Case No: 1600277/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr I Jones

Respondent: Whitecross Dental Care Limited

Heard: by video **On:** 2 & 3 November 2021

Before: Employment Judge S Jenkins

Representation
Claimant: Mr J Boyd (Counsel)
Respondent: Mr J Algazy (One of Her Majesty's Counsel)

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

2. The Claimant was not an employee of the Respondent within the meaning of section 83 of the Equality Act 2010.

3. The Claimant was not a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

4. The Tribunal therefore has no jurisdiction to consider the Claimant's claims and they are dismissed.

5. The Claimant's claims against Integrated Dental Holdings Limited are dismissed.

REASONS

Background

1. the Claimant brought several complaints, including: unfair dismissal; discrimination on the ground of age; detriment by reason of having made protected disclosures, and/or by reason of refusing to attend work in circumstances of danger which he reasonably believed to be serious and

imminent, and which he could not reasonably have been expected to avert; payment in respect of accrued annual leave; and unauthorised deductions from wages. All those claims require the Claimant to be either an "employee", whether for the purposes of section 230 of the Employment Rights Act 1996 ("ERA") or section 83 of the Equality Act 2010 ("EqA"), or a "worker" for the purposes of section 230 ERA. The Respondent contends that the Claimant was at all times self-employed and was neither an employee nor a worker, and therefore that the Employment Tribunal has no jurisdiction to consider his claims.

2. Following a preliminary hearing before Employment Judge Sharp on 28 June 2021, it was identified that an open preliminary hearing should take place to determine the issue of the Claimant's status; specifically to determine the following:

    a. Was the Claimant an employee of the Respondent within the meaning of section 230 ERA?

    b. Was the Claimant, an employee of the Respondent within the meaning of section 83 EqA?

    c. Was the Claimant a worker of the Respondent within the meaning of section 230 ERA?

3. I heard evidence from the Claimant on his own behalf; and from Kirsty Fisher, currently Practice Manager of the Respondent's Llanelli, Cardigan and Swansea practices; and Tara Morris, formerly the Respondent's Area Development Manager for South Wales; on behalf of the Respondent. I was provided with an electronic bundle comprising 1356 pages including index, and I read those to which my attention was drawn. I also considered the parties' comprehensive written submissions.

Issues

4. As identified above, the principal issues for me to address were whether the Claimant was an employee of the Respondent during the period of his engagement with it, or, alternatively, whether the Claimant was a worker of the Respondent during that period.

5. A secondary issue for me to address, although not specified in the Notice of Hearing as an issue to be determined, was the correct identity of the Respondent. The claims were brought against two Respondents, Integrated Dental Holding Group Limited ("Integrated") and Whitecross Dental Care Limited ("Whitecross"). At the outset of the hearing, I enquired as to which of the two named Respondents was the correct one. Neither party provided any witness evidence regarding this point, but there was some documentary evidence in the bundle, and I also had regard to the latest annual reports of both companies.

6. In his written submissions, the Respondent's representative contended that the correct Respondent was Whitecross. The Claimant's representative's submissions were silent on the issue, although the heading of the document referred only to Whitecross as the Respondent. In the event, I considered that any subsequent judge or tribunal would be in no better position than me to determine the issue, and that it would be in furtherance of the overriding objective for me to resolve that point following this hearing. As will be seen from my conclusions below, I concluded that Whitecross was the correct Respondent to the Claimant's claims. I have therefore referred to that company as the "Respondent" in the remainder of this judgment.

Law

7. The statutory definitions relevant to the issue of employment status are found in section 230 ERA and in section 83 EqA, and these provide as follows:

"*230 Employees, workers etc.*

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

"*83 Interpretation and exceptions*

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

8. A considerable amount of case law surrounding employment status has developed over the years, up to and including recent consideration of the issue by the Supreme Court in the cases of Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29, and Uber BV and others v Aslam and others [2021] UKSC 5. The foundation of the case law on employment status remains, however, the case of Ready-Mixed Concrete (South-East) Limited v The Minister of Pensions and National Insurance [1968] 2 QB 497. MacKenna J in that case noted that a contract of service exists if three conditions are fulfilled, namely; personal service, control, and that the other provisions of the contract are consistent with it being a contract of service.

9. In Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, Stephenson LJ noted that, in his judgment, there must be an "*irreducible minimum of obligation on each side to create a contract of* service". He further noted that he doubted that that irreducible minimum could be reduced lower than MacKenna J's essential conditions in Ready-Mixed Concrete.

10. Therefore, in order for there to be considered to be a contract of employment between two particular parties, there needs to be an "irreducible minimum" in relation to three core matters: personal service, control, and mutuality of obligation. In addition, the other factors present within the relationship should be consistent with there being a contract of employment.

11. As can be seen from the specific statutory definitions, the concept of personal service is also significant for the purposes of the definition of "employment" under section 83 EqA, and of "worker" under section 230 ERA, which refer, respectively, to "*a contract personally to do work*" and a "*contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract*".

12. The assessment of personal service usually revolves around the question of whether the individual has the right to substitute another person to do the specified work, and this case was no exception in that regard.

13. Several cases have dealt with the issue of substitution, notably Express and Echo Publications Ltd v Tanton [1999] ICR 693, MacFarlane v Glasgow City Council [2001] IRLR 7, Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, Redrow Homes (Yorkshire) Ltd v Wright [2004] ICR 1126, Premier Groundworks Ltd v Jozsa (UKEAT/0494/08Those cases were referred to in the Judgment of Sir Terence Etherton MR in the Court of Appeal in Pimlico Plumbers Ltd v Smith and anor [2017] ICR 657 (subsequently upheld by the Supreme Court), and which led to him summarising the applicable principles as to the requirement for personal performance as follows, at paragraph 84:

"*Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different*

language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.".

