THE EMPLOYMENT TRIBUNALS

Claimant: Dr Mark Ter-Berg

Respondent: (1) Simply Smile Manor House Limited;
(in voluntary liquidation)
(2) NHS England, Midlands and East;
(3) Mr Parul Malde; and
(4) Dr Colin Hancock

RECORD of a PRELIMINARY HEARING

On: 15, 16 March 2023

Heard at: Bury St Edmunds (by CVP)

Before: Employment Judge K J Palmer (sitting alone)

Representation

For the Claimant:	Mr Ratledge, Counsel
For the First Respondent:	No representation
For the Second Respondent:	Mr T Wilkinson, Counsel
For the Third and Fourth Respondent:	Mr S Butler, Counsel

RESERVED JUDGMENT

Pursuant to an Open Preliminary Hearing

Background

1. This matter came before me today as an Open Preliminary Hearing pursuant to a Preliminary Hearing which took the form of a Case Management Discussion before me on 1 February 2023. At that earlier Preliminary Hearing, I listed the matter for a two day Open Preliminary Hearing to consider the following:

   1.1. A determination of the remitted points sent back to the Employment Tribunal by the Employment Appeal Tribunal pursuant to HH Judge Auerbach's decision handed down on 18 October 2022; and

1.2. Whether the Claimant's claim should be struck out against the Second Respondent.

History

2. This matter has a considerable history which I set out in some detail in the Case Management Summary produced pursuant to the Preliminary Hearing which took place on 1 February 2023. I do not propose to repeat it here.

3. It is, however, necessary to say that the Hearing before me arose as a result of a Hearing before Employment Judge Ord which took place on 24, 25 and 26 February 2020.

4. The purpose of that Hearing was to determine whether the Claimant was an employee of the First Respondent, or not. The Hearing before Judge Ord had followed a Case Management Hearing and Orders made by Employment Judge Laidler on 17 January 2019.

5. That Case Management Hearing and those Orders followed the Judgment on an Application for Interim Relief dated 17 January 2019.

6. The Claimant presented a case to this Tribunal on 5 November 2018. In it he pursues claims for unfair dismissal under s.96 of the Employment Rights Act 1996 ("ERA"), automatic unfair dismissal under s.103A ERA 1996, detriment arising out of protected disclosure under s.47B ERA 1996, a claim for holiday pay and a claim under s.92 ERA 1996 for failure to give written reasons for dismissal.

7. Judge Ord, in a Judgment sent to the parties on 26 February 2020, found that the Claimant was not an employee of the First Respondent, dismissed the Claimant's claims in unfair dismissal and revoked the Order for Interim Relief made on 17 January 2019.

8. That decision was appealed by the Claimant and in a decision of the Employment Appeal Tribunal (EAT) before His Honour Judge Auerbach, the EAT handed down a Judgment on 18 October 2022. In a sealed Order of the EAT, it was Ordered as follows:

8.1. That ground 3 of the Appeal be allowed. Grounds 1 and 2 be dismissed.

8.2. The Employment Tribunal's decision that the Appellant was an employee of the First Respondent be quashed. (Here I believe there is a typographical error in that the word "not" was omitted from this sentence as Judge Ord's decision was that the Claimant was "not" an employee).

8.3. The matter be remitted to the Employment Tribunal to consider afresh the correct construction of Clause 36 of the Associates Agreement of April 2013 and the question of whether, as a matter of

law, the Appellant was or was not an employee of the First Respondent, taking into account its conclusion on that question, and the findings of fact in relation to all other matters made in the Employment Tribunal's decision. That is the subject of the present Appeal.

