Case No: EA-2020-000023-AT (Previously UKEAT/0124/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 September 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mr James Main	**Appellant**
- and -	
SpaDental Limited	**Respondent**

- -
- -

Mr J Williams (instructed by Irwin Mitchell LLP Solicitors) for the **Appellant**
Mr S Healey (instructed by NatWest Mentor) for the **Respondent**

Hearing date: 9 September 2021

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

The claimant is a dentist. The claimant contended that he was a worker and so entitled to holiday pay. The parties accepted the claimant had entered into a contract with the respondent whereby he undertook to do or perform personally work or services for the respondent. The employment tribunal concluded that the claimant was self-employed and so was not a worker. The employment tribunal erred in law by failing properly to analyse whether the claimant fell outside the definition of a worker because he (1) carried on a profession or business undertaking in respect of which (2) the respondent was by virtue of the contract a client or customer.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of Employment Judge Salter after a hearing on 11 October 2019, holding that the claimant was not a worker for the respondent within the meaning of the **Working Time Regulations 1998**. The judgment is dated 14 November 2019.

2. The claimant is a dentist. He claimed that he was a worker for the respondent and was entitled to claim holiday pay. The claimant appealed against the decision that he was not a worker. The matter was considered on the sift by Lord Summers who by an order with seal date 30 July 2020 set the matter down for a hearing on all grounds. The employment judge set out the relevant facts at paragraphs 18 to 40 of the judgment:

> "18. The Claimant is a dentist. In 2013 he sold his practice to Main Dental Partners Limited ('MDPL'). He provided his services to MDPL through two contracts: a contract of employment as the managing Director and a service agreement ('the First Service Agreement'). The latter of these involved the Claimant providing his services to MDPL through J Main Limited, a limited company owned by the Claimant.
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> 19. Throughout the period until he resigned the Claimant filled out self-employed tax returns and paid national insurance contributions as a self-employed individual. Indeed, in April 2017, as part of an IVA the Claimant stated he was self-employed [131 §2.17]. In July 2017 a bankruptcy order was made [132] against the Claimant on the petition of HM Revenue and Customs. In that Bankruptcy the Claimant stated he was self-employed at the date of the bankruptcy order [133].
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> 20. On 3rd August 2017 the First Service Agreement was terminated, and a second Service Agreement was entered into on 31st August 2017 ('the Second Service Agreement'). This did not have the Claimant providing his services to MDPL through J Main Limited, he supplied them directly to MDPL.
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> 21. Whenever there was a change in the contractual arrangements these did not affect how he performed his clinical tasks.
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> 22. Throughout his engagement with MDPL, the patient would pay MDPL who, in turn would calculate how much they were to pay J Main Limited, and latterly the Claimant, and payment would be made. The Claimant received payments from J Main Limited in the form of the net profit and dividend payments. This changed in 2017 when payments were made to him directly [100] as J Main Limited 'no longer existed'. In the letter Mr. Main offered to indemnify the Respondent for any claims brought by the creditors of J Main Limited.

23. In October 2018 MDPL was purchased by Spa Dental Holdings Limited and subsequently changed its name to that of the Respondent.

24. I accept the Claimant's evidence that when there were changes in his contractual arrangements in 2017 these had no impact on his clinical practices. He contends however there were changes in his non-clinical procedures in that he was no longer the managing director of the company but would have to make decisions as 'one of three'.

25. Looking at the practicalities of the Claimant's engagement with the Respondent the claimant supplied a limited amount of equipment including a dental loop, a dental headlight and he used his iPhone to take photographs. He was also the only dentist to be provided with remote access to the Practises' computer system.

26. The Claimant was obliged under the agreement to maintain his own indemnity insurance [49 §5.8; 73 §5.8] and was responsible for his payments to the General Dental Council [49 §5.9.2; 73 §5.9.2].

27. The hours had reduced under the second agreement from those in the first agreement. Under the first agreement the Respondent was open from 0845 until 1730 five days a week.

