Case No: 1400999/2019

EMPLOYMENT TRIBUNALS

Claimant: James Main

Respondent: SpaDental Limited

Heard at: Bristol Employment Tribunal by VHS **On:** 3rd & 4th May 2022

Before: Employment Judge Gibb

Representation

Claimant: James Williams of Counsel
Respondent: Jonathan Gidney of Counsel

RESERVED JUDGMENT

The Claimant was a worker pursuant to Regulation 2(1) of the Working Time Regulations 1998.

ORDER

(1) The parties shall provide any dates to avoid over the next 6 months for a final hearing on the Claimant's holiday pay claim, no later than 7 days after this Judgment is sent to the parties.

(2) The claim will be listed for a final hearing for three hours.

(3) No later than 28 days after the date on which this Judgment is sent to the parties, the Claimant shall provide a schedule containing a precise calculation of his holiday pay claim to the Respondent's representative and send a copy to the Tribunal.

(4) No later than 14 days after receipt of the Claimant's schedule under paragraph (3) above, the Respondent shall deliver to the Claimant and copy to the Tribunal a counter-schedule in response.

(5) No later than 14 days after delivery of the counter-schedule under paragraph (4) above, the parties shall co-operate to agree a bundle of documents with a 100-page limit for use at the final hearing and the Claimant shall deliver copies electronically to the Respondent and the Tribunal.

(6) Four weeks after the agreed bundle has been lodged, the parties to exchange electronically witness statements, with a 3,000-word limit, for use at the final hearing and to provide copies to the Tribunal.

(7) The parties should use their best endeavours to reach an agreement in relation to the claim.

REASONS

CLAIMS AND ISSUES

1. By an ET1 dated the 27 of March 2019, the Claimant issued proceedings for unpaid holiday pay between 2013 and 2019. In his grounds of claim, he claimed firstly that he was an employee of the Respondent, alternatively that he was a worker. By an ET3 dated 26 of April 2019, the Respondent denied that the Claimant was either an employee or a worker, asserting instead that at all material times he was a self-employed contractor under a contract for services.

2. A preliminary hearing to determine the Claimant's status took place on the 19 October 2019. By reserved judgement, the tribunal held that the Claimant was not a worker (the Claimant already having conceded that he was not an employee).

3. The Claimant appealed this decision. The appeal was heard by the EAT on 9 September 2021. It allowed the appeal on the ground that the tribunal erred in its approach to the assessment of the Claimant's worker status. The EAT remitted the hearing to a newly constituted tribunal to determine whether or not the Claimant was a worker, save that the Respondent's concessions: (i) that there was a contract, and (ii) that the Claimant undertook to do or perform personally any work or services, could not be reopened. The questions before this tribunal therefore were whether:

    i. The Claimant carried out a profession or business undertaking; and

    ii. The status of the Respondent by virtue of the contract was that of a client or customer of the Claimant.

PROCEDURE, DOCUMENTS & EVIDENCE

4. The preliminary hearing was heard on 3 and 4 of May 2022 by VHS. The Claimant was represented by Mr Williams of counsel and the Respondent

was represented by Mr Gidney of counsel. There was an agreed bundle of documents running to 205 pages to which one additional email was added during the course of the hearing. Both counsel produced detailed written submissions and an agreed bundle of authorities for which I am grateful.

5. The tribunal heard evidence from the Claimant who relied upon three witness statements. The tribunal also heard evidence from the following witnesses on behalf of the Respondent: Sandra Smith, Christopher Hilling and David Hart.

6. At the start of the hearing, I raised a concern with the parties concerning the Claimant's locus to present the claim. It was clear from the documents in the bundle that a bankruptcy order been made against the Claimant on 21 of June 2017 and a Trustee in Bankruptcy ("Trustee") subsequently appointed. The Trustee had been represented at the original preliminary hearing and his consent given orally by counsel for that hearing to proceed. There was no written or other indication to show that the Trustee's consent continued to apply in relation to this hearing.