8.4. For the avoidance of doubt (and without limitation), for these purposes the findings in the decision of the Employment Tribunal that is the subject of the present appeal (a) as to what the parties subjectively intended should be the nature of their relationship when they signed the Associative Agreement, and (b) to the effect that the terms of Clause 36 recorded accurately what the parties in reality agreed in relation to its subsequent matter, were both findings of fact that cannot be re-opened; but (a) the correct construction and meaning of the words of Clause 36; and (b) the question of whether in the light of its correct construction and meaning, its effect was that the requirement for an obligation of personal service which is an ingredient for an employment relationship was not fulfilled, are both questions of Law which will be for fresh determination by the Employment Tribunal on remission, as part of its fresh determination of whether in light of its conclusions on them and all the other facts that have previously been found, the Appellant was, or was not, an employee.

8.5. The matters to be determined upon remission by virtue of this Order should not be determined by Employment Judge Ord or a panel of which he is a judicial member.

8.6. An expedited transcript of the Judgment given orally today be produced.

9. That is the issue that came before me today for determination as the first issue.

10. The second issue relating to the Second Respondent, I shall deal with later.

11. I had before me Counsel for the Claimant, Mr Ratledge, Counsel for the Second Respondent, Mr Wilkinson who was present only in respect of the second issue before me, and Counsel for the Third and Fourth Respondents Mr Simon Butler.

12. The First Respondent is in voluntary liquidation and was not represented.

13. Pursuant to the Orders which I gave at the Preliminary Hearing on 1 February 2023, I am grateful to Counsel for filing skeleton arguments which were helpful. I also had before me a Bundle of relevant documents running to some 239 pages and a Bundle of Authorities from the First Respondent running to some 127 pages.

14. I heard from Mr Butler on behalf of the Second and Third Respondents first of all.

15. He stressed that the issue before me was a narrow one and that His Honour Judge Auerbach confirmed that the findings in the decision of the Employment Tribunal so as to (a) what the parties subjectively intended should be the nature of their relationship when they signed the Associative Agreement and (b) the effect that the terms of Clause 36 recorded accurately what the parties in reality agreed in relation to the matter, were both findings of fact that could not be re-opened.

16. He adequately summarises the findings of fact in Judge Ord's Judgment in his written skeleton. He refers me to the relevant Authorities, including Chitty on Contracts 34th Edition, paragraph 15-054 with respect to the guidance to be used in construing a contractual clause.

17. He asked me to conclude that the meaning of Clause 36 based on that Authority and the starting point in construing any contract being that words are given their ordinary and natural meaning, that Clause 36 has the following meaning:

    17.1. Firstly, the Claimant was entitled to provide an alternate person to carry out the dental services under the Agreement;

    17.2. Secondly, the Claimant was responsible for obtaining and checking references and the registration status of the locum tenens;

    17.3. Thirdly, the Claimant was responsible for ensuring that the locum tenens is entered into the performance list of a primary Care Trust;

    17.4. A dentist must be on the performance list in order to perform NHS dental services;

    17.5. Fourthly, in the event that the Claimant is unable to utilise the facilities for a continuous period of more than 20 days, the Claimant shall use his best endeavours to make arrangements for a locum tenens to carry out the dental services;

    17.6. Fifthly, the use of the words "through ill health or other cause" is illustrating by way of example the circumstances which may arise which causes the Claimant to be unable to use the facilities.

    17.7. The use of the words in brackets adds only information. It does not change the meaning of the sentence or paragraph. The words have been used to provide an explanation.

    17.8. The words used are not restricting the circumstances to ill health or some other cause linked to or attributable to ill health. The words were inserted in brackets to illustrate circumstances when the Claimant may be unable to use the facilities.

17.9. Clause 36 did not need to refer to ill health or other cause. However, there is nothing wrong with inserting words in brackets to illustrate what it may include.

17.10. Sixthly, the use of the words "other cause" does not mean through ill health or other similar cause. Nor does it mean that the other cause will be one that has not been chosen by the Claimant;

17.11. Seventhly, the Claimant is not prohibited from providing a locum before the 20 day period has elapsed. The Claimant is entitled to use a locum for any period. He may choose not to do so. However, if the Claimant fails to utilise the facilities for a continuous period of more than 20 days, he is required to use his best endeavours to make arrangements for the use of the facilities by a locum.

