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Filling in the cavities in workplace protection

Sejpal v Rodericks Dental Ltd ♦ [2022] EAT 91; June 16, 2022

Implications for practitioners

This judgment is likely to have wide implications within the dental profession. According to the most recent January 2022 figures from the General Dental Council,[1] there are 42,215 registered UK dentists. For those not already regarded as workers, which is likely to be the vast majority following previous authority on the worker status of dentists (*Community Dental Centres Ltd v Sultan-Darmon* [2010] IRLR 1024 (EAT)), this judgment will have a significant impact on their workplace protections. Furthermore, the EAT's approach to substitution clauses is likely to be felt far beyond the dental profession.

1 https://www.gdc-uk.org/news-blogs/news/detail/2022/01/17/total-number-of-registered-uk-dentists-remains-stable-following-renewal

In *Sejpal* the EAT held that a dental associate engaged by Rodericks Dental Ltd (RDL) provided personal service to the company. The case has been remitted to a fresh tribunal to determine whether RDL was a client or customer of the claimant by virtue of the contract between them. If not, the associate will be held to be an worker within the meaning of s83(2)(a) of the Equality Act 2010 (EA) and, by implication, the Employment Rights Act 1996 (ERA).

Facts

Ms N Sejpal (NS) is a dentist who began working as an 'associate' for RDL from August 2009. NS moved to RDL's Kensington practice in 2010. Her contract contained a clause later asserted by RDL as constituting a substitution clause drafted in terms which are typical across the profession:

> *In the event of the Associate's failure (through ill health maternity paternity 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 Primary Care Trust and the Company to provide Personal Dental Services Plus/Personal Dental Services as a Performer at the practice, and in the event of the failure by the Associate to make such arrangements the Company shall have authority to engage a locum tenens on behalf of the Associate and to be paid for by the Associate. The Company and Associate will agree the method of payment of the locum tenens. The Company will notify the PCT that the locum tenens is acting as a Performer at the Practice. 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 and will confirm to the Company that these requirements have been carried out, The Associate will provide the Company with such relevant information as he may reasonably require.*

Clauses of a similar nature have been found at first instance and by the EAT in *Sultan-Darmon* as excluding the personal service requirement necessary to establish worker status.

NS began a period of maternity leave in December 2018. RDL closed the Kensington practice on December 31, 2018.

NS claimed that others were redeployed to other locations, whereas her contract was terminated. She brought claims for pregnancy or maternity discrimination (sex discrimination was also referred to), unfair dismissal, and a redundancy payment in April 2019. Claims relying on employee status were ultimately withdrawn which left

♦ [2022] IRLR 752

the employment tribunal with the question of determining whether NS was 'employed' under s83(2)(a) EA, meaning *'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'*.

It is well-established that s83(2)(a) EA has the same scope as s230(3)(b) ERA:

> *(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.*

Employment Tribunal

The ET held that NS was not a 'worker' within the meaning of s230(3)(b) ERA, nor an 'employee' pursuant to s83(2)(a) EA as she was not employed under a contract personally to do work. The ET concluded that the necessary mutuality of obligation, per Underhill LJ in *Windle and another v Secretary of State for Justice* [2016] EWCA Civ 459, was missing. The ET also gave significant weight to the substitution clause written into NS's associateship contract referring to the contract itself as *'the heart of this case'*.

The ET considered that the contract did not constitute a sham in the contract law sense, holding that there was no evidence to support NS's contention that the terminology did not reflect the reality of her situation. It found that there was no evidence of misrepresentation, nor was there evidence that NS had lacked the capacity to understand the contract she was entering into, and there was no inequality of bargaining power. Consequently the ET determined that NS could not pursue her discrimination complaints.

The SC decision in *Uber* had not been handed down at the time of the ET decision.

Employment Appeal Tribunal

A number of grounds of appeal were advanced. The EAT began its analysis of the relevant law by establishing that a holistic approach must be taken in determining the question of worker status, emphasising that *'the statutory test must be applied, according to its purpose'* [para7]. The relevant tests are set out as follows in paras 10-12:

> *10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA:*
> *a) A must have entered into or work under a* ***contract*** *(or possibly, in limited circumstances briefly discussed below, some similar agreement) with B; and*
> *b) A must have agreed to* ***personally perform some work or services for B***
>
> *11. However, A is excluded from being a worker if:*
> *a) A carries on a* ***profession or business undertaking; and***
> *b) B is a* ***client or customer of A's*** *by virtue of the contract*
>
> *12. Section 83(2)* ***Equality Act 2010*** *… provides:*
> *(2) 'Employment' means -*
> *a) employment under a* ***contract of employment****, a contract of apprenticeship* ***or a contract personally to do work****; [emphasis added]*

'Some' work or services requirement

The EAT placed specific emphasis on the requirement for NS to perform some work or services for RDL per s230(3)(b) ERA. Whilst the EAT simply applied the statute as written, the added emphasis is important, suggesting that it should be sufficient that the individual has agreed to perform some work personally, even if the right to engage a substitute has been utilised on other occasions. This finding is in line with the SC's finding that Uber drivers were able to turn down some work, and that this was not incompatible with the 'irreducible minimum' standard required for employee or worker status in *Uber BV v Aslam* [2021] UKSC 5.

The EAT cited *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 in concluding that the concept of the irreducible minimum did not assist in considering the position of NS, that is a person working under a single engagement [paras 25-26].

In *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 Lord Wilson sought to clarify the circumstances in which a substitution clause would or would not be compatible with personal service:

> *The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.* [para 31]

... sufficient that the individual has agreed to perform some work personally, even if the right to engage a substitute has been utilised on other occasions.