28. Under the second agreement the Respondent would provide the facilities to the Claimant between the hours of 0900 and 1730 Monday, Tuesday and Thursday and 0900 to 1500 on Wednesday and Friday [71 §4.2]. The Claimant would have to make himself available for those hours on the days he decided to work. It was a term of the Service Agreements that the Claimant would use all reasonable endeavours to utilize the facilities provided by the Respondent during the days and time that they are made available to him pursuant with that clause. The Claimant agreed not to practice elsewhere during such times without the consent of the Respondent [71-72 §5.2.1]. it was left to him to determine when he worked at the other two practices.

29. If the Claimant did not use the facilities, then he would be charged an 'Absent Dentist Charge'. I am told and accept this is because the Respondent would have provided resources such as staffing and the like) and not receive any commission from the work the Claimant was going to do during that time.

30. The reduction in working hours came about at the Claimant's request as he was to collect his children from school on Wednesday and Friday ad so needed to leave the premises early. I accept the Claimant's evidence that the Respondent never refused the Claimant's requests to leave early.

31. Subject to General Dental Council obligations the Claimant had free choice as to which patients he treated and which he did not. I am told, for instance, that he chose not to treat Tewkesbury implant patients of Dr May, when that doctor retired. Normally, patients would book in with the practice's receptionist, but the Claimant could and would change these. I do not find this surprising as the Claimant is a professional and would likely know how long certain procedures would take and whether the appointment was appropriate in length. However, also, the Claimant would change appointments if he was not able to see that patient at the time booked.

32. Mr. Hilling explained that the Claimant would set the prices for work he undertook. This led to a substantial difference in prices charged within the Respondent: I am told, and

> accept that, for example, the Claimant charged £599 for whitening work, whilst other dentists in the practice charged £299.00.
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> 33. If dental work carried out by the Claimant required correction, then it would be undertaken by the Claimant at his own expense. He carried his own indemnity insurance.
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> 34. He was responsible for the supervision of the support staff provided by the Respondent [50 §5.10.1; 74 §5.10.1] even though they were engaged by the Respondent. Again, I find this unsurprising given the Claimant's position as a medical professional reliant upon support staff to assist him in furtherance of his clinical obligations. This may, for instance, require the Claimant to work through lunch if the Claimant and allocated support staff were sterile and working on a lengthy procedure.
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> 35. The Claimant also specified how he wanted the support staff to be dressed when they worked with him, requiring them to wear gowns and face masks when other dentists did not require this.
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> 36. The Claimant would have to provide a locum or cover for an emergency. Costs would be shared jointly by the Respondent and Claimant [53 §6.4.4; 76 6.4.4].
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> 37. I accept the Claimant's evidence that he would largely have to pay for his own training, although the Respondent would pay if there was a benefit to them or they required the training. The Claimant was able to choose when he undertook the training.
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> 38. The Claimant had to agree his holidays with the Respondent. The Practice Manager (the Claimant's wife until 2014; Mr. Russ Beaumont until 2016 and then Sarah Trout until the Claimant left) would attend and ask him when he was taking time off. The Claimant would usually take the same holidays each year: a week in August around the second Bank Holiday, so as not to impact his earning potential. He would call and arrange for Dr. Gilmore to cover his absences.
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> 39. The Claimant was entitled to take an unlimited amount of holiday, but anything over 25 days would result in him having been deemed to authorise the Respondent to deduct from his fees an amount equal to an Absent Dentist Charge for each day in excess of his annual leave entitlement [50-51 §6.1.1] Throughout his time with the Respondent the Claimant's requested holidays were never refused.
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> 40. As would be expected the Respondent had a number of policies and procedures in place which the Claimant was subject to. Further they were required by the British Dental Association and NHS England to keep records of patients and their treatments. As the treating dentist this obligation was passed onto the Claimant and was a term of the Service Agreements he entered into [90 and 91]."