17.12. The Agreement does not restrict the appointment of a locum.

18. In short, Mr Butler attempts to persuade me that the Claimant had an unfettered right to substitute another person to perform the services under the Agreement.

19. He then helpfully refers me to the Authority of Pimlico Plumbers Limited v Smith [2017] ICR 657, and Sir Terence Etherton MR's paragraph 84. I will revert to this paragraph later.

20. Essentially, Mr Butler asked me to draw a different conclusion as to the meaning of Clause 36 than that arrived at by His Honour Judge Auerbach. At paragraphs 79 and 80 of HH Auerbach's Judgment in the EAT, he clearly arrives at a different conclusion as to the interpretation of Clause 36 than that arrived at by Judge Ord and that which Mr Butler asks me now to arrive at. Mr Butler tells me that I am not bound by HHJ Auerbach's conclusion as to his disagreement with Judge Ord's interpretation of that Clause. He says I am entitled to draw a different conclusion on construction. He said it is important for me to consider the whole contract and what was intended in the Agreement.

21. He says I am entitled to agree with Judge Ord that it was a genuine substation clause.

22. He then goes on to say, however, that if I disagree with him on that point and I adopt HH Judge Auerbach's reasoning as to the construction of Clause 36, namely that I disagreed with Judge Ord's construction, that is not of itself determinative of the Claimant's status. In essence, therefore, if I conclude that there is not an unfettered right to substitution, I can still conclude on the basis of the other findings in Judge Ord's Judgment by which I remain bound, that the Claimant was not an employee of the First Respondent.

23. He asked me to look closely at the intention of the parties. He said it is very clear on Judge Ord's findings of fact which I am not entitled to re-open, that the intention of the parties was that the Claimant be self-employed.

24. He sold the practice and entered into the agreement. He was a self-employed Associate. He was familiar with the contract he was entering into as he himself had used it when he was principal in the practice he was at that stage selling. The bargaining position was entirely even. It was a commercial arrangement. He said it is not a case of someone being provided with an agreement that they were unfamiliar with. He intended to be self-employed. Insofar as any construction I determine, this cannot depart from the intention of the parties. They intended it at the outset and it continued to be so. He says whatever construction I applied to Clause 36, it does not change the reality on the ground and the intention of the parties was that the Claimant be self-employed. He was an independent contractor, not an employee.

25. Mr Ratledge, on behalf of the Claimant, asked me to conclude that Clause 36 does not convey either a fettered or unfettered right of substitution on the Claimant, but instead imposes duties upon the Claimant contingent upon certain events occurring for certain periods. He says the use of a locum tenens is conditional upon the Claimant's failure to utilise the facilities for a continuous period of more than 20 days.

26. The use of a locum is also conditional upon the failure to use the facilities, being due to ill health or other cause. He adopts the reasoning of HHJ Auerbach on the interpretation of this phrase being linked to the word failure and denoting a cause that has not been chosen by the Claimant, but visited upon him.

27. He refers me to the case of Mr Anthony Rodriguez v Whitecross Dental Care Limited and Integrated Dental Holdings Limited. In that case the Tribunal considered a similar standard dental contract clause dealing with the provision of locums in deciding that the clause did not create a right of substitution, the Tribunal looked at not only the clause that the Respondent purported to give rise to a general right of substitution, but also at the other clauses within that contract and its interplay with them. He said that if that approach is taken here and Clause 36 is considered in the context of the Associate Agreement as a whole, then other Clauses such as 8, 11, 16 and 18 impose duties both towards and upon the Claimant that are incompatible with Clause 36, creating a right of substitution. He referred me in turn to those other Clauses referred to.

28. He says that when all of these points are taken together, it is clear that Clause 36 does not confer a right or substitution on the Claimant and that Clause 36 is limited. He also refers me to the Pimlico Plumbers Limited v Smith [2017] IRLR328 case, and the case of Chatfield-Roberts v Phillips UK EAT 0049/18. He refers me to the same paragraph of the Pimlico Plumbers

case as Mr Butler referred me to, which is concerned with substitution clauses.