14. Sir Terence Etherton MR's summary was very recently considered by the Court of Appeal in Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514. In that case, Lewis LJ noted, at paragraphs 40 and 41:

"*In considering that paragraph[1], however, it is important to bear in mind the following. First, the actual issue for a tribunal is whether a claimant is under an obligation personally to perform the work or provide the services. Secondly, Sir Terence Etherton MR was seeking to summarise the principles to be drawn from existing case law: he was not seeking to establish a rigid classification or lay down strict rules as to what did or did not amount to personal performance or when a right of substitution did or did not negate the existence of an obligation to do work personally. Thirdly, on analysis of paragraph 84, there are only two principles summarised. The first is that if the claimant has what is described as an unfettered right to substitute another person to do the work or perform the services that is inconsistent with an undertaking to do so personally. The second principle is that a conditional right "may or may not be inconsistent" with personal performance depending on the precise contractual arrangements and, in particular "the nature and degree of any fetter on a right of substitution". The third to fifth points made in paragraph 84 are provided, expressly, "by way example", of situations where a contractual right on the part of the claimant may be one indicator that the obligation is or is not one to do the work or perform the services personally. The points made are, in effect, a summary of the earlier decisions (which each involved particular facts) which had been analysed by Sir Terence Etherton MR at paragraphs 76 to 83 of his judgment.*

Against that background, it would be wrong to seek to treat those five points as setting out definitive categories of what situations do, or do not, involve a right for a claimant to substitute another person to carry out the work sufficient to displace any contractual obligation to perform the work personally. It will usually be unhelpful to try and shoehorn the particular facts of a case into one of the "categories" listed (they are not in fact categories at all) and then to treat that as dispositive of the issue of whether the claimant is contractually obliged to perform the work personally."

[1] i.e. paragraph 84 in Pimlico Plumbers.

15. I also took into account the Central Arbitration Committee [1] case of Independent Workers Union of Great Britain v RooFoods Limited t/a Deliveroo [2018] IRLR 84, RooFoods Limited t/a Deliveroo. In that case, it was decided that the Deliveroo riders were not able to class themselves as workers for the purposes of trade union recognition, and a significant factor in that decision was that individual riders were able to substitute other riders, whether from those already registered with Deliveroo or otherwise, going as far as, on occasions, the originally engaged rider taking a "cut", i.e. a form of commission, and not passing on the full payment received to the rider who actually undertook the work.

16. A further issue for me to address was whether the ostensible relationship between the Respondent and the Claimant should be considered to be a "sham", i.e. in this context, that it did not represent the true intention of the parties, both at the time of the inception of the relationship and subsequently, applying the Supreme Court decision of Autoclenz v Belcher [2011] UKSC 41, and the earlier Court of Appeal decision in Firthglow Ltd (t/a Protectacoat v Szilagyi [2009] ICR 835. The Supreme Court has since broadened the scope of the Autoclenz ruling and, in Uber, held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status.

17. In paragraph 69 of the Judgment in Uber, Lord Leggatt noted that, in the context of assessing whether it is permissible to look beyond the terms of a written contract, "*the primary question was one of statutory interpretation, not contractual interpretation*". Although that case concerned only "worker" status, in my view it must also apply to "employee" status, where the words of a statute are also being interpreted.

18. The Supreme Court made clear that it is not appropriate to treat the written agreement between the parties as a starting point, but instead the focus should be on the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.

19. In addition to the appellate cases referenced above, which have considered the issue of employment status in a variety of factual circumstances, Mr Algazy QC, on behalf of the Respondent, referred me to a specific EAT decision dealing with the status of dentists, that of Community Dental Centres Ltd v Sultan-Darmon [2010] IRLR 1024. The description of the agreement between the Claimant and Respondent in that case, referred to as a "licence agreement and contract for service", appeared to have been drafted in a very similar manner to the agreement between the Claimant and Respondent in this case.

20. The Employment Tribunal in that case was not satisfied that the claimant was an employee. In particular, the Employment Judge was not satisfied that

[1] Whilst the CAC decision was appealed to the High Court and the Court of Appeal, its findings on worker status were not challenged.

there was sufficient mutuality of obligation, noting that there was no guarantee that any particular number of patients would be introduced and no obligation upon the Claimant to treat any patient he decided he did not wish to treat.

21. The Judge was also not satisfied that the respondent exercised control over the claimant. The Judge noted that, undoubtedly, the respondent exercised control over the claimant's environment, but it did not purport to control the claimant in the exercise of his professional discretion.

22. The Judge also noted that there were a number of areas which demonstrated that the relationship between the parties was inconsistent with a contract of service, referring to the requirements that the claimant provide his own professional indemnity insurance and to indemnify the respondent in respect of damage arising from his negligence, the lack of any disciplinary procedure applicable to the claimant, the existence of financial risk if the claimant failed to complete the required number of units, and the equal responsibility of the parties for bad debts. Finally, the Judge noted that there were other significant factors pointing away from the inclusion of employment, such as the fact that the claimant enjoyed selfemployed status.

23. As the claimant in that case did not appeal the Tribunal's finding that he was not employed, the EAT judgment had no direct bearing on that element of this case, and the Tribunal judgment was not binding upon me. The Respondent in the Sultan-Darmon case did however appeal the Employment Tribunal's conclusion that, notwithstanding that the Claimant was not an employee, he was nevertheless a worker. That decision was overturned by the EAT on the basis that the Employment Judge could not conclude, in relation to the question of whether the Claimant was employed, that there was no obligation to perform services personally, and yet conclude, in relation to the question of whether the Claimant was a worker, that there was such an obligation.

24. The Employment Judge had based his conclusions in respect of worker status on the Claimant being under an obligation to provide the services of a dental surgeon, either by turning up to work himself or by supplying a locum, relying on the EAT decision in Redrow Homes (Yorkshire) Ltd v Buckborough [2009] IRLR 34. Silber J in Sultan-Darmon, however, noted the contradiction between the EAT's judgment in Buckborough and the Court of Appeal decision in Tanton. He noted that he had addressed the points in Josza, and had concluded that the comments in Buckborough were obiter, that the judgement in Tanton was binding, and, insofar as there was a dispute, Tanton had to be followed.

25. In Josza, Silber J had noted that "*where a party has an unfettered right for any reason not to personally perform the contractual obligations under a contract but can delegate them to someone else, he cannot be a "worker" within the meaning of the WTR even though the person actually performing the contractual obligations has to meet certain conditions. The position would be different if the right not to perform the contractual obligations depended*

on some other event such as where the party was "unable" to perform his or her obligation".

26. Silber J also referred, in Sultan-Darmon, to other EAT judgments issued shortly before his judgment in that case; Archer-Hoblin Contractors Ltd v MacGettigan [2009] All ER (D) 88, and Yorkshire Window Company Ltd v Parkes [2010] All ER (D) 108. He ultimately concluded that "*the unfettered right given to the claimant to appoint a substitute without any sanction at will means that he cannot be a "worker*"".