7. Following discussions with counsel, I decided to proceed with the hearing and Mr Williams agreed to contact the Trustee's solicitors to obtain his consent to this hearing proceeding. On 4 May 2022, the Trustee's solicitors confirmed that the Trustee consented to the Preliminary Hearing proceeding on the question of his worker status. Mr Williams also confirmed that a copy of this decision would be provided to the Trustee.

THE FACTS

8. The Claimant is a qualified dentist. He owned and operated a dental practice under the trading name 'James Main Dental Practice' based in Glastonbury. On 5 March 2013, the Claimant entered into a business transfer agreement by which he sold the business as a going concern to Main Dental Partners Ltd ("MDPL"). At around this time, MDPL bought four dental practices based upon the business model that the dentist sold the practice and would then be contracted to provide dental services to the business going forward. The Claimant also retained shares in MDPL.

9. On 26 October 2018, MDPL's shareholding was bought by SpaDental Holdings Limited and became part of the SpaDental Group, which is a business that buys, sells and manages dental practices.

10. On 19 November 2018, MDPL was renamed SpaDental Limited. Although the legal name of the Respondent has changed during the material time, its legal identity has not and so for the purpose of this judgment, I will refer to it throughout as the Respondent.

Terms of the Service Agreements

11. On 5 March 2013, the Claimant entered into two agreements. The first was an employment contract by which he was employed as the Managing Director of MDPL. The second was a services agreement pursuant to which he agreed to provide dental services to MDPL at the Glastonbury practice ("SA1").

12. The SA1 was a tripartite agreement. The Respondent contracted with J Main Limited ("JML") as 'Contractor', described as a company carrying on the provision of dental services, and the Claimant as 'Principal'. The Claimant was a director and shareholder of JML.

13. By clause 2, the Respondent granted JML a non-exclusive licence and authority to provide dental services from the Glastonbury practice and was conditional upon the Claimant carrying out the dental services and treatments as required by the patients. The parties also undertook to use reasonable endeavours to further the interests of the practice.

14. The Respondent agreed to provide the dental equipment and staffing services. Clause 4 set out the Respondent's obligations to maintain the equipment; arrange for its replacement when damaged; supply the required dental and other staff required to provide the dental services and make the Glastonbury practice available to the Claimant every weekday, 8.45am to 5.30pm.

15. By clause 5, JML and / or the Claimant agreed to provide such dental services and treatment as shall be required by the patients. The Claimant agreed to use his 'reasonable endeavours' to use the facilities during these times. In other words, the Claimant was expected to work at the Glastonbury practice at the stated hours. The Claimant agreed not to practice elsewhere without the prior consent of the Respondent. By clause 5.4, the Claimant agreed to maintain full and accurate books and records of the patients and these remained the Respondent's property.

16. The agreement contained a provision that if the Claimant failed to generate income of £30,000 per month for three calendar months in any 12-month period, the Respondent was entitled to terminate.

17. Fees were payable to JML based upon the work that the Claimant had carried out the preceding month and were paid in accordance with the Schedule annexed to SA1 [clause 3]. Each month, JML provided the Respondent with a statement of work carried out in the Schedule format. The Claimant was paid 35% of the net fees generated. The Schedule further permitted for working capital adjustments to be added or deducted from the monthly total.

18. Under clause 5, the Claimant agreed that he would maintain his own professional indemnity insurance and agreed to indemnify the Respondent in relation to identified breaches including dental negligence. The Claimant also agreed to remedy defective work [clause 5.6].

19. The Claimant agreed to maintain his membership of the General Dental Council [clause 5.9.2].

20. In accordance with clause 5.10, the Claimant provided day to day supervision of the staff at the practice. He also agreed to abide by the Respondent's policies, procedures and work systems and to undertake any training as required to meet any regulatory requirements.

21. Clause 6 entitled the Claimant to take 25 days leave per year. He did not receive payment for the days he took as holiday. In the event that the Claimant took additional leave, he was required to pay an Absent Dentist Charge in the sum of £950 per day. It was agreed between the parties that the Claimant arranged his holiday leave at the start of every year. The Claimant never took additional leave.