29. He goes on to say that if I accept the contentions on construction that he sets out above, then I must determine whether the Claimant was employed by the First Respondent adopting the findings of fact of Employment Judge Ord, but not his conclusions.

30. He says, therefore, I am entitled to go back to the starting point of the test in Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2QB497. He says of that test of personal service and the test of control of another and the terms of the contract being consistent with it being a contract of service. The personal service already having been decided, he said that will leave the issues of control and contract terms. He asked me to conclude that Clause 36 does not confer a right of substitution and that the third test of the Ready Mixed Concrete test is made out.

31. On the question of intention and belief of the parties, he says that from the Autoclenz Limited v Belcher case where the wording of the contract puts legal definition in clear terms, intention is irrelevant.

32. Mr Butler comes back in submissions and said that I am confined in the remission to me to construe Clause 36 and I cannot re-open the new arguments which Mr Ratledge has asked me to do. He says control is not relevant as Judge Ord has already dealt with this in his Judgment. He refers me to paragraphs 8 – 19 of Judge Ord's Judgment and says he has made this determination and I am bound by it, I cannot disturb those findings. He says Judge Ord finds that there was no control. Judge Ord specifies this at paragraph 98.4 in his conclusions.

33. Turning to the passage of the Pimlico Plumbers case referred to me by both Counsel.

34. The relevant passage appears at paragraph 34 of Sir Terence Etherton MR's Judgment and is as follows:

> "Some of those cases are decisions of the Court of Appeal which are binding on us. Some of them are decisions of the Appeal Tribunal, which are not. In light of the cases and the language and objects of the relevant legislation I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services, is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend upon the precise contractual arrangement 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 an 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 an 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 an 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."

35. Mr Ratledge asked me to conclude that the circumstances of Clause 36 fall neatly within the third example cited. He says there are no exceptional facts here and therefore I must conclude that such a right of substitution is consistent with personal performance.

36. Mr Butler, on the other hand, says that there are exceptional facts that I can therefore conclude that in this particular instance, even if I agree with HHJ Auerbach's construction of Clause 36, that Clause is not consistent with personal performance due to the exceptional facts. He asked me to consider that those exceptional facts are the intention of the parties. He said it does not depart from the true intention to try and interpret that clause in that way. He said I am bound by the findings of Judge Ord in that there are exceptional facts. Judge Ord has set them out.

The Law

37. My remit in this Hearing is very narrow. I am only permitted by the remission from the Employment Appeal Tribunal to enter into an exercise in which I re-visit the issue of the construction of Clause 36 of the Agreement entered into by the Claimant with the First Respondent.

38. My remit then specifies that subject to my conclusions on the construction of that clause, I have to consider whether those conclusions taken together with all other aspects of Judge Ord's Judgment (save for his final decision) affect or alter that final decision that the Claimant was not an employee of the First Respondent.

39. As I see it, that is as far as this Hearing can go. I am bound by the terms of the Order set out by His Honour Judge Auerbach. Therefore, the law relevant to this determination is equally narrow.

40. Chitty on Contracts guides me as to the construction of Clause 36 and I am grateful to Mr Butler for directing me to the 34th Edition, paragraph 15-054 which provides the following guidance:

> "The Court is concerned both to identify the objective meaning of the language which the parties have chosen and to ascertain what a reasonable person would have understood the parties to have meant. It can thus be seen that the Courts are not concerned to identify the subjective understandings of the parties to the contract or the meaning which they

> subjectively ascribe to the term in dispute and such evidence is therefore not admissible. The Agreement must be interpreted objectively.
>
> The starting point in construing a contract is that the words are to be given their ordinary and natural meaning.
>
> Every contract is to be construed with reference to its object and the whole of its terms, and accordingly the whole context must be considered in endeavouring to interpret it, even though the immediate object of enquiry is the meaning of an isolated word or clause."

41. Subject to my findings on the construction of Clause 36, I must then determine whether those findings taken together with the other findings in Judge Ord's Judgment from which I cannot demure, draws me to a different conclusion on status than that reached by Judge Ord.