Findings

27. The First Respondent included in the Claimant's claim form, Integrated Dental Holdings Ltd ("Integrated"), is described in its annual report and financial statements as an "investment holding company". It is a subsidiary of a further company Turnstone Equityco 1 Ltd ("Turnstone"), which, at the relevant times, was owned by a private equity company.

28. The Second Respondent named in the claim form, Whitecross Dental Care Ltd ("Whitecross"), is not a subsidiary of the First Respondent, but is also a subsidiary of Turnstone. Within its annual report and financial statements, the principal activities of the group are stated to be the operation of dental practices and the provision of materials.

29. The annual report and financial statements of Turnstone indicates that the group operates around 600 dental practices across the UK. It does so under the trading name of ""My Dentist".

30. The Claimant, aged 65 at the time his relationship with the Respondent ended, was a dental surgeon with over 40 years' experience. He set up his own practice as a dentist in Milford Haven in 1988, and ran that practice for the following 20 years.

31. In 2007, the Claimant approached Integrated with a view to selling his business, and an agreement for the acquisition of the Claimant's practice was completed in 2008. Alongside that agreement, the Claimant entered into an agreement with Whitecross, on 1 March 2008, to continue to work at the surgery as a dentist. That agreement was not before me, although a subsequent agreement, entered into between the parties on 1 April 2015, which both parties accepted was the operative agreement between them for the purposes of this case, was before me, and its terms are summarised below.

32. The dental practice appears at all times to have been a relatively small practice, with at most two full-time equivalent dentists, two full-time equivalent nurses, one receptionist, and one practice manager.

33. The agreement entered into between the Claimant and the Respondent on 1 April 2015 was entitled "SELF EMPLOYED ASSOCIATE AGREEMENT" ("Agreement"), and the Claimant acknowledged that the written agreement was predicated on the basis of self-employment. The Claimant's case was

that the reality of the arrangements between the parties, in the way they operated during the entirety of the engagement, i.e. between 2008 and 2020, pointed towards employment, notwithstanding the terms of the written agreement.

34. The terms of the 2015 agreement contained summary terms, setting out matters such as location, notice period, hours, leave and payment terms. They were supplemented by what were described as standard terms. The agreement contained the following relevant provisions (the Claimant being described as the "Associate", and the Respondent being described as the "Company").

"*1.2. The Associate is in business on his/her own account, providing services relating to dental care and treatment, and it is the intention of the parties that the Associate shall enter into these arrangements on a self-employed basis.*

1.3. Nothing in this agreement shall constitute a contract of employment between the Company and the Associate, nor shall it constitute a partnership between the Company and the Associate.

2.1 The Company grants to the Associate a non-exclusive license and authority (during the operation and subject to the terms and conditions of this Agreement) to carry on the practice of dentistry at the premises of the Dental Centre.

2.2 Subject to the terms of this Agreement the Company shall use reasonable endeavours to provide for the use of the Associate at the Dental Centre:

(a) the Equipment…;

(b) the Staff [which specifically included, "the services of a dental nurse at the chairside"]; and

(c) the Support Services [defined as "such materials, drugs and supplies as the Company determines are appropriate from suppliers or catalogues approved by the Company from time to time", and "the service of a dental laboratory, which the Associate may select from the list of approved dental laboratories provided by the Company"]; and, specifically the services of a dental nurse, and materials and supplies.

2.3 The Associate shall not without the prior consent of the Company use at the Dental Centre any equipment, facilities or services other than the Facilities provided under this Agreement (except that the Associate may use his/her own hand instruments….).

3.1 Any dental nurse provided under clause 2.2(b) shall be subject to the clinical supervision of the Associate in the course of performing

clinical duties but the Associate shall have no right or obligation to supervise the dental nurse (or any other Staff) in any other respect.

3.2 The Associate may not take disciplinary action against any worker or employee working at the Dental Centre…

4.1 In providing dental care and treatment at the Dental Centre the Associate will:

(a) have clinical freedom in the provision of care and treatment to patients and accept full clinical responsibility for the same;

(b) comply with all relevant NHS regulations and Area Team guidelines;

(c) comply with any rules of professional conduct or good practice made or issued by the GDC, CQC or other regulatory body from time to time;

(d) comply with the policies and procedures applicable to the Dental Centre, including without limitation, any policies relating to radiation protection, NHS and GDC Rules and Regulations, medical emergencies, health and safety, infection control, prescribing, decontamination, clinical governance, confidentiality, informed consent, child protection, data protection, freedom of information, patient complaints, and equal opportunities;

(e) exercise due care and skill; and perform his/her obligations under this Agreement efficiently and in a proper and timely manner;

(f) perform his/her obligations to the standard required by the Company as set out in the Clinical Governance Framework in place from time to time applicable to the Dental Centre or other similar policy.

4.2 The Associate warrants that:

(a) he/she is registered as a qualified dental practitioner with the GDC and will, at his/her own expense, maintain such registration at all times during the term of this Agreement; and

(b) he/she holds Appropriate Indemnity Cover and will, at his/her own expense, maintain such cover during the term of this Agreement.

4.6 The Associate will indemnify the Company and keep it indemnified against any losses, liabilities, costs or expenses which the Company incurs and which arise from:

(a) the Associate's care and treatment of any patient in the course of the Associate's practice of dentistry at the Dental Centre

(including any uninsured losses); or

(b) any negligence or fraudulent act or omission by the Associate which causes the Company to be in breach of its obligations under the NHS Contract.

5.1 The Company shall make the Facilities available during the Contracted Hours [9:00am to 5:00pm, Monday to Friday]…, and the Associate shall use reasonable endeavours to attend the Dental Centre and utilise the Facilities during the Contracted Hours or shall provide appropriate cover for the treatment of patients and delivery of the Associate's Contracted UDA [7,978 per Contract Year] during any Contracted Hours in which he/she does not attend the Dental Centre.

6.1 In any calendar year (1 January to 31 December) the Associate shall be entitled to take up to the Agreed Leave [30 days]…

6.2 The Associate shall be entitled to take the number of Permitted CPD sessions specified in the Summary Terms [3 days] as study leave for continuing education.

