Case Number: 2500912/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Wade**

Respondent: **AG Wade Limited**

Heard at: **Newcastle Employment Tribunal (in person)**

On: **30 and 31 May 2023**

Before: **Employment Judge Murphy**

Representation
Claimant: **Mr M Haywood of Counsel**
Respondent: **Ms P Wellock, Litigation Executive**

JUDGMENT having been sent to the parties on 12 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

The judgment of the Tribunal was as follows:

1. the claimant was an employee of the respondent in terms of section 230(1) of the Employment Rights Act 1996 ("ERA") in the period from 12 August 2021 to 5 April 22.

2. the claimant was a worker engaged by the respondent in terms of section 230(3) of ERA in the period from 12 August 2021 to 5 April 22.

3. the claimant was an employee of the respondent in terms of section 83 of the Equality Act 2010 ("EA") in the period from 12 August 2021 to 5 April 22.

1. A public preliminary hearing ('PH') took place as an in person hearing at the Newcastle Employment Tribunal on 30 and 31 May 2023.

2. The claimant was an optometrist who undertook work for the respondent. His work for the respondent terminated on 5 April 2022 and he has brought complaints of unfair dismissal, automatic unfair dismissal, breach of contract (notice), unauthorised deductions from wages, a whistleblowing detriment complaint and an age discrimination complaint.

3. The respondent denies that the claimant has the employee status required to complain of unfair dismissal and breach of contract. It similarly denies that he was an employee for the purposes of section 83 of EA. The respondent further denies that the claimant has the worker status required to complain of unauthorised deductions under Part II of ERA (Wages) and protection from detriment under Part V of ERA.

4. The claimant gave evidence on his own behalf at the preliminary hearing and led evidence from Kirsty Foster, his daughter and a former employee of the respondent. The claimant has ADHD for which adjustments were made at the hearing (10 minute breaks every thirty minutes when the claimant was giving evidence and every hour during other parts of the hearing). The respondent led evidence from Vik Kumar, the sole shareholder of the limited company which purchased the respondent in August 2021. Evidence in chief was taken by way of written witness statements. A joint bundle was lodged running to 442 pages to which reference was made by the parties during the evidence.

5. The purpose of the PH was to determine the status of the claimant in the period from 12 August 2021, when he along with his wife, Deborah Wade, ceased to be majority shareholders of the respondent, to 5 April 2022, when the claimant's relationship with the respondent ended. The purpose, specifically, was to determine whether he was an employee under s.230(1) and s.83 of EA and / or a worker under 230(3) of ERA.

Findings of fact

6. The following facts and any referred to in the 'Discussion / Decision' section were found to be proved on the balance of probabilities.

Historical position: 1993- Aug 2021

7. The respondent is a company which provides optometry services. It operates four separate sites. In the period between 1993 and August 2021, it traded as Wade Opticians. The claimant was lead optometrist and managing director of the respondent.

8. From 1 February 2004 until August 2021, as well as being a shareholder, the claimant worked for the respondent. During this period, his relationship with the respondent was characterised by the parties in a written contract as being one of employment as lead optometrist / MD. A written contract was signed on 31 October 2020 (the 'COE'). According to its terms, the claimant was obliged to work 40 hours per week and to vary his hours as required according to business

need. The claimant was paid a salary from which the respondent deducted tax and NI at source under PAYE in the period from February 2004 to August 2021. He was, under the COE, entitled to paid holiday and SSP. The COE stated he was entitled to 5.6 weeks' paid holiday and to statutory employer pension requirements. It stipulated that he was subject to the respondent's disciplinary procedure, grievance procedure, dress code and other specified procedures. It further stipulated that he was liable to the respondent by way of deductions from pay to cover any fines, penalties or losses caused by his conduct, carelessness or recklessness or any breach of the company rules or dishonesty. The claimant, at his own expense, maintained indemnity insurance cover for this period.

9. The claimant was also subject to certain restrictive covenants under the terms of the contract which bound him or purported to bind him for a period of 12 months post-termination.

10. Before 12 Aug 2021, the claimant and his wife, Deborah Wade, each owned 500 shares in the respondent and his daughter, K Wade or Foster, owned one share. Those three individuals were the only shareholders. They also held office as directors of the respondent.

The sale of the respondent: 12 Aug 2021

11. Pursuant to a written Share Purchase Agreement ('SPA') which was entered and had effect from 12 Aug 2021, the whole share capital of the respondent was purchased by a limited company called Apple of my Eye Limited. Vik Kumar was the sole shareholder of Apple of My Eye Limited and of its sister company, Concept Eye Clinic Ltd. The claimant, his wife and his daughter ceased to be shareholders of the respondent on 12 August 2021. On 13 August 21, they all resigned as directors of the respondent. Two new directors were appointed on that date, namely Helena Habibi and Concept Eye Clinic Ltd.

12. On 12 August 2021, the claimant entered a settlement agreement with the respondent in terms of which his employment was stated to have terminated. According to the settlement agreement terms, the claimant waived or purported to waive all claims arising from his employment with the respondent or its termination excluding personal injury claims, pension claims and claims to enforce the terms of the settlement agreement itself. The restrictive covenants in his written contract dated 31 October 2020 were agreed in the settlement agreement to survive the termination of his employment. In the usual way, the claimant took legal advice from a qualified advisor on the terms of the settlement agreement before signing it.

