EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102882/2022 Hearing at Edinburgh on 19, 20 and 22 December 2022

Employment Judge: M A Macleod

Dr Mustafa Mustafa	Claimant Represented by Dr I Hussein Lay Representative
Sayegh Orthodontics Limited	Respondent Represented by Mr A Wallace Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimants claims all fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 23 May 2022 in which he complained that he had been unfairly dismissed, and unlawfully deprived of wages, by the respondent.

2. The respondent submitted an ET3 response form in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place on 19 and 20 December 2022. As it turned out, the Hearing did not conclude within those 2 dates, but the

Tribunal was able to make available to the parties a further day on 22 December 2022, whereupon the Hearing concluded.

4. The claimant attended and was represented by Dr I Hussein, a lay representative whom the Tribunal understands to be the claimant's now employer. The respondent was represented by Mr A Wallace, solicitor.

5. Prior to the start of the evidence, I conducted a short preliminary discussion with the representatives in order to address two preliminary matters.

6. Firstly, there was a suggestion that this was to be a Preliminary Hearing to address the question of whether or not the claimant was at the material time an employee of the respondent. Dr Hussein opposed this and emphasized that he and the claimant had attended at the Tribunal in the belief that the Hearing was to address the merits of the claim. I confirmed that that was correct, and that this was indeed a Hearing on the merits.

7. Secondly, Dr Hussein sought to present to me, at the bar, a number of envelopes with documents therein. He had not provided copies of those documents to the respondent's solicitor nor to the Tribunal, and accordingly I returned the envelopes to him. I confirmed that the Tribunal was not in a position to photocopy documents for him and that if he wished to produce the documents he should do so by presenting the appropriate number of copies, duly page numbered, so that each party, the Tribunal and the witness table would be furnished with the documents in such a manner as to ensure that they were properly before the Tribunal.

8. The respondent called as witnesses Philip Sweeney, a freelance business consultant for the respondent who has responsibility for payroll and other financial matters, and Sanjit Singh Nandhra, one of the joint owners of the respondent's business. The claimant gave evidence on his own behalf, and called Jonathan Mark Pullman, an activist and campaigner; Emma Ward, dental receptionist; and Tracey Hayes, senior business manager.

9. A joint bundle of productions was presented to the Tribunal and relied upon by the parties in the course of the Hearing.

10. Based on the evidence led and the information presented, the Tribunal was able to make the following findings in fact.

Findings in Fact

11. The claimant, whose date of birth is 4 July 1973, is a qualified and experienced Orthodontist. The respondent is an Orthodontic business, with a number of clinics including those at London Street, Edinburgh, and High Street Musselburgh. The business is jointly owned by Sanjit Singh Nandhra and his brother, each holding a 50% interest. They owned one third of the business each with another owner, Samir Sayegh, until his retirement in 2020.

12. The claimant entered into an agreement with the previous owner of the business to provide Orthodontic Associate services in January 2011.

13. An "Orthodontic Associate Agreement" dated 17 January 2011 was produced (234ff), bearing the name of the respondent and the claimant as the parties thereto. That agreement was not signed. Mr Nandhra was not involved with the business at that time, and therefore could not speak to it. The claimant maintained that he had seen "something similar" to that agreement at the time when he joined the business, but that he had made a number of amendments to the agreement and returned it to Mr Nandhra. No copy of that amended agreement was produced to the Tribunal. The claimant's position was essentially that he had signed a provisional agreement.

14. The Tribunal found the evidence on this matter to be rather unsatisfactory, but sets out its conclusions in the Decision section below.

15. The claimant insisted in evidence that he had reached a verbal agreement with Mr Sayegh in 2011, as part of his conditions for accepting the contract and moving his home and his family to Scotland from his previous workplace in England, to the effect that he would be an

employee, and that he would be guaranteed 700 patients, though that would clearly have to be built up over a period of time.

16. The claimant saw patients who were both private and NHS referrals. The agreement stated (paragraph 4.1, p236) that the claimant would be paid net commission of 50% of commissionable .earnings. Paragraph 4.4 confirmed that the claimant would replace all faulty or failed treatment at no extra charge to the patient, and repay to the respondent fees for faulty or failed treatment. Paragraph 4.5 allowed the respondent to retain a percentage of the claimant's net commission to pay for outstanding laboratory bills, patient refund charges and repayment of any fees for faulty or failed treatment.

17. Payments were made on a basis which was consistent with the terms of this agreement. The claimant was paid a proportion of the net commissionable earnings he brought in to the business. Payment was made direct to an account held by a limited company owned by the claimant, MMRO-Dent Ltd (SC515722) (270), which was incorporated on 15 September 2015 and dissolved on 22 October 2019. Thereafter, payments were made to an account operated by the claimant in the name of MMRO Dental Partners, from 20 September 2019. The claimant confirmed that he adopted such an approach because it was tax-efficient. No tax was deducted, nor national insurance, from the payments made to him by the respondent throughout his employment.

18. The agreement stated (paragraph 5.4, p237) that in the absence of agreement to the contrary, the claimant would adhere to the usual hours of the Practice, namely Monday to Friday 9am to 5.30pm. His evidence was that this was correct, and that he was unable to set his own hours. He said that the respondent would allocate patients to him, and that would fill his weekly and daily diary, and he would simply attend at the clinic and carry out the work there. The agreement went on to specify (paragraph 5.5) that any time off required to be agreed with the owner of the business, and that it was understood that the claimant would take no more than 6 weeks' holiday, excluding bank holidays, in each calendar

year. The claimant's evidence was that this was correct; the evidence of Philip Sweeney, who provided financial and payroll services to the respondent, was that this was not strictly adhered to, and the respondent's position was that this was not how the arrangement worked in practice.

19. The claimant's evidence was that from time to time he may have to leave early, to attend to a domestic emergency, but that he always required to seek permission from the directors of the respondent before doing so, and that on occasion that permission was withheld.

20. He also maintained that if he wanted to take holidays, he had to seek the permission of the Practice Manager, and that on two occasions that permission was withheld. For example, he said, he applied to have the first 2 weeks in July 2019 off as annual leave, but was refused permission on the basis that it would not be possible. The respondent provided no evidence about this, and the Practice Manager was not made available to give evidence in order to clarify the respondent's position.

21. The respondent employed Orthodontic Assistants, who were trained orthodontic nurses. They would carry out work on behalf of the claimant when instructed to do so. The claimant would see a patient and prescribe the type of bracket to be applied to that patient's teeth; the assistant would then fit that bracket to the claimant's specifications. An Orthodontic Assistant is limited in the duties and responsibilities which they can carry out. The claimant's evidence was that he never had control over which assistant would be allocated to him to carry out the duties he would prescribe them to carry out. He had no control over how much the assistant would be paid.

22. In the event that the claimant's treatment of a patient gave rise to a complaint about faulty or failed care, the claimant required to take responsibility for part of the refund of any payments made in respect of that claimant. He bore at least part of the risk of a claim for negligence in

relation to his care, personally, rather than an employer accepting vicarious liability for his actions as part of his duties as an employee.

23. Mr Sayegh wrote a letter, which was not addressed but was, on the evidence, addressed to whom it may concern (2), dated 18 November 2013, which stated, with reference to the claimant: *"The above-mentioned has been working with us as a Specialist in Orthodontics for the last three years. During that time, he had treated thousands of cases in my Practices and has won several awards for his excellence in Orthodontic Clinical work. He is enthusiastic, organised, eager to improve and please his patients. He treats his patients with a very high level of professionalism and he is a hard worker…! would gladly recommend Dr Mustafa to any Clinical Orthodontic position."*

24. On 30 August 2013, Elaine Duncan, Practice Manager, wrote a letter to whom it may concern (3), stating *"This is to confirm that Mr Mustafa Mustafa has been employed by Sayegh Orthodontics Ltd as a Specialist in Orthodontics since September 2009."*

25. On 23 July 2012, Joan Campbell, Practice Manager, wrote a letter to whom it may concern (4), stating *"This is to confirm that Mr Mustafa Mustafa has been in full-time employment with Sayegh Orthodontics Ltd as an Orthodontist since September 2009 to the present day."*

26. On 10 December 2009, the Scottish Public Pensions Agency (SPPA) wrote to the claimant at the respondent's business address (5) to confirm that *"Your employer has informed us that you entered pensionable NHS employment on 31 August 2009 and that you have chosen to join the National Health Service Superannuation Scheme."*

27. The claimant remained a member of the NHS Superannuation Scheme until the end of his working relationship with the respondent, and, so far as this Tribunal is aware, remains a member of that scheme. His contributions to that scheme were deducted prior to his receiving any payments from the respondent. The respondent did not make an employer's contribution to the scheme.

28. In January 2022, Mr Sweeney drew the attention of the directors of the respondent to a website (267) for Ocean Orthodontic Clinic. Under "Meet the Team", there appeared 3 photographs: the claimant, described as Orthodontist; Kirsty Ives, Treatment Co-ordinator; and Emma Ward, Receptionist. Towards the top of the page, the web page stated: *"Find out more about Ocean Orthodontic Clinic and the award winning team behind some of Scotland's most amazing smile transformations."* Under that, there was a button marked "Book your free consultation".

29. Mr Nandhra was very concerned about this. He noted that not only was the claimant advertised on the site, but that Emma Ward, who had recently worked for and left the employment of the respondent, was also involved in the clinic. He concluded that there was a risk to the respondent's business, and that there was a danger that staff from their business would move to the new business. He also took the view that since the web page indicated that the last update of that page was in December 2021, and that bookings were being elicited, the website was a live site and that the claimant must already have been working for them, and carrying out treatment there. As a result, he decided to terminate the claimant's contract with the respondent forthwith.

30. Mr Nandhra telephoned the claimant and informed him of his decision. He said that he was aware that the claimant had set up a clinic in competition to their own, and that he had taken a staff member away with him. He also advised him not to enter the respondent's premises, and that he was no longer to carry out any work for the respondent.

31. The claimant did not say much on this telephone call, which took very little time.

32. Mr Nandhra followed up his call with an email on 28 January 2022 (40):

"Dear Mustafa,

Further to our telephone conversation today regarding you now operating an orthodontic practice in Edinburgh, I am writing to confirm that your

services as an Orthodontist with Sayegh Orthodontics Ltd (SOL) are no longer required with immediate effect.

SOL will organise and process the transfer of your patients and will notify the relevant Health Boards as required.

Any residual, outstanding payments due to you will continue to be made in the usual manner.

Yours sincerely,

Saranjit Nandhra"

33. On 1 February 2022, the claimant attended the Musselburgh practice, with a friend, Jonathan Pullman. By the time his relationship with the respondent was terminated, the claimant mainly worked in Musselburgh and Livingston. His motivation, he said, was to see his patients, and to ensure that they were properly attended to, but he was refused entry by the reception staff, on the instructions of the directors. He felt that the patients were being compromised.

