EMPLOYMENT TRIBUNALS

Claimant: **Dr M Henry**

Respondents: **(1) Smile Care South Limited**
(2) Dr J Dhariwal

Heard at: **East London Hearing Centre (via CVP)**

On: **3 July 2023**

Before: **Employment Judge Norris, sitting alone**

Representation:
Claimant – In Person
Respondents – Mr M Walker, Counsel

RESERVED JUDGMENT – PRELIMINARY HEARING

The Tribunal finds that:

(1) The Claimant was at the relevant time a "limb "b" worker of the First Respondent pursuant to section 230(3) Employment Rights Act 1996 and Regulation 2(1) Working Time Regulations 1998;

(2) The Tribunal makes a declaration to that effect;

(3) The Claimant was not an employee of either Respondent and he was not a worker of the Second Respondent. Accordingly the claim is dismissed against the Second Respondent; and

(4) Unless the claims can be settled between the parties, a Hearing is to be listed.

REASONS

Background to the case

1. The First Respondent (whose title is corrected by agreement as above) is a company carrying out dental services activities. The Second Respondent is its director and CEO. He also holds (according to Companies House) 15 other active appointments, most if not all of which are connected to the provision of dental services.

2. The Claimant came to the UK in 2016 as a refugee from Egypt. He worked from 2018 until 21 December 2022 as a dental nurse, receptionist and then as a dentist in the First Respondent's Tower Hamlets practice at the Harford Health Centre ("practice").

3. On 17 February 2023, the Claimant brought claims for unlawful deductions from wages and/or breach of contract against the Respondents. He brings those claims on the basis that he is a "limb 'b'" worker pursuant to section 230(3) Employment Rights Act 1996, that is a worker who:

   "has entered into or works under…. 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".

Conduct of the Hearing

4. The claims were consolidated and listed for a Preliminary Hearing (PH) by Employment Judge Jones, who decided that the Tribunal would consider whether the Claimant was an employee or a worker or self-employed and whether the Employment Tribunal has jurisdiction to hear his complaints. The Claimant had prepared a witness statement with exhibits and the Second Respondent had also produced a witness statement with a 52-page "disclosure bundle". Both parties had drafted skeleton arguments.

5. The Second Respondent was not present at the beginning of the PH; Mr Walker, who appeared on behalf of both Respondents explained that the Second Respondent had thought the hearing was to start at 12.00. We discussed the authorities as to the employment status of dentists and it was agreed that the question of whether the Tribunal has jurisdiction is likely to turn on the question of whether the patients treated by the Claimant were those of the First Respondent or those of the Claimant himself. If I find that they are patients of the First Respondent and that the First Respondent is not a client of the Claimant, it was agreed that the correct finding would be that the Claimant is a "limb b" worker.

6. We adjourned for just over 20 minutes for Mr Walker to take instructions and to see if the Second Respondent was able to join. There was a delay in re-starting as a result of the Second Respondent's technical difficulties. The Tribunal then heard evidence from the Second Respondent, to whom I posed a number of questions to elicit the necessary evidence on which to make my decision. There was no cross-examination or re-examination. The Claimant then gave his evidence and was cross-examined by Mr Walker as well as, again, answering some questions from me. I heard submissions from both parties, during which some further evidence was introduced by the Claimant to which I allowed the Respondents to respond, with the Claimant concluding the submissions.

7. In light of the complexity of the issues and the fact that all parties indicated they were likely to appeal if they lost (or indeed that there might be an appeal and cross-appeal in some circumstances), we finished at lunchtime and I reserved my decision.

Relevant facts

8. Some of the facts in the case were undisputed whereas others had to be resolved for the purposes of this PH. I make findings as follows:

   8.1 The Claimant had undertaken dental studies in Egypt before coming to the UK at the age of around 28. It is not disputed that his first role with the Respondents was that of dental nurse. In November 2018 he became the receptionist at the practice and in or around 2019, the practice manager. He signed a contract of employment (in fairly standard terms) with "Smile Dental Care" in May 2019 and continued as the practice manager until January 2020, while he completed his examinations to qualify as a dentist in the UK. It is common ground that Smile Dental Care is the trading name for the First Respondent.