42. I must consider the effect of that substitution clause, subject to my construction of it, on whether it is consistent or inconsistent with personal service. That may affect my ultimate judgement on whether the Claimant was or was not an employee of the First Respondent.

43. Under s.230 of the Employment Rights Act 1996:

> 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.

44. I have been referred to a considerable number of Authorities, not all of which I propose to cite here. However, those that are relevant to my decision in this Judgment are as follows:

44.1. Autoclenz Limited v Belcher [2011] UK SC41 - where the Supreme Court held that for a contract of employment to exist, there had to be an irreducible and minimum obligation on each side and that a right of substitution is inconsistent with employment status. The question of whether or not the right to provide a substitute was not used was not relevant provided it was genuine. The fact that a term is not enforced does not mean that such a term is not part of the agreement.

44.2. Pimlico Plumbers Limited and Anr. v Smith [2018] UK SC29 – I have referred to this above and in particular the passage cited to me by both Mr Wilkinson and Mr Butler, being paragraph 84 of the Judgment of Sir Terence Etherton MR.

44.3. Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1967] 2QB497 – confirming three conditions which must be fulfilled for an employment relationship to exist:

44.3.1. An agreement that in consideration of a remuneration a person will provide their own work and skill in performance of some service for the other.

44.3.2. An express or implied agreement that in performance of the service he will be subject to the other's control in a sufficient degree to make that other person "master".

44.3.3. That the other provisions of the contract are consistent with it being a contract of service.

Conclusions

45. Having carefully listened to both Counsel and taken due cognisance of the previous Judgments, I agree with the analysis of His Honour Judge Auerbach set out at paragraphs 79 and 80 of his Employment Appeal Tribunal Judgment.

46. I disagree with Mr Butler that on any sensible construction, Clause 36 in the Agreement entered into by the Claimant with the First Respondent, is an unfettered substitution clause. The words "other cause" do not mean, in my judgement, that the clause can be invoked by the Claimant in any circumstances where he merely wishes to use the facilities for such a period as fails to take on board that it contemplates that the triggering event is a failure to utilise the facilities for a defined period. "Through ill health or other cause" must be read as meaning "ill health or other similar cause". I agree with HHJ Auerbach's analysis that the other cause contemplated will also be one that has not been chosen by the Claimant, but has in some sense been visited upon him. If the clause was meant to be capable of applying whenever the Claimant chooses not to use the facilities for more than 20 days, it would not have referred to "ill health or other cause" at all.

47. I therefore consider that Clause 36 confers the right of substitution only when the Claimant is unable to carry out the work in those circumstances.

48. The question I then have to determine is whether that construction of Clause 36 taken together with the other findings in Judge Ord's Judgment, with which I am not entitled to demur from, affects the final determination as to whether the Claimant was or was not an employee of the First Respondent.

49. In this respect, I am persuaded by Mr Butler. The findings of fact of Judge Ord make it clear that the intention of the parties, as was expressed by the Claimant in the giving of evidence, was always that the Claimant was other than an employee. The wording of the contract as a whole, irrespective of my construction of Clause 36, evinces this intention.

50. Judge Ord's findings of fact by which I am bound are clear:

50.1. Prior to 1 April 2013, the Claimant had been the principal of two dental surgeries operating as a single practice. He purchased them in 1992. He also set up an additional NHS practice in Brundall. Those business interests were sold to the First Respondent in 2013.

50.2. Whilst the principal of the practices, the Claimant issued to those dentists working in the practice with him, the standard form of British Dental Association Associate Contract. He entered into a contract as an Associate Dentist with the First Respondent on 1 April 2013.

50.3. An example of the Associate Agreement as issued by the Claimant, whilst he was principal, does not differ in any material way from that which he entered into on 1 April 2013.

50.4. The Claimant accepted in his evidence in chief that when he was initially engaged by the First Respondent, he was engaged as a self-employed contractor. His case was that matters changed over time, so he

> *"realised that the employment relationship was not one of a self-employed contractor but more of an employer / employee"*

50.5. Importantly, the Claimant accepted that when he entered into the Agreement which was not changed in any material way (other than the Claimant giving up his role as Clinical Lead which was an Addendum or Annexed to the Agreement in any event), during the course of his engagement with the First Respondent he was contracted as, intending to be, and was being engaged by the First Respondent as a self-employed contractor.

50.6. The intention of the parties when they entered into the Agreement, therefore, was as the parties both agreed, the Claimant would not be an employee of the First Respondent.

50.7. When asked by me during the course of closing submissions what had changed in the Agreement in terms of its implementation, or the parties intentions during the currency of the Agreement, Counsel for the Claimant relied solely upon the fact that the substitution / locum clause had never been used. He had accepted on the Claimant's behalf that it was a genuine clause. The Claimant referred in his evidence to it being *"untenable"* when asked to explain this, the issue related not to the efficacy of practicality of the implementation of the clause but to the financial implications to him (i.e. that if he used a locum to carry out work his net income would be substantially reduced).

51. The above are extracts from the findings of fact of Judge Ord, by which I am bound.

52. At paragraph 83 of the Judgment of HHJ Auerbach, he says as follows:

> "I have now heard further argument from Counsel as to what should happen next. There is some measure of agreement. Firstly, both

> Counsel agree, rightly in my view, that the error I have identified in upholding Ground 3 (Judge Ord's construction of Clause 36) contributed to the Tribunal's conclusion that the personal service requirement of an employment contract is not satisfied in this case and therefore that conclusion cannot stand and that matter must be remitted to the Tribunal for fresh consideration. Counsel also agree that it is at least possible that if the Tribunal reaches a different conclusion next time on the question of whether the Agreement satisfied the requirement for personal service, that could impact on its overall conclusion as to whether the Claimant was an employee, even if all other findings in EJ Ord's decision remain as given. Neither of them suggested that I could dispose of the matter on the basis that there can only be one right answer to those questions."

53. He went on to say at paragraph 85:

> "Whilst it is common ground that if the Tribunal concludes that Clause 36 does not negate personal service, that could in turn have an impact on its conclusion on the overall question of whether the Claimant was an employee, Mr McNerney, putting his case at its highest, argued that all of those questions should be amenable to entirely fresh consideration. However, his fall back position was, in agreement with Mr Butler, that EJ Ord's findings on all other matters could be taken as a starting point, save in relation to Clause 36, so that if the second time around it was found that the personal service requirement was not negated by that clause, the Tribunal will then need to feed that finding into the picture created by the overall findings already made by EJ Ord which should therefore stand."

54. HHJ Auerbach goes on to say that this is the appropriate basis on which to remit and he does so.

55. I have therefore concluded that I agree with HHJ Auerbach's construction of Clause 36. I further conclude that the limited basis of Clause 36 means that it is consistent with personal service.

56. I am bound by all other findings of Judge Ord (save for his final conclusion). I do not propose to repeat them here. However, at paragraph 98 of his Judgment in his conclusions, he says the following:

> "98.1 The Agreement between the parties sets out that no relationship with employer / employee is created by it.
>
> 98.2 That was the intention of the parties at the time and the parties were content to proceed on that basis.
>
> 98.3 The Claimant asserted his position as self-employed contractor on two occasions in writing and never asserted that he was an employee during the currency of his work with the Respondent.
>
> 98.4 The Claimant has not established that there was control over his work to make the Respondent his employer.

57. I am bound by those conclusions. Therefore, even applying my construction to Clause 36, the irreducible minimum in Ready Mixed Concrete is not met.

58. Moreover, turning to the limited substitution clause itself, I agree with both Counsel that Clause 36 falls fairly and squarely into the third example given by Sir Terence Etherton MR at paragraph 84 of his Judgment in Pimlico Plumbers Limited v Smith. To repeat:

> "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."

