Afterwards, Jin emailed us saying that the clauses we had asked to be changed would be changed and three clauses would need to stay the same. That was fine with us and we carried on working under their arrangements. It was the middle of the pandemic and in the turmoil of the pandemic I simply did not think of additional signing the contract. My husband emailed them our agreement/confirmation of the final form of the contract.
In this agreement and the "Provider Performer Agreement" it states that if we are unable to work for 20 days, we "shall appoint a locum" however it is clear that the locum must be acceptable to the Respondents, therefore the Respondents have absolute discretion and can withhold their consent. My understanding is this was the only way we could appoint anyone as a "substitute"".

21. The reference to the "three clauses" that "would need to say the same," must be a reference to the clauses in respect of Bad Debt, Locum, and UDA Target, referred to in JV's email of 9 June 2020, which the Claimant says, "was fine with us". She further says that she and her husband then carried on working under those arrangements (even though they did not sign the contract) and refers to their obligation to provide a Locum if unable to work for 20 days (though her witness statement is an incomplete summary of clause 7).

22. I therefore find that the Claimant was bound by the Locum clause set out in clause 7 of the SAC. The "final form of the contract" for all relevant purposes was the SAC (any potential variations in respect of "commitment state", "UDA figures" and "working hours" referred to in the email of 11 June 2020 were not addressed or prayed in aid by either party in the hearing).

23. Further, for the avoidance of doubt, I find this was the contract that governed the parties' relationship from when the Claimant first began to practise from the Respondents' clinics. First, neither party at the hearing submitted that the contractual obligations between the parties changed in May/June 2020. Secondly, although the contract was not sent to the Claimant and her husband until 26 May 2020 the Respondents plainly intended it to apply retrospectively from the start of the working relationship and there is nothing in the email exchange referred to above to indicate the Claimant and her husband demurred from that position. Thirdly, the email from JV from 9 June 2020 implies the SAC was materially the same as the standard Associate Contract on the BDA site and the Claimant said in evidence that she had previously been an associate dentist in other practices in which case she must have expected her relationship with the Respondents to be subject to a contract like the SAC from the outset.

24. I turn to other relevant aspects of the factual framework:

25. As regards holidays/annual leave the SAC made no reference to holidays. In particular, there was no limit on the amount of holiday the Performer could take or any required procedure for booking or taking holiday, and in the event the Claimant took a continuous holiday between 31 July 2020 and 16 September 2020. Ms Bewley submitted the Claimant had to obtain the Respondents' agreement to taking holiday, but the evidence did not support that submission. The Claimant's evidence was that if she wanted to go on holiday, she had to inform the practice and would try to give them as much notice as possible. She further said she and her husband would always inform the owners of a dental practice that they needed a long holiday during the summer so that this did not come as surprise and that in this case she had informed the Respondents about that arrangement prior to starting work there.

26. As regards working hours, schedule 1 to the SAC set out the practice hours (8am to 8pm) of the surgery and within that time frame the Performer was able to set their own working hours save that pursuant to clause 6.1 the Performer had to make every reasonable effort to make use of the facilities for the Minimum Period of Use each week which was defined in schedule 1 as being 20 hours per week. Again, the Claimant accepted in cross-examination that she could set her own working hours.

27. As regards premises and facilities, clause 6.1. provided that the Respondents provided the Services, Equipment and Facilities set out in schedule 2. In particular, the Respondent supplied the premises, "normal dental equipment customarily used in the profession of dentistry and other necessary furniture incidental to the profession of dentistry" and "other drugs and supplies normally used in the profession of dentistry". The Respondents also supplied the services of a dental nurse, although the nurse was subject to the day-to-day supervision of the Performer. Paragraphs 1.8 & 1.9 of schedule 6 provided the Performer was entitled to use any suitable dental equipment or materials provided by him at his own expense and was entitled to choose which dental laboratory to use (provided it was reasonable acceptable to the Provider) and would be primarily liable for all laboratory bills incurred.

28. As regards clinical independence, the Performer had complete clinical independence and authority to decide in consultation with the patient the appropriate nature and form of delivery of dental treatment. Clause 4.3 of the SAC stated that the Respondents would not place any restrictions on the patients the Performer may advise or treat, or the types of treatment provided.

