THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

MS NEILUFAR ABIZADEH

Claimant

AND

PERFECT SMILE SURGERY LIMITED (1)
CHIRAG PATEL (2)
ELIZABETH HOLLAMBY (3)

Respondents

ON: **25 July 2018**

Appearances:

For the Claimant: Andrew Smith, Counsel
For the Respondent: Richard Hignett, Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The claims of sex discrimination and pregnancy or maternity discrimination are dismissed for want of jurisdiction as the claimant was not in employment for the purposes of section 83(2) of the Equality Act 2010.

REASONS

1. This was a preliminary hearing to determine whether the Tribunal had jurisdiction to hear the claimant's pregnancy or maternity discrimination and sex discrimination complaints against the respondents by virtue of her employment status.

2. The claimant did not in fact commence employment and so pursues her discrimination claim relying on the provisions relating to applicants for employment under section 39(1) Equality Act 2010 (EqA). For practical purposes, it was agreed that the matter would be approached based on what the status of the relationship would have been had she been engaged. In deciding that issue, my starting point is the contractual documentation between the parties and whether, in all the circumstances, it reflected the reality of the relationship, as it would have been, had it progressed.

3. I heard evidence from the claimant on her own account. On behalf of the respondents, I heard from Charig Patel, owner and director of the first respondent (hereinafter called the respondent). I was provided with a joint bundle of documents and the references in square brackets in the judgment are to pages within the bundle.

The Issues

4. The issues to be determined are:

    i. Whether the claimant would have been engaged by the respondent under a contract of employment or

    ii. Whether the claimant would have been engaged by the respondent under a contract personally to do work.

The Law

5. Section 83(2)(a) EqA defines employment as employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

Findings of Fact

6. The respondent is one of a number of companies within the "Perfect Smile" brand, providing dental and orthodontic treatment to NHS and private patients across a network of 30 surgeries in London, Newcastle, Portsmouth and Wigan.

7. The claimant is a qualified dentist and specialist orthodontist.

8. On 27 March 2017, the claimant was interviewed by the respondent for the position of Specialist Orthodontist for its clinic in Putney, London. On 30 March, the claimant accepted the respondent's offer of the position, subject to agreeing terms.

9. There then followed protracted contract negotiations in April, May and June, which revolved around the terms of a draft Associate Agreement (the "Contract") provided to the claimant by the respondent. This was a template document which the respondent

adapted for its dentists. During the negotiations, the claimant had access to advice from the British Orthodontic Society. Although she only sought their advice on the payment terms, she conceded that she could have taken advice on other aspects of the Contract.

10. On 27 June 2017, the contract negotiations came to an end when the respondent withdrew the job offer. The claimant contends that it did so because of her pregnancy, though that was not a matter for me to decide at this hearing.

11. Although the Contract was not signed, both parties agree that it formed the basis of the proposed relationship between them. The version in the bundle incorporates most, if not all, of the changes made during the negotiations.

The Contract

12. Below are some of the key terms of the Contract:

13. Clause 2.1 grants the claimant (described as the Associate) a licence to provide specialist orthodontist treatments to the NHS and private patients of the respondent's practice. The claimant had to pay for the licence in respect of both types of work.

14. Under the contract the claimant would be paid a flat rate of £9,000 per month based on her completing a certain number of units of orthodontic activity (UOAs) on NHS patients. In addition, the claimant would receive 50% of income earned from private patients after the deduction of laboratory bills, which she was responsible for. Although the majority of the respondent's patients were NHS, the claimant's intention once on board was to build up the private patient business through referrals and by paying for her own digital marketing. [125]

15. The claimant was not entitled to any holiday pay under the agreement and she confirmed in evidence that this was consistent with other practices she had worked at.

16. Clause 4.3 of the Contract provides that the respondent shall not place any restrictions on the patients the claimant may advise or treat, or the types of treatment she may provide ….

17. Clause 14.1 provides:

"*It is the intention of both parties that the Associate shall for all purposes be self employed and independent under this agreement. The Associate shall perform his services on his own account and for the avoidance of doubt does not provide any services or work to the provider (the respondent). Nothing contained in this agreement shall create any relationship of employer and employee and/or worker or partnership between the parties. The terms set out in schedule 7 shall apply to this agreement*".