6.3 The Company may, at its discretion:

(a) authorise leave requested by the Associate in excess of Agreed Leave (but subject always to maximum aggregate leave of 8 weeks pre year pro-rated based on the Contracted Hours); and/or

(b) authorise CPD days requested by the Associate in excess of Permitted CPD (but subject always to maximum aggregated CPD of 5 days per year pro-rated based on the Contracted Hours)…

8.1 The Associate may offer advice or treatment at the Dental Centre under private contract provided that such advice or treatment does not contravene the terms of the NHS contract.

9.1 The Associate will provide care and treatment to NHS patients referred to him/her by the Company. Such NHS patients will be patients to which the NHS contract applies, and will be patients of the Company and not patients of the Associate personally.

9.2 The Company shall not place any restriction on the NHS patients that the Associate may attend or the types of treatment that he or she may provide save that all patients treated and treatment provided must be in accordance with the NHS Contract.

10.1 The Associate is required to provide the Contracted UDA specified in the Summary Terms. ["UDA" being a "Unit of Dental Activity"]

12.1 In consideration for the licence to carry on the practice of dentistry at the Dental Centre and for the use of the Facilities, the Associate shall pay to the Company the Licence Fee (comprising the NHS Licence Fee and the Private Licence Fee).

[The NHS Licence Fee was defined as "50% of the Monthly NHS Contract Payment" (which was in turn defined as a multiplier of Gross UDA Value (£33.84 per UDA) and Delivered UDAs, prior to deduction of the NHS Licence Fee.]

[The Private Licence Fee was defined as 50% of the Private Fees.]

12.3 The Associate will be responsible for 50% of the cost of any laboratory work and such cost will be deducted from monies due to the Associate.

12.4 Bad debts associated with payment for NHS or private work carried out by the Associate shall be borne equally by the Company and the Associate.

15.1 The Associate shall guarantee the quality of his/her clinical work and treatment to patients … and shall restore at his/her own expense by repair or replacement any defective treatment…

17 The Associate shall discharge personally all his/her personal tax and national insurance liabilities and shall indemnify the Company and keep it indemnified on a continuing basis in respect of any tax and national insurance liabilities arising from the arrangements in this Agreement.

21.2 In the event of the Associate's failure for any reason (including Agreed Leave, ill health, adoption, maternity or paternity leave) to attend the Dental Centre and utilise the Facilities for a continuous period of more than one working week the Associate must make arrangements for the use of the Facilities by a locum, to provide the Services at the Dental Centre, unless the Company agrees otherwise.

21.3 The locum must be a qualified dental practitioner registered with the GDC, and approved by the Company. The Company may withdraw any approval it gives after consulting with the Associate and provided it acts reasonably in doing so.

21.4 Unless the Company and the Associate agree otherwise, the Associate shall be responsible for any locum they appoint, including payment of the locum.

21.5 During any period that the Associate engages a locum, the Associate remains responsible for all the Associate's obligations arising under this Agreement and will be liable for any breaches of this Agreement caused by any act or omission of the locum.

21.6 If the Associate does not appoint a locum, the Company may, at its discretion:

(a) appoint a locum…or

(b) terminate the Agreement without notice if the Associate fails to attend the Dental Centre and use the Facilities for a continuous period of more than one calendar month."

Clause 23 contained summary termination provisions, which focused on breaches or failures by the Claimant. There was no reference to a termination where the Claimant failed to appoint a locum, other than under clause 21.6(b).

Clause 24 contained various post-termination restrictions, which restricted the Claimant in his activities in competition with the Respondent for a period of 12 months after the agreement terminated.

35. As I have noted, the Claimant accepted that the express terms of the written Agreement pointed to a position of self-employment. His focus in support of his contention that he was employed by the Respondent was on the practical implementation of their relationship. In that regard, my findings, on the balance of probabilities where there was any dispute, were as follows.

36. The Agreement provided that the Claimant would use reasonable endeavours to attend at the Dental Centre and utilise its facilities during the contracted hours, i.e. the hours of 9:00am to 5:00pm, Monday to Friday. It went on to indicate that the Claimant would provide appropriate cover for the treatment of patients and the delivery of his contracted UDAs during any of those hours in which he did not attend the Dental Centre. The Respondent's witnesses however, contended that the Claimant set his own working hours, asserting that, as he was self-employed, that was his prerogative. Ms Fisher, who only covered the Milford Haven surgery for a little under three months in practice, noted that the Claimant would attend the practice after 9:00am on most days, and would leave immediately after he treated his last patient of the day. Ms Morris provided similar evidence, covering a longer period, albeit in circumstances where she did not attend the Surgery with any regularity. The Claimant however was adamant in his evidence that he consistently worked between 9:00am and 5:00pm at the Surgery.

37. In my view, there was always likely to have been some degree of latitude in relation to the precise hours worked by the Claimant, bearing in mind that, for a twenty-year period, the Surgery had been the Claimant's own business. For example, it would not have been surprising to me that if the Claimant's first patient of the day was booked in at 9:15am or 9:30am, he may not have turned up at the Surgery until 9:10am or 9:25am. However, the Claimant was contracted to provide a significant number of UDAs each year, which broadly equated to him working consistently full-time for most of the year.

38. The Respondent was broadly content with the Claimant's services, although I did see exchanges in the bundle regarding under-performance in some years, but that seemed primarily to have derived from the death of one of the

dentists at the practice. It seemed to me that if the Claimant had not been in the habit, for the most part, of working full-time hours regularly between 9:00am and 5:00pm, Monday to Friday, then the stipulated target would not have been met, the Respondent would have faced questions from the Local Health Board, and the Claimant would have faced questions from the Respondent. In the circumstances, whilst there may well have been a degree of flexibility around the precise hours worked by the Claimant, in my view, he worked consistently on a broadly full-time basis.

39. The position was however rather different with regard to holidays. The Agreement noted that the Claimant would be entitled to take 30 days' agreed leave each year, i.e. six weeks, but it also catered for the possible authorisation of a further two weeks at the Respondent's discretion. However, in oral evidence the Claimant accepted that he had taken significantly more leave than that, certainly in recent years. He did not dispute the Respondent's figures of 65 days leave in 2017, 64.5 days leave in 2018, and 75 days leave in 2019. In terms of weeks, that equated to 13 weeks in 2017 and 2018, and 15 weeks in 2019. There did not appear to have been any form of resistance to the Claimant taking that level of leave in those years, or any criticism of him for doing so.

