



EMPLOYMENT TRIBUNALS

Claimant: Miss D Martin
Respondent: Mr P Carroll t/a Cripps Dental Centre
Heard at: Nottingham (via CVP)
On: 15 November 2021
Before: Employment Judge Smith (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr P Keith of Counsel

JUDGMENT

1. The Claimant was not a “worker” of the Respondent within the definition of section 230(3) of the Employment Rights Act 1996.
2. The Claimant was not an “employee” of the Respondent within the definition of section 83 of the Equality Act 2010.
3. Accordingly, the Claimant’s claims are all dismissed.

REASONS

1. An oral judgment and reasons was delivered to the parties at the conclusion of this preliminary hearing (PH). Pursuant to **r.62(3)** of the **Employment Tribunals Rules of Procedure 2013** the Claimant exercised her right to request written reasons and these fuller written reasons are handed down in compliance with that request.

Introduction

2. By way of an ET1 claim form received by the Tribunal on 20 October 2020 the Claimant presented certain claims to the Employment Tribunal. These were later clarified at a preliminary hearing (PH) before Employment Judge Heap on 15 July 2021. The Claimant's claims were of whistleblowing detriment (**s.47B Employment Rights Act 1996**), discrimination because of religion or belief (**s.13 Equality Act 2010**) and harassment relating to religion or belief (**s.26 Equality Act 2010**). It was also recorded that the Claimant wished to amend her claim form to include further complaints, such as perceived disability discrimination.
3. The Respondent defended all of the claims, both substantively and on the basis that the Claimant was neither a "worker" for **s.230(3) Employment Rights Act 1996** purposes nor an "employee" for **s.83 Equality Act 2010** purposes, and that as a result she had no standing to bring any of her claims. Whilst the statutory provisions carry different wordings, the recent Supreme Court case of **Pimlico Plumbers Ltd v Smith [2018] IRLR 872** made it clear that there is a conceptual overlap between the two of such completeness that it is a "*distinction without a difference*" (per Lord Wilson, at paragraph 14).
4. On that occasion it was recognised that the first issue that ought to be decided in the case was whether the Claimant was a **s.230(3)** "worker" and a **s.83** "employee". Whilst Employment Judge Heap listed the present PH to consider other issues, it would only be necessary to do so if the Claimant proved that she did indeed come within the ambit of those definitions. At the outset of the PH the parties agreed that I should determine the "worker"/"employee" point before considering any of those other matters, and the PH proceeded on that basis.
5. I was presented with a bundle of documents amounting to 263 pages and was taken to some of those documents during the oral evidence. I heard live evidence from the Claimant on her own behalf, and from the Respondent on his own behalf. I also heard live evidence from Dr Anthony Olowo-Ofayoku on behalf of the Respondent.

The law

6. **Section 230(3)(b)** of the **Employment Rights Act 1996** provides the definition of persons known as limb (b) "workers". Limb (a) "workers" are those who worked under a contract of employment, but that is not contended for in this case. A person is a limb (b) "worker" if they are:

"an individual 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..."

7. For the purposes of whistleblowing claims, **s.43K** of the **1996 Act** extends the definition of "worker" beyond the boundaries of **s.230(3)(b)** by making provision

for certain other categories of person, but none of those are contended for in this case.

8. In **Uber BV & ors v Aslam & ors [2021] ICR 657** the Supreme Court held that the determination of “worker” status is a question of statutory interpretation, not contractual interpretation.
9. **Section 83(2)(a)** of the **Equality Act 2010** does not distinguish between “employees” and “workers” but instead uses its own concept of “employee” for the purposes of the discrimination legislation, defined as “*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work ...*”. As the Supreme Court noted in **Pimlico Plumbers** (cited above), the concepts of **Employment Rights Act** “worker” and **Equality Act** “employee” overlap to the point where the statutory definitions are a “*distinction without a difference*”. In **Secretary of State for Justice v Windle [2016] IRLR 628** the Court of Appeal made it clear that the concepts are on all fours with each other and should be interpreted in the same way.
10. In this case the Claimant makes two contentions which, she says, brings her former role within these two statutory provisions and entitle her to protection as a whistleblower and from unlawful discrimination. Her first contention is that there was an obligation for her to provide personal service to the Respondent. Personal service is an essential component of both **s.230(3)(b)** and **s.83(2)(a)**, as set out above. When **Pimlico Plumbers** reached the Court of Appeal (**[2017] IRLR 323**) the Master of the Rolls (at paragraph 84) summarised the relevant principles relating to personal service and the effect of clauses permitting the use of substitutes (“substitution clauses”). That summary was not interfered with by the Supreme Court when it heard the subsequent appeal, and it is reproduced thus:

“In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.”