59. However, I agree with Mr Butler that here there are exceptional facts. They are set out in Judge Ord's findings of fact and drawn into his conclusions as I have indicated above. The true intention of the parties was reflected in the Agreement. The limited construction of Clause 36 does not defeat that true intention.

60. For the reasons I have set out above, therefore, the Claimant is not an employee of the First Respondent.

61. I would emphasise that this Judgment, along with the Judgment of Employment Judge Ord and His Honour Judge Auerbach, does not deal with and was never meant to deal with, whether the Claimant was or was not a "worker" under s.230(3) of the Employment Rights Act 1996.

62. That is something that will have to be determined at a later date in these proceedings, either in a further dedicated Preliminary Hearing or at the Full Merits Hearing of this matter.

Whether the Claimant's Claims should be Struck Out against the Second Respondent

63. This is the second aspect of the Preliminary Hearing listed before me today.

64. There was some initial speculation as to whether we could deal with this. It may be sensible to re-visit a little of the history which has led to this being before me.

65. On 21 January 2019, on the papers before her, Employment Judge Laidler concluded that the Tribunal had no jurisdiction to consider the claim against the Second Respondent and / or that the claim had no reasonable prospect of success for the following reasons:

> "1. The Claimant had not pleaded any allegations relating to the Second Respondent in the particulars of claim.
>
> 2. The Second Respondent does not have a contractual relationship with the Claimant.
>
> 3. The Claimant is neither an employee nor worker of the Second

Respondent."

66. She went on to Order that the claim against the Second Respondent would stand as dismissed on a date seven days after her Order unless before that date the Claimant has explained, in writing, why the claim against the Second Respondent should not be dismissed.

67. Those acting for the Claimant then wrote to the Tribunal on 22 February 2019, requesting that the Second Respondents remain a party to the proceedings until the Claimant's employment status was determined at the Preliminary Hearing listed to do so, which was the Hearing that ultimately came before Judge Ord. They argued that if it were ultimately determined that the Claimant was not an employee or worker of the First Respondent, then the Claimant would claim that he was a worker performing services under the control of the Second Respondent. This was by way of an alternative claim.

68. Those representing the Second Respondent wrote to the Tribunal disagreeing with that argument and reminding the Tribunal that there was on the pleading, no alternative allegations or case pleaded against the Second Respondent at all. They say there is no direct contractual relationship between the Claimant and the Second Respondent. The Second Respondent commissioned the First Respondent Dental Practice to provide dental services. It is a matter for the First Respondent to employ or engage staff to provide those services. The Second Respondent is not privy to the nature of the relationship between the Claimant and the First Respondent. They go on to say that the Claimant brought the claim against the Second Respondent very much in the alternative should his claims against the First Respondent fail. They say that with respect to the Claimant there is no basis either in the email sent to the Tribunal or the ET1, for the claims to continue against the Second Respondent. Having considered these letters, Employment Judge Laidler concluded in accordance with the overriding objective that the Preliminary Hearing should proceed to determine the Claimant's status with regard to the First Respondent and that at that Preliminary Hearing, the Second Respondent was not required to attend. She went on to say that once that decision had been given, further directions would be made with regards to the position of the Second Respondent.

69. When the matter subsequently came before me, Employment Judge Ord had given his Judgment and that Judgment had been appealed and quashed on the basis of the third Ground of Appeal only.

70. The issue of the Claimant's employment or otherwise with the First Respondent was remitted to me on the narrow point identified by HHJ Auerbach, but of course the issue of whether the Second Respondent should remain a party to the proceedings remained.

71. On 1 February 2023, I identified that as an issue to be dealt with at this Preliminary Hearing.

72. It was agreed by all parties that if I concluded on the first point before me at this Hearing, that is the remission to me from the EAT, that the Claimant was an employee of the First Respondent then the claims against the Second Respondent would fall away and claims against the Second Respondent should be dismissed. Mr Ratledge, on behalf of the Claimant agreed this.

73. However, I have not found that the Claimant is an employee of the First Respondent. The question of whether the Claimant is a worker has not at any stage yet been considered in these proceedings. It was discussed whether it should be included in the original Preliminary Hearing before Judge Ord and that was rejected.

74. Therefore we are at the situation where some years into these proceedings, only the determination of employee status has been arrived at.

75. There was an argument therefore, that the consideration of whether the Second Respondent should remain in the proceedings could not be dealt with until that issue had been determined. However, Mr Wilkinson pointed out to me that I had listed that point for determination and that he had attended in order to deal with it. He said that the question of whether the Claimant was or was not a worker was irrelevant to the issues. He said to date, some four and a half years after the ET1 was presented to this Tribunal, the situation remains the same. Namely that there was no pleaded case against the Second Respondents. He said there has been no Application to Amend to include any pleaded case against the Second Respondent. He reminded me that this issue was listed to be dealt with at this Hearing and those representing the Claimant should have attended at this Hearing prepared to deal with this issue. Yet, there has been no Application to Amend and no draft particulars put forward as to any claim against the Second Respondent. The position remained as under the original ET1, namely that the Second Respondent had simply been added as an alternative, but that there was absolutely no pleaded case against them.

76. I am persuaded by Mr Wilkinson that I therefore must consider this. The issue of whether the Claimant was or was not a worker of the First Respondent may need to be determined in due course in these proceedings, but it is irrelevant to the issue as to whether the claim should be permitted to proceed against the Second Respondent.

77. He reminds me that the Claimant has not pleaded any allegations relating to the Second Respondent in the particulars of claim. The Second Respondent does not have a contractual relationship with the Claimant. The Claimant is neither an employee or worker of the Second Respondent.

78. He said if the Claimant had wanted to advance any arguments to counter those suggestions, they have simply not done so. The purpose of today's Hearing was to enable them to do so.

79. The only submissions in the skeleton put forward by a Mr David Flood on behalf of the Claimant, was that the status quo should remain that the Respondents remain in the proceedings until all issues as to status have been determined.

80. Mr Ratledge, today in front of me, confirms that there is no pleaded case against the Second Respondent, that there was not any contractual relationship between the Second Respondent and the Claimant and no detriment has been pleaded against the Second Respondent. He asked me, however, to consider that striking out the claim would be draconian and that such a matter should not be considered until such time as the Claimant had been given the opportunity to set out its claim by way of further particularisation of its ET1 against the Second Respondent.

81. Mr Wilkinson counters that on the basis that he says we are four and a half years down the line. There has been no Application to Amend and no attempt by the Claimant at all to advance a claim against the Second Respondent.

Conclusion

82. I find myself agreeing with Mr Wilkinson. This claim has been in train for four and a half years. At no stage has a claim been put against the Second Respondent in terms of the allegation of any contractual nexus between the Second Respondent and the Claimant and no detriments have been pleaded.

83. The Claimant knew that a strike out was going to be an issue to be determined at this Hearing. It was only reasonable, therefore, for the Claimant to have produced a draft amended claim to include claims against the Second Respondent. Nothing has been produced.

84. Taking into account the overriding objective as I am bound to do, it cannot be proportionate for me to allow the Second Respondents to remain in these proceedings. They continue to incur costs. Mr Wilkinson has attended at Tribunal at this Hearing specifically to deal with this point. The Claimant has given little attention to this issue.

85. Any Application to Amend would be contested strongly after such a long period of time. It cannot be in accordance with the overriding objective for me to allow this unsatisfactory situation to continue with respect to the Second Respondent.

86. On the face of the documents before me, there is no reasonable prospect of success against the Second Respondent and on that basis, combined

with adherence to the overriding objective, the claims against the Second Respondent such as they are, are struck out.

87. The Second Respondent is to be removed as a Respondent to these proceedings.

88. **The matter should be listed for a telephone Preliminary Hearing on the first available date to consider further the case management issues that remain in this matter. That hearing will be allowed 3 hours.**

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Employment Judge K J Palmer

Date: 19 April 2023

Judgment sent to the parties on: 5 May 2023

For the Tribunal Office