3. There are three respects in which the findings of facts are challenged by the claimant. It is contended that insofar as it was held at paragraph 32 that the claimant could set prices for the work that he undertook, he could only do so in agreement with the respondent. While it was correct, as held at paragraph 35, that the claimant said he wanted support staff to wear gowns and facemasks, he

contends that he had to agree with the respondent that his request would be fulfilled. The claimant contended that insofar as he would arrange for a locum, at paragraph 36 it should have been held that he could only do so in an emergency. Those factual issues are the basis of the perversity ground of appeal to which I shall return.

4. The tribunal set out the law very briefly at paragraphs 41 to 43. Regulation 2 of the **Working Time Regulations** was set out together with a list of authorities that the employment judge stated she had been referred to, although in a couple of cases that was incorrect:

> "THE LAW
>
> Working Time Regulations 1998 ('the 1998 Regulations')
>
> 41. So far as is relevant reg 2, of the 1998 Regulations is as follows:
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> > '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;
> >
> > and any reference to a worker's contract shall be construed accordingly;
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> 42. A similar definition appears in the Employment Rights Act 1996 s230(3).
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> Authorities and Texts
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> 43. I was referred to the following authorities: *Marshall v Southampton and South-West Hampshire Area Health Authority (No 2)* [1993] ICR 893, ECJ; *Revenue & Customs Comrs v Stringer* [2009] ICR 985, HL; *Hospital Medical Group Limited v Westwood* [2013] ICR 415, CA; *Sash Window Workshop Limited v King* [2015] IRLR 348, EAT; *Fenoll v Centred'Aide par le Travail 'La Jouvenne'* C-316/13 [2016]IRLR 67; *King v Sash Window Company* [2018] ICR 693, ECJ *Pimlico Plumbers v Smith* [2018] ICR 1511 *Stadt Wuppertal v Bauer*; *Willmeroth v Broßonn* C-569/16, C-570-16 [2019] IRLR 148 and *Hashwani v Jivraj [2011] UKSC 40, [2011] IRLR 827."*

5. The employment judge set out her conclusions at paragraphs 47 to 50:

> "47. As is probably usual in cases where there are professionals, those they work with or for

> may not have their skill set or experience and so the professional is given autonomy to undertake their profession. The autonomy for the claimant went beyond clinical autonomy however, as I find he set fees and discounts, decided when he would work, determined his hours and location of work and made demands of the Respondent's staff that other dentists did not (for instance working over lunch or clothing requirements). He was also responsible for his work and to correct any errors.
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> 48. I also do not consider that the levels of control purportedly exercised by the Respondent were of a level that showed some degree of authority over the Claimant inconsistent with a self-employed professional. In a regulated profession such as dentistry it is obvious records of treatments would be required to be kept. The fact that the Respondent required the Claimant to keep records of his procedures in order for them to comply with their obligations does not, it appears to me, show a degree of control over the Claimant that is inconstant with being self-employed, after all, who better to ensure the record was accurate and complete than the treating dentist.
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> 49. Against this, however, I weighed the holiday pay provision in the Service Agreements that referred to leave "entitlement" and set a maximum period on this of 25 days per annum before a charge would be made against the Claimant by the Respondent. Although this is inconsistent with being self-employed, when I weighted it against the other factors identified above I consider that the Claimant at the time his engagement with the Respondent ended the Claimant was a self-employed dentist receiving, effectively, support services (e.g. support staff and premises) from the Respondent who was a customer of his, or previously of J Main Limited. The Respondent did not exercise tight control over the claimant.
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> 50. I do not consider therefore, that the Claimant has proven, on the balance of probabilities, that he was a worker within the meaning of the 1998 Regulations." [emphasis added]

6. The claimant appeals on four grounds: (1) that the employment tribunal failed properly to set out the relevant law; (2) that the employment tribunal failed to consider material arguments the claimant advanced as to a potential difference in approach to the meaning of the term "worker" in EU and UK law; (3) the employment tribunal erred in its approach to the assessment as a matter of law of whether the claimant was a worker; and (4) there were three allegedly perverse findings of fact. Core to this appeal is ground number 3, whether the Employment Tribunal directed itself properly as to the correct legal test in assessing whether the claimant was a worker and applied that test correctly to the facts that it had found.