34. On 5 February, the claimant wrote to Mr Nandhra (41) to express his concerns:

"Dear Saranjit,

I am writing to express my deep concerns following my brief visit to the Musselburgh practice on the morning of February 1st, which I undertook in the company of an independent witness. Leaving aside for now the matter of contract termination which I believe to be clearly in breach of the agreed terms among us and terms I have with NHS, the key issue at this moment in time is the welfare and best interests of my patients, for whom I continued to hold responsibility and, in my judgement, an ongoing duty of care. Indeed, I regard it as an ethical obligation.

Of prime importance in the continuing treatment of my patients is the matter of consent. Are you able to confirm please that the transfer of care has been fully explained, that your own lack of orthodontic specialism has

been communicated, and that the decision to remove these patients from my supervision was yours alone, in my view, each patient needs to fully understand all of the above and be happy to proceed with yourself on that basis.

I also seek reassurance that the patient journey will not be negatively impacted by your actions, that their treatment will continue on time, to plan and at the standard that I would expect It is important that you can give me certainty about this according to the NHS and GDC standards for safe practice and professional competence.

Both my witness and I were very shocked by the response of the onsite staff to my sincere and polite enquiry in regards to the concerns described above. Both the practice manager and the dental nurse in Musselburgh appeared terrified and clearly unable to interact in a normal way with a very recent and well-regarded colleague. I can only assume that their reluctance to engage or co-operate with me in any way was in compliance with some form of instruction from yourself. But no employee should ever be made to feel that their own job is at stake should they fail to act according to orders which makes them feel professionally, morally or behaviourally compromised. This can only degrade the collective morale of the practice and thereby diminish the optimum environment for the patient.

I trust you will consider the issues raised here and I look forward to a speedy reply, with hopefully a satisfactory outcome for all concerned.

Sincerely,

Dr Mustafa Mustafa"

35. On 9 February 2022, Mr Nandhra replied (43):

"The staff are there to do their jobs of management, nursing and prioritise the interests of the patients and timely conclusion of their treatment. They are not there to deal with unexpected intrusion by people unknown to the staff. SOL has always paid paramount importance and prioritised the well

being and excellent treatment of patients over the last 35 years. This concept will continue. The patients that were under your care will carry on being treated by specialists and all necessary consent will be in place."

36. The claimant responded by letter dated 21 February 2022 (44). In that letter, he said: "4s *you know, you have taken a unilateral decision of terminating my employment at the clinics, with an immediate effect, and prevented me from access to any of the clinics, my files and my patients files and the patients themselves. Although your decision represents an extreme upset of the professional relationship, and outrageously violates work regulations, my focus was and still is to maintain the care and well-being of my patients."* He went on to assert that patients were not being properly consented for treatment, and that they were being misled by being made to believe that it was his decision not to continue their care. He asked that he be allowed to make the necessary arrangements for the transitional period for his patients.

37. The claimant wrote again, having received no reply to his previous letter, on 21 March 2022 (45). He repeated his assertion that *"you have violated the terms of my work contract with Scottish Orthodontics by causing an immediate termination, disregarding the agreed notice."* He also accused the respondent of having deprived him of a "graveness" (understood to be grievance) procedure. He went on to claim certain payments he considered himself to be due from the respondent, as follows, in terms of his contract:

"1. Three months payments, as per my notice. This is equal to £31,977.33 per month, a total of £95,931 .99.

2. Under payments, as per your admission for the period until September 2021. This is liable to audits, but I estimate the total to be £12,500.

Please note that I hold my rights to be compensated for the difficulty caused by your abrupt measure, and for the deliberate grief and harm you caused me by your unethical and unprofessional treatment."

38. The claimant requested a response by 5 April 2022, before raising these matters with the corresponding regulatory bodies and taking legal action.

39. Mr Nandhra did reply to this letter, on 29 March 2022 (46):

"You opened a practice in direct competition with SOL whilst working for the company.

You also employed a member of SOL staff to work there.

This breaches your contract with SOL on two counts.

There are other breaches which I will go into at a later date.

Taking action which is contrary to the interests of the practice woner allows termination forthwith.

You owe monies for treatment paid in advance but not completed which SOL is now having to pay to other clinicians.

I will carry out a balancing exercise to determine what monies are due and to whom."

40. The claimant was dissatisfied with this response, and wrote to Mr Nandhra again on 1 April 2022 (47). In that letter he said:

"It is appalling that you insist on failing your duties as a company director, employer and regulated professional. Instead you choose to provide ailing excuses and explanations that are in direct breach both the UK law and the accepted standards of the profession.

I have written to you in grievance as a direct and immediate response to your shocking decision of dismissing me without prior notice or due regard to an agreed contract of employment. I have attended work in order to treat existing patients and found myself being refused entry to the premises. ..

I regret to say you have given me no choice but to escalate this matter further and it is now my duty to inform you that I will be instigating legal

proceedings with immediate effect to claim for my financial and moral rights. I shall duty inform the relevant regulatory bodies of what / believe to be a direct breach of their own regulations.

Please also be reminded that any current, or previous use of my name or credentials subsequent to my final day at work, and any submissions or claims on my behalf would be a serious violation of law amounting to fraud and identity theft."

41. He concluded by noting "without prejudice" before his name on the letter. Nothing was made of this by either party in the hearing before me. It was not suggested by or on behalf of either party that this letter was inadmissible owing to the insertion of the words "without prejudice". On the face of it, the terms of the letter set out a complaint rather than any attempt to negotiate a resolution which might be regarded as confidential, and accordingly it may simply have been a form of words used to emphasize the formal nature of the letter. As a result, I consider the letter to be admissible in these proceedings.