40. Much was made on the Claimant's side of a comment by Ms Fisher, at a meeting on 14 February 2020, that only contracted holiday leave would be granted for the remainder of the holiday year, and that if contracted leave had been taken then it would not be granted, and that that went for all staff, including dentists. However, that was not, to my mind, indicative of any particular element of direction aimed at the Claimant with regard to leave. Bearing in mind that the meeting was a general staff meeting, I did not take from the minutes that it was anything more than a statement of the desired position on Ms Fisher's part, as opposed to a prohibition.

41. With regard to targets, the agreement between the Claimant and the Respondent noted an overall number of UDAs that were to be completed each year. There was no specific target for private income, with any target being applied on a practice basis as opposed to an individual dentist basis. Ms Morris's evidence on this point was that, in fact, what was really being looked at in relation to private income was an aim, or desire, as opposed to a target that had to be met. That contrasted with the Respondent's position in relation to its NHS work, which it had contractually committed to complete. Bearing in mind that the agreement did not discuss any form of target for private work, simply assessing how any private income would be divided up, I accepted Ms Morris's evidence and concluded that there was no specific target for the Claimant with regard to private work.

42. Nevertheless, there was clearly a target applied every year to provide a specific amount of work for NHS patients. The Claimant was however granted significant flexibility in fulfilling that target. As I have noted, the Claimant was in a position to take significant amounts of leave in the 2017, 2018 and 2019 years, and noted himself in his witness statement that, whilst he was able to take more than 30 days' holiday in accordance with clause 6.3 of the agreement, he was only able to do that if he was on target with his UDAs.

Whilst, as I have indicated, the requirement in terms of UDAs necessitated the Claimant working largely full-time for a large part of the year, there was therefore some inherent flexibility for the Claimant in how he fulfilled those targets.

43. In terms of the payments made to the Claimant in respect of the NHS work, he received monthly payments from the Respondent. In the years prior to the agreement being entered into in 2015, it appeared, from various payslips within the bundle, that the Claimant received a payment of one twelfth of the contract value each month, with claw backs being made in the following month if performance in the particular month concerned was below the required level. Subsequent to that, the Claimant received sums referrable to his performance against UDA targets. Within the bundle were payslips for the months of June to November 2019 inclusive. These showed that the Claimant received sums in respect of the NHS work, before the deduction of laboratory and other fees, which ranged from £4,825 at the lowest to £15,776 at the highest. The payslips also recorded the Claimant's private income during this period, which ranged from £29.50 at the lowest to £1300 at the highest.

44. The Agreement required the Claimant to maintain indemnity insurance and it appeared that he did so at all times.

45. The Claimant engaged the services of an accountant to prepare financial statements for him for each financial year. Those statements included a trading and profit and loss account, and were approved by the Claimant each year. They showed a gross profit calculated by reference to the fees and sundry income received by the Claimant, less the cost of sales, i.e. the laboratory fees, and other items of expenditure, such as insurance, telephone, motor expenses, accountancy fees and subscriptions, together with finance costs, such as bank charges, bank loan interest and hire purchase, before arriving at a net profit figure.

46. The Claimant was always treated as self-employed for income tax purposes. Indeed, there was within the bundle, an email from HMRC in 2013, indicating that the contract used by the Respondent had been reviewed, and that HMRC were happy that dentists could continue to be classed as self-employed. No evidence was put before me of any subsequent review of the status of dentists engaged by the Respondent by HMRC, whether to confirm the dentists' ability to be classed as selfemployed or to question that status. The Claimant appeared to maintain his self-employed status subsequently, by reference to the financial statements prepared on his behalf, and I therefore concluded that HMRC remained satisfied throughout that the Claimant could be classed as self-employed.

47. With regard to equipment, as the Agreement indicated, all relevant equipment was made available for the Claimant's use by the Respondent. Whilst the Claimant had the ability under the Agreement to use his own hand tools, there was no indication that he ever did. Any new or replacement equipment could be ordered by the Claimant from a list provided by an approved supplier. The Respondent's witnesses confirmed that the Claimant was not compelled to

use the approved supplier and could order equipment from any other supplier, but would, in that event, have to pay for the equipment himself. For obvious reasons, there was no indication that that ever happened.

48. There was no requirement on the Claimant to wear any form of branded uniform, and the Respondent's witnesses were adamant that no such uniform was ever provided. The Claimant confirmed in his evidence that he was provided with branded scrubs and one set of white clogs in terms of footwear, but that that was a significant time ago, and he never used them. On balance, I preferred the evidence of the Claimant on this issue, as the scrubs and clogs appeared to have been provided to the Claimant prior to the commencement of the employment of the Respondent's witnesses. However, as the Claimant never used them I did not consider that this was a material issue.

49. The Respondent's witnesses accepted that Mr Jones's name did feature on a sign outside of the practice, but indicated, and this was not challenged, that that was a requirement of the General Dental Council and was not something the Respondent itself required.

50. With regard to patients, understandably the Claimant continued to provide services to patients who had been patients of his practice prior to the sale of it to the Respondent in 2008. The Claimant did then have the ability to refuse to take on new patients, and there were occasions when he did so. The Claimant indicated in his evidence that this was always when his "list" was full, and therefore occurred in circumstances when he was not in a position to take on new patients, but the fact remained that he did, at times, refuse to take on new patients. That did not appear ever to have been something that was challenged by the Respondent, but I presumed that, as long as the Claimant was in a position to meet the overall UDA target from his existing list, then there would have been nothing to be gained by the Respondent from making any such challenge.

51. The agreement between the Claimant and the Respondent included a requirement that the Claimant comply with policies and procedures applicable to the Dental Centre, and these were listed in clause 4.1(d), albeit not exhaustively. In my view however, the list of policies reflected those which, from a patient safety and broader health and safety perspective, any organisation would require individuals working at its premises to observe, namely the policies on radiation protection, medical emergencies, health and safety, infection control, prescribing, decontamination and clinical governance. The remaining policies, those relating to confidentiality, informed consent, child protection, data protection, freedom of information, patient complaints and equal opportunities, whilst not relating to clinical matters, nevertheless were ones which the Respondent, as a business providing services to the public, would sensibly have required staff working at its premises to comply with. There was no evidence before me that any other policies, which may have been more directly orientated towards the Respondent's business, without any material element of regulatory or customer-facing focus, were applied.