7. In considering the appeal, I have had regard to the limitations applicable to the Employment Appeal Tribunal as an appellate court in interfering with decisions of the Employment Tribunal. The

position has recently been restated by the Court of Appeal in the judgment of Popplewell LJ in **DPP Law v Greenberg** [2021] EWCA Civ 672, at paragraphs 57 and 58.

8. Bean LJ considered the extent to which there may be an error of law where a tribunal has failed sufficiently to set out the relevant legal provisions or principles in **Dray Simpson v Cantor Fitzgerald Europe** [2020] ICR 695, at paragraphs 29 to 32:

> "29. Failure by an ET to set out even a brief summary of the relevant law is a breach of Rule 62(5) of the ET Rules. But I do not think it is a profitable discussion to consider whether it is an error of law, nor whether there has been 'substantial compliance' with Rule 62(5). It is an error, but the real question in my view is whether the error is material. That is surely what Morison P meant when he said in Kellaway that it does not 'amount to an automatic ground of appeal'.
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> 30. It has become conventional (and has been made much easier since the invention of word processing) for employment tribunals to include in their decisions the relevant statute law and a summary of what is established by the leading authorities on the relevant subject. But, just as a dutiful recital of the relevant law does not immunise the decision against arguments that the tribunal has erred in its application, so a failure to set out the relevant law does not necessarily mean that there is any substantive error in the tribunal's decision or in the reasoning which leads to that decision, although it does make it more likely that there will be a challenge to the judgment.
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> 31. The point of Rule 62, headed 'reasons', is to enable the parties to know why they have won or lost. In his classic judgment in *Meek v City of Birmingham District Council* [1987] IRLR 250 Bingham LJ cited with approval the following observations of Sir John Donaldson MR in an earlier case (*Martin v Glynwed Distribution* [1983] ICR 511):
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> > 'The duty of an industrial tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the industrial tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the industrial tribunal.'
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> 32. I do not know why the ET in the present case did not set out ss 43A-B (and perhaps s 103A) and a brief summary of the most relevant authorities. Such an omission is very unusual in my experience, at least in cases of substance which reach this court on an application for permission to appeal or a substantive appeal itself. But in my judgment, as Mr Reade came close to conceding, this is not a free-standing ground of appeal. Unless the Appellant can show that the tribunal made a substantive error of law, the failure to comply with Rule 62(5) in itself leads nowhere. I will return to the issue of Meek-compliance at the end of this judgment."

9. The real question is whether the judgment, fairly read, demonstrates that the tribunal appreciated the correct legal test and applied it to the findings of fact that it made.

10. Fundamental to the consideration of whether a person is a worker is the wording of the statute itself. That was emphasised by Baroness Hale in the Supreme Court in **Clyde & Co LLP & another v Bates van Winkelhof** [2014] ICR 730, at paragraph 39. The key issue that the tribunal must assess is whether on the facts that it has found an application of the wording of the statute demonstrates that the claimant was a worker. That being said, the definition of a limb (b) worker as set out in the statute is not entirely straightforward. The distinction is not between those who are self-employed and those who are workers. Under the statute a person may be self-employed but still be a worker. It is necessary to consider (1) whether the individual carries out a profession or business and (2) whether the putative employer is a client or customer of that business.

11. In **Hospital Medical Group v Westwood** [2012] ICR 415 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 at paragraph 19:

> "I am unable to accept Mr Green's submissions for a number of reasons. Firstly, they effectively emasculate the words of the statute. If Parliament had intended to provide for an excluded category defined as those in business on their own account, it would have said so, rather than providing a more nuanced exception. Secondly, whilst it is true that Mr Green's approach has the attraction of greater simplicity and predictability, it simply does not fit with the words of the statute. The status exception does indeed provide a third, albeit negative hurdle. Thirdly, it is counterintuitive to see HMG as Dr Westwood's 'client or customer'. HMG was not just another purchaser of Dr Westwood's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as 'one of our surgeons'. Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account. "