18. Schedule 7 is headed: "Self Employed Status" and contains 14 sub-clauses, which the respondent principally relies on in asserting that the claimant was not engaged under a contract of employment or contract personally to do work. The claimant told the tribunal that she was not concerned with the issue of status as she understood that she was self

employed purely for tax purposes. However, only 2 of the sub-clauses deal with tax and national insurance. They are cl 1.1 and 1.3, which require the claimant to be responsible for her own tax and national insurance and to indemnify the respondent against such tax and NI liability. It should therefore have been obvious to the claimant that the provisions in the contract relating to her status were about more than the treatment of tax and NI.

19. Sch 7 para 1.4 allowed the claimant to work at other practices during the course of the agreement. This is something that the claimant would most likely have taken advantage of as it was agreed during the negotiations that she would be free to work in her husband's dental practice. [128].

20. Sch 7, para 1.5 gave the claimant complete clinical freedom and responsibility for all treatment provided by her under the Contract. She would therefore have had full control on how these were delivered and sole responsibility for designing the treatment package. This was something that she insisted upon in the negotiations, as her email to the respondent of 29 March 17' confirms where she states: "*But also as discussed, I would need to have full control and flexibility on how I deliver these UOA's*". [125] The claimant's clinical freedom included the ability to decide whether or not to treat a patient, subject to any duty of care owed under GDC (General Dental Council) rules/codes of practice. There were no set hours that the claimant had to work. It was also agreed that she would have flexibility to decide the amount of non-clinical days and whether she wanted to work extra long hours in some weeks and shorter hours/days in other weeks. The only stipulation from the respondent was that she met the agreed UOA's. [128] The claimant would also have determined the price of any private treatment (the price of the NHS work was prescribed) though any minimum charge would take into account the "From" prices on the respondent's website and also cl. 19.8 of the Contract, which required the claimant to make a proper charge for treatment unless discounted or free treatment had been agreed with the respondent in advance.

21. The claimant would have had use of the respondent's equipment when working at the practice. This would have included a dental chair, all necessary surgical instruments, bonding and impression materials, trays and cameras etc. However, the claimant was liable to indemnify the respondent against the cost of repair or replacement of any equipment occasioned by her negligence or wilful neglect – Sch 2, para 6 [56].

22. The claimant was also liable to meet the cost of any failed or defective treatments she provided to patients and to indemnify the respondent against the same. The claimant would remain liable to pay the respondent its share of any fee for private treatment carried out which the patient failed to pay for. The claimant would also have been required to meet any payments, costs, compensation or other sums incurred by the practice in settling patient complaints, where the claimant, or her insurers, had failed to resolve the matter. [65]

23. The claimant was required to hold her own professional indemnity insurance to cover the above liabilities.

24. The provision considered to be significant by the respondent is at sch 7 para1.10. That entitles the claimant to at any time appoint a locum reasonably acceptable to the respondent to carry out all or any of her obligations under the agreement [64]. In addition to this, there was a separate provision requiring the claimant to appoint a locum in circumstances where there had been failure to make use of the respondent's facilities for a prolonged period (clause 7.1) [49]. Any locum appointed was to be treated as the servant or agent of the claimant, who would be liable for their costs and for ensuring that they provided the service in accordance with the agreement.

25. It was the claimant's intention, had she joined the respondent, to engage a therapist to undertake part of her role and she had been actively seeking a suitable candidate. A therapist is not as specialised as an orthodontist and would not have been able to prescribe treatments or decide on a treatment plan. However, the claimant's evidence was that the therapist would have undertaken various stages of treatment. It was also her evidence that she would have interviewed any prospective therapist to ensure that they were right for her. The contract did not envisage the appointment of a therapist and it was the respondent's case that the appointment would have come within the substitution provisions.