11. An Employment Tribunal may conclude that substitution clause does not reflect the reality of the working relationship, and disregard it (**Autoclenz Ltd v Belcher and ors 2011 ICR 1157**, Supreme Court). In **Community Dental Services Ltd v Sultan-Darmon [2010] IRLR 1024** the Employment Appeal Tribunal considered an appeal on “worker” status in the specific context of the dental profession and overturned an Employment Tribunal judgment that Dr Sultan-Darmon was a “worker”. As is apparent from the report of that appeal, the clause in Dr Sultan-Darmon’s contract with Community Dental Services Ltd included the following clause:

“In the event of your failure (through ill health, maternity leave or other causes excluding up to 30 days’ annual holiday allowance) to utilise the facilities for a continuous period of more than five days you shall make arrangements for the use of the facilities by a locum tenens acceptable to [the company] and in the event of your failure to make such arrangements [the company] shall have authority to appoint a locum tenens if possible to act on your behalf who should be your servant or agent and shall be paid by you.”

12. The EAT’s conclusion in **Sultan-Darmon** was that this clause amounted to an unfettered right to substitute which defeated the Claimant’s contention that there was an obligation upon him to provide personal service, and in turn defeated his claim to “worker” status.
13. The Claimant’s second contention is that she was subject to a degree of control by the Respondent to the extent that she qualifies as a **s.230(3)** “worker” and a **s.83(2)** “employee”. Her point is that the Respondent has such control over her activities that the relationship was one of her providing personal service to him, in the sense envisaged in **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181** (Court of Appeal).

Findings and analysis

14. The Claimant is a dentist. She was engaged with the Respondent from some time in 2010.
15. She had previously been engaged at another practice, Heanor Dental Care, and on 1 August 2008 she signed an associateship agreement with that practice. This agreement, she accepted, was on standard British Dental Association (BDA) terms and she agreed that during this time she was truly self-employed.
16. Upon her commencement with the Respondent in 2010 she in fact never signed a copy of an associateship agreement but she agreed that it was to the terms of the Respondent’s associateship agreement that she was working. The associateship agreement with Heanor contained materially identical provisions to those set out in the contract with the Respondent, in terms of the parts I was directed to during the course of the PH.

17. Amongst those clauses were clause 29 of the Heanor agreement, which materially corresponded with clause 36 in the Respondent's terms. I reproduce that clause as follows:

Locums

In the event of the Associate's failure (through ill health or other cause) to utilise the facilities for a continuous period of more than 14 days the Associate shall use his best endeavours to make arrangements for the use of the facilities by a locum tenens, such locum tenens being acceptable to the PCO and the Practice Owner to provide dental services as a Performer at the Premises, and in the event of the failure by the Associate to make such arrangements the Practice Owner shall have authority to find a locum tenens on behalf of the Associate and to be paid for by the Associate. The Practice Owner and Associate will agree the method of payment of the locum tenens. The Practice Owner will notify the PCO that the locum tenens is acting as a Performer at the Premises. The Associate will be responsible for obtaining and checking references and the registration status of the locum and ensuring that the locum is entered into the Performers List of a Primary Care Trust in England. The Associate will confirm to the Practice Owner that the requirements of the immediately preceding sentence have been carried out and will provide the Practice Owner with such relevant information as he/she may reasonably require.

18. It was not suggested by the Claimant that the terms of any such agreement (i.e. the Heanor agreement or the Respondent's terms) were a sham or not reflective of the parties' true intentions (as per **Autoclenz** and **Sultan-Darmon**), nor did either party suggest that the Respondent was a client or customer of the Claimant. I therefore accepted that the terms did accurately reflect the true nature of the relationship between the parties in relation to the Claimant's power of substitution.
19. In my judgment, as in **Sultan-Darmon**, those clauses afforded the Claimant a very wide right of substitution and one she could exercise if she wished. I rejected her argument that the Respondent's refusal to permit her to substitute herself with a Dental Therapist or a Hygienist was suggestive of a right fettered by the Respondent, even though it was an agreed fact that she had at a particular stage suggested that. In neither situation would that have amounted to a true substitution – like for like – at all, because Dental Therapists (as qualified as they are) cannot perform adult extractions or root canal treatment. The Claimant's best estimate was that 80% of a dentist's work could be done by a Dental Therapist, but in my judgment, an 80% substitute is not a substitute at all.
20. As **Pimlico Plumbers** and the authorities I have cited above all emphasised that the requirement for personal service is critical to the question of whether the threshold of "worker" or **Equality Act** "employee" status is crossed. In my judgment, in this case it is not crossed because the agreed clause was an accurate reflection of the parties' agreement and such a clause is inconsistent with there being the necessary feature of personal service.