12. It is always necessary to consider not only whether the individual carries out a profession or business undertaking but also whether the respondent is a customer or client of that business

undertaking. While those issues are to be assessed by application of the statutory wording, the assessment has to be based on principles that have been subject of considerable analysis by the appellate courts. No single approach has been determined to be superior to all others. The approaches that can be adopted to consider whether an individual is a worker were summarised by Baroness Hale at paragraphs 31 to 39 of **Bates van Winkelhof**:

> "31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract "personally to do work" within its definition of employment (see, now, Equality Act 2010, section 83(2)), does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.
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> 32. In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328: [2004] ECR I-873 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a "worker" for the purpose of an equal pay claim. The court held, at para 67, following *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1987] ICR 483; [1986] ECR 2121 :
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> > "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."
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> However, such people were to be distinguished from "independent providers of services who are not in a relationship of subordination with the person who receives the services" (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of *Hashwani v Jivraj* [2011] ICR 1004 .
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> 33. We are dealing with the more precise wording of section 230(3)(b) . English cases in the Employment Appeal Tribunal have attempted to capture the essential distinction in a variety of ways. Thus, in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 , para 17(4) Mr Recorder Underhill QC suggested:
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> > "The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-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."

34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 , para 53 Langstaff J suggested:

> "a focus on 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."

35. In *James v Redcats (Brands) Ltd* [2007] ICR 1006 , para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:

> "in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145 , he concluded, at para 59:

> "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? … Its purpose is to distinguish between the concept of worker and the independent contractor who is on business in his own account, even if only in a small way."

37. The issue came before the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [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. Hospital Medical Group Ltd ("HMG") 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 HMG 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 HMG.

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 "to eschew a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal 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: [2013] ICR 415, 427.
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> 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 the *Redcats* case [2007] ICR 1006 , a small business may be genuinely an independent business but be completely dependent on 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 LJ recognised in *Westwood's* case [2013] ICR 415 , 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."

13. A consideration of all of the relevant factors is required using the available tools of analysis to determine the question of whether a person is a worker. Often, a key test is that of integration; considering whether the individual is integrated into a business undertaken by the respondent. In a case of this kind it is likely to be helpful to consider whether the patients are really patients of the respondent rather than of the claimant; whether the claimant was providing services to the respondent, not with them in the role of client or customer of the claimant, but to enable the respondent to provide services to patients who are the clients or customers of the respondent. The tribunal should generally consider issues such as control, the predominant purpose of the agreement and, to a lesser extent, subordination, where appropriate. While there is no single key to unlock the words of the statute there has to be an analysis of the relevant factors and the wording of the statute to determine whether a person comes within the definition of worker.

14. The parties before the Employment Tribunal agreed that there was a contract between the claimant and the respondent and that the claimant agreed to perform personally work or services for the respondent. The scope of the appeal was limited to the third component of the limb (b) worker test; i.e. whether the claimant performed the work or services for another party to the contract whose status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the claimant. It is an error of law to assume that the answer to the question of whether a person is self-employed is determinative of whether the person is a limb (b) worker. There should be a careful analysis of whether (1) the person carries on a profession or business undertaking **and** (2) whether the other party to the contract is a client or customer of that business undertaking.

15. The Tribunal did not analyse the caselaw. The Tribunal set out the statutory test, which is fundamental, but there was no consideration of what was to be gleaned from the caselaw. The concept of integration was not considered, particularly the analysis of the Court of Appeal in **Westwood**. The analysis was focused on the question of whether the claimant was self-employed. At paragraph 46, the tribunal considered that the claimant's description of himself as self-employed for the purpose of the IVA, bankruptcy proceedings and for tax purposes was not particularly significant. The Tribunal noted a degree of control, but at paragraph 48 stated that the degree of control was not such as to be inconsistent with the claimant being a self-employed professional. The Tribunal went on to consider the issue of record-keeping and found that did not demonstrate a degree of control that was inconsistent with the claimant being self-employed. The Tribunal noted that the claimant's holiday provisions might have suggested otherwise but, overall, concluded that they were not inconsistent with the claimant being self-employed. In circumstances in which there was so cursory an analysis of the relevant law, without any self-direction that a self-employed person can be a worker, it is clear that the tribunal approached the matter on the basis that the determinative question was whether the claimant was a self-employed person. That is not the correct legal test because the claimant could be