   8.2 In April 2020, the Claimant signed a new contract with Smile Dental Care. That contract is headed "Associate Self Employed Agreement" ("Agreement") and under the heading it says it is based on the British Dental Association ("BDA") contract. It states that nothing within it shall constitute a partnership or a contract of employment between the Practice Owner (i.e. the Second Respondent in this case) and the Associate. It is trite to say that merely asserting this in a contract is not definitive, because it is the statutory analysis that defines employment status. Other relevant terms in the Agreement include:

      a) The Practice Owner grants the Associate a non-exclusive licence and authority to carry out the practice of dentistry at the practice premises. The agreement is expressed to be "*personal to the parties named*" and is not capable of "*assignment, charge or other disposition except termination*";

      b) The agreement is subject to NHS-imposed conditions;

      c) The Practice Owner provides premises, furniture, equipment, staffing and laboratory services and materials, drugs and supplies necessary for dental practice ("facilities"). The Associate is not permitted to use his own facilities at the practice's premises. The Practice Owner is liable for repairing and replacing the facilities as necessary;

      d) The parties undertake to use their best endeavours to further the interests of the practice and to comply with the terms of any contract between the Practice Owner and the LAT (Local Area Team);

      e) The Associate supervises the staff but the Practice Owner is their sole employer;

      f) The Associate must maintain registration with the General Dental Council ("GDC"), indemnity cover, a valid DBS certificate and membership of a defence body approved by the GDC;

      g) The Practice Owner makes the facilities available between Monday and Friday 09.00 to 17.00 with an hour for lunch each day;

h) There is an express stipulation that "Lateness will not be accepted and the associate should ensure they arrive on time unless prior arrangements have been made".

i) The Associate does not have the right to paid holiday. It is recommended that the Associate takes no more than 35 working days' holiday per year and the parties must give each other at least eight weeks' notice of any proposed holiday of three or more working days. The Practice Owner has the discretion to close the practice on public holidays.

j) The Practice Owner may introduce NHS patients to the Associate. He may decline to treat them provided that does not place the Practice Owner in breach of the contract between the practice and the LAT. Treatment of such patients by the Associate must be in accordance with the terms of the contract between the practice and the LAT.

k) The Associate is required to provide a minimum number of Units of Dental Activity ("UDAs") in each financial year, at a fixed price per unit, and to endeavour to spread the work evenly across the year, with half completed by 1 October each year and without completing the requirement before 31 March. He is entitled to 50% of the gross fees from treating private patients. Payment for the UDAs is reconciled against the charges levied by the practice for the licence. The Associate is liable to compensate the Practice Owner if the LAT terminates the contract because the Associate has failed to meet the relevant UDA requirements. The Practice Owner and the Associate are jointly responsible for patient bad debts and laboratory fees.

l) The Associate maintains the books and records of treatment given to all patients and makes them available on request to the Practice Owner. On termination of the agreement, the books and records are retained by the Practice although the Associate may access them for any proper reason. Practice data and patient details are not to be removed from the practice;

m) The Associate is required to abide by all the practice's policies and procedures, including as to health and safety, confidentiality and uniform.

n) Friends, family and staff members are to be treated and charged as patients of the practice and are not entitled to discounts or special favours.

o) The Associate is entitled to 100% of any payments made by the NHS for sickness, adoption, maternity and paternity. However, any period of sickness is said to be unpaid.

p) The Associate must use his best endeavours to arrange for a *locum tenens* if he fails to use the facilities for more than 30 days. If he does not arrange for a person acceptable to the LAT and the practice, the First Respondent has the authority to engage the *locum tenens* and to

pass on the cost to the Associate.

q) The agreement is terminable on three months' notice either way. It can be terminated with immediate effect by the Practice Owner in certain circumstances, including where the Associate is guilty of gross misconduct. It can also be terminated with immediate effect by the Associate e.g. where the Practice Owner ceases to hold an LAT contract to provide dental services.

r) For 18 months after termination of the agreement, the Associate is required not to carry on the practice of dentistry within a five-mile radius of the practice (other than within a hospital or part of the NHS Salaried Primary Dental Care Services), or to provide dental treatment to anyone who was a patient of the practice within the 12 months prior to termination.

s) For two years after termination the Associate is required not to solicit any patients or members of staff at the practice, or to canvass or advertise his services to any practice patients (who for these purposes are defined as anyone who has been treated by the practice, whether by the Associate or any other person, within the preceding 24 months);

t) The intellectual property of the practice (including marketing material) is not to be used or removed from the practice without the Practice Owner's permission.

8.3 As the Claimant had obtained his dental degree overseas, he was required by the NHS and Health Education England to undertake a programme in order to perform NHS dental services. The Claimant started his training in June 2021 and was working under the supervision of one of the dentists at the practice for a year.

8.4 I accept the Claimant's evidence that:

a) he considered, in light of the terms of the Agreement, that he was not permitted to work at any other dental practices while he was working for the Respondent and did not do so (the Second Respondent said he believed the Claimant was working for another practice on Saturdays but the Claimant denied this; there was no evidence to support that assertion and I find it was mere conjecture);

b) he believed that he was required to provide the services under the Agreement himself and at the times stipulated in the Agreement, which amounted to a full-time contract; and

c) he took little time off because of the lack of holiday pay available.

8.5 I further accept that the reality of the *locum tenens* situation was that it would have been impossible for the Claimant to source and provide a suitable locum.

8.6 I find that the notice requirements in relation to the taking of holiday were partly to ensure continuity of patient care, as the Second Respondent asserts, but were chiefly "*to enable the Associate to achieve the Associate's UDA target*", as the Agreement itself states.

8.7 The Claimant was a member of a Facebook group for "Egyptians in London". He made it known on that page in response to a request for Arabic-speaking dentists that he worked for Smile Dental Care in Tower Hamlets and speaks Arabic. He did not advertise himself as having his own practice; he said people could contact the surgery if they chose. He accepted and I so find that when patients came to the practice in response, they did ask to see him. The Claimant also distributed leaflets on behalf of the First Respondent.

8.8 At the end of his year's training, the Claimant had a meeting with the Second Respondent's nephew who also worked with the First Respondent and who told the Claimant that the Second Respondent wanted him to move to Norwich, where a new practice had just been opened. The Claimant did not wish to do so and an alternative of Kings Lynn was proposed by the Respondents. The Claimant did not want to move to Kings Lynn either. He wanted to stay in London.

8.9 The Claimant was signed off sick and applied for payments from the NHS during his sickness absence. He was assisted in that application by one of the First Respondent's accountants. The First Respondent did not however pay across to the Claimant the money that was received from the NHS in respect of the Claimant's sickness absence. The Claimant resigned giving three months' notice and without returning to work.

8.10 I did not hear oral evidence and do not need to make detailed findings on the issues that arose in connection with the move and the Claimant's entitlement or otherwise to the NHS sick payments, because they are likely to form part of the claim following this decision on the preliminary point. However, the Claimant says and I accept that at the most there had been very little discussion at the time he entered the Agreement about moving to an alternative location on conclusion of his training, and indeed he observes that in any event, in April 2020 when he signed the Agreement, the Respondents did not own the sites in question.

8.11 It is not disputed that in line with the Agreement and following a review by HMRC of the engagement of the Claimant and others by the Respondents, the Claimant was treated as self-employed for tax purposes.