Integration

26. The claimant contended that she would have been fully integrated as part of the respondent's workforce. She argued that it was common practice to require orthodontists and dentists to wear a uniform with the practices' branding. However, the respondent's evidence was that branded uniforms were only provided to reception staff and nurses and that dentists provided their own uniform. The claimant was unable to effectively challenge that evidence as by her own testimony, she was unsure whether the respondent had a branded uniform. I therefore accept the respondent's evidence on this. The claimant also claimed that she would have expected the respondent to provide her with branded business cards with her name and job title. However, that expectation was contrary to the direct evidence of the respondent, which was that they do not provide business cards, just appointment cards. I accept that evidence also.

27. The claimant further contended that had she commenced in the role, her name and job title would have appeared in the respondent's marketing and on the "Meet the Team" page of its website. She saw this as indicative of integration. The respondent told the tribunal that it was under a legal obligation to list all its dentists on its website. The claimant was unable to effectively challenge this, stating that she was unaware of the requirement. In any event, the respondent's case was that all its 200 dentists worked on a freelance basis, including its former orthodontist, Dr MM Pacha, whose appearance on the respondent's webpage the claimant relied on in support of her integration argument.

Submissions

28. Both parties provided written submissions which they spoke to. I do not propose to set these out the submission here but have taken them into account and the authorities referred to.

Conclusions

29. Having considered the evidence, the submissions and the relevant law, I have come to the following conclusions on the issues:

Would the claimant have been engaged under a contract of employment

30. The first point I make is about the contractual documentation, specifically, the Contract. Although based on a template which the respondent had adapted, it was not presented to the claimant on a "take it or leave it" basis; there was a lengthy period of negotiation during which the claimant was able to secure a number of significant changes to its terms. She also had access to advice from the British Orthodontic Society but only sought advice on the payment terms, suggesting that she was more than able to deal with the other aspects of the contract on her own. The claimant is a highly skilled professional and I am satisfied, firstly, that there was equality of bargaining power between her and the respondent and; secondly, that she understood the significance of the terms she was agreeing. That is important as one of the things I have to consider is whether the contract reflected the true intentions of the parties and I am satisfied that it did.

31. The claimant sought to argue that the Contract was not reflective of the reality of the relationship between the parties, or in this case, the relationship as it would have been. However, in the absence of an actual relationship, the claimant's evidence on this was based on her understanding of how things were done in the industry rather than on any knowledge of how things operated at the respondent's practice. Even the claimant's evidence on industry practice was not of particular assistance to her. For example, she agreed in evidence that non-payment of holiday pay under the Contract was consistent with terms under which she had worked in other practices, which belied her suggestion that dental professionals were normally had worker status. The respondent was best placed to give evidence on its normal working practices and there was nothing in its evidence to suggest that the Contract was a sham or did not reflect the reality of its operation.

32. In considering whether or not the contract was one of service, the factors I have taken into account include, but are not limited to, the following:

33. The clear intention of the parties was that the claimant would be self-employed and it was clear from her evidence that she recognised the tax advantages that this would have afforded her as she made the point (wrongly in my view) that her self-employed status was for tax purposes only.

34. Based on my findings at paragraph 20 above, I am satisfied that the degree of flexibility that the contract afforded the claimant meant that the respondent had limited control over the claimant. Although the patients were and would have remained, at all times, those of the respondent and it would have managed that relationship administratively, that does not, in my view, amount to control of the claimant, who would have had the ultimate say over what she did, when she did it and how she did it.

35. The claimant was free to work for others during the currency of the contract without restriction and with the respondent having no primary or preferential call on her time.

36. The claimant had to indemnify the respondent against risks that, in an employer/employee relationship would ordinarily be covered under an employer's compulsory liability insurance. See paragraphs 21-23 above.

37. Fundamental to a contract of service is the requirement for personal service and a factor that may affect this is the ability to substitute performance to another. There has been much caselaw on the extent and nature of substitution necessary to negate personal service and this was recently addressed by both the Court of Appeal and Supreme Court in Pimlico Plumbers Ltd & Ors v Smith [2018]UKSC 29. In the Court of Appeal, Sir Terence Etherton MR identified a number of scenarios in which substitution might apply and from those he extrapolated the following:

    i. An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

    ii. A conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality

    iii. 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

    iv. A right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work will, subject to any exceptional circumstances, be inconsistent with personal performance

    v. 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

38. The above examples, although not intended to be a finite list of circumstances, provide useful guidance in assessing the requirement for personal service when viewed against the substitution clause in the Contract.