13. In addition to the restrictive covenants which restricted the claimant under his old employment contract which remained in force and effect after 12 August 2021, under Clause 8 of the SPA, additional restrictions were placed on the claimant. These were stipulated to be for a period of 24 months, commencing the completion date of 12 August 2021.

14. Broadly, during this restricted period, the claimant was not permitted to carry on business in competition with the respondent, though an exception was specified

in relation to companies called Wade Optometry Limited and Foster and Wade Limited which were operated by the claimant's two children. These companies also provided optometry services. The SPA specified among other restrictions that the claimant was also prohibited from: canvassing or soliciting the respondent's customers; from having business dealings with customers of respondent who were customers at the time of completion or in the 12 preceding months; from having business dealings with or enticing away suppliers; and soliciting the respondent's staff. This is a broad-brush description of the restrictions which were considerably more detailed in their drafting.

Consultancy Agreement written terms dated 12 August 2021

15. On 12 August 2021, the claimant also entered into a written contract with the respondent which was characterised, according to its terms, as a consultancy agreement. This document is referred to in this judgment as the CA for the convenience of identification. That abbreviation implies no finding about the true character of the relationship with which the PH is concerned. The claimant was 68 years old at the time of entering the CA.

16. Clause 1 identified the parties and defined the claimant as 'the Consultant'. It stated:

> *The Agreement will be in accordance with the following Terms and Conditions unless and until an alternative is specifically agreed between the Parties*

17. The agreement was terminable by either party on the provision of not less than three months' written notice (clause 2).

18. The purpose of the agreement was narrated in Clause 3 of the CA as follows:

> ***3. Purpose of the Agreement:***
>
> *The purpose of the Agreement is to set out the terms under which the Consultant will provide services to Wades*
>
> *The services that the Consultant will provide is that of a registered Optometrist services The Consultant will provide the Services with care, professionalism and integrity*

19. With regard to payment and the use of substitutes, the CA provided as follows at clauses 4 - 6:

> ***4. Fees and expenses****:*
> *Fees for the Agreement will be as follows:*
> *Daily Rate of £250 per session or 17.5% of clinic revenue for that given session; whichever is greater.*
>
> ***5. Invoices and payment:***

Unless specifically agreed otherwise, invoices will be submitted weekly by the Consultant and payment made within 14 days. The invoices submitted should give details of the Consultant has worked [sic] *during the period and a breakdown of amounts due.*

6. Substitutes:
The consultant may not substitute their services with a replacement

20. It included the following clauses governing spending authority, application of policies and taxation:

7. Authority:

Unless expressly stated otherwise, the Consultant does not have any authority to incur any expenditure in the name of Wades and does not have authority to bind the organisation and hereby agrees not to hold him [sic] *out as having such authority.*

8. Health and Safety and other relevant policies:

The Consultant is expected to comply with all health and safety procedures, safeguarding procedures and all other similar procedures from time to time in force at the premises where the Services are provided.

The Consultant shall comply with all the Wades policies that are deemed relevant to his appointment.

9. Taxation:

The relationship of the Consultant and Wades will be that of independent contractor and nothing in this agreement shall render him an employee, worker, agent or partner and the Consultant shall not hold herself out as such. The Consultant is a self-employed person responsible for taxation and National Insurance or similar liabilities or contributions in respect of the fees and the Consultant will indemnify Wades against all liability for the same and any costs, claims or expenses including interest and penalties.

21. The claimant was restricted under clause 10 from divulging confidential information to third parties. Clause 11 dealt with GDPR.

22. Clause 12 was concerned with intellectual property and was in the following terms:

12. Publication of material:

Any services provided by the Consultant under this Agreement shall be the sole property of Wades and all intellectual property and all other property rights in those deliverables shall vest in the Wades "Intellectual Property" includes letters, patent trademarks whether registered or

unregistered, registered or unregistered designs, utility models, copyrights including design copyrights applications for any of the foregoing and the right to apply for them in any part of the world, discoveries, creations, inventions or improvements upon or additions to an invention, confidential information, know-how and any research effort relating to any of the above mentioned business names whether registerable or not moral rights and any similar rights in any country.

The Consultant hereby assigns to the Wades all existing and future Intellectual Property Rights in any Intellectual Property and all materials embodying these rights to the fullest extent permitted by law.

23. The CA included restrictions on the claimant at clause 13, as follows:

13. Restrictions:

Nothing in this agreement shall prevent the Consultant from being engaged, concerned or having any financial interest in any capacity in any other business, trade, profession or occupation during this agreement provided that:

a) such activity does not cause a breach of any of the Consultant's obligations under this agreement;

b) the Consultant shall not engage in any such activity where there is a real, potential or perceived conflict of interest between his/her obligations to the Wades without the prior written consent of the [sic]

and

c) the Consultant shall alert the Wades to any activity that may breach his/her obligations under a) and b) above immediately and shall give priority to the provision of the Services over any other business activities undertaken by the Consultant during the course of his appointment under this agreement.