29. As regards the right to decline to treat patients, clause 4.2 of the SAC provided that "The Provider may introduce patients to the Performer but,

subject to the Performer's overriding professional responsibility to accept patients where appropriate, the Performer shall be under no obligation to accept those patients. If the Performer declines to advise or treat any patient introduced by the Provider, he shall refer them back to the Provider". In evidence the Claimant said in practice she would always see patients unless they needed a specific treatment she could not provide, or she considered the patient didn't trust her.

30. As regards the goodwill associated with the dental practices, clause 4.1 of the SAC provided that the goodwill of the Performer's patients belonged to the Respondent, and he could not inform those patients of any new or alternative practicing arrangements either before or within one year of the termination of the SAC. Clause 4.5 also provided the Performer could not move the patients, funding, or other benefits of a Service Level Agreement away from the practice. Further schedule 4 set out a number of post-termination restrictions lasting during the term of the agreement and for a period of 12-months following its termination which, amongst other things, prohibited the Performer from practicing at a premises within 5 miles of the Respondents' practices and providing dental services to any person who had been treated as a patient by the Performer at the Respondents' practices during the 12 months prior to termination.

31. Finally, clause 13 set out that it was the intention of the parties that the Performer was for all purposes self-employed and independent and that he performed his services on his own account and did not provide any services to work to the Respondent. Further details were set out in schedule 6 which, amongst other things, provided at paragraph 1.4 that the Performer was permitted to practise at other premises during the agreement (subject to the Code of Practice) and at paragraph 1.6 that the Performer was capable of sustaining a loss in the operation of the agreement. Further, paragraphs 1.10 and 1.11 provided that the Performer was: entitled "at any time to appoint a Locum reasonably acceptable to the Provider to carry out any or all of his obligations under this Agreement" and "at any time to assign this Agreement to a dentist of equivalent experience to the Performer and who confirms in writing to the Provider their acceptance of the terms of this Agreement".

Conclusions

32. Section 230 ERA provides that "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.

33. The Claimant does not contend she was an employee, but says she was a worker within s.230(b) ERA and the second type of self-employed person referred to by Lady Hale in paragraph 25 of **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC**:

"24 First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

25 Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or business with clients or customers or provide work or services for them…The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else…"

34. Miss Bewley submitted, and I accept, that whether the Claimant falls within this second category of self-employed person depends upon whether, on objective analysis, her relationship with the Respondents satisfied the requirements of s. 230(b) ERA rather than the classification or label given to that relationship in the SAC: **Uber BV & others v Aslam & others [2021] UKSC 5 at [85]**).

35. It is common ground there was sufficient mutuality of obligation between the Claimant and the Respondents to establish the existence of a contract between them, so the remaining issues are whether the contract was for personal services or to work personally, and whether the Respondents were clients or customers of the Claimant.

36. As regards personal service, Ms Bewley submitted that the only argument against the existence of an agreement for personal service was the substitution provision contained in clause 7.

37. In this respect her first submission was that clause 7 never became part of the Claimant's contract and the only substitution provision to which the Claimant agreed was that set out by the Claimant's husband in his email of 2 June 2020, stating the Respondent would be responsible for finding the Locum.

38. I rejected this submission on the facts above.

39. Ms Bewley's second, alternative, submission was that even if clause 7 applied, it would only be applicable in very limited occasional circumstances and was subject to an unqualified discretion to withhold consent. Further, when the Claimant did take a six-week holiday, she was

not required to provide a substitute nor was she fined. In this respect Ms Bewley relied on [84] of the judgment of the Court of Appeal in **Pimlico Plumbers Ltd v Another v Smith [2017] EWCA Civ 51**, which provides:

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

40. In this case I do not accept that the obligation to appoint a Locum only arose in very occasional circumstances. While it may be unusual for an associate not to make use of the facilities for a continuous period of more than 20 days, the alternative circumstance when such an obligation came into play was not making use of the facilities for an aggregate period of more than 25 days during any period of 4 months, which was capable of biting more often. Further and in any event the Claimant (and her husband) were plainly concerned about the potential practical implications of clause 7 for them because it was the subject of discussion and negotiation between them and the Respondents. Moreover, the Claimant said in evidence that she always liked to take a long holiday during the summer because of their family commitments, a choice which, on the face it, could well trigger clause 7. The fact that when the Claimant did take six weeks holiday in the summer of 2020 she was not required to provide a substitute and was not fined, does not, in my judgment imply the Respondent would not subsequently rely on clause 7 or that the clause was of no practical effect given the very unusual circumstances that prevailed in the summer of 2020 by reason of the Covid Pandemic.

41. As regards the assertion that clause 7 gave the Respondents an absolute and unqualified discretion to withhold consent to substitute, Ms Bewley relied on the word "acceptable", the Locum having to be "acceptable" to the PCO and the Provider.

42. The first point to note is that the fifth example given in **Pimlico** is addressing the situation where an individual's *right* to substitute can be

negated by the other party's absolute and unqualified right to withhold consent. Clause 7, by comparison, confers an *obligation* on the Performer to substitute, rather than a right to do so, and a corresponding right on the part of the Provider to be provided with a substitute. Accordingly, as a matter of practical reality, in the context in which clause 7 operates, the Provider's interest lies in being provided with a substitute to perform the required services, rather than in negating an unwanted substitution instigated by the Performer.

43. A very similar clause was the subject of analysis in **Community Dental Centres Ltd v Sultan Darmon [2010] IRLR 1024**. That case also concerned the status of a dentist. The Employment Tribunal found that Mr Sultan-Darmon was not an employee of the respondent practice because there was no mutuality of obligation, but nevertheless held that he was a worker. On appeal, the EAT found those findings were inconsistent, mutuality of obligation also being a fundamental criterion of there being a worker contract. However, the EAT also considered a second ground of appeal, namely that in any event there was no obligation on Mr Sultan-Darmon to do or perform personally any work because of a substitution clause which obliged him "to make arrangements for the use of the facilities by a locum tenes acceptable to the respondent" in the event of failure by him to utilise the facilities for a continuous period of more than five days. While that obligation differed from the one in the present case as regards its trigger point, the wording "acceptable to the respondent" is materially the same as in in the present case. Notably, Mr Justice Silber concluded at [32] that "the unfettered right given to the claimant to appoint a substitute without any sanction at will means he cannot be a worker", a finding which necessarily implied he regarded the substitution clause as constituting an "unfettered right" to substitute notwithstanding the requirement the substitute be "acceptable" to the respondent.

44. Since this authority was not cited to me by either representative, I made copies for them and invited their submissions on it. Mr Williams did not make any such submissions. Ms Bewley, submitted the judgment was a matter of a finding on the particular facts and further that it had been superseded by the later judgments in **Uber BV** and **Pimlico Plumbers**.

45. Although I accept **Sultan-Darmon** was a judgment on its facts, the key fact, the wording of the obligation to substitute an "acceptable locum" happens to be materially same as the one in the present case. Further, the main authority which appears to have led Mr Justice Silber to his conclusion at [32] was the Court of Appeal authority of **Express and Echo Publications Ltd v Tanton [1999] IRLR 367** in which an obligation to substitute another "suitable person" to perform the services whom the respondent was satisfied was trained and able to undertake the services was similarly regarded as constituting an unfettered right to substitute. Notably **Tanton** was cited by the Supreme Court in **Pimlico Plumbers** at [21] (and by the Court of Appeal in **Pimlico** at [76]) without any suggestion

the Court of Appeal had been wrong to hold the clause defeated Mr Tanton's claim to have been employed under a contract of service.

46. While the qualification of the substitute having to be a suitable person whom the respondent was satisfied was trained and able to undertake the services in question is not the same wording as that of a Locum having to be acceptable to the respondent, given the context in which the clause in **Sultan Darmon** and the parallel clause 7 of the SAC actually operated (see above at paragraph 42), it seems to me that a substitute "acceptable" to the Provider was in fact likely to mean in practice no more than a substitute whom the Provider was satisfied was trained and able to undertake the dental services required, and notably in **Sultan-Darmon** Mr Justice Silber drew no distinction between the two phrases.

47. Further, and in any event, schedule 6 of the SAC set out a further right (as distinct from an obligation) of substitution in the following terms:

> 1.10 [the Performer shall] be entitled at any time to appoint a Locum reasonably acceptable to the Provider to carry out any or all of his obligations under this Agreement;

48. Paragraph 1.11 of schedule 6 also provided a right of assignment:

> 1.11 [the Performer shall] be entitled at any time to assign this Agreement to a dentist of equivalent experience to the Performer who is reasonably acceptable to the Provider and who confirms in writing to the Provider their acceptance of the terms of this Agreement.