8.12 In general terms, I find the following facts about the arrangements at the practice:

a) The practice is responsible for all the administration in relation to patient treatments, from taking calls or greeting new patients who walk in, booking them in with a dentist who will be available and willing to treat them and collecting their payments after the treatment. I accept the Claimant's evidence from his time working on reception for the First Respondent that patients rarely call and ask for a specific dentist; they

want to see a dentist and they are allocated to whichever dentist has capacity. The receptionist provides the dentist with a list of patients whom they will be seeing each day when they come in to work;

b) The dentists' own names are not given on the First Respondent's website, which has a landing page for each of the different practices within the group. The reality is therefore more likely to be, and I find, that prospective patients as a general rule will come to the practice as a whole rather than to see a particular dentist. The exception to this would be where someone has been recommended a particular dentist by a friend or relative and they might ask for that dentist by name; however, they may not necessarily be available. That would be the same in the case of any employed professional such as a solicitor or accountant for instance: friends or family may recommend a particular practitioner but if they are not available, that prospective client may well see someone else from the same firm. That is all more so in a dental practice where for many prospective users of the service, the number of available appointments (all of which are by default in person) is governed by whether that practice is taking on new NHS patients.

c) A dentist may in theory say to the receptionist that they do not want to see a particular patient (e.g. they do not want any more NHS patients) or have no capacity to take on more patients or, conversely, that they do have space and would like the receptionist to book more patients in. However I accept the Claimant's evidence that a refusal of work might happen in theory but that he never refused work in practice. The decision as to whether the practice generally is taking new NHS patients will be taken in consultation with all the dentists at that practice;

d) The First Respondent provides uniforms with the Smile Dental Care logo for nurses and managers. The Claimant's evidence, which I accept, was that when he was working in administration for the First Respondent, he also ordered tunics for the dentists on the same Amazon account and in the same colour, though not with logos;

e) Practice correspondence and other documentation (such as invoices) is sent out on paper with the heading Smile Dental Care with the relevant dental associate's name on it. The dentists including the Claimant did not have business cards with their name on them. They had cards that said Smile Dental Care;

f) The Second Respondent's approach to the terms of the Agreement generally is that an Associate can "*take it or leave it*"; they are not "*forced*" to sign it. I accept his evidence that there is some scope for flexibility in the hours, in that an Associate may, for example, choose not to work one day a week or work "child-friendly" hours. Similarly, the Claimant was able to negotiate better terms for the percentage retention for his private patients' fees. However, I accept the Claimant's evidence that he asked for the "mobility" clause to be removed from the Agreement and was told it would not be removed

because this was the same BDA template as was given to everyone. I find this is highly likely because of the very strong resistance he had to being required to move out of London and that the reality was, the inclusion of the individual clauses in the contract was non-negotiable;

g) The Associates have freedom to choose the materials they use and the laboratories to which they send dental work.

8.13 I accept the Claimant's evidence that the leaflets he distributed bore the Smile Dental Care logo and website address. These leaflets were printed by the First Respondent's head office and posted to the branch.

8.14 I further accept that as a result of the post-termination restrictions in the Agreement, the Claimant's Egyptian patients, of whom there were approximately ten out of a practice list of thousands, none went with him. Those patients did not have his private phone number.

Law

9. I have set out above the "limb b" worker definition that appears in the Employment Rights Act 1996 and the Working Time Regulations 1998. In *Uber BV & Others v Aslam & Others*[1], itself quoting from *Bates van Winkelhof v Clyde & Co LLP*[2], the Supreme Court observed that by this definition, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

10. The *Uber* case was concerned with the first limb of the definition rather than, as here, the third limb. It was noted that in *Autoclenz v Belcher*[3], the claimants had signed written contracts stating they were not employees of Autoclenz but subcontractors; there was no mutuality of obligation because they were not obliged to offer their services to the Company nor was it required to offer work to them; and they could provide suitably qualified substitutes. Nonetheless, each tribunal/court found that the terms of the written contract did not alter their legal status as "workers".

