EMPLOYMENT TRIBUNALS

Claimant: Mrs. A. Kuzniar

Respondent: Roxdent Limited

Heard at: **Central London by CVP** **On:** **7 December 2023**

Before: **Employment Judge S. Matthews**

Representation
Claimant: In person
Respondent: Mr. Rozycki (Counsel)

RESERVED JUDGMENT

The claimant was an employee and worker of the respondent at the relevant time. The claimant's complaints will therefore proceed.

REASONS

Introduction

1. The claimant, a dentist, commenced work for the respondent, a dental practice on 24 January 2022. Her contract was terminated in March 2023. The claimant says the termination date was13 March 2023, the respondent says it was 3 March 2023. Early conciliation started on 11 May 2023 and ended on 20 June 2023. The claim form was presented on 19 July 2023.

2. The claim is about unlawful deduction from wages, failure to pay notice pay and whistleblowing. The claimant is making the following complaints:

   2.1 Unlawful deductions in respect of pay due on 14 March 2023.
   2.2 Breach of contract (failure to give one month's notice).
   2.3 Protected disclosure detriment.

3. The respondent's defence is that the claimant was not an employee or worker and therefore cannot pursue the complaints set out. The respondent asserts

that the claimant was self-employed. The claimant asserts that she was a worker.

4. This was a preliminary hearing to decide the issue of employment status. It was listed to be heard following a case management hearing on 15 September 2023.

5. The issue to be decided today is whether the claimant was an employee or a worker within section 230 Employment Rights Act (ERA) 1996 or whether the claimant was neither and was a self-employed independent contractor. The Tribunal's role is to determine employment status, based on factual findings. What was intended or believed by the parties is not determinative of employment status. It is for the Tribunal to decide.

6. The claimant's complaints of whistleblowing and unlawful deduction of wages can be pursued if she was a worker or employee. Her complaint of breach of contract (notice pay) can only be pursued if she was an employee. None of the complaints can be pursued if she was self-employed.

7. I had before me two bundles of documents. The respondent's bundle was 604 pages and the claimant's bundle was 485 pages. The claimant also filed an 80-page bundle which included a skeleton argument and her witness statement. There was considerable duplication between the bundles. Many of the documents were not relevant to the issue of the claimant's employment status. I indicated at the start of the hearing that I would only refer to documents to which I was taken in evidence. The parties are reminded that disclosure of documents should be proportionate and relevant to the issues in dispute; excessive disclosure of documents causes delay.

8. I was able to make the relevant factual findings largely by referring to the contract at page 47-53 of the respondent's bundle (109-115 of the claimant's bundle) and by hearing oral evidence.

9. I heard oral evidence from the claimant and from 2 witnesses for the respondent:

   Dr. R. Marcinkowska (Director)
   Ms. A. Sacharko (Practice Manager)

10. Each witness swore a prepared statement. An interpreter was present at the hearing to assist both the claimant and the respondents' witnesses if necessary.

11. At the conclusion of the hearing I heard submissions on employment status from the claimant and from counsel for the respondent. I reserved Judgment.

12. The matter will now be listed for a further case management hearing to finalise the issues and set the timetable for the final hearing.

Findings of Fact

13. I will firstly set out my findings of fact as it is on these facts that I base my decision that the claimant was an employee.

14. The claimant's working relationship with the respondent dates from 24 January 2022. There were 4 dentists in the respondent's practice; Dr. R. Marcinkowska (RM) who was a director and 3 dentists, including the claimant, who RM categorised self-employed. There were additional staff who RM categorised as employees, such as dental nurses and a receptionist.

The written contract

15. There was initially a verbal agreement between the respondent and the claimant. This was formalised by a written contract dated 30 April 2022 which the claimant signed on 14 April 2022.

16. The contract is headed 'Contract for Dental Services'. It refers to the claimant as an 'independent contractor'. Clause 3 (a) states that the contract does not create an employer/ employee relationship.

17. I have considered both the wording of the contract and the reality of the day-to-day relationship between the claimant and the respondent.