49. Ms Bewley submitted that the right of the Provider in paragraph 1.10 to withhold consent to substitution was still basically unqualified, despite the insertion of the word reasonably.

50. I do not accept that assertion since use of the word reasonably expressly injects an element of objectivity which prevents the Provider from withholding consent unreasonably. In that respect the clause is on its face broadly similar to the substitution clauses at issue in **Tanton** requiring the substitute to be trained and suitable to undertake the services, and that in **Premier Groundworks v Jozsa [2009] UKEAT/047/08** (referred to in the Court of Appeal's judgment in **Pimlico** at [80]) requiring the substitute to be as "capable, experienced and qualified" as the claimant, and again, in particular, in **Creasey v UK Mail Ltd [2013] All ER (D) 242** (referred to in the Court of Appeal's judgment in **Pimlico** at [81]) where the respondent's consent to substitution was not to be unreasonably withheld.

51. Ms Bewley further submitted that in any event schedule 6 was an attempt to contractually classify the Claimant as not being a worker or employee and should be disregarded as being of no effect pursuant to **Uber BV** at [85]. In support of her submission that schedule 6 did not reflect the true

relationship between the parties, she submitted that paragraph 1.4 of schedule 6, which permitted the Performer to practice at other premises during the agreement (subject to the Code of Practice), was inconsistent with the restriction contained in paragraph 5.1 of schedule 4 preventing the Performer from practising at a premises situated within 5 miles of the Provider both during the agreement and for 12 months following termination. Further she relied on a WhatsApp message from the Claimant from October 2020 as evidence that in reality the Claimant had sought and obtained permission to work somewhere else when she didn't receive the agreed level of work from the Respondent.

52. I am not satisfied paragraph 5.1 of schedule 4 or the WhatsApp message imply that schedule 6 was merely a label which did not reflect the objective status of the parties' relationship. While paragraph 1.4 of schedule 6 is limited by the 5 miles restriction imposed by paragraph 5.1 of schedule 4, it plainly remained effective (subject to that limitation) as evidenced by the fact that the Claimant did take on work for another practice.

53. As regards the WhatsApp message, this states: "I mentioned to you that in order to make up for my loss of earnings I would need to take on another professional occupancy on my remaining three days in the week, you have expressed your acknowledgement in my intention and we have agreed on this decision and also agreed that my working days at your company will stay as Wednesday and Thursday as is now. Accordingly, I have now taken on a second job."

54. I do not consider that message shows the Claimant could only take on work at another practice with the Respondents' agreement. The message doesn't refer to the Claimant asking and receiving permission to work elsewhere, but to her "mentioning" her need to take on another position, and the Respondents acknowledging her "intention". On my reading, the subsequent reference to them having agreed on that decision and to the Claimant keeping the same working days, is indicative of a desire to maintain good relationships, make the necessary practical arrangements and have the position recorded in writing, rather than of a requirement to obtain the Respondents' consent.

55. Furthermore, as regards paragraph 1.10 itself, and the right to appoint a Locum, although the Claimant said that she wouldn't have appointed a Locum, she accepted in cross-examination that she was aware of the right to appoint one whenever she wanted.

56. In summary therefore, paragraph 1.10 of schedule 6 conferred a right on the Performer to substitute locum that was unfettered by circumstance or duration and subject only to being "reasonably acceptable" to the Provider. This was a right of which the Claimant was aware. In addition, paragraph 1.11 of schedule 6 conferred a right to assign the contract to a dentist of equivalent experience (also reasonably acceptable to the Provider) who

accepted the terms of the contract. Further clause 7 imposed an obligation on the Performer to substitute a Locum in case of certain lengths or periods of absence while at the same time the contract set no limit on the number of holidays or length of a single period of leave that the Performer could take. By comparison with the situation in **Pimlico Plumbers**, where the right to substitute was described by the Supreme Court as appearing to have been so insignificant as not to have been worthy of recognition in the terms deployed, not only was the Claimant aware of this provision, but the obligation to substitute was also of such concern and potential relevance to her and husband that they sought to negotiate an amendment so that they would not have to be responsible for finding a Locum in the event clause 7 was triggered. This was no doubt because of the Claimant's evidence that she liked to take long holidays every summer which therefore made clause 7 of practical importance to her.