22. By clause 6.4.3, the Claimant was required to notify the Respondent of ill-health on the first day of sickness and the Respondent would assume responsibility for the appointment of locum cover. If the Claimant failed to work at the practice for more than three days continuously, the Respondent was able to appoint a locum and the Claimant was not entitled to payment for any sums generated by the locum. The Claimant was also required to pay the Absent Dentist Charge for any days the locum was not appointed. These provisions were never invoked by the Respondent.

23. Clause 11 set out the restrictive covenants which applied to the Claimant during his notice period or following termination. The Claimant agreed not to practice as a dentist within 10 miles of the practice for 2 years post termination. He also agreed that for 2 years following termination he would not solicit patients or employees of the Respondent.

Termination of SA1 & Signing of SA2

24. In a letter dated 20 June 2017, the Claimant informed David Hart, a non-executive director of the Respondent, that JML was to be wound up. The Claimant noted that unless the fees generated under SA1 could be paid directly to him, he would be unable to continue with SA1 and would have no choice but to give his notice.

25. On 21 June 2017, a bankruptcy order was made in respect of the Claimant.

26. On 3 August 2017, the Respondent terminated SA1 in accordance with the provisions of the agreement relating to the Claimant's solvency [clause 9.4.1].

27. On 31 August 2017, the Claimant and Respondent entered into a further services agreement ("SA2"). I have compared the two services agreements side by side and there is very little difference save for the fact that the Claimant's hours of work changed to 9am – 5.30pm on Monday, Tuesday and Thursday; 9am – 3pm on Wednesday and Friday. The parties proceeded at trial on the basis that this change of agreement had no material effect on the Claimant's provision of dental services to the Respondent.

28. Throughout the entire period, the Claimant was responsible for paying his own income tax and national insurance as a self-employed person.

Operation of the Service Agreements

Day-to-Day Practice

29. The Claimant had complete clinical autonomy in the running of his day-to-day practice. The Claimant specialised in dental implant work and saw himself as a specialist rather than a general dentist. He worked primarily at the Glastonbury practice, but also treated the Respondent's patients at its other practices. I accept the Respondent's evidence that the Claimant organised his own diary and when he went to the other practices.

30. The Respondent did not guarantee the number of patients that the Claimant would be treating and the Claimant was not obliged to treat all patients. It was agreed that the Claimant had declined to treat the patients of Dr May, who had left the High Street practice. The Claimant had complete control over the treatment he offered to patients and the manner in which he treated those patients.

Supervision of Compliance

31. The Respondent owned and ran the business, maintained the practice premises, employed the administrative and clinical staff and was responsible for ensuring that the practice maintained its regulatory responsibilities. As a result, it makes business sense that the Respondent was vigilant in ensuring the Claimant complied with the applicable policies and procedures as set out under the service agreements. The Respondent was pro-active in ensuring the Claimant's compliance.

Hours of Work

32. The Claimant worked exclusively for the Respondent whilst contracted under the service agreements. It was the Claimant's case that his hours of work were completely controlled by the Respondent and he was required to adhere to his contractually agreed times. The Respondent did not accept this. Its case was that the Claimant in practice work shorter days on Wednesday and Friday from the outset and frequently changed both his and other staff working patterns to suit himself.

33. Sandra Smith, who worked at the Glastonbury practice between 2013 and 2019, and from 2016 was the Operation and Compliance Officer, gave evidence that the Claimant liked to work a shorter day on Wednesday and Friday. She also said that he frequently asked staff to work through lunch, despite being asked by the Respondent not to do so. I accept her evidence in this regard.

34. Mr Hart gave evidence that the Respondent agreed to the Claimant working a shorter day on Wednesdays with effect from October 2016.

Surgical Gowns

35. There was a disagreement between the Claimant and Respondent as to whether or not the clinical staff should wear surgical gowns during procedures. The Claimant was insistent that they should and the Respondent eventually agreed to provide such equipment. I find that the

Claimant required the Respondent's consent to this change. There is no suggestion that the Claimant was required to fund the cost of the gowns.

Uniform

36. The Claimant was required to wear a uniform which included the logo of the practice. This is clearly shown on promotional material in the bundle and the Respondent's staff are all shown wearing similar uniforms.

Fees

37. There was some disagreement as to whether or not the Claimant was responsible for setting the level of fees for treatment. The Claimant's case was that the fees were pre-set but that he would be consulted about the appropriate level. The Claimant said that once the fee was inputted into the Practice Management System ("PMS") it could not be changed by him. Mr Hart also gave evidence, which I accept, that from the outset, the Claimant determined the pricing for implant treatment. I find that the pricing for treatments which was then entered into the PMS was determined following discussion between the parties and to that extent the Claimant was closely involved in setting the prices. I further find that the Claimant determined the fees for individual implant treatments and that he would on occasion decide not to charge a patient or apply a discount (for example if they agreed to pay upfront for work).

Equipment

38. It was agreed that the Claimant provided a limited amount of his own equipment such as a loup. There was disagreement as to the extent to which the Claimant provided his own implant equipment. The Claimant accepted that he used his own specific equipment for implant work prior to January 2016, but maintained that after that date, the Respondent has acquired these tools which he then used. The Respondent disputed this and said that the Claimant continued to use his own tools. I preferred Mrs Smith's evidence to the Claimant's on this issue and find that he continued to use his own implant tools after 2016.

Marketing & Materials

39. The Claimant was a central figure in the Respondent's marketing strategy for the Glastonbury practice. This was important as the Respondent retained the business name and identity of the practices which it took over. From March 2013 – January 2019, the practice website operated as the 'James Main Dental Partnership', as did the business' social media posts. The Respondent promoted outreach marketing events which were run by the Claimant for prospective patients as well as seminars for dentists who might wish to make referrals.

40. The Respondent set the marketing budget and it is clear from emails with the marketing specialists that Mr Hart would provide suggestions for the marketing strategy. I accept that the Claimant had the final say in respect of clinical information provided in any marketing material.

41. The Claimant was supplied with business cards which referred to him as a dentist surgeon at the James Main Dental Partnership.

Termination

42. By a letter dated 26 February 2019, the Respondent exercised its contractual right to terminate SA2 under clause 9.4.5 on the grounds that the Claimant had failed to generate the agreed Minimum Income Threshold over the preceding 12 months.

THE LAW

Definition of Worker

43. Regulation 2(1) of the Working Time Regulations 1998 ("WTR") 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;*
>
> *and any reference to a worker's contract shall be construed accordingly;"*

Purposive Approach to the Statutory Wording

44. At the outset, I remind myself that I must adopt a purposive approach to the wording of the statute following the guidance set out in *Uber BV v Aslam (SC(E))* [2021] ICR 657, at 674 paras 68-70 in which the Supreme Court issued a further reminder that the question of worker status is one of statutory, not contractual, interpretation.

Limb (b) Workers

45. In *Bates van Winklehof v Clyde & Co LLP* (SC(E)) [2014] ICR, 730, Baroness Hale delivered the leading judgment. She identified three types of potential employment relationships: those employed under a contract of employment, those self-employed people in business on their own account and undertake work for their clients or customers and an intermediate class of workers who are self-employed, but do not fall within the second class. This latter class is the 'limb (b) worker'.

Elements of the Legal Test

46. Baroness Hale then succinctly summerised the leading cases and identified those key factors which the tribunal might assess and weigh in its overall consideration of status:

> *"In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328: [2004] ECR I-873 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a "worker" for the purpose of an equal pay claim. The court held, at para 67, following Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1987] ICR 483; [1986] ECR 2121:*
>
> > *"there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."*
>
> *However, such people were to be distinguished from "independent providers of services who are not in a relationship of subordination with the person who receives the services" (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of Hashwani v Jivraj [2011] ICR 1004 .*
>
> *33. We are dealing with the more precise wording of section 230(3)(b). English cases in the Employment Appeal Tribunal have attempted to capture the essential distinction in a variety of ways. Thus, in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para 17(4) Mr Recorder Underhill QC suggested:*
>
> > *"The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."*
>
> *34. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, para 53 Langstaff J suggested:*
>
> > *"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's*

operations, will in most cases demonstrate on which side of the line a given person falls."

35. In James v Redcats (Brands) Ltd [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:

> *"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."*

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in Mirror Group Newspapers Ltd v Gunning [1986] ICR 145, he concluded, at para 59:

> *"the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? … Its purpose is to distinguish between the concept of worker and the independent contractor who is on business in his own account, even if only in a small way."*

37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.

38. Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the Redcats "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a more prescriptive approach which would

gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.

39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."

47. Although Baroness Hale rejected the idea of subordination as a prerequisite of worker status - whilst also stressing the importance of applying the words of the statute - Lord Leggatt in *Uber* considered that, when applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation:

"In determining whether an individual is a "worker", there can, as Baroness Hale DPSC said in the Bates van Winkelhof case [2014] ICR 730, para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the

> *facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."*

48. The case law therefore sets out a number of different considerations which might assist in the overall analysis whilst recognising that as set out in *Westwood* there is 'no single key to unlock the words of the statute'. These authorities show that in considering the Claimant's status under the WTR, I must give particular consideration to the extent to which he was individual integrated into the business; the degree of control exercised over him by the Respondent and the predominant purpose of the agreement.

49. The first two elements of the limb (b) test, namely whether the Claimant worked under a contract and further, whether he contracted to do so personally have been conceded by the Respondent. In light of those concessions, I must consider whether the Claimant carried out a profession or business undertaking and whether the Respondent was a client or customer of the Claimant.

50. Counsel for the Respondent also referred me to *Community Dental Centres v Darmon* [2010] IRLR 1024 and *Suhail v Herts Urgent Care* [2012] UKEAT/0416/11/RN. However, in my view, the decisions in those cases turned on their own facts and do not add any further judicial insight into the correct legal approach in this case.

FINDINGS

Integration

51. The Respondent bought the Claimant's business as a going concern, including the trading name and the goodwill in the patients. The parties both contracted to use their reasonable endeavours to further the interests of the practice. The Respondent even continued using the branding and logo created by the Claimant prior to the business sale in 2013. The Claimant was required to wear uniform which bore this logo. The Respondent's staff also wore a similar logo'd uniform.

52. The Claimant was front and centre of the Respondent's marketing campaign and even had business cards printed that intrinsically linked him with the Respondent's business. Mr Hart agreed in cross examination that an advert for a seminar given by the Claimant did not include any reference to the Claimant's status. The Respondent's business model was based upon the continued use of the trading name James Main

Dental Partnership with the Claimant continuing to offer his dental services from the same premises.

53. The Claimant did not market himself independently of the business and although the service agreements potentially permitted him to work elsewhere with the prior consent of the Respondent, the Claimant worked for it exclusively throughout.

54. For the most part, the Claimant was the only dentist working at the Glastonbury practice. He oversaw the staff, he was integral in setting the price levels for treatments and it appears to me that the practice operated around his preferred working pattern. In my view, rather than indicating that the Claimant was a self-employed independent contractor, these facts point towards a high level of integration into the business. In my view, the Claimant was integrated into the Respondent's business to a high degree.

55. I have taken account of the factors pointing the other way, including particularly the contractual provisions agreed by the parties, the manner in which the Claimant was paid and that he was responsible for his own tax and national insurance, but these factors do not change my overall view on this point.

Control

56. I accept that the Claimant had autonomy as to whether he treated a patient, whether he treated patients in the other practices and the treatments offered to those patients. I also note that he was responsible for his own professional indemnity insurance, GDC membership and remedying clinical mistakes.

57. However, I do not consider that these factors tip the balance in my overall consideration of the control over the Claimant's working environment and practices enjoyed by the Respondent. In other instances, the Claimant required the Respondent's consent to change working practices. For example, whilst SA1 sets out the practice hours, the Claimant sought and obtained the Respondent's permission to a shorter day on a Wednesday. Another example is that the Claimant sought and obtained the Respondent's agreement that the clinical staff wear surgical gowns.

58. More generally, the Respondent monitored compliance with the policies and procedures with which the Claimant was contractual required to comply, which again points to a large degree of control over the Claimant's work within the business.

Dominant Purpose

59. The service agreements were designed to obtain the specialist dental services of the Claimant for the Respondent's business 'the James Main Dental Partnership' and on that basis, the dominant feature of the service agreements was the obligation on the Claimant personally to perform work. I do not accept the Respondent's submission that the dominant purpose the service agreements was to generate income as set out, although that was clearly an important factor. The wider background to these agreements is relevant: the Claimant had originally sold the

business to the Respondent, initally been appointed as MD of the Respondent and held a shareholding in the latter. The Respondent's evidence was that the intention was to keep the dentists incentivised. Further, by keeping the same dentist owner in the business whilst retaining the same premises, name and livery, the Respondent clearly intended to embed fully the dentist in the business going forward.

60. The service agreements themselves were structured to ensure that the Claimant worked for the benefit of the Respondent's business and included concepts such as the parties working together to further the practices' best interests. This clearly went beyond the provision of a service to a client or customer.

61. I also consider that the nature and extent of the restrictive covenants included in the service agreement indicate a significant degree of control in restraint of the Claimant's ability to trade post termination that suggests a relationship where the Respondent continued to exercise control. In my view, this strongly points away from the relationship of client or customer and can only be seen as reasonable if this relationship is adjudged to go beyond that of the independent contractor and their client or customer: see *Pimlico Plumbers v Smith (CA)* [2017] ICR 657, at 682 (para 115).

Profession or Business Undertaking

62. Both parties agree that the Claimant was not an employee. Under SA1, the Claimant was initially not the primary contractor but the principal and the agreement was structured so that JML submitted a statement of services and the fees due were paid to JML who in turn paid the Claimant. Throughout, the Claimant has filed self-employed tax returns and been responsible for his own national insurance payments. Although some of the contractual provisions were reorganised under SA2, I do not consider that this changed the underlying arrangements in any effective way.

63. I have weighed those matters against the facts that the dominant purpose of the service agreements was obtaining the Claimant's personal services, that the Claimant worked exclusively for the Respondent, that he was integral to and integrated into the business during his contractual engagement. In my consideration of which side of the line the Claimant falls, I bear in mind the assistance provided by Langstaff J at para 53 of *Cotswold Developments* and Elias J in his discussion in *James v Redcats*. I therefore find that the Claimant was a self-employed worker and not carrying out a separate profession or business undertaking.

Client or Customer

64. In my view, the Respondent was neither a client nor customer of the Claimant. As noted in *Hospital Medical Group v Westwood* (supra), it was not just another purchaser of the Claimant's dentistry skills. The Claimant contracted specifically and exclusively to provide dental services to the Respondent's patients from the locations agreed during the working week. To the outside world, the Respondent presented the Claimant as the practice dentist and integrated as such – it bore his name and was marketed in that way.

65. I also consider that a number of the factors I have already set out in relation to consideration of the level of integration, such as the requirement to bear branded uniform, business cards and contractual obligations to further the practice's best interest also militate against the Respondent being a client or customer of the Claimant's. The risk largely lay with the Respondent. Although I accept the Respondent's point that it is possible for a business to enter into an agreement with a client which includes commercial obligations without that automatically creating worker status, I do not find that this is the position in this case. The service contract and the reality of the working relationship meant that the Claimant was integral to the Respondent's business and it looked for, and in fact did exercise, a considerable degree of control over the Claimant's working environment.

66. Given the above findings, it has not been necessary to address the Claimant's additional argument that the Claimant was a worker under Article 7 of the Working Time Directive.

67. In conclusion, applying the principles in accordance with the case law identified and particularly the guidance set out by the Supreme Court in both *Bates van Winkelhof* and *Uber BV v Aslam*, I find that the Claimant was a worker under Regulation 2(1)(b) of the WTR.

Employment Judge Gibb

Date: 17 May 2022

Reserved judgment & reasons sent to the parties: 14 June 2022

FOR THE TRIBUNAL OFFICE