Pay

18. The claimant's earnings were calculated by reference to a percentage (50%) of the gross income arising from the patients she treated. If there was a complaint and a refund was agreed with the patient that sum was deducted from the claimant's earnings. The claimant paid 50% of laboratory bills for items such as prosthetics and crowns, consistent with earning 50% of the income from that patient. The cost of the dental technician, if one was used, was shared with the respondent. She submitted an invoice for her fees to the respondent.

19. The claimant was not entitled to sick pay or holiday pay under the written contract.

20. The claimant did not pay any fees for rental of the room or the dental chair. Clause 10 (a) of the contract states that the respondent will provide 'premises and medical equipment'. Clause 10 (b) states that the claimant is to pay for them if damaged. The claimant wore her own tunic and clothing most of the time, but she sometimes wore a tunic with the respondent's logo on it, when her tunic needed washing.

21. The respondent did not deduct tax or national insurance (clause 14 of the contract). RM said in evidence that the reason the dentists in the practice were self-employed was so that the respondent would not have to pay tax and national insurance on their earnings. As the dentists earn more than the other staff in the practice it would be much more expensive for the respondent. The respondent also wished to reduce the paperwork that was involved with an employment contract.

The Business Model

22. The claimant was not required to find her own patients. The patients were supplied to the claimant. The patients were viewed by both the claimant and

the respondent as belonging to the respondent, not to the claimant. RM said that if patients complained she carried out 'corrections'. It is clear from this statement that she did not see the patients as the claimant's patients. Clause 16 (a) of the contract states that the respondent was the 'exclusive owner of all the medical records of patients seen by [the claimant]'. Clause 10 (c) of the contract states that the claimant was not allowed to treat patients if they were not registered with the practice. When the claimant asked to bring in two patients one was accepted and one was refused.

23. The claimant was held out as an integral part of the respondent's practice. The appointments were booked in by reception. Although she gave her a name when seeing patients, she was not held out by the practice as being in business on her own account. Clause 10 (a) of the contract requires her to agree to use her name and image for marketing of the respondent's business. Clause 17 states that she was not to provide patients with her private contact details while working there or for 12 months afterwards. Clause 10 (d) provides that the claimant must not receive any form of payment from patients and if she does the contract will be terminated with immediate effect.

24. There was a price list (403 of the respondent's bundle) which was displayed on the website and in reception in both Polish and English. Although there may have been some discretion within a range of prices, RM confirmed in evidence that she would not expect the claimant to charge outside the price list range without an explanation. She said that patients would complain and she wanted to protect the claimant from complaints.

25. Clause 5 of the contract states that the claimant is not to be involved 'in any capacity with a [competing business] (for example a dental/medical practice in London) without the company's prior written consent'. The respondent submits that the clause would not be enforced outside a 2 mile radius. The claimant says she was not made aware of this.

26. The claimant was offered other jobs while working for the respondent, but she did not have time to work in another job and the situation where she needed to ask for consent never arose. She worked for another practice when she first joined the respondent in January 2022. The respondent knew that the claimant was in the process of leaving that practice to work for them and she resigned from that role on 7 February 2022.

27. Clause 8 of the contract states that if the claimant breaches the contract the respondent has the right to terminate it immediately. Clause 13 provides for a notice period of one month on either side, excluding termination for breach of contract by either party.

28. The claimant is expected to arrange her own professional registration and indemnity insurance (clause 9 of the contract). The claimant will be required to repay some or all of the fees associated with training courses paid for by the respondent (clause 21).

Personal Service/ Substitution

29. The claimant did not use a substitute from outside the practice to carry out her work and never considered doing so. When she could not attend for some reason, she would inform reception and the patients would be passed to other

members of the practice. RM confirmed in evidence that when the claimant gave short notice the claimant may ask RM directly to step in, the other dentists in the practice would split the patients between them or RM's husband would arrange for another dentist in the practice to see the patients.

30. Clause 7 of the contract provides that if the claimant is sick or injured she is to inform the Practice Manager before the start of surgery time due to 'the commitment to deliver a consistent service to patients on scheduled appointments'.

31. The only reference to a possible right of substitution in the contract is at clauses 9 (a) and 9 (b). This part of the contract relates to the claimant's personal liability and provides that she is personally liable to indemnify the respondent for a breach by her or 'any substitute engaged by her'. Although it envisages a situation where a substitute may be used, I find it does not, in itself, grant a right to engage a substitute.

Control

32. The written contract states that 'working hours are flexible' and to be 'agreed from time to time with the practice manager' (clause 4(b)). It then goes on to state 'availability discussed and implemented days and hours as follows'; from 11 am to 8 pm on Thursdays and Fridays and from 10am to 8pm on Saturdays. RM confirmed in evidence that she expected the claimant to work those days and times. The contract states that the claimant was to ensure that she was available at all times on reasonable notice (clause 4 (a)).

33. The patients were booked in for appointments by reception. The claimant would message reception or reception would message her to tell her what time the patients were booked in. If the claimant did not have any patients, for example at the beginning of the day, she did not go into work until later. She was expected to attend within the hours agreed if she did have patients; there was flexibility only if patients were not booked in.

34. The contract (clause 6) stipulated that the claimant was to give one month's notice if she wished to take a holiday (which would be unpaid). In evidence RM said the claimant was supposed to fill in a holiday form but did not do so. The claimant took 7 weeks off from 24 February 22 to 9 April 22 and 4 weeks off from 22 June 2022 to 16 July 2022. The first period was before she signed the written contract. She had Covid from 24 February 2022 and then there was a delay in her starting back at work. In respect of the second period the claimant cannot remember whether she gave four weeks' notice but thinks that she would have given at least 3 weeks.

35. When she was on holiday the claimant's appointments would be postponed or, if it was an emergency, the emergency dentist would see them.

Supervision

36. In terms of how much supervision the respondent had over the claimant's day-to-day work it is important to bear in mind that the claimant was a professional, qualified dentist, who would not need supervision to the extent that a less qualified person would need supervision.

37. The claimant said that she talked to the respondent about some patients and discussed the treatment she was carrying out when she thought it was necessary. She said RM was very aware of what she was doing on a daily basis. RM said that the claimant may have asked her for second opinions but that was not the same as RM clinically supervising her. The claimant would, for example, sometimes see patients and decide not to charge them or she could see a patient and decide not to treat them.

The Law

38. An employee and a worker are defined in section 230 of the Employment Rights Act (ERA) 1996:

> 230 Employees, workers etc.
> (1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
> (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;
> and any reference to a worker's contract shall be construed accordingly.

39. An employee is both an employee and a worker. An 'employee' has a 'contract of employment' whereas a 'worker' has a 'contract of service'. Personal service is common to both employee and worker status. A worker's contract of service must not amount to a contract whereby the they are carrying on a business or profession on their own account and the respondent is a client or customer of that business.

40. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz Ltd v Belcher and others [2011] UKSC 41, [2011] ICR 1157 in the Supreme Court:

> *"18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ... Freedom to do a job either by one's own hands or by another's inconsistent with a contract of service, though a limited or occasional power of delegation may not be".*
> *19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must ... be an irreducible minimum of obligation on each side to create a contract of service". ii) If a*

genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

41. Whether an individual works under a contract of employment or service is determined according to the wording of the statute. The true nature of the agreement must be ascertained and contractual wording, that may not reflect the reality of the day to day relationship, must not be allowed to detract from the statutory test and purpose.

42. In Autoclenz Ltd v Belcher and others Lord Clarke held:

"35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem".

43. A tribunal must therefore consider multiple factors in deciding whether someone is an employee or a worker, not just the wording of the contract or the intention of the parties.

44. 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 [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."

Submissions

45. Counsel for the respondent submitted that the claimant had the benefit of flexible hours; she was the 'motor behind the hours' that were agreed. She was not prevented from doing work for other companies. She was effectively running her own business, responsible for her own tax, national insurance,

materials and pricing to a large degree. There is no evidence that she was restricted in her clinical practice. She made her own decisions and was free not to charge the patients when she thought it appropriate. She did not have to come in to work if no patients were booked in. Counsel reminded the Tribunal of the requirement to adopt a structured approach in applying the statutory test as described by his Honour Judge James Taylor in another case involving a dentist, Mrs. N. Seipal v Rodericks Dental Limited 2022 EAT 91.

46. The claimant submitted that she was closely supervised and, in many instances, did not have the final word in her clinical practice. She did not work for other companies because her circumstances would not allow it. The job was part time, but the hours were not flexible.

Conclusions

47. All employees are workers so if I find that the claimant was an employee it also means that she was a worker.

48. The starting point is the wording of the statute (paragraph 38 above) which must be applied to the particular circumstances of this case. What was intended or understood between the parties is not determinative of employment status. There was a written contract but I also need to look at the reality of the relationship.

49. I have taken into account the following factors that point to self employment; there was no deduction from the claimant's pay for tax or national insurance and she was paid on the basis of 50% of the gross profit which she made. Those factors need to be balanced against the other factors set out below.

Employee/ Worker or self-employed?

50. Personal service is a common factor in worker and employee status. If I decide that the claimant's personal service was required, and that the respondent was not a client or customer of the claimant the claimant must have been either a worker or an employee; she could not be self-employed. I will therefore consider this factor first.

51. Taking an overview of how the contract worked in practice I decided that the dominant purpose of the contract was for the claimant to provide personal service. She was not entitled to ask someone else (a locum) to attend the respondent's practice to substitute her services. If she could not attend the practice her appointments would either be postponed or somebody else in the practice would see the patient. She could not sub-contract out her services.

52. Although the way in which the claimant was paid was by a percentage of gross profits she was not in business on her own account. The patients were not her own patients; they were booked in by the reception for her to see. The claimant was held out as one of the dentists at the respondent's practice; patients could not book with her direct and she was not allowed to enter into a direct financial arrangement with them or give them her personal contact details. She was not required to invest in equipment to do the work; she was provided with the medical equipment she needed to do her work, at no cost.

53. The respondent's practice was not the claimant's client or customer. It is counter-intuitive to view the arrangement as such. There was a very wide non-competition clause which on the face of it was not compatible with the claimant being free to offer her service to other practices outside the respondent's practice or being in business on her own account. The respondent submits that it would not enforce this, but the claimant would still have to ask permission before carrying on her profession elsewhere.

54. I am therefore satisfied that the claimant was required to provide personal service and the respondent was not a customer or client of the claimant. On those grounds her status is that of a worker.

Employee or Worker?

55. I will next consider the degree of control the respondent exercised over the claimant. This will assist me in deciding whether the claimant was an employee as well as worker. The claimant was required to regularly work three days a week. She was expected to attend the practice to see patients on the dates when they were booked in. She had to ask permission for holidays and to take time off.

56. She was not engaged on a job by job basis. She expected to be given work on three days of the week and was expected to do it. She could not control how much or how little she worked, she was required to attend on those days and times that appointments were booked in.

57. The respondent by necessity required the claimant to be available at the times it stipulated. That is why it set out the days and times in the written agreement. This was not a business where patients would turn up at the practice speculatively. They had an appointment which had been booked in advance and expected to see a dentist at that time and on that date. The respondent only had four dentists and the appointments were booked for those dentists. If the claimant chose not to go into work the patients had to be postponed or to see one of the other dentists. The respondent would not be able to provide the service it wished to provide (pre-arranged appointments) unless the claimant agreed to be available and attend on set dates and times.

58. I have considered the evidence I heard on the degree of control the respondent had over the day-to-day work of the claimant. Leaving aside clinical supervision, the respondent had a considerable degree of control over the claimant's day-to-day work including when and where she carried out the work. The claimant was expected to see patients that had been booked in for her and was not free to introduce her own patients. She had to charge for treatment in accordance with a pricelist which was made available to the patients on the website and at reception. There was a more limited degree of clinical supervision but that is to be expected in the case of a professionally qualified employee.

59. Based on those fact findings and applying the wording of the statute, I find that the employment status of the claimant was that of an employee.

Employment Judge **S. Matthews**

Date 29 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....2 January 2024.....

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FOR EMPLOYMENT TRIBUNALS

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