24. That notwithstanding, the position was also governed by the restrictions in the SPA (which were more stringent) as well as those extant restrictive covenants in the COE.

25. Clause 14 (Insurance and Liability) of the CA provided as follows.

The Consultant shall have personal liability for and shall indemnify Wades for any loss, liability, costs, damages or expenses arising from any breach by the Consultant or a substitute engaged by the Consultant including any negligent or reckless act, omission or default in the provision of the Services and shall accordingly maintain in force during the agreement a full and comprehensive Insurance Policy.

26. The CA contained a clause 15 which included obligations on the clamant regarding the services to be provided, as follows:

15. Other conditions:

a) The consultant will remain working in the business in a locum capacity for a minimum of three years following Completion subject to personal health and welfare;

b) Agree to a three month notice period; and

c) Agree to work a minimum of three sessions per week for the first six months

d) Regular working pattern 9-5.30pm to include the majority of Saturdays with allowances for holidays etc.

27. Clauses 16 and 17 (the final clauses in the CA) related to termination and were in the following terms:

16. Termination

Notwithstanding the provisions of clause 2, Wades may terminate this agreement with immediate effect with no liability to make any further payment to the Consultant (other than in respect of amounts accrued before the Termination Date and any payment due by law) if at any time the Consultant:

a) commits a material breach of this agreement;

b) commits any serious or repeated breach or non observance of any of the provisions of this agreement.

c) is convicted of any criminal offence (other than an offence under any road traffic legislation in the United Kingdom or elsewhere for which a fine or non-custodial penalty is imposed);

d) is in the reasonable opinion of Wades negligent or incompetent in the performance of the Services;

e) is incapacitated (including by reason of illness or accident) from providing the Services for an aggregate period of 26 days in any 52-week consecutive period;

f) commits any fraud or dishonesty or acts in any manner which in the opinion of Wades brings or is likely to bring the Consultant or the Wades [sic] *into disrepute or is materially adverse to the interests of Wades; or*

g) commits any breach of the client's policies and procedures.

17. Obligations on termination

On the Termination Date the Consultant shall:

a) immediately deliver to Wades all property in his possession or under his control; and

b) irretrievably delete any information relating to the business of Wades stored on any magnetic or optical disk or memory and all matter derived from such sources which is in her [sic] *possession or under her* [sic] *control outside the premises of Wades.*

How the relationship operated between 12 Aug 21 and 5 April 22

28. Other than a period of absence due to an operation, the claimant worked at least the hours envisaged by the CA, and often more. He was required by the respondent to work Thursdays, Fridays and Saturdays each week. He continued to work at least three sessions per week after the expiry of the six-month period envisaged by clause 15 (c).

29. The CA provided at paragraph 3 that the services to be provided by the claimant were that of a "*registered Optometrist services*". At paragraph 15, it said "*the Consultant will remain working in the business in a locum capacity*". The locum model is relatively common in the sector of qualified optometrists.

30. In terms of clinical duties, the claimant was required by the respondent to attend at 9.15 am to be prepared for the morning clinic, fifteen minutes before his first appointment. He was required by the respondent to examine patients in accordance with the clinic diary, principally at the respondent's Durham clinic. He was asked by Mr Kumar to stay on time according to the time allocated for the appointments by the respondent's staff.

31. For the period between 12 August and December 2021, the claimant was the only qualified optometrist regularly working at the Durham branch. Locum optometrists were arranged by the respondent during this period from time to time to supplement the claimant as a qualified optometrist resource in the branch. From December 2021, an optometrist employed by Concept began also working at the Durham site one day per week.

32. Between 12 August and December 2021, in addition to working in Durham, the respondent required the claimant to cover clinics at its Lanchester clinic. On one of his working days, he required to work the morning on clinical appointments in Durham and travel through to Lanchester to cover the diary there in the afternoon. This often resulted in the claimant missing lunch. He reported this to the practice manager and asked for adjustments to be made to the appointments book, but little changed.

33. The claimant was a highly experienced optometrist. He was not directed as to how he should carry out his clinical services or exercise his clinical judgment by the respondent. He was able to work with substantial autonomy in his clinical duties. He required to carry out his work in the manner set out by the GOC and the British College of Optometrists which all optometrists are required to abide by. Within these parameters, he would apply his skill accordingly to test the patients allocated to him.

34. As well as engaging in general optometry practice, the claimant was also a leader in a specialist field of optometry called Vision Therapy. As with general practice, he was not directed as to how he should carry out this specialist area of his practice. In this particular area of practice, the respondent did not have access to any personnel who would be sufficiently qualified or experienced to give direction to the claimant in relation to this niche specialism. It was the respondent's vision that they would tap into this area of the claimant's practice to learn from him in order that they may carry on delivering this specialism in the future after the claimant's association with the respondent had ended.

35. The claimant was given a list of tasks by the respondent and was often contacted after hours regarding patients by the respondent's staff. He attended to emails, phone calls and meetings on both patient and managerial matters pertaining to the running and development of the practice outside of business hours on the three days when he attended to undertake clinical work. He did not invoice for this additional time and was not paid for it.