Here, the EAT picked up the baton from *Uber*:

> *… post Uber, and the focus on statutory interpretation that is now expressly required, that there could be a situation in which despite there being a contractual term that provides an unfettered right of substitution, the reality is that the predominant purpose of the agreement is personal service, so that the person is a worker. It might even be argued that personal service need not be the predominant purpose of the agreement, provided that the true agreement is for the provision of "any" personal service as required by the statute.* [para 32]

Whilst the EAT stated that it was not necessary to fully determine the issue, it provided a clear indication of its preliminary conclusions:

> *Just as the concept of irreducible minimum mutuality of obligation has little to offer to the analysis of the situation when a person is working during one of a number of periodic engagements, it is hard to see what it has to offer while a person is working pursuant to a contract, even if substitution would be permissible, with the result that there could be other periods during which the person is not providing services that are, instead, provided by a substitute.* [para 28]

The end of substitution clauses as a bar to status?

Having regard to these conclusions, the EAT rejected RDL's contention that the requirement for personal service was not made out because there existed an unfettered right of substitution arising from clause 30 of the associate agreement.

Effectively, NS was contracted to provide a 'locum tenens' of acceptable quality to RDL if unable to work for more than 14 days. The EAT's analysis focused upon a *'realistic assessment of the true agreement between the parties'* [para 60], following the SC's approach in *Autoclenz Ltd v Belcher and others* [2011] UKSC 41 and clarified in *Uber* to engage in an exercise of statutory interpretation. It concluded that NS was required to provide some personal service because there were clear fetters on the right to

substitute in the practical application and the wording of the contract. Notably, RDL contended that certain factors that could be regarded as fetters should be discounted, because they were regulatory requirements; for example, a locum tenens had to meet certain standards of competency and qualification to be accepted by RDL.

The EAT held that '*The fact that terms of an agreement may be necessary to comply with regulatory requirements does not alter the fact that they form part of the agreement, and so are relevant to assessing its nature* [para 21]', referring to para 102 of *Uber*. The EAT also indicated that a substitution clause may be regarded as unlawful contracting out if an objective analysis of the relationship would lead to the conclusion that its aim is to limit statutory protections [para 20], referring to Lord Leggatt's analysis in *Uber*.

On this analysis, it will be less typical for a substitution clause to bar worker status where it would otherwise exist. The courts have been moving towards taking a holistic view of substitution clauses and their actual effects, rather than their intended purpose since *Clyde & Co LLP & another v Bates van Winkelhof* [2014] UKSC 32. Post *Uber* it was questionable whether the possibility of drafting a contract to purposefully exclude statutory protection, if a person was providing personal service, remained possible. Previously, companies focused on 'no mutuality' clauses, which *Autoclenz* put paid to as an avenue for limiting employment rights. Attention then shifted to substitution clauses. It is now possible that the dispute will fall on the customer/client exemption. The EAT highlights [para 67] that it will not be simple to make this exemption out, though it must be noted that identifying a professional undertaking for roles such as that of a courier, may be difficult.

Comment

NS's case has been remitted to a different ET to determine afresh '*the questions of whether the claimant carried on a profession or business undertaking; **and** of whether the respondent was a client or customer of the claimant's by virtue of the contract'* [para 69]. The EAT considered the case of *Hospital Medical Group v Westwood* [2012] ICR 415 in its analysis, noting that *'Maurice Kay LJ considered a submission that if a person is genuinely self-employed that person cannot be a worker. The contention was firmly rejected'* [para 35] as well as drawing attention to the *necessity* for the exclusion to apply that B is a client or customer of A's. Given the fact that NS worked exclusively for RDL for over a decade, the close integration between dental associates and the engaging practices, and the fact that her contract included post-termination covenants, a finding that RDL was her client or customer appears unlikely and as such a finding of worker status can be expected.

Even as it stands, this judgment is likely to have major implications for the dental profession. The finding that NS agreed to personally perform some work or service for RDL is in direct contrast to the finding of the EAT in *Sultan-Darmon* which was the previous authority on the worker status of dental associates. RDL owns more than 100 dental practices which all operate using the 'associate' business model of dental practitioners, and many dental companies use this same model. The vast majority of dental associates are 'self-employed' in the same manner as NS according to the British Dental Association. Should dental associates become regarded as workers, back pay of benefits such as holiday pay would need to be considered on a nationwide basis, following *Smith v Pimlico Plumbers Ltd* [2022] ICR 818. Whilst this was a case addressing worker status, the question of whether there is a contract of employment whilst working in which continuity gaps might be bridged so as to entitle dentists to bring claims of unfair dismissal and redundancy may well also emerge.

More broadly, this judgment is potentially groundbreaking on the effect of substitution clauses. Substitution clauses are regularly relied upon by putative employers as a means of precluding worker status. In the long-running union recognition proceedings *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 the Central Arbitration Committee concluded that the existence of a valid substitution clause was an insuperable difficulty since it left no room for a requirement of personal service, irrespective of whether the clause was exercised by the individual worker in question: that decision was not overturned in consequent appeals.

Sejpal moves the dial. In restating the requirement as one to provide 'some' personal service and having regard to the practical question of whether the clause was in fact exercised, the EAT has restricted the scope for a substitution clause as a conclusive bar to fundamental workplace rights. This has the benefit of both logic and principle on its side. Arguably, the protection against harassment or discrimination enjoyed by person A whilst at work should not be removed simply because someone could in theory have worked in her place on that day or, even if she exercised substitution rights, on previous occasions. The EAT has provided a further reminder that the ET must focus on the practical reality of the situation, recognising that worker status is a gateway to the enjoyment of fundamental statutory rights which should not be lightly denied.

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1 This briefing was first published in Cloisters – Employment on June 16, 2022 and is reprinted here with kind permission of the author.