52. Similarly, whilst the Claimant attended training courses in relation to his work, which were not exclusively clinically-focused, e.g. he was required to complete an online health and safety module, no evidence was put before me that the Claimant was required to undertake training beyond that which was appropriate for his clinical work, or for the Respondent's broader obligations as a business.

53. The Claimant attended staff meetings from time to time. Notwithstanding the Respondent's witnesses' perspectives that there was no obligation on the Claimant to attend them, I considered that it would have been expected that he would attend, and that the Claimant himself would have expected to attend, as they involved general discussions about how the practice was operating.

54. In terms of management, as the agreement noted, the Claimant would supervise a dental nurse whilst undertaking clinical work, but had no other such obligations. The evidence indicated that the Claimant habitually worked with one individual dental nurse when she was available, having done so from the time when it was the Claimant's own practice. The Respondent's witnesses accepted that there would be benefits to be derived from a particular dentist and a particular nurse working together, and that that would commonly occur. There were however obvious occasions when the Claimant would work with other dental nurses, when the nurse who habitually worked with him was not present. Beyond the supervision of the nurse whilst undertaking clinical work, and the occasional signing off of work undertaken by nurses for the purposes of training and development, the Claimant did not undertake any other managerial role. There was an indication from emails in the bundle that the Claimant was potentially to become involved in the interviewing of new dentists, but those emails were from several years earlier, and Ms Morris's evidence, which I accepted, was that, as far as she could remember, those proposals did not come to fruition, with all interviews, in her experience, being undertaken by the Respondent's central employees.

55. As I have noted, the agreement between the Claimant and the Respondent did contain the ability on the part of the Claimant to provide a locum. Indeed, the agreement permitted him to make use of the locum at any time, subject only to the professional qualification of the locum and the approval of him or her by the Respondent.

56. The agreement stipulated that the Claimant would indeed need to provide a locum if he himself was not in a position to provide the services for a continuous period of more than one working week. However, until the period after the Respondent had served notice on the Claimant, no such locum was ever provided by the Claimant and nor, indeed, was any concern raised by the Respondent about that. The Respondent did not at any time seek to appoint a locum itself and charge a locum arrangement fee to the Claimant as potentially envisaged by the contract. This was despite the fact, as previously indicated, that the Claimant took significant periods of holiday, certainly during the last three years of his engagement with the Respondent. The Claimant also indicated in unchallenged evidence that no locum was provided during a period when he had been absent following an operation.

Up until the very end of the relationship between the Claimant and Respondent therefore, whilst the agreement allowed for the Claimant to make use of a locum, that, in fact, never happened.

57. In October 2020 however, for reasons which I did not need to consider in relation to the matters under consideration at this stage, the Respondent served notice of termination on the Claimant. That notice indicated that the agreement between the Claimant and the Respondent would end with effect from 16 February 2021.

58. In the period immediately prior to the serving of the notice, the Claimant was not at work due to his concerns about the risk of contracting Covid-19. The Claimant then provided a medical certificate, dated 17 November 2020, noting that he was unfit for work due to anxiety for three months, i.e. up to the termination of the agreement. Notwithstanding that certificate however, the Claimant did undertake work for another surgery in Milford Haven from January 2020 onwards, and continued to work there after the termination of his agreement with the Respondent.

59. In relation to his obligations under his agreement with the Respondent, the Claimant sent an email to the then Practice Manager, on 17 November 2020, noting that, following his certification as being unfit for work during the remainder of his notice, he would seek to appoint a locum to work in his place. He noted that his contract required the Respondent to pay him in full in order that he might pay the locum. He further noted that, alternatively, the Respondent might wish to appoint its own locum, in which case it would be obliged to pay the Claimant the difference between the full payments that he would normally receive and the cost of the locum. The practice manager replied to the Claimant on 20 November 2020, noting that the Claimant was entitled to appoint a locum and that the Respondent would be happy for him to do so as he had suggested. She asked the Claimant to
keep the Respondent informed about the progress of the appointment so that they could make sure that the facilities were provided for the locum as required.

60. It appeared that, almost immediately, steps were taken by the Claimant to procure a locum. An email from the person who was ultimately appointed as the locum was sent to the Claimant on 22 November 2020, and that referred to the locum job having been advertised on the Facebook page of Dental Wales. Later that same day, the Claimant sent an email to the Practice Manager, confirming that he had appointed a locum who could start as soon as the Respondent confirmed the figure that it would pay. He suggested that the locum should start on 25 November 2020. The Practice Manager passed that query on to one of the Respondent's employees who dealt with payments to dentists. She then replied to the Claimant on 26 November, thanking the Claimant for appointing the locum, who was due to start the following Wednesday, i.e. 2 December 2020.

61. The locum and the Claimant then entered into a locum agreement on 27 November 2020, noting that the engagement would commence on 2 December 2020 and end on 15 February 2021. A specific fee per morning

and afternoon session was agreed, and the signature section recorded the Claimant as 'Sole Trader'.

62. The Claimant confirmed that he continued to be paid by the Respondent under the agreement in respect of the UDAs performed by the locum, and that he gained from that, i.e. that the amount he paid to the locum was less than the sum he received from the Respondent.

Conclusions

63. Applying my findings and the applicable law to the issues I had to decide, my conclusions were as follows.

The correct Respondent

64. In light of my findings at paragraphs 27 to 29 above, it seemed clear to me that Whitecross was one of the companies within the group which operated the dental surgeries, with Integrated being purely a form of holding company. The Claimant's express contractual relationship was also always with Whitecross. It seemed to me therefore, that the correct Respondent in this case should be Whitecross, and that the claims against Integrated should be dismissed.

Employment status

65. My starting point for considering whether the Claimant was an employee of the Respondent focused on whether there was a contract of employment. It was only if the Claimant worked under a contract of employment for the Respondent that he would be qualified to pursue his claim of unfair dismissal.

66. The definition of employment for the purposes of the Claimant's claims under the Equality Act also refers to being employed under a contract of employment. That definition however, also extends to being employed under "a contract personally to do work", which I addressed separately.