36. On balance, it is found that there was an expectation by the respondent that the claimant would take care of some management duties at the practice and that this was the understanding of both the parties. There was an expectation by the respondent that he would provide training for the Vision Therapist and the Dispensing Assistants brought in by the Respondent. The claimant was also required by the respondent to afford general and more specialist training regarding the lens prescriptions issued for Neurodevelopmental work.

37. There was an expectation by the respondent that the claimant would mend items of equipment or liaise with the respondent regarding the servicing of equipment / obtaining of replacements. On at least one or two occasions he was expressly asked to do so by the respondent. On other occasions, the claimant, as the most senior optometrist present at the practice undertook this role in circumstances where, nobody else was supplied by the respondent to attend to the issues. The claimant was concerned that a failure to attend to the equipment issues may affect the efficient running of the clinics or indeed prevent patient appointments going ahead. The claimant received no reprimand for attending to these matters.

38. The claimant was regularly included in emails and meetings at which management and strategy issues were discussed.

39. The claimant held his own professional indemnity insurance, purchased at his own expense, which covered the period of his practice from 12 Aug 21 to 5 April 22.

40. In terms of payment for his work, the claimant invoiced the respondent as envisaged by the CA. However, the invoice instructed payment to be made to a limited company called Wade Optometry Limited of which the claimant was a director. The vast majority of the time in the period from 13 August 21 to 5 April 22 when the arrangement ended, the claimant was paid 17.5% of the clinic revenue which exceeded the minimum flat rate provided for in clause 4 of the CA. No PAYE deductions were made by the respondent. Payment was made by the respondent by BACS transfer to Wade Optometry Limited. There was no evidence before me regarding how this income was ultimately distributed to the claimant, whether by salary or dividend from Wade Optometry Limited.

41. The claimant did not ever exercise a right of substitution or seek to do so. Mr Kumar alleged in his evidence that, in practice, the claimant substituted by calling on a locum. This was contrary to the respondent's pleaded case in paragraph 12 of the Grounds of Resistance which avers '*he* [the claimant] *was not entitled to substitute his services with a replacement*'. The claimant strenuously denied that he ever arranged a locum called Stuart Maxwell to cover his shifts. Mr Kumar's bald assertion was unsupported by any evidence of

specific occasions when he claims the claimant exercised a right of substitution. It is found on the balance of probabilities that the claimant did not ever arrange for Mr Maxwell or any other locum to cover his scheduled shifts. If any locum was engaged to provide cover at the Durham practice where the claimant worked, that arrangement was made by the respondent's staff**.** Further, it is found that on no occasion did Mr Kumar discuss with the claimant the possibility that he might be at liberty to provide a substitute notwithstanding the terms of the CA either for general optometry services or at all. The claimant's understanding was that he was not at liberty to substitute and he did not do so.

42. A meeting took place on 25 Nov 2021 attended by the claimant, his daughter, K Foster, and Mr Kumar. At that time, it had been agreed between Ms Foster and the respondent that Ms Foster was to be employed by the respondent from December 2021 as a Business Development Manager. At the meeting on 25 November, the claimant and Ms Foster raised various concerns about staffing levels, the claimant's lack of beaks and a need for staff training.

43. Ms Foster started her role in December 2021. Her role extended beyond business development, and she was asked by the respondent to act as a conduit, liaising with the claimant on behalf of the respondent in relation to various operational matters. Ms Foster was employed by the respondent until 28 Feb 2022.

44. She provided the claimant with a doc called a 'Company Handbook' around December 2021. He was not asked to sign for having received it. He was not told it was being provided to him for information purposes. He was not told it did not apply to him. The document was a different handbook to that which had previously been published by the respondent in the period before the share sale. The handbook referred to 'Concept Eye Clinic Ltd'. It contained, among other things, a disciplinary policy and procedure and a dress code.

45. At some stage in 2022, before his engagement terminated, the claimant came into the practice to carry out his appointments and was told *en route* to the consultation room by the practice manager, Sam Harrison, that there was a new staff dress code which consisted of wearing chinos and a shirt. The claimant did not own chinos. At this stage, the claimant's relationship with the respondent had deteriorated significantly and he was disgruntled about various matters. Because of his disgruntlement, he declined to purchase a pair and, so, did not comply with this code. He received no reprimand from the respondent for failing to do so.

46. The respondent invited the claimant to the Christmas party in December 2021, though this was subsequently cancelled for reasons relating to Covid. The respondent informed the claimant of its cancellation.

47. The claimant was described on one occasion by Mr Kumar as his 'Chief Mate' in an email dated 4 March 2022.

48. As far as holidays were concerned, the claimant was able to arrange these with prior notice but was not paid for them.

49. During the period from 12 August 2021, the claimant continued to utilize the equipment and machinery owned by the respondent. As he had before the share sale, he also continued to use some of his own small handheld equipment. I accepted the claimant's evidence that it can be common in the sector that optometrists develop a preference for specific hand-held equipment and use their own. There are a number of brands of equipment which perform the same function, but optometrists often prefer to use the equipment to which they have grown accustomed. They sometimes purchase these as optometry students and continue to use them in their careers.