a self-employed person but still be a limb (b) worker. I conclude that the employment tribunal did fall into the fundamental error of assuming that a self-employed person could not be a worker.

16. The only reference to a customer was in paragraph 49, in which it was said that the claimant was a self-employed dentist receiving support services from the respondent, who was a customer of his. To the extent the Tribunal referred to a customer relationship, that sentence dealt with services provided by the respondent to the claimant, potentially making him a customer of the respondent rather than vice versa. For the exclusion to limb (b) status to apply it is the respondent that had to be the client or customer of the profession or business undertaking carried on by the claimant. Alternatively, if contrary to my determination the tribunal was referring to the support provided by the respondent as a matter of background, but overall concluded that the respondent was a customer of a profession or business undertaking carried out by the claimant, there is no explanation of how the tribunal reached that assessment by application of any of the relevant concepts of integration, control, predominant purpose or subordination. There is nothing in the judgment that explains how it might have been concluded that the respondent was a customer of the claimant and whether there was anything beyond the express reference to the support services provided by the respondent to the claimant that the Tribunal relied upon. I do not accept that the Tribunal considered and analysed the question of whether the respondent was a customer of a profession or a business undertaking carried out by the claimant in accordance with the correct legal principles.

17. Ground 3 of the appeal succeeds. I consider that this is not a case in which I could say that there is only one possible answer. Maurice Kay LJ states at paragraph 3 of **Westwood** that cases of this kind are particularly fact-sensitive. Lady Hale specifically referred to the importance of the tribunal applying the statutory test. It was put to me that I was in as good a position as the Employment Tribunal to determine this matter. That is not a basis on which the EAT can substitute a decision, see paragraph 44 of **Jafri v Lincoln College** [2014] EWCA Civ 449.

18. I have considered whether this case should be remitted to the same or a different employment tribunal. There has been a substantial period of time since the judgment was given. There was a significant failing in legal analysis. I consider that there is a risk that, even be it unconsciously, there could be a second bite of the cherry. In addition, as this is so fact-sensitive an issue, and although there were concise findings of fact, as I consider the matter should be remitted to a different tribunal, it will be necessary for that tribunal to reach its own findings of fact so that it can be sure that all relevant matters are considered in the overall analysis of whether the claimant was a worker, save that the concessions that there was a contract and personal service cannot be reopened. The remission will be limited to the question of whether the claimant carried out a profession or business undertaking and whether the status of the respondent by virtue of the contract was that of client or customer, having regard particularly to the approach adopted by the Court of Appeal in **Westwood**, the Supreme Court in **Bates van Winkelhof** and the Supreme Court in **Uber BV and others v Aslam and others** [2021] ICR 657, including the approach to be adopted to statutory interpretation at paragraphs 68 to 70, insofar as considered to be relevant to the analysis in this case.

19. I do not consider there is anything in ground 1 as a freestanding ground. The error of law in this case was not merely that the Tribunal failed to set out the relevant law in sufficient detail. Accordingly, ground 1 of the notice of appeal is dismissed. The appeal is allowed on ground 3 alone. As the matter is to be remitted and the issues will be subject of full argument, it will be open to the claimant to raise his EU law point (asserted at ground 2) if relevant, although I have to say I am far from persuaded there is any difference of approach between UK or EU law or that, if there is any slight difference, it is of any relevance to this case. The perversity issues at ground 4 fall away as the matter will be open for full factual determination on remission. Accordingly, the appeal is allowed on ground 3. The matter is remitted for hearing before a different employment tribunal.