11. Uber's representatives attempted to assert that the starting point for consideration of whether the claimants in its case were workers should be to interpret any applicable written agreement in place; but this was rejected by the Supreme Court, following *Autoclenz*. The primary question, said the Court, is one of statutory interpretation: do the Claimants meet the relevant statutory provisions so as to qualify for the rights, irrespective of what has been contractually agreed? If so, any clause that purports to exclude their rights as workers is void.

12. The *Uber* decision continues that it is necessary to:

"view the facts realistically and to keep in mind the purpose of the legislation. …,

[1] [2021] ICR 657
[2] [2014] ICR 730
[3] [2011] ICR 1157

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

13. It had been found that the Uber drivers:

"…had in some respects a substantial measure of autonomy and independence. In particular, they were free to choose when, how much and where …to work. In these circumstances it is not suggested on their behalf that they performed their services under what is sometimes called an "umbrella" or "overarching" contract with Uber London - in other words, a contract whereby they undertook a continuing obligation to work. The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established the terms on which drivers would work for Uber London on each occasion when they chose to log on to the Uber app.

Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working."

14. I have had regard to the fact that the right to take holiday, with pay, is a key right derived from the Working Time Directive to protect health and safety. The right was extended to workers because, as it was put in *Byrne Brothers (Formwork) Limited v Baird & Others*[4], quoted with approval by Lady Hale in *Bates van Winkelhof v Clyde & Co LLP*[5]:

"*…. The essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."*

15. I was also referred by the parties and have given consideration to a number of cases, most of which are dentistry-specific:

- *Cleeve Link Limited v Bryla (EAT/0440/12)*
- *Hayter v Rapid Response Solutions Limited (1401308/20)*
- *Sejpal v Rodericks Dental Limited [2002] EAT 91*
- *Community Dental Centres v Sultan-Darmon EAT*
- *Main v SpaDental Limited (1400999/2019).*

16. I explained that I am not bound by the decisions of other first-instance tribunals (*Hayter, Main)* and *Hayter* is not a dentistry-specific case though it is a case about

[4] [2002] ICR 667
[5] [2014] UKSC 32

employment status. However, the decision in *Main* is nonetheless instructive because in that case, the claimant's claim to be a worker had initially been rejected by the Tribunal at a PH but his appeal to the EAT had been successful and the matter remitted to a newly-constituted tribunal to determine whether he was a worker having regard to the questions of whether he was carrying out a profession or business undertaking and whether the Respondent's status by virtue of the contract between it and the claimant was that of client or customer of the claimant.

17. In *Sejal*, the EAT set out the correct approach to the statutory framework and I take into account the observations it made about the Employment Tribunal's approach to the analysis in that case, which also involved a dentist working for a practice pursuant to an Associate Contract. That analysis should consider whether A has entered into or worked under a contract with B, whether A has agreed personally to perform some work or services for B and whether A carries on a profession or business undertaking of which B is a client or customer by virtue of the contract "*It is clear*", said the EAT, "*that the focus must be on the statutory language and distinguishing between employees, self-employed workers and self-employed people who carry on a profession or a business undertaking on their own account (and therefore enter into contracts with clients or customers to provide work or services for them)"*. Later in the decision, the EAT said, *"Contractual wording that may have been designed to make things look other than they are must not be allowed to detract from the statutory test and purpose."*

18. I take into account, in line with the EAT's authority in *Sejal*, the concepts of integration, control and subordination, which it is suggested may help in considering whether the Claimant is otherwise excluded from being a worker. The themes of vulnerability and dependence are also relevant when deciding whether an individual is in business on their own account. Further, the necessity to comply with regulatory requirements, which may be set out in an agreement, does not alter the fact that they are part of that agreement and thus are relevant to assess its nature.

19. I have also had regard to the decision (Langstaff J) in *Cotswold Developments Construction Limited v Williams*[6]:

"The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

20. In the Supreme Court's judgment in the *UNISON* case[7], Lord Reed said:

[6] [2006] IRLR 181
[7] *R (on the application of Unison)* [2017] UKSC 51

"Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees…."

21. The Supreme Court has also recognised the significance of an imbalance of bargaining power. In *Autoclenz* Lord Clarke said:

    "… the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

<u>Conclusions</u>

22. There can be no argument that in this case, the parties entered a contract: that contract was the Agreement, produced by the Respondents in line with the BDA standard and entered into between the Claimant and the First Respondent. As I have found, all the First Respondent's Associates are provided with the same standard form document and they either accept it or they do not, with only minor variations to the terms (but not the removal of the terms themselves) permitted.

23. The underlying purpose of the Agreement is to provide a mechanism by which the Respondents meet their contractual obligations to the LAT, as is demonstrated by the fact that the parties are required to use their "best endeavours" in that regard; if the contract between the Respondents and the LAT ends, the Agreement is very likely to do so as well. The Claimant has no such contract with the LAT.

24. Pursuant to the Agreement and notwithstanding the limited right for the Claimant to appoint a *locum tenens*, I conclude that the Claimant was required to perform personally the services for the First Respondent, as is stipulated in its terms (see 8.2(a) above).

25. I further conclude that when viewed realistically, the Claimant was thoroughly integrated into and reliant on the First Respondent's operations for the period of his engagement. I consider it is a facet of dental services provision generally that the Claimant is required to maintain indemnity cover, to be registered with the GDC and the other similar regulatory-type provisions as set out in the Agreement. He is not doing so to progress a business that he has established himself. The fact that the Claimant was able to introduce a very small number of patients – both in real and percentage terms - to the practice via the "Egyptians in London" Facebook page did not enable him to do so. He was almost entirely dependent on the practice to provide him with access to patients generally and could not "*look after [himself] in relevant respects*".

26. The Claimant was presented to patients as being a member of the Smile Dental Care team, not as an individual in practice on his own account, through his business cards, the website and the headed paper. He wore clothing that was consistent with the other members of the dental team even if it bore no logo. He

retained no right to treat patients who came to him during the term of the Agreement once he left the First Respondent; indeed, to do so would potentially have placed him in breach of the post-termination restrictions. In any event he did not retain the patients' dental records, which remained with the practice.

27. The reality is also that once the Claimant had left, when the patients next contacted the practice to book an appointment with him, they would have been offered, and very likely accepted, one with another dentist in the practice instead. They were not "the Claimant's" patients. Even though he was in contact with some Arabic-speaking prospective patients through the Egyptians in London Facebook page, I have also accepted that the Claimant a) thereby introduced the patients to the First Respondent's practice and not to his own business; b) did not retain the patients after his engagement by the First Respondent ceased.

28. Further, the mere fact that the Claimant is a member of the "dental profession" does not define his status, any more than merely being part of the solicitor's profession would govern the status of an in-house lawyer (and as noted by the EAT in *Macalinden v Lazarov & Others*[8], identifying when someone is part of a "profession" for other purposes may be of limited value to the present exercise).

29. The "purposive" approach discussed in *Autoclenz* for employees and workers would not need to apply to those who run their own business and have an entrepreneurial approach to their work, as they intentionally sacrifice protection for independence and the chance to make money directly through their endeavours. The findings above in this case do not support a conclusion that the Claimant was acting in that manner. On the contrary, he was obliged to carry out a period of supervised training so that he could practice dentistry in the UK, and he did so pursuant to the Agreement.

30. However, even if the Claimants is in business on his own account, I conclude that he was recruited to work for the Respondent as an integral part of the clinic, using the Respondent's facilities and working with the dental nurses, receptionists and other employees recruited by the Respondent.

31. The situation is however inconsistent with him being an employee of either of the Respondents. I accept that HMRC has carried out an analysis of the situation and is satisfied that for its purposes, the Claimant is self-employed.

32. The Claimant was expressly required not to give free treatment to his friends and family or even to his colleagues and notwithstanding what the Second Respondent said about that being in practice a possibility, there was no evidence that the Claimant was aware of this. Every patient was a patient of the practice and chargeable as such. The Claimant offered dentistry services only at the times when the practice was open.