50. The claimant was not financially responsible for any overheads, except the handheld equipment mentioned, and the main equipment and materials were provided by the respondent, such as the Projector Chart, Trial Lenses, Nidek electronic refractor head, Tonometer, Slit Lamp, Topographer, Oct and Optomap camera etc.

51. The claimant had a period of sickness absence in or around December 2021 when he was hospitalised for an operation. He was not paid SSP or otherwise during his absence.

52. With the advent of IR35 to the private sector in April 2021, many locums in the optometry sector were urged by their advisors to give consideration to whether they ought properly to be classed as self-employed for tax purposes and accountancy firms active in the sector published articles and blogs on the impact of the legislation specifically for locum optometrists. Examples of such material were included in the bundle. These included warnings of a risk of 'false self-employment' for tax purposes.

Termination of the relationship in April 2022

53. On 5 April 2022, the respondent terminated the claimant' contract without notice. It is the respondent's pleaded case that this was because of an incident involving a member of staff (para 29 and 33 of the GOR).

54. In a WhatsApp message the same date to Mr Kumar, the claimant queried reports from his patients that they had been told about his immediate retirement. Mr Kumar replied by WhatsAapp to the claimant: "*The fact is, I sacked you. I'm sure you don't want me to convey this message to either staff or patients*".

Relevant Law

55. Section 230 of ERA provides:

> *"(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."

56. Section 83 of the EA includes the following:

(2)"Employment" means—
(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
(b)Crown employment;
(c)employment as a relevant member of the House of Commons staff;
(d)employment as a relevant member of the House of Lords staff.

57. Though the formulation of the test for an employee in the EA is slightly different to ERA, in **Pimlico Plumbers Ltd v Smith [**2017] EWCA Civ 51 at [12-14], Lord Wilson affirmed previous caselaw in describing this as a distinction without a difference.

58. In **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497 (**Ready Mixed Concrete**), the Court set out a three pronged test for identifying a contract of service:

''A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …"

59. In the case of **Ter-Berg v Simply Smile Manor House Limited and Ors** [2023] EAT 2, the EAT considered the approach based on the Supreme Court decisions in **Autoclenz v Belcher** [2011] ICR 1157 and **Uber BV v Aslam** [2021] UKSC 5 when considering whether a written contract reflects what the parties agreed. It summarized the principles thus:

> " *When deciding whether a claimant was an employee, a worker, or neither, and determining, for that purpose, whether the terms of a document relied upon as a written contract reflect what the parties in reality agreed, the employment tribunal should follow the approach set out in* ***Autoclenz v Belcher****, including not applying certain rules of contract law that would apply when considering other types of written contract. That approach is confirmed by the decision of the Supreme Court in* ***Uber BV v Aslam****, which provides further guidance as to the policy considerations underpinning it, which should be borne in mind when applying it. Provided that, in such a case, the tribunal does apply that approach, it is not necessarily an error for it, when explaining its reasons, to start with a consideration of the terms of any document said to amount to such a written contract. But it will be an error for the tribunal, in such a case, to confine its consideration to such terms, to treat them as conclusive, or to treat them as giving rise to a presumption which restricts what it might conclude from its consideration of all the facts and circumstances in accordance with the* ***Autoclenz/Uber*** *approach.*
>
> *In relation to clauses to the effect that a written agreement is not intended to create a relationship of employment or a worker relationship:*
>
> *(a) As held by the Supreme Court in* ***Uber****, such a clause will be void and ineffective if, upon objective consideration of the facts, the tribunal finds that it has as its object the excluding or limiting of the operation of the legislation in question (pursuant to section 203(1) Employment Rights Act 1996 or the equivalent provisions of other legislation);*
>
> *(b) In any event, if, apart from such a clause, the other facts found by the tribunal point to the conclusion, applying the law to those facts, that the relationship is one of employment or a worker relationship, such a clause cannot affect that legal conclusion; but*
>
> *(c) If neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship*"

Submissions

60. Ms Wellock and Mr Haywood helpfully handed up written submissions to which they spoke. These are appended to this judgment in the interests of brevity.

Both set out the applicable law in relation to which there was no material dispute (though how the law applies to the facts of this case was contested).

61. Ms Wellock gave an oral submission to supplement her written submission. The following is a summary; it is not reproduced verbatim. Ms Wellock emphasised the claimant had a high level of expertise and was not subject to control. She asserted he was self-employed and knew at all times that was the nature of the relationship. She suggested that, as a matter of fact, the claimant could not help intervening in the respondent's business and involving himself in matters, unbidden by the respondent. She asserted that he was not bound by policies and procedures but was provided with the handbook by his daughter for reference. She asserted the CA reflected the true and correct position in terms of which procedures bound the claimant under the arrangement. Mr Kumar's reference to the claimant as his 'Chief Mate' was, she said, out of respect and indicated nothing about the status of the working relationship. She referred to the tax and invoicing position and submitted that these pointed towards self-employment.