57. It is true, as Miss Bewley submitted, that the Claimant was able to perform an unusually high number of UDAs per month. However, there was no evidence before me that she is unique or even that the right to substitute was limited by the requirement that a substitute had to be capable of achieving the Performer's UDA target. To the contrary, the email of 1 June 2020 indicates it was the Claimant and her husband who were concerned to ensure the Respondent would expect and take responsibility for any Locum to hit the Claimant's target of 700 UDAs per month, presumably so that the Claimant would not incur a financial penalty under clause 7.5 that applies in circumstances where a Locum fails to match a Performer's Average Monthly Performance.

58. In the light of the above, I therefore conclude there was no personal obligation on the Claimant to provide services to the Respondents. I am satisfied clause 7 and paragraph 1.10 of schedule 6 reflected the reality of the bargain struck between the parties and that the dominant feature of the SAC was not one of personal performance, rather the Provider was uninterested in the identity of the Performer providing the dental services in question so long as any substitute for the Claimant was a reasonably acceptable Locum within paragraph 1.10 of schedule 6 and/or an acceptable locum falling within clause 7.

59. It follows that the Claimant was not a worker within s.230 ERA and the claim for unlawful deduction of wages must fail.

60. Although it is unnecessary to decide whether the Claimant satisfied the second limb of the worker test, namely that the status of the Respondents by virtue of the SAC was not that of clients or customers of a profession or business undertaking carried on by her, I will also address this point briefly for the sake of completeness.

61. Ms Bewley's submitted that the Respondents were not the Claimant's clients or customers. While the Claimant had complete clinical

independence that was necessarily because of the nature of the expert services she was providing to patients. In other respects, she was integrated into the dental practice operated by the Respondents, providing dental services to the general public as part of the Respondents' business rather than operating a business on her own account. She used their premises, management, and administrative structure. She worked within the opening times of the practice that were dictated by the Respondents. The goodwill of the patients remained the property of the Respondents and she could not move any patients or funding elsewhere.

62. Mr Williams did not address this point directly, but submitted the SAC was a standard contract which had existed in the field for many years, and everyone knew how it worked.

63. It is important to bear in mind that the question is not whether the patients were clients or customers of the Claimant but whether the Respondents were her clients or customers. In other words, the potential way in which the Claimant was in business on her own account was by making her services as a dental surgeon available to dental clinics. In this respect I note that the SAC permitted the Claimant to practice at other premises, albeit not within a five-mile radius of the Respondents, and that she exercised this right by taking on in October 2020, in her words from the relevant WhatsAPP message, "another professional occupancy" for 3 days per week. Indeed, the Respondents are themselves two separate legal entities and the Claimant had chosen to practice from each clinic, entering into separate SACs that differed between clinics in respect of the rate paid per UDA and the time she would spend at each clinic. This is consistent with someone making her own commercial decisions in business on her own account as a professional dentist.

64. The Claimant was also liable to pay for all her professional training (paragraph 1.4 of schedule 6); entitled to choose which dental laboratory she used and primarily liable for her laboratory bills (paragraph 1.9 of schedule 6), and even entitled at any time to assign the contract to a dentist of equivalent experience (paragraph 1.11 of schedule 6).

65. Ms Bewley also relied on the fact that Claimant had to make every reasonable effort to make use of the facilities for 20 hours per week (clause 6.1) and to achieve a minimum number of UDAs. While this is true, the Claimant's level of attendance ultimately remained a matter of choice for the Claimant with the sanction for falling below the agreed targets being one of financial penalty. In this respect paragraph 5 of schedule 3 provided that if the Performer fell below the agreed targets, the amount charged for the licence to practice from the Respondents' premises might be increased, the UDA value fee might be varied, or additional deductions might be made. Paragraph 7 also provided that the Performer was liable to pay the Provider any financial sanction imposed on the Provider due to the Performer's failure to meet the UDA allowance. Further paragraph 1.6 of

schedule 6 provided that "[the Perfomer shall] be capable of sustaining a loss in the operation of this Agreement.

66. In the light of all the above, on the evidence available to me, I am not satisfied that, even if the Claimant was undertaking to do or perform personally work or services for the Respondents (which I have found she was not) the status of the Respondents was not that of being the Claimant's clients or customers.

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Employment Judge S Moore

Date: 16/6/2022

Sent to the parties on: 1/7/2022

N Gotecha

For the Tribunal Office