33. It is hence entirely unrealistic to suggest that the Respondents, or either of them, are the "client or customer" of the Claimant. The First Respondent's marketing efforts through publicity, as set out above, generated the patients whom the Claimant then treated. He was in a very similar position to Dr Westwood in a claim brought against Hospital Medical Group[9], in which the Court of Appeal said:

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[8] UKEAT/0453/13

[9] *Hospital Medical Group v Westwood* [2014] ICR 415 CA

"HMG was not just another purchaser of the claimant's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf of HMG. In its marketing material, HMG referred to him as "one of our surgeons". Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account."

34. For present purposes, there is one clinic, Smile Dental Care, part of the chain of practices operating under that name, to which the patients come to receive dental treatment, and they rely on the First Respondent to provide it; the patients are the truly the "customers" of the First Respondent but that is the only such relationship across the arrangement. When the Claimant marketed services on Facebook, he did so on behalf of the First Respondent, with leaflets produced by its head office, not on behalf of a business that the Claimant was operating on his own account. As was found in *Westwood*, I conclude it would be "counterintuitive" to see the practice as the Claimant's client or customer.

35. It strikes me also that no patient would be likely to consider the Claimant to be in business on his own account and the Respondents (or either of them) to be the Claimant's "client"; there would be no reason for them to differentiate the businesses in that way, even if, as Richardson J points out in *Macalinden*, one would not perhaps normally use the words "client or customer" to describe such a relationship anyway.

36. I am therefore not satisfied that the Claimant was in business on his own account, though I do accept that for tax purposes, he is entitled to write off his expenses such as the cost of his indemnity insurance, and may well do so with the approval of HMRC. As such, he may take advantage of the concessions that are available to the self-employed, otherwise he would be doubly disadvantaged by neither being treated as a worker nor being able to write off his expenses as a contractor, and to do so is not inconsistent with him being a worker in any case; HMRC does not differentiate between self-employed contractors and workers in that regard. Other than this aspect of the matter however, there is little evidence that the Claimant has a business of his own.

37. In any event, the Claimant was required to conduct himself at all times in a manner that would not put the Respondents in breach of the contract with the LAT. During his employment, that "best endeavours" requirement meant that he would not have been able to work elsewhere. This is one of the factors showing a significant degree of inequality of bargaining power between the Claimant and the Respondents as to the inclusion or not of each the Agreement's terms.

38. In addition, I conclude that the Claimant signed up to these terms wholesale because he had no choice and notwithstanding that he was very unhappy about the possibility of being required to move to another location at the conclusion of his training pursuant to the mobility clause. To the extent that this was discussed (rather than merely raised by the Claimant and immediately refused) on entering the Agreement, the reality was that the Claimant had no power to have the mobility clause removed nor to dictate or even really to influence the circumstances in

which it would or would not be exercised. The requirement for him to move to a location of the Respondents' choosing after his training concluded, which was entirely contrary to his own wishes, supports the conclusion that the Claimant had no real autonomy in the relationship and was instead under the control of and subordinate to the Respondents.

39. It is also significant in terms of considering the Claimant's degree of dependence that the Claimant felt unable to take time off on holiday and did not do so, because of the lack of pay if he was not working. This is more akin to the position that an employee would be in, rather than that of a truly self-employed person. The Claimant was required to conduct himself at all times in a manner that would not put the Respondents in breach of the contract with the LAT. During his engagement, that "best endeavours" requirement meant that he would not have been able to work elsewhere.

40. All of these findings of fact and conclusions lead me inevitably to the decision that the Claimant is a "limb b" worker for the First Respondent. He is neither a worker nor an employee of the Second Respondent, against whom the claim is dismissed. In light of this decision, a Hearing is to be listed if the parties are unable to reach agreement between themselves as to the issues on liability and remedy. Directions and a notice of hearing will be sent under separate cover to that effect if required.

Employment Judge Norris
Dated: 12 August 2023