62. Mr Haywood also supplemented his written submission with oral remarks. Again these are summarised here for brevity. Mr Haywood suggested it was clear on the face of the written CA that it was, in reality, a contract of employment. This was so, according to the claimant, given the presence of a requirement for personal service and mutuality of obligation regarding the requirement to work and be paid. Mr Haywood acknowledged that the claimant was a sophisticated and experienced practitioner. He was, however, subject to control outside of the clinical aspects, in the claimant's submission. He was also, according to Mr Haywood, integral to the business. The duties placed upon him were, he said, atypical for a locum

Discussion and Decision

Employment Status: s.230 ERA and s.83 of EA

63. The essential test for employment status was set out in **Ready Mixed Concrete**, which referred to the need for an irreducible minimum of personal service, mutuality of obligation and control. In **Autoclenz,** the Supreme Court has held that Tribunals should examine the working relationship between the parties, how that operated and what was the reality of the situation. The true agreement has to be gleaned from all the circumstances, of which the written agreement is only a part. Contractual terms which are inconsistent with the findings of the tribunal regarding the reality of the situation may be disregarded.

64. The Tribunal requires to assess the situation on a holistic basis, considering all relevant factors. The irreducible minimum factors of personal service, mutuality of obligation and control are discussed first.

Personal Service

65. The respondent's representative submitted that, although the CA stated that the Claimant could not provide a substitute, this was in relation to the Vision Therapy component of the Claimant's work only, due to the practical difficulties

that would have arisen when trying to find a replacement for the Claimant in this specialist area of work.

66. I have considered the provisions of the CA as well as the factual circumstances in which the claimant performed work for the respondent. Findings of fact have been made at paragraph **41** that the claimant always provided personal service to the respondent, that he did not substitute and that he did not understand that he was at liberty to send a substitute for any aspect of the service he required to provide**.** Nor is it accepted that the respondent understood the claimant was at liberty to exercise a right of substitution, based on the evidence before me.

67. In regard to a requirement for personal service, the acting's of the parties accorded with the express prohibition on substitution in the CA. There was no right to substitute, either unfettered or conditional, and the claimant was obliged to provide personal service. In practice, any absences, including holidays, if covered, were covered by other optometrists arranged by the respondent.

Control

68. The test for control must be applied in modern circumstances where many employees have substantial autonomy in how they operate and are left to an extent to exercise their own judgment. According to the EAT in **White and Anor v Troutbeck SA** UKEAT/0177/12/SM EAT, '*It does not follow that because an absent master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them…. The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided* ' (paras 41, 45).

69. As a qualified optometrist, the claimant was able to work with relative autonomy. He was required to carry out his work in accordance with the GOC and British College of Optometrists which bind all optometrists. As a leader in the field of Vision Therapy, he was highly expert in this particular area of practice.

70. He required, however, to adhere to the respondent's requirement regarding the scheduling of patients' appointments and the time spent with them during appointments. He was expected to deal with many out of hours queries regarding both patient matters but also managerial matters with respect to the running and development of the practice. His working day was governed by the the respondent's hours of business, and he was required to attend promptly for work, 15 minutes before his first appointment.

71. There was a focus in the evidence on the non-clinical work performed by the claimant for the respondent during the material period. Ms Wellock submitted that the claimant did various bits of work including fixing equipment of his own accord. She pointed out he was not asked to do certain things which he did. In his evidence, Mr Kumar seemed to imply the non-clinical work the claimant undertook might be regarded as having been undertaken not pursuant to the CA or to any employment contract but as part of an unpaid good will handover that one might expect between a vendor and a purchaser. I am not persuaded these duties are explicable by reference to such a practice. I was not addressed on the legal basis for such a proposition.

72. Nor am I persuaded by Ms Wellock's argument that these non-clinical activities were carried out by the claimant of his own volition, in circumstances where he could not help intervening in the respondent's business and involving himself in matters. There were occasions when the respondent expressly asked the claimant to attend to tasks of this nature. I have found that at other times, the claimant undertook such tasks as attending to equipment maintenance or training staff in circumstances where, nobody else was supplied by the respondent to attend to such pressing matters at the clinic. There was a lack of evidence of the respondent reprimanding the claimant for 'over-stepping' his role and involvement in the business, which one might have expected if that was how the respondent had viewed the claimant's actions.

73. I have made a finding of fact that the claimant was concerned that a failure to attend to the equipment issues may affect the efficient running of the clinics if he did not attend to these tasks. There is a lack of realism to the suggestion made by the respondent at the hearing that the claimant was expected by the respondent to simply sit back and let the diary of patient appointments be cancelled if necessary because of a lack of adequately maintained equipment and then to claim the flat daily rate envisaged by clause 4 of the CA for his time doing nothing in that session. On occasions when the respondent did not give explicit instructions to take to do with the mending of essential equipment or other tasks necessary to ensure the running of the clinic, I am satisfied that in the absence of the provision of any other resource to attend to the issue, it was implied between the parties that the claimant would attend to the matters. Such an implied requirement was necessary in order to make the contract work properly in accordance with the intention of the parties which must have included a mutual expectation that scheduled patient appointments would be honoured unless there were wholly unavoidable circumstances. I further find that these non-clinical tasks were part and parcel of his duties under the agreement to provide services.

74. The duties performed by the claimant went beyond the hours set out in the CA and beyond attending appointments with patients and administering eye examinations. It was the claimant's position, and Ms Foster's evidence, that they went far beyond the typical duties one might expect of a locum optometrist based on her experience of working as a locum optometrist and of engaging locum optometrists**.**

75. I am not persuaded that the question of whether the claimant's workload and range of duties was or was not typical for a locum in the optometry sector is an area of enquiry that is of particular assistance in determining the issues with which I am concerned. I have made what I understand to be an uncontroversial finding that in 2021 some accountancy firms advising the sector identified a challenge for locum optometrists with the advent of IR35 in ensuring their status was properly assessed for tax purposes. From the material before me, it was evident that some accountants held a view that, depending on the individual circumstances of their arrangements, some locum optometrists were at risk of what was described by one form of accountants as 'false self-employment'.

76. No doubt some practices and arrangements are common for locums and others less so. The focus, however, is on whether or not, on a consideration of all of

the facts and circumstances of this case, the claimant's relationship with the respondent was truly one of employment or worker status, irrespective of how similar or different it was to the experience of other locum optometrists.

77. I note that the attention given to this area of factual enquiry has likely arisen because at Clause 15(a), the CA refers to work as a locum. That document also refers to the provision of registered Optometrist services (Clause 3, second paragraph). Given the claimant's experience and clinical expertise, the question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided. In relation to the non-clinical aspects of the work he undertook, the question remains the same.

78. I find that it resided with the respondent. As a qualified and experienced optometrist, it is accepted that the claimant was not subject to detailed control in the conduct of clinical duties.

79. Nevertheless, there is no question that the claimant was free to work or not work for the respondent at his whim or fancy. He was contractually obliged to work for the respondent for a minimum three-year period. In practice, he was required to work three days per week throughout the material time apart from holidays and sickness absence. He required to do so beyond the six-month period mentioned in the CA. He required to work on certain days and during certain hours. He was expressly told he required to arrive promptly. He was provided lists of tasks and given express instructions regarding matters requiring to be attended to from time to time. It was implied (often as the only optometrist present) that he would attend to other matters to ensure the smooth running of the clinics. He was told where he required to work and when he required to arrive there (which was a point of contention on days when he had to travel between Durham and Lancaster causing a lack of breaks).

80. He was provided with a copy of the company Handbook by Ms Foster, and not told by her that this was for information only or that it did not apply to him. The respondent has sought to make much of the fact that Ms Foster was the claimant's daughter. However, regardless of her relationship to the claimant, she was a manager employed by the respondent who was specifically expected by the respondent to act as a conduit between the respondent and the claimant. Her actions can be regarded as carried out on behalf of the respondent as much as any other manager of the respondent.

81. The claimant was, according to the terms of the CA, liable to have his contract terminated without notice if he committed any breach of the respondent's policies and procedures. Those policies and procedures which applied to him were not exhaustively defined in the CA. It stated among other matters that, '*The Consultant shall comply with all the Wades policies that are deemed relevant to his appointment*' (para 8). Those written terms together with the provision of the staff handbook by the respondent to the claimant all point to an intention that the claimant would be subject to the respondent's policies and procedures or at least a significant number of them. The claimant might ignore them without checking their applicability at his peril, given the potential exposure to summary termination for a breach.

82. In 2022, the claimant was informed by Practice Manager, Sam Harrison, of a new dress code. By this time, the relationship was fraying and the claimant had become disgruntled with the respondent. He did not own chinos and this, combined with his disgruntlement appears to have been the reason for his rebellion. It was not his understanding that it had no application to him. It was reasonable for the claimant to infer that the respondent's Practice Manager informed him of the dress code with an explanation that the claimant would comply with it. It is fair to acknowledge that then respondent did not reprimand him for the omission. However, this may be viewed in the wider context of a relationship was deteriorating at the material time. A number of disputes had arisen between the parties regarding matters which might be regarded as far more weighty than the issue of dress code. Some of these are the subject of the claimant's complaints to the Tribunal. In all the circumstances, I am not persuaded that the absence of a specific reprimand materially undermines a finding that the Practice Manager's intention when he informed him the claimant of the dress code was that the claimant would comply with it.

83. Taking all relevant facts and circumstances into account, I am satisfied that the ultimate right of control resided with the respondent.

Mutuality of Obligation

84. In the context of employment status, a requirement has been expressed for an 'irreducible minimum of obligation on each side.' (**Nethermere (St Neot's) v Taverna and Gardner** [1984] IRLR 240). The precise formulation of the obligation on the employer's side has varied in the caselaw. It may often be to provide work and pay for it, but if a retainer is paid during periods when no work is provided, that may suffice (**Clark v Oxfordhshire HA** 1998 IRLR 25 at para 41). It is possible for the obligation to provide work to be implied. In **Airfix Footwear Ltd v Cope** 1978 ICR 1210, EAT**,** the EAT upheld a tribunal's decision, implying a contract of employment over a period of seven years, with the employee normally working five days a week, notwithstanding an ostensible lack of obligation on the company to continue to provide work. The minimum obligation on a putative employee, on the other hand, is that they must be obliged to accept and do work provided, though an obligation to do a certain minimum amount of work may suffice (**Nethermere**).

Did the claimant have an irreducible minimum obligation to accept work?