39. To recap, the substitution clause in the Contract provides that the Associate: "*be entitled at any time to appoint a locum reasonably acceptable to the Provider to carry out any or all of his obligations under this agreement*". Applying the examples at i-v. above, this does not fall within i) as it is not an unfettered right. Neither does it fall within iii) as the clause is not limited to periods when the claimant is unable to give personal performance and in any event,that scenario is covered separately in the Contract at clause 7.1 [49]. I do not consider that v) applies either as the requirement that the substitute be "*reasonably acceptable*" to the respondent introduces a degree of objectivity inconsistent with an absolute and unqualified discretion. That leaves ii and iv, which overlap to a certain extent.

40. Given the specialist nature of the claimant's role and the regulatory environment in which it is carried out, it goes without saying that the respondent would require any substitute to be qualified and competent to perform the substituted functions. That would be the case regardless of the status of the claimant. At paragraph 29 of her statement, the claimant says that in her experience, dental practices will always have to agree that a locum is able to step in before they are appointed. That is not inconsistent with the requirement in the Contract that the locum be reasonably acceptable to the respondent. On that, the respondent's evidence was that it would generally rely on the recommendation and expertise of the orthodontist as to the suitability of the substitute. I accept that evidence as there was nothing I heard to suggest that other factors would have come into play. The claimant further contended that the cost of any locum would normally be borne by the practice. However, there was no evidence to suggest that a uniform approach is adopted or mandated across the industry and the terms of the substitution clause, which she agreed, provide otherwise.

41. As stated in my findings, from the outset it was the intention of the claimant to engage a therapist to undertake aspects of her role. It was submitted by counsel for the claimant that the idea that she could have substituted her work to a therapist was not sustainable. However, that assumes that the whole of her role was to be substituted when in fact the evidence was that the therapist would have carried out various stages of treatments. It was also submitted for the claimant that the therapist would have been an assistant and that this was not the same as substitution. I disagree with that characterisation of the therapist's role. The therapist would have performed the work instead of the claimant rather than with her, in some instances when the claimant was not there. That is supported by the claimant's evidence that the therapist would have been paid out of her wages. I am satisfied that the therapist would have been a substitute rather than a mere assistant.

42. It was suggested on behalf of the claimant that as the respondent was being recruited for her specialism, personal performance was a key component of the relationship and substitution would have been exceptional. The wording of the substitution clause does not limit it to occasional use or periods of time. Even if it were used exceptionally, that would not reduce its validity.

43. Taking all the above matters into account, I find that the substitution clause was not a sham and that its terms were inconsistent with a requirement for personal service. I therefore find that there was no requirement for personal service under the Contract.

44. If I am wrong about personal service, I find, in any event, that the claimant would not have been employed under a contract of service as overall, the terms of the Contract, in particular, those highlighted above, are inconsistent with a contract of service.

Was the claimant employed under a contract personally to do work

45. The case of Halawi v WDFG UK Ltd [2015] IRLR 50 makes clear that employment under the EqA must be interpreted in accordance with Article 141(1) EC. Under Article 141(1), a person will be in employment if they work under a contract personally to do work and

are subordinate to the putative employer. Applying that to this case, my findings on personal performance, above, are equally applicable here. Again, if I am wrong about personal performance, I have also found above that the claimant had complete freedom on how she carried out her role and on that basis, I find that she was not insubordinate to the respondent. I therefore find that the criteria under Art 141(1) have not been met and that the claimant was not employed under a contract personally to do work.

46. The claimant does not therefore satisfy the provisions of section 83(2) EqA as to employment and it follows that she does not have the right to bring a discrimination complaint.

Judgment

47. The claims of sex discrimination and pregnancy or maternity discrimination are dismissed for want of jurisdiction.

Employment Judge Balogun
Date: 17 October 2018