67. In terms of the contract between the parties, it was clearly not envisaged that the self-employed associate agreement, as a written document, should operate as a contract of employment. Its express terms referred to a relationship of self-employment, and the Claimant accepted that the express terms of the contract did not give rise to an employment relationship. The Claimant's case instead focused on the underlying reality of the circumstances between the parties, relying on the direction of the Supreme Court in Autoclenz, that the terms of a written document may not represent the true intention of the parties, and on the Supreme Court's further judgment in Uber, that the primary question is one of statutory interpretation and not contractual interpretation.

68. I therefore looked at the underlying relationship between the parties, in the light of the express terms, to consider whether it could be said that a contract of employment existed between the parties in this case, notwithstanding the

express terms of the written agreement. I focused on what the earlier appellate decisions indicated should be the irreducible minimum of; personal service, control and mutuality of obligation, further taking into account whether other factors present within the relationship were consistent with there being a contract of employment.

Mutuality

69. I noted that the Employment Judge in the Sultan-Darmon case concluded that he was not satisfied that there was sufficient mutuality of obligation, noting that, whilst the respondent undertook to introduce patients to the claimant, there was no guarantee that any particular number of patients would be introduced, or even that the claimant would necessarily get his fair share of patients, as compared with other dentists engaged by the respondent. The Judge noted also that there was no obligation upon the claimant to treat any patient he decided he did not wish to treat. He concluded that there was no legal obligation on either side which was sufficiently clearly enforceable to amount to a mutuality of obligation.

70. In this case, I noted that the Claimant had the ability to refuse to treat individual patients, and the evidence confirmed that he did indeed, on occasions, refuse to treat patients. However, that was only in circumstances where his list was, to all intents and purposes, full. During the time of the relationship between the parties, the Claimant worked generally as one of two dentists at the premises, and worked on a broadly full-time basis. The indications were therefore, that the Claimant was working at, or near to, capacity and was fulfilling his contractual obligations to the Respondent. It did not seem to me therefore, that the Claimant had, in any sense, a “free hand” to refuse to treat patients. There was no evidence put before me of any circumstances where the Claimant refused to treat individual patients other than where he considered that his list was full, and I considered that, save where the Claimant was in the position where he felt that he could not safely take on additional patients, there was a general expectation that the Respondent would provide (in the sense of arranging appointments for) patients to the Claimant, and the Claimant would then attend to those patients. In my view, that amounted to a mutuality of obligation between the parties.

Control

71. MacKenna J in Ready-Mixed Concrete, noted that, *"control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done.*". In this case, as was the case with Mr Sultan-Darmon, the Respondent clearly exercised control over the Claimant's environment. It provided the surgery premises for use by the Claimant, and provided all equipment for the Claimant. In addition, the patients of the surgery were provided to the Claimant, in terms of appointments being arranged by the Respondent's reception staff.

72. Clearly, the Claimant was free to exercise his professional discretion in terms of what treatment would be provided to each individual patient. However, that would not be unexpected in the context of a professional such as a dentist.

73. In terms of the more peripheral elements of the relationship, I did not think that the provision of some limited training to the Claimant, and indeed the requirement that he undertake some training modules, necessarily involved control over his activities by the Respondent. The Claimant had a free hand to undertake professional development training as he thought fit, although he could make use of the training provided by the Respondent. Furthermore, whilst the Claimant was obliged to undertake certain training activities by the Respondent, for example, in relation to health and safety, those were matters which anyone present at the premises would have been likely to have been obliged to have undertaken.

74. I formed a similar view with regard to the fact that the Claimant was subject to a range of the Respondent's policies. The majority of these related to the Claimant's clinical obligations, or broader health and safety expectations. Whilst there were certain policies which were of more general application, again I considered that these were of the sort that would sensibly be applied by the Respondent to anyone attending and working at its premises.

75. Similarly, I did not consider that the Claimant's attendance at team meetings was an indicator of his being controlled by the Respondent. The matters discussed at such meetings were general ones, and, notwithstanding that there was one comment by a practice manager in one meeting suggestive of a direction to the Claimant that he would be controlled in relation to his holidays, that did not, in my view, cover matters which were only the province of people controlled by the Respondent, i.e., employees.

76. I also noted, with regard to holidays, that, certainly in the three most recent complete years discussed in evidence before me, the Claimant took significant amounts of leave, roughly double that of his anticipated entitlement. However, I noted that that was in the context of the Claimant being subject to an annual UDA target, and in circumstances where there would be no benefit to be gained by the Respondent or the Claimant by overachieving against that target. It seemed to me therefore that the general latitude given to the Claimant in relation to annual leave was indicative of the Respondent being fairly relaxed about the Claimant's attendance, as long as the overall annual target was met.

77. Overall however, I considered that there was a sufficient degree of control of the Claimant's overall activities by the Respondent to point towards a relationship of employment.

Personal service

78. I took into account the range of cases which have dealt with the ability to provide substitutes. These were summarised by Silber J in Sultan-Darmon, but were also summarised by Sir Terence Etherton MR in Pimlico Plumbers, in the lead up to his summary of the situation at paragraph 84.

79. Those analyses indicate that an ability for an individual to provide a substitute, when "unwilling" to perform the services personally, and not just when "unable" to perform them, would generally not lead to an employment relationship, see Tanton. Conversely, where the ability to provide a substitute arose only when "unable" to provide the services, then that would be more indicative of an employment relationship, see MacFarlane. That case also suggests that the arrangement would be more indicative of employment where any replacement individual was paid directly by the employer and not by the original worker. MacFarlane also suggests that where the employer can veto the replacement employee, then that would again point towards a relationship of employment.

80. However, Jozsa, albeit dealing with worker status rather than employee status, noted that where an individual has an unfettered right, for any reason, not to personally perform the contractual obligations under a contract, but can delegate them to someone else, he cannot be a worker. Silber J, in that case, noted that the position would be different if the right not to perform the contractual obligation depended on some other event, such as where that party was "unable" to perform his or her obligations.

81. As noted in MacFarlane, the ability on the part of the employer to control the replacement is a relevant factor.

82. That led to Sir Terence Etherton MR summarising his five principles at paragraph 84 in Pimlico Plumbers. However, as noted by Lewis LJ in Stuart Delivery, Sir Terence was not seeking to establish a rigid classification or lay down strict rules as to what did or did not amount to personal performance or when a right of substitution did or did not negate the existence of an obligation to do work personally. Lewis LJ also noted that only the first two matters mentioned by Sir Terence were, in reality, “principles”, the third, fourth and fifth points being provided by way of example. They were however relevant examples for this case.

83. The third indicated, albeit, as noted, only by way of example, that a right of substitution only when "unable" to carry out the work would generally point to an obligation to provide personal performance. The fourth, again only put forward by way of example, noted that a right of substitution, limited only by the need to show that the substitute was as qualified as the contractor, will generally be inconsistent with personal performance. The fifth, again put forward only by way of example, noted that a right to substitute only with consent of another person who has an absolute and unqualified discretion to withhold consent would point to personal performance.

84. In this case, the Claimant's ability to appoint a locum was not confined to circumstances where he was unable to carry out the work. The particular clause within the Agreement (21.2) noted that the requirement to appoint a locum arose, "*In the event of the Associate's failure for any reason (including agreed leave, ill-health, adoption, maternity or paternity leave) to attend the Dental Centre*".

85. With regard to the circumstances of the locum, clause 21.3 of the Agreement noted that the locum must be a qualified dental practitioner registered with the GDC. There was therefore an obligation to provide someone as qualified as the Claimant to do the work. At that stage therefore, the third and fourth principles identified by Sir Terence Etherton MR would point strongly towards a lack of a requirement for the Claimant to undertake the work personally.

86. However, clause 21.3 contained further wording, saying that the locum must be "*approved by the Company*." It went on to say, "*The Company may withdraw any approval it gives, after consulting with the Associate and provided it acts reasonably in doing so*". I therefore needed to assess whether that amounted to an absolute and unqualified discretion to withhold consent on the part of the Respondent, i.e. the fifth principle identified by Sir Terence.

87. I noted, with regard to the circumstances of the appointment of the locum in this case, that the Claimant was unable to attend the practice during his notice period. On 17 November 2020, he raised the question of a locum and, in an email of that date, he noted the alternatives of appointing a locum himself, or of the Respondent appointing its own locum. The reply from the Practice Manager was that the Claimant was entitled to appoint a locum, and that the Respondent would be happy for him to do so. By 22 November 2020, the Claimant confirmed that he had appointed a locum who could start as soon as the Respondent confirmed the figure it would pay. The locum's indemnity insurance certificate and CV were provided to the Respondent by the Claimant, and an internal email between the Practice Manager and an individual responsible for payments referred to the Claimant having appointed his own locum and needing to work out and arrange a suitable fee to pay him. There was then a further email from the Practice Manager on 26 November 2020, in which she said, "*Thank you for appointing [the locum] who is starting next Wednesday, we look forward to welcoming him in the practice*".

88. To my mind, notwithstanding the existence within the contract of the requirement that the Respondent approve the locum, that did not involve any form of absolute, unqualified discretion to withhold consent. I was supported in that view by the subsequent wording of clause 21.3, which, although referring to the withdrawal of consent previously granted, referred to such withdrawal not being exercised unreasonably.

89. I also noted, although as I have noted above, it is strictly not binding on me, that the arrangement in the Sultan-Darmon case, which led to the Employment Judge in that case concluding that the claimant was not an employee, referred to the appointment of a locum "*acceptable to [the Respondent]*".

90. In my view, the fairly cursory approval process undertaken by the Respondent did not amount to any material practical ability to withhold consent on the part of the Respondent.

91. I also noted that, whilst the agreement between the Claimant and Respondent contained a comprehensive list of circumstances in which the

Respondent was entitled to summarily terminate the agreement with the Claimant, that did not include anything arising from the appointment of a locum. The terms of the Agreement allowed the Claimant to make use of a locum whenever he wished.

92. I noted that the circumstances of the appointment of a locum only arose right at the end of the Claimant's relationship with the Respondent, in the last three months of his notice period. However, I noted that the Claimant engaged that locum and earned a profit from doing so, i.e. he received more from the Respondent under his agreement with them than he paid the locum. I also noted that, notwithstanding his indication to the Respondent that he was unfit to work, the Claimant also worked at a neighbouring dental surgery in January and February 2021, i.e. at a time when he still owed the primary obligation to provide services to the Respondent.

93. in my view, the existence of this materially unfettered right to appoint a substitute, the fact that the Claimant did indeed appoint such a substitute, and gained from that appointment, led me to conclude that the Claimant did not have the required obligation to provide personal performance, which was fatal to his claim that he was employed under a contract of employment.

94. Having reached that conclusion, it was not strictly necessary for me to examine the other factors to assess whether they were consistent with there being a contract of employment. However, had I needed to do so, I would not have considered that they were. In addition to the agreement itself being expressed as one of self-employment, the Claimant appeared perfectly content to take advantage of his self-employed status during the entirety of his association with the Respondent. He paid tax and national insurance on a self-employed basis, and thus was able to set against his income certain expenditure which he would not have been entitled to do had he been an employee. I also noted also that the terms of his arrangement with the locum recorded the Claimant as a "sole trader".

95. Having concluded that the lack of an obligation on the Claimant to carry out his work personally was fatal to a conclusion that he was working for the Respondent under a contract of employment, I could fairly briefly deal with the alternative definition of employment under the Equality Act. That alternative definition involved a requirement to conclude that the Claimant was engaged under a contract personally to do work.

96. My conclusions in relation to the personal service element of the contract of employment question applied equally to that issue. The fact that the Claimant had a materially unfettered right to appoint a substitute meant that he was not engaged under a contract personally to do work. My conclusion therefore, was that the Claimant was not an employee of the Respondent, whether for the purposes of section 230 ERA or for the purposes of section 83 EqA.

Worker status

97. My conclusions in relation to the issue of personal service also allowed me to deal with this issue very briefly. Being a “worker” for the purposes of section

230 ERA involves either work under a contract of employment, which my conclusions indicated I did not consider was the case, or work under another contract to do or perform personally any work or services for the other party. Again therefore, the question of personal performance arose, and indeed, the Pimlico Plumbers case and the Sultan-Darmon case dealt with the question of worker status, and the subsidiary question of whether the claimants in those cases were engaged to perform work personally.

98. For the reasons I have identified above in relation to the personal service aspect of the contract of employment issue, my conclusion in relation to that was the same; I did not consider that the Claimant was a worker of the Respondent within the meaning of section 230 ERA.

99. My conclusions therefore ultimately mean that the Claimant is not able to pursue any of his claims against the Respondent.

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Employment Judge S Jenkins
Date: 30 November 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
1 Dec 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche