



EMPLOYMENT TRIBUNALS

Claimant: Dr Mark Ter-Berg

Respondent: (1) Mr Parul Malde
(2) Dr Colin Hancock

Heard at: Bury St Edmunds

On: 2 February 2026 (in chambers)
3 February 2026 (by video)
4 February 2026 (in chambers)

Before: Employment Judge Graham

Representation
Claimant: Mr J Jenkins, Counsel
Respondents: Mr J McCracken, Counsel

JUDGMENT

1. It is the judgment of this Tribunal that the Claimant was a worker under s. 230 Employment Rights Act 1996 at the material time. The claim will proceed to a final hearing.

REASONS

Introduction

1. This public preliminary hearing has been listed following the remission by the Employment Appeal Tribunal on 28 February 2025. This is a long running matter and the issue which previous judges have been asked to determine concerns the Claimant's employment status.
2. I do not consider it necessary to repeat the entire procedural history of this matter in detail one further time as that has been recorded many times, and the judgment of His Honour Judge Auerbach sets out the most up to date detailed history at paragraphs 1–16 of the appeal judgment in appeal EA-2024-000265-00.
3. It is nevertheless helpful if I record that the Claimant is a dentist who was formerly principal of a group of three dental practices, following which he sold the business to Simply Smile Manor House Limited in April 2013. The Claimant then entered into a written agreement with that company in the form of a British Dental Association Standard Associate Agreement for use in GDS Contracts. The

Claimant had previously used such contracts with dentists when they worked in the dental practices he owned.

4. The Claimant filed his ET1 on 5 November 2018. Within his ET1 the Claimant complained of unfair dismissal / automatic unfair dismissal, detriment for having made protected disclosures, and he also sought to recover holiday pay. The Respondents denied the claim, arguing that the Claimant was neither an employee nor a worker. The issue of employment status is therefore key in determining whether the claim can proceed. Without being at least a worker the Tribunal will have no jurisdiction to consider the complaints at all.
5. The claim was brought against Simply Smile Manor House Limited, NHS England Midlands and East, and the current two named individuals. The claim against NHS England Midlands and East has previously been struck out. Simply Smile Manor House Limited has, in the long life of this matter, entered creditors' voluntary liquidation in 2022, before being dissolved on 29 December 2023, and has since been removed from these proceedings by HHJ Auerbach, and is now referred to in this judgment as "the company". The claim proceeds against Mr Malde and Dr Hancock only who were directors of the company.
6. It has already been determined in the long history of these tribunal and appeal proceedings that (i) the Claimant was not an employee, and (ii) there existed a contract requiring the Claimant's personal service. This issue of personal service was decided in the most recent appeal decision of HHJ Auerbach on 28 February 2025.
7. This judgment therefore addresses only the final limb of the test as to whether the Claimant was a worker - specifically was the company, by virtue of the contract, a client or customer of a business undertaken by the Claimant within the meaning of s. 230(3)(b) Employment Rights Act 1996?
8. In coming to my decision, I had the benefit of a bundle of documents of 769 digital pages, as well as helpful and detailed written submissions from both parties which they then supplemented orally on 3 February 2026.
9. The findings of fact made by Employment Judge Ord at the public preliminary hearing of 24 to 26 February 2020 are set out at paragraphs 8 to 46 of the judgment dated 22 April 2020. I have taken those into account but I have also kept in mind the reference to ***Bon Groundwork Ltd v Foster* [2012] EWCA Civ 252; [2012] ICR 1027** at [4] by HHJ Auerbach in the most recent appeal in this matter at [32] which reminds me that a tribunal is only bound by findings in a previous decision involving the same parties, which were an essential part of the fact-finding or reasoning on the issue before it. I make that point because Judge Ord was tasked with deciding the issue of whether the Claimant had been an employee - that is not my task today. I am to decide if the Claimant had been a worker, and two thirds of the questions a Tribunal would normally need to determine have helpfully already been decided before today.
10. It was directed that this hearing would not hear any new evidence and I was not invited to make any new findings of fact.
11. The Respondent was today represented by Mr McCracken of counsel who adopted the written submissions prepared by Mr Butler who had appeared previously.

Law

12. Section 230 Employment Rights Act 1996 provides:

Employees, workers etc.

...

(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;

13. With respect to the part of the test for worker which I must determine, the Employment Appeal Tribunal held in ***Byrne Brothers (Formwork) Ltd v Baird*** [2002] ICR 667:

“(1) We focus on the terms “[carrying on a] business undertaking” and “customer” rather than “[carrying on a] profession” or “client”. Plainly the applicants do not carry on a “profession” in the ordinary sense of the word; nor are the contractors their “clients”.

(2) “[Carrying on a] business undertaking” is plainly capable of having a very wide meaning. In one sense every “self-employed” person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation “business undertaking” rather than “business” tout court; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the 1998 Regulations do not extend to “the genuinely self-employed”; but that is not a particularly helpful formulation since it is unclear how “genuine” self-employment is to be defined.

(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations—given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term “customer” gives some slight indication of an arm’s-length commercial relationship—see below—but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.

(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu — workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-...-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is

essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract—not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see *Carmichael v National Power plc* [1999] ICR 1226, especially per Lord Hoffmann at pp 1234–1235.” [17]

14. The Employment Appeal Tribunal in **Cotswold Developments (Construction) Ltd v Williams** [1006] IRLR 181 posed the question of whether the individual actively marketed their services to the world in general or whether they work as an integral part of the principal's operations (the integration test):

“It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that “other” is neither a client nor customer of theirs - and thus that the definition of who is a “client” or “customer” cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. 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. It is not necessary for this decision to examine more closely the individual cases which may fall much closer to the dividing line, and the principles upon which those cases should be determined, because in the present case the Tribunal determined that Cotswold was not in the position of a client or customer of any profession or business undertaking carried on by the Claimant reason of “the nature of the Claimant's relationship with the Respondent” (paragraph 7.3). They did not elaborate further. However, it seems to us that they were entitled to draw that conclusion, in particular because no finding of fact suggests that the Claimant operated as an independent tradesman, and much of it is suggestive if not determinative of the fact that Cotswold recruited him to work for it. Accordingly, we reject that submission on behalf of Mr Gordon.” [53]

15. The **Supreme Court in Pimlico Plumbers v Smith** [2018] UKSC 29 further considered the issue integration:

“On the other hand, there were features of the contract which strongly militated

against recognition of Pimlico as a client or customer of Mr Smith. Its tight control over him was reflected in its requirements that he should wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room. The severe terms as to when and how much it was obliged to pay him, on which it relied, betrayed a grip on his economy inconsistent with his being a truly independent contractor. The contract made references to “wages”, “gross misconduct” and “dismissal”. Were these terms ill-considered lapses which shed light on its true nature? And then there was a suite of covenants restrictive of his working activities following termination.” [48]

16. In **James v Redcats (Brands) Ltd [2007] ICR 1006** the Employment Appeal Tribunal considered another test – the dominant purpose test and whether the Tribunal considers whether the dominant feature of the contract is the obligation to personally perform the work, which will indicate worker status, or whether the dominant feature is a particular outcome or objective, and the obligation to provide personal service is incidental or secondary:

“As the italicised words at the end of the quote make clear, the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? The test does not assist in determining whether a contract is a contract of service or of services; it does not, in other words, help in discriminating between cases falling within limbs (a) and (b) of the definition of worker. Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way.” [59]

And

“This is not to suggest that a Tribunal will be in error in failing specifically to apply the “dominant purpose” or indeed any other test. The appropriate classification will in every case depend upon a careful analysis of all the elements of the relationship, as Mr Recorder Underhill pointed out in Byrne. It is a fact sensitive issue, and there is no shortcut to a considered assessment of all relevant factors. However, in some cases the application of the “dominant purpose” test may help tribunals to decide which side of the boundary a particular case lies.” [68]

17. In **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005, [2013] ICR 415** this case involved a doctor who was undertaking work for the respondent which had a number of clinics, and the issue to be decided whether the claimant was a worker or was that respondent a customer of the claimant’s business. Per Kay LJ:

“There is no doubt that the Employment Judge found that Dr Westwood was engaged in business on his own account. That finding informed the conclusion that he was not employed under a contract of employment. The next question is: what was that business?” [11]

18. In **Clyde & Co LLP v Bates van Winkelhof [2014] UKSC 32** the Supreme Court held:

“37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005, [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. The Hospital Medical Group argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers, the NHS for his

services as a general practitioner, the Albany Clinic for whom he did transgender work, and the Hospital Medical Group for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to the Hospital Management Group.

38. Maurice Kay LJ pointed out (at para 18) that neither the Cotswold “integration” test nor the Redcats “dominant purpose” test purported to lay down a test of general application. In his view they were wise “not to lay down a more prescriptive approach which would gloss the words of the statute”. Judge Peter Clark in the EAT had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the Court might give some guidance as to a more uniform approach: “I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his “integration” test will often be appropriate as it is here”. For what it is worth, the Supreme Court refused permission to appeal in that case.

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

19. The issue of worker status was once considered in **Jivraj v Hashwani [2011] IRLR 827** the Supreme Court held that it may be helpful to consider whether the individual performs services under the direction of another in return for remuneration, or whether the individual is an independent provider of services who is not in a relationship of subordination with the person who received the services (at paragraphs 27, 34 and 39).

Submissions

20. The parties provided me with written submissions before the hearing which were supplemented orally.
21. Mr Jenkins for the Claimant submits that there is no credible argument that the company was a client or customer of any profession or business undertaking carried on by the Claimant, and that the Claimant therefore satisfies the final limb

of the definition of “worker” in section 230(3)(b) Employment Rights Act 1996.

22. The Claimant does not accept that he was, during the material period, engaged in business on his own account, rather he says that the Claimant is an experienced dental surgeon who formerly owned the relevant practices until their sale to the company in 2013. It is submitted that following that sale, the Claimant did not establish any new business or market his services independently, rather he continued to work in the same practice, undertaking the same clinical activities, but now within the company’s business structure and under its NHS contract. The Claimant refers specifically to paragraph 11 of the decision in **Westwood** where Kay LJ posed the question, if the claimant was in business on his own account, “*what was that business?*”. Mr Jenkins argues that there is no evidential basis for the assertion that the Claimant was operating a business to which the Respondent was a client.
23. The Claimant argues that the Associate Agreement demonstrates the company’s role as the provider of the clinical infrastructure and patient base, and it supplied the dental equipment, nursing and administrative support, materials, laboratory services, and introduced sufficient NHS patients to enable the Claimant to meet his UDA targets. The Claimant argues that these features are wholly inconsistent with a client–customer relationship and instead show the Claimant working within the company’s organised business.
24. The Claimant argues that he was integrated into the company’s operations and he places reliance on his involvement in addressing staff issues, engaging with operational problems (such as stock ordering systems and equipment procurement), and, until July 2015, holding the internal role of Clinical Lead. The Claimant says that even after relinquishing that role, he continued to contribute to matters such as staffing rotas and workplace concerns. Taken together the Claimant argues that these are strongly indicative of him being part of the Respondent’s business rather than being the operator of his own.
25. The Claimant relies further on the cases of **Westwood**, **Williams**, and **Pimlico Plumbers** to which I have referred above, and he argues that these cases establish that the Tribunal should consider whether the individual markets services to the world at large or is recruited to work as an integral part of the putative employer’s business. The Claimant says that the facts overwhelmingly favour the latter, and he reminds me that he was not marketing his services to others, he had no multiple clients, and that he had no business independent of the practice owned by the company.
26. The Claimant further submits that the Respondents’ case improperly relies on the mere fact that the Claimant had historically owned the practice and had a longstanding patient following. The Claimant argues that those matters are irrelevant to the statutory question, and that after the sale in 2013 the Claimant did not operate a separate business; rather he simply continued working under the company’s arrangements, with no changes as found by Judge Ord. The Claimant argues that this continuity undermines the Respondents’ assertions that he was operating independently.
27. Mr Butler for the Respondents submits that the Claimant was not a worker for the purposes of section 230(3)(b), and that the Claimant was, throughout the relevant period, engaged in business on his own account, with the company acting as a client of that business.
28. The Respondents submit that the Claimant operated an established business providing primary dental services before the involvement of the company, and that the Claimant had owned and developed the dental practice, cultivated a substantial patient following, and built a business reputation.

29. The Respondents say that that the company benefitted from the Claimant's existing patient base, his professional expertise, and the goodwill he had created over decades.
30. The Respondents rely on the fact that the Claimant's primary source of income derived from his longstanding patients rather than from patients newly introduced by the company, and that the relationship was therefore not one of dependency, but instead one in which the Claimant brought his own patient list and professional services to the company.
31. The Respondents argue that the Claimant's contractual obligations were owed to his patients, who entered into contracts with him (either express or implied) directly for the provision of dental care and paid him for those services, and this independent clinical relationship between the Claimant and his patients is inconsistent with any suggestion that the Claimant was part of the company's business structure.
32. The Respondents further argue that the Claimant accepted when he was initially engaged by the company he was engaged as a self-employed contractor, and further the agreement was not changed in any material way (save for giving up the role of clinical lead, which it says was incidental), therefore he was contracting as a self employed contractor as was intended to be.
33. The Respondents' submissions rely on several features of the relationship which they say are consistent with genuine self-employment – namely that the Claimant chose his own working hours; he selected his annual UDA target; he provided certain equipment and materials; he bore financial risks (including liability for UDA shortfalls and for private treatment costs); and he had the ability through a genuine (though unused) substitution clause, to appoint a substitute if necessary. The Respondents argue that these demonstrate an arm's-length commercial relationship incompatible with worker status.
34. The Respondents argue that the Claimant was not in a subordinate or dependent position, rather they say that he operated at all times with autonomy reflective of an independent professional practitioner, setting his own working pattern and conducting his clinical activities without control or supervision from the Respondents or the company.
35. The Respondents maintain that the company was a client of the Claimant's independent dental practice and he marketed his professional expertise and services, and they argue that the company contracted for those services in a manner analogous to a traditional professional–client relationship (such as solicitor/client or consultant/client).
36. The Respondents submit that the Claimant's later insistence that he was not running a business on his own account is inconsistent with both the documentary evidence and his conduct during the relationship. Rather, the Respondents argue, the Claimant held himself out as an independent clinician, and was not integrated into the company's business.
37. In his oral submissions Mr Jenkins tells me that the Respondents have no answer to the vital question, if the Claimant is a business, what then is that business? Mr Jenkins also points out what he says is an inconsistency in the Respondents' arguments – if the Claimant was contracting direct with the patients as they alleged, then what service was it that he was providing to the company?
38. Mr Jenkins says the reality is that the company was a provider of dental services, the Claimant was a dentist who worked for them and it is akin to any business, for

example an accountant working for an accountancy firm – that accountant may provide services direct to clients but they are the firm's clients.

39. Mr Jenkins disagrees with Mr Butler's submissions and argues the Claimant was not paid directly by the clients, rather they paid the company and he says there is no evidence that there was an implied or an express contract between the Claimant and the clients as the Respondents suggest.
40. Mr Jenkins refers me to the Associate Agreement at clause 31(i) onwards which provides that even the private patient fees were paid to the company. I am further referred to the preamble to that Agreement which provides that it was the company had the General Dental Services contract with the NHS – the Claimant did not do so, rather he needed (and was dependant upon) the company for that and there was no evidence at all of any private contract(s) between the Claimant and others. Mr Jenkins refers to the private patients and agrees that many of them may have previously known the Claimant but that legally it made no difference to him – they were registered with the practice – not the Claimant.
41. Mr Jenkins tells me that the Respondents' submissions repeatedly refer to the Claimant as operating at arm's length and that he was independent, he therefore asks what then is that service he is providing to the company, and what business is it that the company was a client of?
42. Mr Jenkins addressed the Respondents' argument that the Claimant marketed himself as an independent dental practitioner and was well known with a dedicated following of patients, and that he had owned the practice and spent many years marketing and developing it. Mr Jenkins says there is no evidence the Claimant had been marketing himself, it was true that he had previously marketed the practice but he then sold it; the work is still of that practice; and patients are registered with the practice not the Claimant. Mr Jenkins tells me that there was no shift in marketing or patient registrations post sale of the practice to the company.
43. Whereas the Respondents had said that the company benefited from the Claimant's business acumen, knowledge, patient list, and following, Mr Jenkins asks the question in relation to what, and what then do they say is the Claimant's business?
44. The Respondents have argued that the Associate Agreement "may have mentioned" the company introducing NHS patients, the patients were already the Claimant's and entered into either implied or express contracts with him, and the Claimant agreed to provide care and in return the patients agreed to pay fees establishing an independent legal relationship. Mr Jenkins repeats that the company introduced the patients, they were legally patients of the practice, and the Claimant did not enter into any contracts express or implied with the patients, and he reminds me that the Respondents do not attempt to explain how these implied contracts are said to have come into existence.
45. Although the Respondents had argued that the Claimant was not reliant upon the company for the provision of dental services or access to patients, Mr Jenkins tells me, again, that the patients were registered at the practice, and it was largely irrelevant that these had been the Claimant's patients beforehand.
46. The Respondents had argued in their submissions that the Claimant was not in a subordinate or dependent position (akin to that of an employee), and functioned as an arms length, independent contractor. Mr Jenkins tells me this is incorrect, the company granted a licence and provided access to its staff, to its equipment, and to its premises.

47. Finally Mr Jenkins points out that the Respondents argue that the patients had entered into (express or implied) contracts with the Claimant on the one hand, however the Associate Agreement contains a number of restrictive covenants, including clause 45(a)(iii) which purports to limit the Claimant from soliciting patients of the company for a period of up to three years after the agreement ends. Mr Jenkins asks the question of how this sits alongside the Respondents' arguments that the patients were already in some form of implied or express contract with the Claimant, and how therefore could the company lay claim to the patients in such a case?
48. Finally Mr Jenkins refers me to the preamble of the Associate Agreement which confirms that the practice owner (the company) carries on the practice of dentistry at the premises, and wishes to introduce patients to the Associate (the Claimant) and to make available to him equipment and services in connection with the practice of dentistry at the premises, and that it is the company which will hold the General Dental Services Contract, and that the Claimant is recorded as a Performed engaged by the Practice Owner to provide services under that agreement and privately.
49. Mr McCracken replied briefly to restate that he adopts the submissions of Mr Butler who prepared them but who did not appear today, and that the reality was that the Claimant was self employed, he had set up the business running it for years and his reputation was known. As to the question repeatedly posed about what is the business, Mr McCracken tells me that the Claimant was the business, and it was just by his being, and being in existence, which was the service supplied. I took that to mean the Claimant's continued connection or association with the practice is what was being relied upon here.
50. I queried the references in the Respondents' submissions to the decisions in **Groom v Maritime and Coastguard Agency [2024] EAT 71**, and also **Johnson v Transopco UK Ltd [2022] ICR 691**. The reason for my question is that it was not immediately clear what the relevance was for the legal issue before me today. Mr McCracken confirmed that these were not being advanced. Whereas reference was also made to **MacAliden (training as Charm Offensive) v Lavaroz UKEAT/0453/13/JOJ**, it appeared to me that the same points had already been made by the Court of Appeal in **Williams**, already referred to above, to which Mr McCracken helpfully agreed with me.
51. I allowed Mr Jenkins to have the final word, and he told me that bringing a benefit is not the same as supplying services.

Conclusion and decision

52. I remind myself of the sole issue for determination today set out at the final sentence of paragraph 55 of the appeal decision of HHJ Auerbach of 28 February 2025 which is as follows:
- “The question of whether the Claimant was or was not a worker now turns entirely on what I have called the third limb of the statutory test, that is, whether the company was, by virtue of the contract between them, a client or customer of any profession or business undertaking carried on by the Claimant.”*
53. I adopt and rely upon the unchallenged findings of fact already made in these proceedings by Judge Ord which were not disturbed upon appeal. I draw my own conclusions as to the application of those facts to the legal issues in this case.
54. I will start with the question posed by Kay LJ in **Westwood**, raised a number of times confidently by Mr Jenkins in this hearing, if as the Respondents say the Claimant was in business on his own account, what then was that business? The

response from Mr McCracken for the Respondents, that the Claimant was “just by his being” or “being in existence” was not a persuasive one and did not resolve the question that I must grapple with.

55. Looking at the unchallenged facts, the Claimant did not set up a new business after April 2013 and there is no evidence that he marketed himself to the public, nor that he had other clients (or patients beyond those of the company). The Claimant continued to work at the same premises as before as an Associate under the Associate Agreement, but now under the company’s structure. That agreement provided the Claimant licence to use the premises, it provided him with equipment, staff and laboratory services, and it required the company to introduce sufficient NHS patients to him so that he could meet his annual UDA commitment. Contrary to the Respondents’ submissions, I am satisfied that the patients paid the company not the Claimant.
56. To answer the question therefore posed in **Westwood**, there was no business. In my determination, the Claimant was not providing dental services to the company as if it were a commercial customer of his, rather he performed dental work within the company’s business, utilising its infrastructure, its resources, its staff and serving its patients. On the issue of whose clients the patients were – it was clear from the restrictive covenant at clause 45(a)(iii) that these were the clients of the company, not the Claimant.
57. I will now examine the issue of integration into the company’s business. From the material before me it is clear that the Claimant worked exclusively at the practice; the Claimant utilised the premises, the equipment, the staff and infrastructure; the Claimant could be introduced to NHS premises by the company; the Claimant was subjected to the company’s policies and clinical governance; the Claimant attended staff meetings and up to July 2015 he acted as clinical lead; and the Claimant corresponded on internal operational matters such as staffing or rotas, equipment and also complaints.
58. Rather than operating at arm’s length, as the Respondents argue, I determine that the Claimant was fully integrated into the company’s business.
59. As regards the issue of control of the business environment, I recognise that the Claimant had a degree of flexibility in that he could select his preferred working day and the number of UDAs he wished to deliver, although this was subject to the formula for compensating the company if there was a shortfall in the number of UDAs he carried out, and this in turn created some level of financial risk to the Claimant.
60. However, I further recognise that it was the company which provided the patient list; the company controlled fees and billing; and the company controlled the facilities and staffing. In addition the company also set clinical governance expectations and it also imposed policies and procedures which applied to staff, including the Claimant. It was clear to me that the Claimant was dependent upon the company holding that GDS contract. It appears to me, taking all these factors into account, and having weighed up the Claimant’s limited autonomy, that the Claimant was deeply integrated into the company’s business and that he was dependent upon that business and its infrastructure.
61. I do not find that the Claimant’s previous ownership of the practice has any particular relevance to the decision I am required to make today. I am also not minded that the Claimant’s limited autonomy was sufficient to preclude him from being a worker. Likewise the limited amount of financial risk to the Claimant was also, either in isolation or in conjunction with the autonomy, not sufficient in my view to preclude worker status.

62. The Respondents have referred to the ability to send a substitute under the Associate Agreement. As per **James** I am required to consider whether the dominant feature of the contract was the obligation to personally perform the work (which will indicate worker status), or whether the dominant feature is a particular outcome or objective, and the obligation to provide personal service is incidental or secondary. I note that the Employment Appeal Tribunal has already determined that the requirement for personal service has been met in this case. It therefore follows that I find that the dominant purpose here was for the Claimant to provide personal service to the patients.
63. I have taken a holistic view of the reality of the relationship, and I am persuaded that given the Claimant was deeply integrated into the business; he was not in business with the company on his own account; he was dependent upon the company; the Claimant was required to provide personal service; and there was a significant amount of control over him by the company.
64. In answer to the question that I am to resolve today, I find that the company was not a client or customer of any profession or business undertaking carried on by the Claimant. Accordingly, I find that the Claimant was a worker.
65. The matter will proceed to a final hearing already listed for 26, 27, 28, 29 and 30 April 2027. Whereas Mr Jenkins has invited me to issue case management directions without the need for a further preliminary hearing, I am minded that a two hour private preliminary for case management by video is required. I shall so direct a hearing to be listed at the earliest opportunity.
66. I thank Mr Jenkins, Mr McCracken, and Mr Butler for their assistance.

Approved by:

**Employment Judge Graham
4 February 2026**

JUDGMENT SENT TO THE PARTIES
ON 5 February 2026

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/