42. Shortly thereafter, on 6 April 2022, the claimant notified ACAS of his intention to make a claim, in compliance with the Early Conciliation Scheme (285). ACAS issued the Early Conciliation Certificate on 12 April 2022 by email. The claimant then presented his claim to the Tribunal on 23 May 2022 (273).

43. The respondent did not make any payments to the claimant following his dismissal. Their position was that he was paid up to the date upon which his relationship with the respondent was terminated.

44. It should be said that the evidence provided by the respondent in this case relating to the payments made to the claimant was extremely unclear, and left the Tribunal in the position of having to interpret the documents presented along side the evidence of the claimant.

Submissions

45. A short summary of the parties' submissions, which were delivered orally, follows.

46. For the respondent, Mr Wallace argued that the Tribunal does not have jurisdiction to hear either the unfair dismissal or the unlawful deductions claims. The claimant was not an employee and accordingly has no right o make either claim. Further, although a worker may make a claim for unlawful deductions, the respondent submitted that the claim had not been made out on the evidence, and in any event, the terms of the claim are unclear to them.

47. Further, he maintained that the claimant's claim seems to relate to September 2021, and therefore the claim was presented significantly out of time. The claimant gave no evidence explaining why the claim was presented so late.

48. Mr Wallace then submitted that if the claimant were found to be an employee, while dismissal would have been unfair due to the lack of process followed by the respondent, any compensation should be reduced to nil due to the claimant's contributory conduct. The reason for dismissal was that he was advertising services for another practice in competition with the business and without the respondent's knowledge.

49. He maintained that the respondent's evidence on the contract should be preferred, and that the contract provided by the respondent should be accepted as the claimant's contract with the respondent.

50. He pointed to particular agreed facts which demonstrated that the claimant was not subject to a contract of employment, namely:

- he was paid for work carried out;
- he was not paid a guaranteed salary:
- there was no obligation to provide him with a certain amount of work;

- there was nothing from the claimant to suggest that he was unhappy with his allocation of work;
- he was paid into the account of a limited company and partnership on the advice of his accountant, which demonstrated that he would enjoy tax benefits as a result.

51. There was, he asserted, no irreducible minimum of mutuality of obligation between the parties. He did not require to provide personal service. The respondent maintained very little control over the treatment plan. The claimant could negotiate a higher fee for more complex work if he considered that appropriate. He provided personal service due to the relationship with each patient. He could rely upon the orthodontic nurses to carry out appointments for him in his absence, If another associate attended an appointment with one of his patients, the associate would be paid.

52. The respondent had no control over the treatment plans. He had freedom to set a higher price. There was no disciplinary procedure, no appraisals and no performance reviews. There was no recognised procedure followed in terminating the contract. He did not require to wear a uniform and did not often use his email address from that place of work.

53. The claimant maintained that he could not choose to work, but went where the work was allocated to him; Mr Sweeney said that the claimant could attend where he chose, which is consistent with his having complete authority over treatment plans.

54. There was no mutuality of obligation between the parties. The claimant was not paid a salary and he could make himself available at any time during the days when the practice was open. His income was related to his activity, not a salary. He was not an integrated part of the business. If a refund were required to be given to a patient, the claimant would share the cost with the business.

55. The respondent did not, he said, contribute to the claimant's pension, which was directly arranged between the claimant and the NHS.

56. The understanding of the parties was that the claimant was self-employed. Mr Wallace said that he was happy to accept that the claimant may have the features of a worker, but that that was not the understanding of the parties at the time.

57. Mr Wallace submitted that the claimant's evidence could not be regarded as credible or reliable. He did not go into detail about the amendments to the written contract, but picked up points which were useful to him.

58. He argued that the claimant's evidence about the new website was not convincing. It was not a marketing tool but an indication that a live business was under way. The claimant was, he submitted, evasive in his answers under cross-examination, whereas the respondent's witnesses were consistent.

59. For the. claimant, Dr Hussein submitted that little weight should be attached the written contract produced by the respondent. The claimant produced 3 clear statements from the respondent (2-4) demonstrating that he was employed. The written agreement was not signed by the claimant.

60. He argued that Mr Sweeney had no interaction with the other dentists, but oddly was able to answer directly and quickly detailed questions about the respondent's relationship with its dentists.

61. The calculations showed the gross earnings of the claimant including the pension with it, which is the hallmark of employment status.

62. Dr Hussein submitted that the claimant attended at work every day from 9am to 5pm, carrying out the orthodontic duties which only he could do. He was employed by the respondent. The respondent took some of the claimant's allowance from the NHS during lockdown, which demonstrates that there was an employment relationship between them. Throughout his employment with the respondent, the claimant has had only one source of

income. He did not seek to recruit any of the respondent's patients even after he was dismissed by them.

63. if anything went wrong with the treatment, it was the claimant's responsibility, which is not unusual for an employee.

64. The respondent has continued to control the payments to the claimant over a period of 7 months. He has gained professional awards which have given financial gains to the respondent.

65. The claimant had to provide personal service to the respondent. Uniforms are not part of the culture for orthodontists. The claimant had an email address from the respondent. He did not mention his agreement with the respondent because his earnings grew as he had aspired to.

66. Dr Hussein submitted that the respondent's evidence was based on assumptions, which were not supported by the evidence.

67. The reason for dismissal given was further evidence of control, since they wanted to prevent him from working somewhere else..

68. The claim is not time-barred. He continued to ask for payments after his employment ended. He was not legally qualified to understand what he was doing. His correspondence was ignored by the respondent

69. The respondent provided facilities and equipment for the claimant. He went into the practice premises and carried out the respondent's work using their equipment.

70. Dr Hussein maintained that the claimant had been deprived of payments unlawfully.

The Relevant Law

71. Section 230 of the Employment Rights Act 1996 (ERA) provides as follows:

(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. "

72. Although the parties did not refer me to the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 AHER 433 QBD, it is appropriate to have reference to its terms, in which Mr Justice MacKenna set out the foilowing questions:

* Did the worker agree to provide his or her own work and skill in return for remuneration?

• Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

• Were the other provisions of the contract consistent with its being a contract of service.

73. This approach had been described by Mummery J in Hail v Lorimer [1992] ICR 739 as having as its object the painting of a picture from the accumulation of detail. The view there expressed was that the overall

effect could only be appreciated by standing back from the detailed picture which had been painted, viewing it from a distance and making an informed, considered and qualitive appreciation of the whole. Turning to the more recent treatment of the issue, in Autoclenz v Belcher [2011] ICR 1157, there Lord Clark of Stone-cum-Ebony had stressed (at paragraph 29) that the question in every case must be what was the true agreement between the parties.

Discussion and Decision

74. This case has been an unusual and difficult case to determine. The Hearing before me was plainly a Hearing on the Merits, though the preliminary issue of the claimant's employment status loomed very large in the evidence. The question of time bar remains open for determination as well, though it is not clear to me that the claimant or his representative understood that that was relevant to this Hearing.

75. The evidence from both parties presented some difficulties for the Tribunal. The claimant presented as an intelligent and articulate individual, experienced in his profession. However, it is clear that he is very angry with the respondent, and his evidence was frequently punctuated with assertions of illegality and even fraud on the part of the respondent, despite my regularly intervening to advise him that such allegations did not belong within the Hearing. It is important to make it plain to both parties that the purpose of this Hearing was not for the Tribunal to decide whether or not the respondent has acted honestly in its handling of monies received, for example, from the NHS, and I express no view on that matter.

76. The issues for determination in this case were not agreed nor set out in a List of Issues by the Tribunal. As a result, it is necessary for the Tribunal to define the issues in this case, and to set out how they are to be determined.

77. The issues, as it appeared to me, can be simply summarised as follows:

1. Was the claimant an employee or worker of the respondent?

2. If so, was his dismissal unfair?

3. If his dismissal was unfair, what compensation should be awarded to him? In particular, should any reduction be made to any award of compensation on the basis that the claimant has, by his blameworthy conduct, contributed to his own dismissal?

4. If the claimant was an employee or worker of the respondent, has the respondent unlawfully deprived the claimant of pay? If so, what sum should be awarded to the claimant?

5. Were the claims presented by the claimant time-barred? If so, which claim or claims, and does the Tribunal have jurisdiction to hear them?

78. It is quite clear that the fundamental question, from which the answers to ail the others flow, is the first one.

1. Was the claimant an employee or worker of the respondent?

79. It is necessary, in my judgment, to consider all of the facts available in order to understand the true nature of the agreement between the parties.

80. That will include an analysis of the evidence given by both parties and their witnesses, and the documentary evidence presented.

81. Taking a chronological overview of the evidence, the first aspect to be considered is the claimant's evidence that when he discussed matters with Mr Sayegh, in advance of his appointment, he made clear to him that he would only accept the position on condition that he was given a contract of employment, and guaranteed 700 patients. Mr Sayegh did not give evidence, and none of the other witnesses was in a position to speak about this matter, other than Mr Sweeney, in general terms, who stated that the written agreement (unsigned) produced to the Tribunal was typical of the agreements with all of the other orthodontists. Dr Hussein's

position was that since there were variations in the claimants contract, reference to other contracts did not assist the Tribunal

82. The claimant also said that he had seen an agreement which was similar to the one produced, though he could not recall if it was in precisely the same terms, but that he had "provisionally" signed it, with handwritten amendments which Mr Sayegh had agreed.

83. There are a number of difficulties with this evidence.

84. Firstly, the claimant does not make any reference to this conversation in his claim form. It was presented as critical evidence which supported his position that he was an employee, and yet nothing in his claim form suggests that there was such a conversation.

85. Secondly, the claimant could have called Mr Sayegh as a witness, but did not do so. Had he done so, the details of such an alleged conversation could have been clarified and put beyond doubt It is not clear why Mr Sayegh was not called as a witness by the claimant.

86. Thirdly, the claimant's evidence was that he expected to be guaranteed 700 patients, which is why he accepted the position in the first place; however, he also said that initially that was not the number of patients he was allocated, but that he was content to allow that number to be built up over time. The respondent observed that this was a contradiction. I do not consider it to be a contradiction, in the sense that it is not entirely inconsistent, but it is not entirely consistent either. If it were a condition of his accepting appointment that he would be allocated 700 patients, it would seem odd for him then to proceed to work on in the appointment with a much smaller allocation than that. It is not clear from the claimant's evidence that he did in fact have 700 patients.

87. Fourthly, it seemed that the claimant's concern at the outset was mainly to ensure that he maintained a particular level of income rather than a specific level of patient allocation.

88. Fifthly, and perhaps of greatest concern, the terms of the claimant's claim form were contradictory of his stated position in evidence, particularly as they seemed to have been drafted with considerable care. The claimant stated:

> *'7 started working on 01/09/2009. I reluctantly signed the only offered contract on 17/01/2011."*

89. It is notable, in my judgment, that he did not say, as he insisted in evidence, that he had "provisionally" signed the contract, with handwritten amendments, which were accepted by Mr Sayegh. He stated that he reluctantly signed the only offered contract. If it were the only offered contract (and the terms are then narrated in the claim form to be drawn from the written agreement produced by the respondent), then there would be no other contract; and in his evidence, he maintained that there was another contract, namely the version with his handwritten amendments which Mr Sayegh accepted. The date of the only offered contract aligns with the date of the produced agreement.

90. Further, the claimant did not say that a different copy of the agreement was then produced, following the agreement to amend, and he accepted that he did not pursue the matter. This would be very unusual in circumstances where the claimant was seeking to stress to the Tribunal that he would not have accepted the appointment had he not been assured that he was to be an employee. If that were such a concern to him, it is inconceivable that he would have let the matter rest there.

91. Accordingly, I am not convinced that the claimant's evidence that he only accepted the appointment on condition that he was made an employee. Rather, it seems to me that not only has the claimant sought to emphasize his apparent employment status since his contract was terminated, with a view to taking legal action, but that he did not challenge his employment status until that point because he was not of the view that he was an employee.

92. His evidence about the alleged conversation with Mr Sayegh, and his assertion that he agreed a handwritten set of amendments with him on the written terms, is not, in my judgment, credible, and I am not prepared to accept it.

93. This brings us to the written agreement which was produced, though not signed. As I have indicated above, the claimant's position on this agreement was difficult to follow, given the terms of his claim. However, there is no evidence that the written agreement (234ff) was ever signed: the claimant's evidence about any other agreement is not, as I have found, credible; and the respondent's witnesses were unable to assist the Tribunal as to whether or not this was the agreement which was placed before the claimant for agreement in 2011, since they were not in the business at that time.

94. On the other hand, the agreement is dated 17 January 2011, which is the date which the claimant himself refers to in his claim form when he was presented with the only offered contract he was given by the respondent. In addition, he says he was only offered one contract, which he reluctantly signed.

95. The conclusion which I have reached is that the agreement produced is, on the balance of probability, the agreement which was signed by the claimant, however reluctantly. It is well understood that the copy produced was not signed, but it follows from the terms of the claimant's claim form that a copy of an agreement was signed. The fact that it has not been produced does not mean that it does not exist, though it is plainly unsatisfactory to the Tribunal that a copy is not available.

96. Accordingly, I consider that the terms of the agreement should be taken into consideration in deciding what the true agreement between the parties was.

97. It is necessary, then, to consider how the parties operated in practice, in order to have all of the necessary factors available to allow a finding on the claimant's employment status to be made.

98. On the evidence, I have concluded the following to reflect the reality of the relationship between the parties:

- The claimant required to give personal service to the patients whom he was allocated by the respondent;
- The respondent found it desirable and convenient to ensure that a patient, once allocated, was treated throughout the course of his treatment journey by the same orthodontist;
- The respondent described the claimant as "working with us as a Specialist Orthodontist" (2); as having "been employed by Sayegh Orthodontics Ltd as a Specialist in Orthodontics" (3); and as having "been in full time employment with Sayegh Orthodontics Ltd as an Orthodontist" (4);
- The SPPA wrote to the claimant in December 2009 to say that "Your employer has informed us that you entered pensionable NHS employment on 31 August 2009 and that you have chosen to join the National Health Service Superannuation Scheme." (5);
- The respondent provided a guide list of prices for particular work to be carried out;
- The claimant was at liberty to alter the price, if he considered that a particular procedure was of such complexity or risk that a higher price could be justified to the patient;
- Payment was made by the patient to the practice, not to the claimant, and he was then paid a proportion of the commissionable earnings;
- Payment was made to the claimant via accounts in the name of MMRO-Dent Ltd and MMRO Dental Partners, not to a personal account operated by the claimant himself;

- Payment was made to the separate accounts on the basis of advice from the claimant's accountant, who suggested this approach as it was tax-efficient;

- The claimant was paid his earnings at the rate agreed by the respondent, without deduction of tax or national insurance. He required to account to HMRC for personal tax on his income directly;

» The claimant was not paid a guaranteed salary;

- The claimant was able to make himself unavailable at times for bookings, though on the basis that he provided sufficient notice to the respondent. If he agreed to accept bookings on particular days, he required to attend to provide the orthodontic treatment agreed;

- The claimant required to attend the premises of the respondent in order to carry out the orthodontic work which he had agreed to do;

- The claimant was not guaranteed a particular amount of work, and there is no indication that the claimant every complained about his allocation of patients;

- The claimant was subject to restrictive covenants set out at paragraph 6 of the agreement (237), stipulating that for the protection of the goodwill of the practice he would not, without the prior consent of the practice owner, carry on the practice of an orthodontist other than for the practice, within a one mite radius of the practice;

- The agreement provided that nothing therein "shall create or be deemed to create any contract of employment" (paragraph 9.1)(241);

- The claimant required to make payment to the respondent in relation to laboratory costs in relation to investigations he instructed in treatments;

- The agreement was said to be "personal to the parties and is not capable of assignment, charge or other disposition" (paragraph 13.1)(243).

- The claimant was solely responsible for the treatment plans in respect of the patients under his care, in which the respondent had no involvement;

- In the event that a patient complained of faulty or failed treatment, the claimant required to contribute to any repayment of fees rendered to the patient; in other words, the claimant bore the risk, or part thereof, of liability in the event of a claim about his treatment;

- The claimant was a member of the NHS Superannuation Scheme, to which the respondent made no contribution;

- The claimant considered himself free to advertise himself as the Orthodontist on the website of Ocean Orthodontics, at a point when he was still in a working relationship with the respondent, without advising the respondent that he was doing so;

- The website of Ocean Orthodontics offered an option to visitors to the site to make a booking to see an Orthodontist, and on the evidence available, that Orthodontist was the ciaimant;

- The respondent considered that the claimant had acted in breach of their agreement by setting up in competition to their business while still under contract to the respondent, without having advised them that he intended to do so;

- The agreement between the parties made no provision for a disciplinary nor a grievance procedure, in the event of a dispute between them;

99. The agreement between the parties in written form specifically provided that it was not a contract of employment. Of itself, while a factor to take into account, I do not consider that to be determinative. However, it is a factor to weigh in the balance, as an indication of the true agreement between the parties and their understanding of that agreement.

100. One point which was made on the claimant's behalf was that if the claimant were not an employee, and therefore entirely free to use his time as he pleased, terminating his contract because he had advertised himself on the website of a different company was inconsistent with that assertion. On the face of it, this is an attractive argument. If the respondent wishes to suggest it has no control over the claimant's activities, then there is no reason why they would consider that taking up duties for another company would be a matter for concern for them.

101. However, it is plain that the respondent did disapprove strongly of the claimant's actions, and saw it as being in breach of the terms of the contract, since he had not sought their prior approval. I should make clear that at this stage I am not assessing the fairness of that approach, but seeking to weigh this issue up as part of determining whether or not the claimant was truly an employee.

102. The fact that the respondent wished to protect its business by ensuring that the claimant and others could not set up in competition with them in an area close to them does not mean that they regarded the claimant as an employee, or that he was in fact an employee.

103. Without adopting a checklist approach to the assessment of whether or not the claimant was an employee of the respondent, it seems to me that it is of considerable significance that the claimant had a degree of freedom in his working arrangements, albeit that over the time when he was working for the respondent he did not exercise that freedom. If the

respondent had ceased to allocate patients to him, there is no evidence that he could have taken action against them tn breach of contract, or claimed that they were failing in an obligation to provide him with work. The claimant developed the relationships with the patients and maintained the treatment plans, in which the respondent had no direct or indirect involvement.

104. As a result, it is difficult to conclude that there was any degree of mutuality of obligation between the parties in relation to the work which he carried out in the respondent's premises.

105. In addition, while the claimant seeks to rely upon the respondent's actions in terminating his contract when they discovered that he was setting up, or had set up, a competing business, it is also apparent that the claimant considered himself to be at liberty to set up that business himself. He denied that he had treated any patients under the banner of Ocean Orthodontics, but it is very difficult to accept that evidence when it was apparent from the terms of the website that people could, in December 2021 , book an appointment with the only Orthodontist referred to on the website, namely the claimant. In my judgment, it is not credible to accept the claimant's evidence that he carried out no treatment of patients at that stage in Ocean Orthodontics, and his denials do not convince.

106. I should point out that Dr Hussein, who 'was the claimant's representative, is also responsible for the business for which the claimant now works, and was anxious to make some observations about the claimant's involvement in that business. He did not submit himself to evidence under oath or affirmation, however, and accordingly the Tribunal can only draw conclusions from the evidence given and not from assertions made by Dr Hussein in his capacity of representative without supporting evidence from a witness.

107. The evidence presented by the claimant was that he made certain payments to Vitaliteeth, the company for which he started to work following his termination by the respondent, and also that he received

significant income from them. In addition, he gave evidence that he had been allowed to defer payments due to Vitaliteeth, in order to allow him to "get back on his feet" and establish himself in the new business.

108. In support of this, a document was presented to the Tribunal in the form of dated entries, with figures attached under the headings of Money In and Money Out, apparently showing the claimant's banking entries for the period from 28 January 2022. Two points require to be made about this document (30Iff): firstly, it is not a bank statement, but a document prepared, by person or persons unknown, extracting information from what may have been a bank statement, from an account which is not named nor allocated a number, and as a result, its provenance is very unclear - it may simply amount to an extract of information, rather than a complete rendering of the claimant's income and outgoings over that period; and secondly, it does not disclose payments made prior to 28 January 2022, which does not allow the Tribunal to draw any conclusion about whether the claimant received any payment from Vitaliteeth prior to leaving the respondent. Since the claimant's position as to his work with Ocean Orthodontics is entirely unclear, this document is, in my judgment, unhelpful and incomplete.

109. The means by which the claimant was paid by the respondent, through a company or a partnership owned by the claimant, for the tax benefits received, is not consistent with the payment of a salary to an employee, relying upon the deduction of PAYE income tax at source, and national insurance.

110. The fact that the claimant not only had to make payment to the respondent in respect of, for example, laboratory services, but also had to share in the payment of refunds to patients for faulty or failed treatment, is not consistent with employment status, but is redolent of the claimant being self-employed and therefore accepting the whole or part of the risk of liability with the respondent's business. The respondent did not accept vicarious liability for the actions of the claimant.

111. On balance it is my conclusion that the claimant was not employed by the respondent under a contract of employment, and was therefore not an employee.

112. The question which remains, however, is whether the claimant was a worker, or a self-employed individual.

113. The question is important as the right not to suffer unlawful deductions from wages in section 13 of ERA applies to a worker as well as to an employee.

114. A worker is defined in section 230 of ERA as a person who works under a contract of employment (which does not apply here) 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;"

115. As has been established, there is an element of personal performance by the claimant in the arrangement with the respondent. The respondent's position on this was that the personal performance was owed by the claimant not to the respondent but to the patients in his care. However, in his submissions, Mr Wallace stated that he there were a number of factors in the relationship which suggested that the claimant may have been a worker. He said he was "happy to accept that the claimant may be a worker, but that was not the understanding of the parties."

116. It is difficult to work out how far this submission takes matters. The understanding of the parties is a factor to be considered, but ultimately the question is what was the actual agreement reached between them.

117. Although I have found that the claimant was providing personal service to the patients rather than to the respondent, it is clear that while he was not an employee he was strongly identified with the practice. The press reports commending him for his work with a particular young patient, and the award he garnered as a result of that work, both indicated that he

worked in the practice. The correspondence from the respondent suggested that he worked with them. During his time with the practice there is no evidence that he worked elsewhere or was identified with another practice until the website of Ocean Orthodontics was found to have his name and picture attached as the Orthodontist responsible for care there.

118. To establish the status of an individual as a worker, it is also necessary to show that the other party to the contract (in this case, the respondent) was not a client or a customer of any profession or business undertaking carried out by the claimant. In Byrne Brothers (Form work) Ltd v Baird and Ors 2002 ICR 667, the EAT sought to give guidance: *"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. "*

119. In the claimant's case, his personal services to patients allocated to him by the respondent; his use of their facilities; the relative regularity of his attendance at their premises; and his payment relationship with them, which again demonstrated a degree of regularity about it; are all indicative of a relationship which in my judgment is not at arm's length or completely independent of the respondent. The fact that he did not, for the vast majority of the duration of the contract, work for others suggests that there was a degree of dependence between the parties, without amounting to an employment relationship.

120. As a result, it appears to me that on the evidence, the claimant was a worker under section 230 of ERA, with the consequences for these claims which follow.

2. If so, was his dismissal unfair?

3. If his dismissal was unfair, what compensation should be awarded to him? In particular, should any reduction be made to any

award of compensation on the basts that the claimant has, by his blameworthy conduct, contributed to his own dismissal?

121. In issue 2, the “If so” refers to the first question, which was whether the claimant was an employee or a worker. Having found that the claimant was not an employee, the Tribunal does not have jurisdiction to hear his claim of unfair dismissal, and accordingly issue 2 must be answered in the negative. Issue 3 then falls away.

4. If the claimant was an employee or worker of the respondent, has the respondent unlawfully deprived the claimant of pay? If so, what sum should be awarded to the claimant?

5. Were the claims presented by the claimant time-barred? If so, which claim or claims, and does the Tribunal have jurisdiction to hear them?

122. I take these two issues together as they are linked. As I have indicated, section 13 of ERA applies to workers and therefore the unlawful deductions claim must be considered.

123. It is necessary to state at this point that the evidence on this matter was very confused, and confusing, and it has never been entirely clear to the Tribunal what the claimant is actually claiming. However, the Schedule of Loss presented at 294/5 focuses largely on the compensation sought in the claimant’s unfair dismissal claim, until a brief reference to "Under payments”, for the period until September 2021 , amounting to £12,500.

124. In his letter of 21 March 2022 to the respondent, the claimant makes reference to under payments, “as per you admission for the period until September 2021” (53). He described the sum as being ‘liable to audits, but I estimate the total to be £12,500”.

125. In his evidence, the claimant was asked, shortly after lunch on the second day of the Hearing, how he reached the calculation for the underpayment. His answer, in my view, was very unclear. He said that he had receipts and had asked for a calculation from the receptionist (though which

receptionist and in which clinic he did not specify). He said that this was where he found a discrepancy, and that he remembered not seeing a receipt from a patient, who had, he said, paid the practice in January. Whether this was January 2021 or 2022 is not clear.

126. The only conclusion I have been able to draw from this rather sparse evidence is that the claimant believes that he has been underpaid, but is unable to prove the specific amount of the underpayment ("I estimate the total to be £12,500"), nor give any detail as to precisely what it referred to. On the evidence I have, it is not even clear which year it related to, though the implication from his Schedule of Loss is that it was prior to September 2021.

127. it is for the claimant to prove his loss. In this case, the claimant has been prone to making a number of allegations against the respondent, whether directly relevant to his claim or not. He plainly mistrusts the respondent, if he has suffered a significant loss such as this at their hands, it is understandable why he would find difficulty in trusting them.

128. However, this is a significant claim, and in order to succeed in proving it, he must satisfy the Tribunal on the evidence that he has actually suffered such a loss. The evidence before me is simply inadequate to allow any such conclusion to be reached. It is unclear to me why no more details were provided, or more specific information was presented, but in any event, a Tribunal cannot conceivably make an award to a party of an allegedly unpaid sum when it is based on an estimate. Further, the claimant requires to prove that the sum he claims, properly calculated, was due to him, and when it was due. In my judgment, the claimant has failed to do so.

129. Accordingly, the claimant's claim of unlawful deduction from wages must fail, and it is dismissed.

130. In these circumstances, it is not necessary to consider whether the claim was time-barred, though I note that there was no explanation provided to the Tribunal as to the reason for the delay in presenting the claim.

131. It is therefore my conclusion that the claimant's claims must fail, and they are thereby dismissed.

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Employment Judge: M MacLeod
Date of Judgment: 30 January 2023
Entered in register: 31 January 2023
and copied to parties