21. I then turn to the Claimant's second contention, that of control. Whilst I accepted that in general the Claimant's working time followed the Respondent's practice's opening hours and that she would have, as she said, to greet clients in line with the Respondent's expectations, in this case her activities were not under a high degree of control by the Respondent.
22. In terms of carrying out her daily tasks, the Claimant was not under the supervision or control of anybody but herself. Reference was made in evidence to Botox treatments the Claimant performed outside her general dentistry-related activities. She agreed to do those treatments and was not compelled. Subsequently, she decided she didn't like performing Botox treatments and decided not to do them anymore. She faced no objection.
23. As to the performance of dentistry, it was agreed that the Claimant had full rein within the bounds of her professional obligations to treat patients in whichever way she saw fit. She was not under the Respondent's control at all. NHS dental work is remunerated according to the amount of units of dental activity (UDAs) carried out. At least as of 2015 the Claimant agreed that she could do either more or fewer UDAs per year by agreement, and it was not suggested that this was controversial or ever changed subsequently.
24. The Claimant agreed that in 2018 she cut down her working hours and that doing so was entirely a matter for her and not the Respondent. She did concede in evidence that she could decide how many days a week she would work, having negotiated the amount of UDAs she was prepared to perform. That matter, she agreed, was not the Respondent's concern.
25. Other factual matters, which the Claimant agreed, also militated away from the degree of control necessary to demonstrate the essential presence of personal service:
 - 25.1 The Claimant was paid for work done rather than paid by the hour, and she was not paid overtime;
 - 25.2 In relation to private patients, the Claimant could decline private patients if she wished. Equally, she had full power to waive the fee on private patients if she wanted to; and,
 - 25.3 Whilst the Claimant's uniform was sourced through the Respondent, the cost of it was billed to her and the uniform itself was plain and unbranded.
26. The Claimant contended that the fact she was a vocational trainer for newly-qualified dentists meant she acquired "worker"/Equality Act "employee" status. I do not agree. It was not suggested that this made her subject to any greater degree of control by the Respondent, or that it modified the contractual situation. I accepted that being a vocational trainer is a serious responsibility and one that brought with it additional commitments, but in my judgment those commitments were to principally the dentist in training. That duty was one for which the Claimant and the Respondent were independently accountable to the local

deanery as the organiser of the training. It did not import personal service into the relationship between the Claimant and the Respondent.

27. The Claimant invited me to draw a parallel between the Respondent's holding of a General Dental Services (GDS) contract and the concept of the "overarching contract" found to be present in cases such as **Pimlico Plumbers**. Ultimately I agreed that the Claimant's reference to the GDS contract between the Respondent and the NHS is, as Mr Keith described, a red herring. That contract was between the Respondent and the NHS; the Claimant was not a party to it. That is an altogether different situation to cases like **Pimlico Plumbers** where the workers had the overarching contract with that company. The fact that the Respondent contracts to provide NHS services said nothing about how the land lay in terms of the relationship between the Claimant and the Respondent.
28. In reality, the Claimant was in business for herself. Through paying a segment of her earned fees into the Respondent's practice, she obtained in return access to the practice's list of patients. It was a *quid pro quo*. She accepted that she had negotiated the percentage she would have to pay to the Respondent down to 50% from 55%. That ability to successfully negotiate on such an important matter suggested to me that there was a much greater degree of equality in bargaining power than typically exists in "worker" relationships. In addition, the Claimant maintained her own accounts through her engagement of an accountant, and reported her income to HM Revenue and Customs.
29. In my judgment, the evidence did not support the contention that the Respondent had a sufficient degree of control over the Claimant so that there was a minimum requirement for personal service making her a "worker" within the meaning of **s.230(3)(b)** of the **Employment Rights Act 1996** or an "employee" within the meaning of **s.83(2)** of the **Equality Act 2010**.

Conclusion

30. It follows that the Employment Tribunal has no jurisdiction to consider any of the Claimant's claims, and necessarily they are dismissed.
31. The claims having failed at the first hurdle, it further follows that it is not necessary for me to go on to consider any of the other issues this PH was listed to determine.

Employment Judge Smith

Date: 7 December 2021

Sent to the parties on:

10 December 2021

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For the Tribunal:

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