85. I find with no difficulty that the claimant had an obligation to accept work. This irreducible minimum requirement was not explicitly conceded by Ms Wellock in the claimant's submission but nor was it meaningfully challenged. There was an express written obligation. The reality of the relationship and the true intent of the parties did not differ in regard to the requirement, save that the requirement on the claimant to perform work actually exceeded the three days per week specified in the CA. It may also have exceeded the CA to the extent that the nature of the duties required may also have extended beyond their description in the CA. However, given the plain finding that the claimant was obliged to accept work, it is unnecessary for me to determine whether the work required of him extended beyond typical 'locum' duties or general Optometrist services.

What is clear is that the irreducible minimum obligation on the claimant was present.

Did the respondent have an irreducible minimum obligation to provide work and / or pay?

86. The written contract sets out that the claimant would receive a daily rate per session of £250 or 17.5% of clinic revenue. The minimum obligation on the respondent to pay the claimant for the work was present. The respondent also, as a matter of fact and in line with the implied intention of the CA, provided work for the claimant in the form of clinical diaries to be covered and other non-clinical work to be undertaken.

87. The requisite mutuality of obligation is established in this case.

Other factors consistent with a contract of service?

88. Both parties drew to my attention a number of other facts in the case. In Ms Wellock's case, she focused on those which she contended pointed away from the existence of a contract of service, while Mr Haywood sought to emphasize those which he suggested supported such a relationship. The true agreement has to be gleaned from all the circumstances, of which the written agreement is a part, but only a part. To that extent, it can be unhelpful to restrict the focus to a single factor or a select group of factors in isolation. I have given careful consideration to all of the relevant facts and circumstances of the case, including the following matters:

    a. In terms of the labels used by the parties, the written terms of the CA refer to 'consultancy' and 'self-employed person' and include a statement at clause 9 that the relationship will be that of 'independent contractor'.

    b. Mr Kumar told the claimant he had 'sacked him' on the termination of the relationship.

    c. The written CA lacked some of the clauses one might usually expect to find in a typical contract of employment and indeed some of the clauses which were to be found in the claimant's previous COE with the respondent, including with regard to pension, salary and disciplinary and grievance arrangements.

    d. The claimant had his own Professional Indemnity cover. This had also been the situation before 12 Aug 2021 when the relationship was governed by what purported to be a written contract of employment.

    e. The claimant, while working for the respondent after 12 August 2021 used some of his own handheld tools. The majority of the equipment the claimant used to provide clinical services was provided by the respondent. It is common in the optometry sector for optometrists to have a preference for their own handheld tools which can often be purchased at University and retained for use thereafter.

f. The claimant was not subjected to PAYE. He required to submit invoices. He was paid not as an individual but through a limited company, Wade Optometry Limited, at his own request.

g. He was not paid for holidays or paid sick pay.

h. The respondent paid no employer pension contributions for the claimant and did not auto-enroll him into any scheme.

i. The claimant was not responsible for any financial overheads at the respondent associated with the clinical duties he performed at their premises (other than the handheld tools mentioned).

j. There was no system of performance management appraisals for the claimant.

k. The claimant was subject to instructions from management. From time to time this was express and written. At other times there were implied expectations upon the claimant that he would perform certain duties to ensure the smooth running of the clinic.

l. The claimant was the only registered Optometrist for a significant period who was in attendance at the Durham site. He was expected to provide training to others.

m. The claimant was described as his 'Chief mate' by Mr Kumar in an email.

n. The claimant was involved in out-of-hours meetings and calls discussing strategy and management.

o. The claimant was provided by K Foster, Business Development Manager, with a copy of the Company Handbook.

p. The claimant was told of the dress code by the Practice Manager in 2022.

q. The claimant was integral to the respondent's operation at the Durham site and was expected to maintain management responsibilities to ensure the smooth and profitable running of the practice.

r. The claimant was invited to the respondent's Christmas party though the event was subsequently cancelled due to Covid related reasons.

s. The claimant was bound by stringent restrictions on practicing elsewhere with the exception of his children's optometry companies. These restrictions derived from three separate documents, including the CA. As a matter of fact, the claimant believed himself bound by the restrictions and did not seek to practice elsewhere as an optometrist in the material period.

89. As observed by Mummery J in **Hall v Lorimer** [1994] IRLR 171**,** it is necessary to '*stand back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole*.'

90. Standing back from the picture and appreciating the whole, I conclude that the claimant was an employee of the respondent within the meaning of section 230 of ERA and section 83 of EA. The irreducible minimum ingredients of personal service, mutuality and control were all present. Those aspects which pointed away from employment are not so significant or weighty as to undermine the existence of an employment contract or to be inconsistent with the existence of an employment relationship. Applying the law to the facts, I have found that the relationship is one of employment. As such, clause 9 of the CA which states it to be one of 'independent contractor' cannot and does not affect this legal conclusion.

91. For the same reasons I find that the claimant was an employee for purposes of EA section 83.

92. It also follows from these findings that the claimant was also a worker within the meaning of s.230 ERA(3)(a) of ERA.

I confirm that these are the Tribunal's written reasons in the case of Case No: 2500912/2022 Mr A Wade v A G Wade Ltd and that I have signed the Judgment by electronic signature.

L Murphy

_____

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 5 July 2023