EMPLOYMENT TRIBUNALS

Claimant: Miss D Martin

Respondent: Dental Partners (DISA) Limited

Heard at: Nottingham **On:** 8 December 2022

Before: Employment Judge Ayre

Representation

Claimant: In person
Respondent: Ms J Furley, counsel

RESERVED JUDGMENT FOLLOWING PRELIMINARY HEARING IN PUBLIC

1. The claimant is not a worker falling within section 43K(1)(b) of the Employment Rights Act 1996.

2. The claim therefore fails and is dismissed.

REASONS

Background

1. The claimant worked for the respondent as a dentist at its Holt House Dental Practice in Matlock between January 2021 and July 2021. In a claim form presented on 26 August 2021, she issued proceedings alleging that she has been subjected to detriments contrary to section 47B of the Employment Rights Act 1996 on the ground that she made protected disclosures. Such claims can only be brought by employees or workers.

2. There have already been two preliminary hearings in this case before Employment Judge Butler, on 22 March 2022 and 9 August 2022. At the last preliminary hearing Employment Judge Butler listed the case for a hearing today to decide whether the claimant was a worker within the meaning of the Employment Rights Act 1996 ("**the ERA**"). The claimant

does not seek to argue that she was an employee, rather she claims to be a worker falling within the extended definition of worker contained in section 43K(1)(b) of the ERA.

The Proceedings

3. There was an agreed bundle of documents running to 149 pages. In advance of today's hearing the claimant had also submitted electronically an additional document which appears to show that in July 2022 the Holt House Dental Practice was assessed by the Care Quality Commission ("**the CQC**") as not meeting requirements in some areas. I have read that document, but it was not in the bundle before me. The document does not appear to be relevant to the issue that I have to determine, and it was therefore agreed that we would proceed without adding that document to the bundle.

4. I heard evidence from the claimant and, on behalf of the respondent, from Qadoos Rashid, Chief People Officer with Dental Partners Trading Limited, one of the respondent's group companies. I also heard oral submissions from each party.

5. The hearing took place on 8 December 2022, and I reserved my judgment. On 11 December the claimant wrote to the Tribunal seeking to introduce new arguments that had not been made during the hearing itself. On 13 December the respondent wrote to the Tribunal strongly objecting to the claimant's letter being placed before me on the grounds that:

    a. The letter was not the case put forward to the Tribunal during the hearing on 8 December;
    b. The contents of the letter had not been put to the respondent;
    c. The respondent had not had the opportunity to address the contents of the letter in submissions at the hearing; and
    d. The letter fundamentally changed the nature of the case being put forward.

6. I have read the claimant's letter of 11 December 2022 and the respondent's email setting out its objection to and comments on that letter. I share the respondent's concerns about the admission of the letter, after the conclusion of the evidence and submissions. I have reached my decision below without taking account of the contents of the letter and based on the case put forward by the claimant at the hearing.

7. Having read the letter, however, I should also say that I have formed the view that if I had taken account of the contents of the letter, that would not have changed the decision that I have reached. The points made by the claimant in the letter, even if I had accepted them in their entirety, would not, in my view, have caused her to fall within section 43K of the ERA. For example, in the letter the claimant wrote that she provided her own uniform, that her clinical work was under her own control, that the respondent had no control or management over her, that she fell outside section 230(b) of the ERA and that she was self-employed. None of these comments / assertions would have changed my view on the question of whether the claimant was a worker within the meaning of section

43K(1)(b) of the ERA.

The Issues

8. At the start of the hearing, we discussed the issue that fell to be determined. That had been defined by Employment Judge Butler at the last preliminary hearing as being: "*The question of whether the Claimant was a worker under the Employment Rights Act 1996*".

9. I asked the claimant whether she is arguing that she is a worker under either section 230(3)(b) of the ERA and/or section 43K of the ERA. The claimant told me twice that she is not relying upon section 230 of the ERA and is not arguing that she is a worker falling within section 230(3)(b) of the ERA. Rather, her case is that she is a worker falling within section 43K(1)(b) of the ERA.

10. The only issue that fell to be decided therefore, is whether the claimant was engaged by the respondent as a worker falling within section 43K(1)(b) of the ERA, namely:

    Was the claimant a worker who did not fall within section 230(3) of the ERA and who contracted with the respondent, for the purposes of the respondent's business, for the execution of work to be done in a place not under the control or management of the respondent, and who would fall within section 230(3)(b) if the words "whether personally or otherwise" were substituted for the word "personally"?

11. The claimant alleges that the respondent was under the control or management of Dental Partners Trading Limited ("**Trading**") or Dental Partners Holdings Limited ("**Holdings**").

Findings of fact

12. The claimant is a dentist who treats both private and NHS patients. She describes herself as running her own business. She qualified as a dentist in 2007 and has worked for a number of different dental practices.

13. The respondent is a company which runs three dental practices, one of which is Holt House in Matlock. The respondent is part of a group of companies. It is owned by Dental Partners Holding Limited ("**Holding**"), which also owns a number of other companies including one known as Dental Partners Trading Limited ("**Trading**").

14. The Dental Partners group bought the respondent as a business in 2017. Since then, the respondent has continued to operate largely autonomously. It had, at the time the claimant worked for the respondent, five employees and those employees are employed by the respondent rather than by a group company.

15. The respondent has its own management structure, with its own Practice Manager who is registered with the CQC and who manages the Holt House practice on a day-to-day basis. Neither Holding, nor Trading, nor

any other Dental Partners group company is involved in managing Holt House on a day-to-day basis.

16. The lease of the premises at Holt House is in the respondent's name, and the respondent has its own profit and loss account and balance sheet. There is however a centralised financial system across the Dental Partners group. The group also has a centralised HR function.

17. In January 2021 the claimant signed a contract to provide dental services for the respondent at Holt House dental practice. That contract was headed "Associate Agreement" and was based upon a template drawn up by the British Dental Association ("**the BDA**") which is the trade union and professional body for dentists in the UK. By mistake, Trading was named in the contract as "the Practice Owner". This was a genuine error made by an external recruitment agency, and both parties accepted that the contract was intended to be between the claimant and the respondent. The claimant's evidence, which I accept, is that by February 2021 her contract was with the respondent.

18. The Associate Agreement reflects the way in which associate dentists have traditionally contracted with dental practices. The practice introduces patients to the dentist, but it is then up to the dentist to treat the patients as she or he sees fit. The dentist pays a fee to the practice to use its facilities. The dentist and the dental practice negotiate a fee for NHS work, but the dentist is normally able to set her or his own rate for private work.

19. The Associate Agreement contained the following provisions (amongst others):

"*…4. Nothing in this Agreement shall constitute a partnership between the Practice Owner and the Associate…*

9(a)…the Practice Owner shall provide for the use of the Associate at the premises and maintain in good and substantial repair and condition the undermentioned equipment…

15. The Associate shall for the entire duration of this Agreement have in force a BDA Indemnity policy, membership of one of the three British defence bodies or other insurance acceptable to the Practice Owner giving comparable benefits. The Associate shall produce evidence of this indemnity or insurance to the Practice Owner on request. The Associate warrants that their professional indemnity or insurance cover shall continue to cover them, in relation to their work at the Practice for the duration of this Agreement, and after this Agreement has terminated for whatever reason…

16. The Associate shall indemnify and keep indemnified on demand and hold the Practice Owner harmless from and against all damages, liabilities…

22. The Associate shall give the Practice Owner at least 4 weeks' notice of any time they are planning to spend away from the practice lasting 3 working days or more…

Private Practice

25. The Associate may offer advice or treatment at the premises under private contract…

26. The Associate may charge patients any fee that he wishes…

35. The Associate shall indemnify the Practice Owner against any losses and costs arising from any fines, financial penalties or other financial claims…as a result of the Associate's breach of this Agreement…

41. In consideration for this licence the Associate shall make payments to the Practice Owner…

42. The Associate shall discharge personally all their personal tax and national insurance liabilities.

47.
a) The Associate
i) may at any time, and

ii) shall, if they are unable to utilise the facilities for a continuous period of more than 5 days, use their best endeavours to make arrangements for the use of the facilities by a locum tenens."

20. The claimant was engaged under this contract to provide dental services at the dental practice operated by the respondent at Holt House in Matlock. Holt House provides both NHS and private dental treatment and the claimant carried out both NHS and private work at Holt House.

21. The respondent has a contract with NHS England to provide a certain number of Units of Dental Activity ("**UDA**"s) each year. The respondent is registered with the CQC. All dental practices must be registered with the CQC, and the CQC imposes a number of legal requirements on them.

22. NHS England issues Standard Operating Procedures ("**SOPs**") which all dental practices are required to comply with. Each practice has the choice as to how to implement the SOPs, and different practices can implement them differently, provided that the minimum standards contained in the SOPs are met.

23. Within the Dental Partners group of companies, different practices have the choice as to how to implement the NHS England SOPs, and the group does not impose a centralised set of SOPs. The claimant suggested in her evidence that Trading was 'in charge' of the SOPs and imposed them on the respondent. Mr Rashid's evidence was that neither Trading nor the group imposed any centralised SOPs. I prefer his evidence on this issue. He is the Chief People Officer for the group and has worked for the group for a long time. He has greater knowledge of how policies and procedures are applied across the group than the claimant. His evidence was consistent and credible.

24. The claimant provided dental services for the respondent between

January 2021 and July 2021 when the respondent terminated the contract between the parties. During that time the claimant also worked at other dental practices.

25. The claimant was required under the terms of her contract with the respondent to carry out a certain number of UDAs, and to indemnify the respondent if she did not complete those UDAs

26. During the time that she worked for the respondent, the claimant had a large degree of clinical freedom. She was required to follow the SOPs issued by NHS England, as they were implemented by the respondent, but could otherwise carry out her work as she saw fit.

27. The claimant was not subject to the policies that apply to employees of the respondent, with the exception of the SOPs and health and safety protocols. She was not covered by any disciplinary or capability procedures.

28. The claimant could carry out as much or as little private dental work as she wanted to and could set her own charges for that work. If patients did not pay for their treatment, then any bad debts were split equally between the claimant and the respondent.

29. The claimant was required to wear PPE, as this was a general requirement imposed during the Covid 19 pandemic but was otherwise not required to wear a uniform provided by the respondent. The respondent provided the equipment that she used to carry out dental treatment at Holt House.

30. The claimant was self employed for tax purposes and prepared her own tax returns. She provided her own indemnity insurance.

31. In January and February 2021, a number of letters were sent to dentists across the Dental Partners group, including the claimant. Those letters were sent by Mr Rashid on Trading headed notepaper. They concerned pay proposals for NHS work, following changes made by NHS England to payments for NHS dentistry during the Covid 19 pandemic. The dentists, including the claimant, were giving the choice of agreeing to the new pay proposals or of opting out of them.

32. Whilst the claimant was working for the respondent one of the patients that she treated made a complaint. The respondent asked another self-employed dentist, Emily Weeks, to carry out a review of the claimant's patient records in response to that complaint. Ms Weeks met with the claimant following the review. The claimant asked Ms Weeks to put down in writing the areas that Ms Weeks considered the claimant could consider for future development, and Ms Weeks did so.

33. The review that Ms Weeks carried out was not part of any performance process or appraisal.

34. On 2 July 2021 the respondent terminated the contract with the claimant with immediate effect. The reason for the termination was that the respondent considered the claimant to have behaved in an unacceptable

manner towards her colleagues and that her conduct could significantly damage the reputation of the practice.

35. In October 2020 the claimant issued proceedings against the owner of another dental practice, in case number 2603718/2020. That claim was disposed of at a public preliminary hearing before Employment Judge Smith on 15 November 2021. One of the findings made by Employment Judge Smith in that hearing was that the claimant:

"…*had previously been engaged at another practice…and on 1 August 2008 she signed an associateship agreement with the practice. This agreement, she accepted, was on standard British Dental Association (BDA) terms and she agreed that during this time she was truly self-employed."*

36. The claimant had accepted, in previous proceedings before the Employment Tribunal, that she had been 'truly self-employed' when working on the standard BDA contract. I asked her what was different between the contract that she worked on previously and her contract with the respondent. She replied that it was the Coronavirus legislation, side agreements with the respondent and extra control exercised over her by the respondent. There was, however, no evidence before me of any side agreements entered into between the claimant and the respondent.

The Law

37. Section 230 of the Employment Rights Act 1996 provides that:

"*(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.

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

(5) In this Act "employment" –

(a) In relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b) In relation to a worker, means employment under his contract;
And "employed" shall be construed accordingly.

(6) This section has effect subject to sections 43K…."

38. Section 43K of the Employment Rights Act 1996 contains an extended definition of 'worker' for the purposes of claims for detriment under Part IVA of the ERA. It includes the following:

"*(1) For the purposes of this Part "worker" means an individual who is not a worker as defined by section 230(3) but who –*

(a) Works or worked for a person in circumstances in which –

(i) He is or was introduced or supplied to do that work by a third person, and
(ii) The terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) Contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"…"

Submissions

Claimant

39. The claimant submitted that, in order to fall within section 43K(1)(b) of the ERA, she did not have to name the external person that controlled or managed her place of work.

40. A substantial amount of control over the Holt House Practice was, she said, exerted through the Standard Operating Procedures imposed through the respondent's contract with the NHS.

41. The claimant accepted that her contract was with the respondent but submitted that during Covid there was significant external management and control of the respondent, including influence from the wider Dental Partners group. She says that the BDA has now launched a 'clear worker' contract because of the control exercised over NHS dental practices by the NHS and other factors.

42. Although the claimant admitted that her contract with the respondent allowed her to send a locum dentist in her place, there are, she said, very

few locums who are now willing to work on NHS dental treatment.

Respondent

43. Ms Furley submitted that the claimant had accepted that she had contracted with the respondent for the purposes of the respondent's business, which was the fulfilment of the respondent's NHS contract and the provision of privately funded dentistry. It is, therefore, clear, she says, that the claimant meets the first two requirements of section 43K(1)(b), namely a contract with the respondent which was for the purposes of the respondent's business.

44. Where the claimant fails, in Ms Furley's submission is in relation to the 'third element' of section 43K(1)(b), namely the requirement that the work is done in a place which is not under the respondent's control or management. The evidence for that, Ms Furley says, is:

    a. Mr Rashid's evidence that Holt House was operated by the respondent;
    b. The NHS contract is in the respondent's name;
    c. The lease of the Holt House premises is in the respondent's name;
    d. The staff employed at Holt House are employed by the respondent; and
    e. Holt House has its own manager.

45. The involvement of Trading is, the respondent argues, a red herring. The fact that Trading was named in the contract with the claimant was an administrative error, and the claimant accepts that her contract was in fact with the respondent. Trading has, Ms Furley says, nothing to do with this claim and was not controlling or managing the work at Holt House. The only reference to Trading other than in the contract was on the footers of some letters sent out by Mr Rashid documenting a pay proposal in early 2021.

46. In relation to Holding, Ms Furley submitted that there was no evidence that Holding had the control or management of Holt House, beyond that of a group company and majority shareholder.

47. Ms Furley argues that the claim must therefore fail because there was no evidence that the claimant was contracted to do work at a place that was not under the control or management of the respondent.

48. In relation to the 'traditional' tests of worker status, Ms Furley submitted that:

    a. The claimant had an unfettered right to send a locum, so was not required to provide personal service.

    b. The traditional elements of worker status were not present.

    c. The contract between the parties was not drafted by the respondent for its benefit. Rather, it was a BDA template drafted for the benefit of both parties.

d. The respondent had no control over the claimant's day to day work.

e. There was no monitoring of the claimant's work, appraisal or performance management.

f. Fees were negotiated in relation to NHS work, and the claimant was free to set her own rates for private work.

g. The claimant took some financial risk. She was required to have her own indemnity insurance, and bad debts were split between the parties.

h. The claimant was not provided with a uniform. PPE in the form of face masks and protected gown is not a uniform.

i. The claimant did not have a Dental Partners email address.

Conclusions

49. I have reached the following conclusions having considered carefully the evidence before me, the relevant legal principles and the submissions of the parties.

50. This case is unusual in that the claimant relies upon a statutory provision (section 43K of the ERA) that has been subject to very little judicial interpretation. The reported cases on that section relate mainly to section 43K(1)(a), which is not the subsection relied upon by the claimant. Guidance was issued by Simler J in ***McTigue v University Hospital Bristol NHS Foundation Trust [2016] ICR 1155***, but that guidance is in relation to claims under section 43K(1)(a), which is widely considered to apply to agency and similar workers.

51. Section 43K(1)(b), the provision relied upon by the claimant, is generally considered to apply to those who work at home or on a freelance basis, and whose workplace is not under the control or management of their employer, and who would fall within the definition of worker in section 230(b) ERA, but for the fact that they are not required to provide personal service.

52. The purpose of introducing section 43K was to extend the protection of the whistleblowing detriment provisions in the ERA to a wider category of workers. That said, however, those who are genuinely self-employed remain excluded from the provisions.

53. In this case, I have no hesitation in finding on the evidence before me that the claimant had a contract with the respondent, as required by section 43K(1)(b). I also have no hesitation in finding that the purpose of that contract was the respondent's business, namely the provision of NHS and private dental services at the Holt House dental practice that was operated by the respondent. There was no suggestion that the claimant worked from home on the contract – rather she performed all of the dental services on site at Holt House.

54. The key issue therefore is whether it can be said that Holt House dental practice was not under the respondent's control or management. The claimant suggests that it was under the control or management of either Trading or Holdings, because of the relationship between those companies and the respondent.

55. The Oxford dictionary definition of control is 'the power to make decisions about how something is run'. The definition of management is 'the activity of running and controlling a business'.

56. I accept the respondent's submission that Holt House was operated by the respondent and was not controlled or managed by either Trading or Holding. Holt House has its own management structure, and a Practice Manager who is responsible for the day-to-day running of the practice. There was no evidence before me to suggest that either Holdings or Trading were involved in running Holt House, or in making decisions about how it is run.

57. Those working at Holt House are employed or engaged by the respondent, and not by either Trading or Holdings. The key contracts relating to Holt House (namely, the contract with the NHS, the lease of the premises and the contracts with staff) are all in the name of the respondent.

58. The respondent does have to comply with SOPs published by NHS England, as do all dental practices, but it is free to interpret these as it sees fit. Neither Trading nor Holdings tell the respondent how to implement the SOPs or have any control over how they do so.

59. Whilst it is inevitable that there is some relationship between the respondent and other companies in the Dental Partners group, particularly Holdings which owns the respondent, neither Holdings nor Trading have the power to make decisions about how the respondent runs Holt House on a day-to-day basis, nor are they involved in running and controlling Holt House.

60. The provision of a central HR function and centralised financial system does not mean that the respondent or Holt House was under the management or control of the group or of any other group company. Rather these were services provided to the respondent by the group.

61. I therefore find that Holt House was not under the control or management of either Holdings or Trading. It was, at the time of the claimant's engagement, operated by the respondent which is a company with its own management structure, balance sheet and financial accountability. Holt House was under the control and management of the respondent.

62. The claimant was, therefore, not a worker falling within section 43K(1)(b) of the ERA because her place of work was under the management and control of the respondent.

63. In light of this finding, it is not necessary for me to consider whether the claimant would have fallen within section 230(3)(b) of the ERA but for the requirement to provide personal services.

64. If I had been required to decide that question, I would have found on balance that the claimant was not a worker falling within section 230(3)(b) for the following reasons:

    a. The intention of the parties (including the claimant) at the time was that she should be self-employed. She describes herself as running her own business.

    b. The contractual arrangements between the parties are consistent with the claimant having self-employed status. In a previous Employment Tribunal claim, when considering the template BDA agreement that she was engaged on with the respondent, the claimant accepted that she was 'truly self-employed'.

    c. The contract used by the parties was not one drafted by the respondent in its favour and imposed on the claimant. Rather, it was based upon a template drafted by the BDA, the trade union and representative body for dentists.

    d. There was a greater equality of bargaining power between the parties as evidenced by the fact that the claimant was free to accept the new pay proposals made in early 2021 or to reject them, with no apparent consequences. The claimant was able to set her own fees for private work and to carry out as much or as little private work as she chose.

    e. There was a shared financial risk. The parties shared the risk of bad debts.

    f. The claimant was required to maintain her own indemnity insurance.

    g. As part of the contractual arrangements between the parties, the claimant provided indemnities to the respondent.

    h. The claimant was free to work elsewhere and did in fact do so.

    i. There was no control over how the claimant performed her clinical services, other than those imposed by NHS England's SOPs, as interpreted by the respondent.

    j. The claimant was self-employed for tax purposes.

65. In light of my findings that the claimant was not a worker falling within section 43K(1)(b) of the ERA, her claim under section 47B of the ERA for whistleblowing detriment fails and is dismissed.

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Employment Judge Ayre

Date: 16 December 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE