EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Dr A Medina		Prodent London Ltd

Heard at: **London Central Employment Tribunal**

On: **30 October – 1 November 2024**

Before: **EJ Webster**

Appearances
For the Claimant: **Ms Ahira (Counsel)**
For the Respondent: **Mr Williams (Counsel)**

JUDGMENT

1. The Claimant's claim for unlawful deduction from wages claim is upheld.

2. The Respondent must pay the Claimant the sum of £29,384.40 (expressed as a gross figure).

REASONS

The hearing

3. I was provided with a digital bundle numbering 790 pages and a supplementary bundle numbering 177 pages. I was provided with written witness statements for the Claimant, Ms Burgess the CEO and owner of the Respondent, and Dr J Master, another dentist working at the Respondent. I also had short supplementary statements for both the Claimant and Ms Burgess. All three were available to give oral evidence.

4. In addition I was provided with a schedule of loss and a counter schedule of loss which both parties relied upon at the hearing.

5. At the outset of the hearing I clarified the issues with the parties. The List of Issues had been outlined in the Case Management Orders given by EJ Jack in

February 2023. Unfortunately those Orders were not in the bundle but they were agreed.

6. Ms Ahira brought to my attention that there was an outstanding application to amend by the Claimant that increased the sums he was seeking following disclosure by the Respondent. Mr Williams accepted the changes sought and so we proceeded on the basis of the amended claim which amended the amounts sought, not the claims or issues to be decided.

7. Both counsel gave helpful oral submissions in the morning of Day 3. I reserved my decision due to the large number of factual disputes between the parties.

List of Issues

8. Unauthorised deductions

    a. Were the wages paid to the claimant at the end of May, June and July 2022 less than the wages he should have been paid?
    b. Was any deduction required or authorised by statute?
    c. Was any deduction required or authorised by a written term of the contract?
    d. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
    e. Did the claimant agree in writing to the deduction before it was made?
    f. How much is the claimant owed?

9. Remedy
    a. How much should the claimant be awarded?

The Law

10. S13 ERA Right not to suffer unauthorised deductions

S13 (1)An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall

be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

11. The cases of Agarwal v Cardiff University and anor 2019 ICR 433, CA, and Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331, CA, confirm that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

12. A tribunal must assess the total amount of wages properly payable to the Claimant by considering what was meant to be paid to the Claimant less any deductions which the Respondent is lawfully entitled to deduct. The remaining sum is the properly payable amount.

13. The burden of proof lies with the Claimant to establish that they are entitled to a sum other than that which they have received. However, in respect of any deductions, it is for the respondent to show that the amount of the deduction is justified. A Tribunal ought not to engage in a speculative exercise without concrete evidence regarding the deductions.

Facts

14. I have only made findings of fact in relation to matters which assisted me in reaching a conclusion. Where I was provided with evidence that is not referred to below that does not mean that I have not considered it but means that it does not assist me in reaching my conclusions. All my findings are reached on the balance of probabilities.

15. The Claimant worked as a dentist for the Respondent. In a previous hearing, EJ Tinnion had concluded that he was a worker for the purposes of the Employment Rights Act 1996 and that his claims pursuant to s13 ERA were in time. A copy of that Judgment was in the bundle.

16. The contract governing their relationship was called the Associate Agreement for Private Practice. I shall refer to it as the Agreement. It was not in dispute that the Claimant signed the Agreement on 15 November 2021 and that he was

provided with a copy. It was not in dispute that this was the contract which governed their relationship.

The Agreement

17. The Agreement included the following relevant clauses:

5. Charge for Licence
5.1 The charge for the licence to practise dentistry granted by this Agreement shall be calculated and paid on the basis set out in Schedule 3.

….

11. Restrictions and Termination
11.1 For the purpose of protecting the goodwill of the Practice Owner upon the termination of this Agreement (for any reason) the parties will be bound by the provisions of Schedule 4.
11.2 The Associate confirms that he has been given the opportunity to take independent legal advice on the terms and effect of this Agreement and in particular the provisions of Schedule 4 and this clause.

…

18.6 The Practice Owner shall be entitled to deduct from the Associate's pay:

18.6.1 100% of any recruitment fees incurred in recruiting the Associate together with all reasonable costs in recruiting a suitable replacement, if the Associate terminates this Agreement within the first 6months for any reason; and

18.6.2 50% of any recruitment fees incurred in recruiting the Associate together with all reasonable costs in recruiting a suitable replacement, if the Associate terminates this Agreement within the first 12 months for any reason, and the provisions of clause 18.6.1 do not apply.

18.7 The Practice Owner shall be entitled to deduct from the Associate's remuneration any sums which he may owe to the Practice Owner including without limitation losses suffered by the Practice Owner as a result of his negligence or breach of this Agreement. The Practice Owner shall provide the Associate with a breakdown of the deductions to be made from the sums due to the Associate within 14 working days of termination of this agreement and save for manifest error the Practice Owner's calculation shall be final and binding.

18.8 The Associate may not treat any patients at the Practice without making a proper charge unless the provision of discounted or free treatment has been agreed in advance with the Practice Owner for each patient treated.

18.9 All patient charges are payable to the Practice and the Associate agrees never to collect charges directly from any patient of the Practice i.e. to only collect patient charges through the usual practice procedures.

Schedule 1 – Definitions

Average Monthly Contribution

The average monthly total Charge for Licence (calculated over the most recent 3 months)

Further Charges
Credit card commission charges = [50]% to be deducted
Treatment finance costs = [50]% to be deducted
Bad debts = [50]% to be deducted
Cost of repairs and replacements of treatment = [100 %] to be deducted
Compliance contribution = £[200] deducted annually
Laboratory charges = 50% to be deducted
Data Protection Registration Charge = £[35] to be deducted
DBS Update Service at the current rate = £[13] to be deducted annually
See clause 18 of this agreement for other potential charges

Retention Figure
40% of one month's Average Monthly Contribution (the Average Monthly Contribution shall be calculated as an average of the last three months of work prior to the Termination Date).

The Retention Figure will be repaid according to Schedule 4.

Schedule 3 - Charge for Licence
1. The Charge for the Licence is to cover all common expenses.

2. Within 14 days of the last business day of each month the Practice Owner shall provide the Associate with a statement of:

2.1 the Private Treatment Fees collected (on a cash received basis) in respect of patients attended by the Associate in respect of this Agreement under private contract, insurance or capitation scheme for the previous calendar month;
2.2 laboratory charges incurred on behalf of the Associate during the previous month;
2.3 any cost of repairs or replacements of treatment.

3. The Charge for Licence

Item	***Amount Charged for Licence***	***Remittances to the Associate***
Private Treatment Fees	*60%*	*40%*

4. The Practice Owner will remit to the Associate on or around the 20th day of each month the remittances according to 3 above after deducting the Further Charges in Schedule 1.

5. Additional deductions may be made according to: clause 6 Hours; clause 7 Locums; or clause 18 Miscellaneous.

6. Where treatment is provided by any practitioner working at the Practice to the patient of another practitioner working at the Practice, the fees earned will be allocated to belong to the practitioner providing the treatment. Accordingly, the relevant fees shall be debited from the statements of the practitioner to whom the patient is registered and credited to the statements of the treating practitioner. In the case of a patient treated under a capitation arrangement or where there is any doubt about the amount of fee due to the treating practitioner the fee will be calculated using the scale of fees for private treatment adopted by the Practice.

Schedule 4 – Termination and Restrictions
2. Upon the termination of this Agreement the Records shall be retained by the Practice Owner provided that the Associate shall (at his own expense) be entitled to take copies of the Records and shall have reasonable access to them if reasonably required for clinical or financial matters relating to his time at the Practice.

On termination or service of notice of termination of this Agreement the Practice Owner may withhold the Retention Figure from sums otherwise due to the Associate to pay for the cost of carrying out remedial work in respect of any treatment carried out by the Associate which (a) fails; or (b) was not completed with reasonable care and skill. Where notice to terminate has been served the Practice Owner may, at his option, withhold the Retention Figure in equal tranches during the notice period. Half of the balance remaining of the Retention Figure will be paid to the Associate 6 months after the Termination Date and the remaining balance together with any interest which has accrued will be paid a further 3 months after Termination Date. Deductions from these payments will be made according to Schedule 1 and this Agreement."

Schedule 5

Failed Treatment
3.1 During this Agreement the Associate agrees to replace all treatment provided by him which fails or which was not carried out with reasonable care and skill such that remedial treatment needs to be provided and for which the Practice Owner is unable to raise a charge within 12 months, at no extra cost to the patient or the Practice Owner. All such failed treatment shall be reported to the Practice Owner on a weekly basis.

3.2 In the event of either the failed treatment not being replaced or the remedial treatment not being provided by the Associate before the termination of this Agreement or the Practice Owner becoming aware of such failed treatment within twelve months of the Termination Date then, on the production of reasonable evidence to the Associate, the Associate shall indemnify the Practice Owner the cost of providing replacement treatment.
…..

4. General
4.1 The Practice Owner will be entitled to deduct from any moneys due to the Associate under this Agreement any sums due from the Associate.

18. The parties agreed that the Claimant's wages were calculated by taking the gross amount of fees he billed in a month and splitting them 40% to the Claimant and 60% to the Respondent. The Claimant's wages were 40% of the billed work.

19. In a normal month, the deductions made were fees for the laboratory work on the patients. Liability for those fees were split 50:50 between them and their individual shares of those laboratory fees was deducted from their % split. So, if the work billed for that month amounted to £10,000 and the laboratory work amounted to £1,000 the parties would have received:
    £3,500 – Claimant
    £5,500 – Respondent

    With each party paying £500 to cover the laboratory work.

20. It was not in dispute that the Respondent was contractually entitled to hold a retention fee when the contract was terminated. The method of the calculation for that payment was in dispute but not the fact or the contractual legitimacy of that deduction under the Agreement.

21. It was not in dispute that the Respondent could deduct from that retention fee the following amounts:

    (i) The cost of carrying out remedial work in respect of any treatment carried out by the Associate which (a) fails or (b) was not completed with reasonable care and skill.
    (ii) Any monies owing from a patient in respect of treatment provided

22. The Respondent was entitled to keep the retention payment for 6 months after which they had to pay half of any balance back to the Claimant. The remaining half was payable back to the Claimant after three months. The Respondent asserted that no funds remained that were payable to the Claimant after the relevant deductions and that was why no payment was made.

Termination

23. It was not in dispute that the Claimant resigned via messaging on 7 July 2022. There was evidence in the bundle of various messages between the Claimant and colleagues within the Respondent disputing the accuracy of payments to him, the timeliness of payments made to him, the quality and timeliness of the lab work and various issues regarding patient care. Save for information regarding specific deductions made I have not made any findings in relation to the cause of the ill feeling between the parties as it was not necessary for the purposes of my conclusions.

24. The Claimant then says that at a meeting on 13 July 2022 with Ms Burgess, he was persuaded to rescind his resignation and agreed to stay on. This version

of events was supported by his subsequent message to a colleague (p337) which said as much and to which his colleague responded in surprise. The Claimant says that it was also supported by Ms Burgess subsequently emailing saying that they hoped he would be able to return to remedy or complete various pieces of work on various patients.

25. Ms Burgess refuted this version of events saying that she did not ask him to rescind his notice and that from the 7 July onwards she behaved as if the contract was coming to an end after his 3 month notice period. She said that the relationship with the Claimant was quite difficult (my words not hers) and that he kept making multiple errors with regard to the treatment of patients and how he asked for lab work and how he entered that onto the system. The difficulties he was having regarding his pay were of his own making in her view. She said that they did not have the same level of such difficulties with other dentists. The invitation to return to work was based on the fact that she did not know until later that his accident was as serious as it now transpires to be and that she believed he was going to work his notice period. There were emails from her to the Claimant discussing the retention payment and the deductions. At no point did the Claimant respond to that correspondence suggesting that he disagreed with the fact that he was leaving.

26. There was, unfortunately, an intervening event on 1 August 2022 which was that the Claimant had a bicycle accident which resulted in his thumb being injured. This injury rendered him unable to work for the remainder of his notice period and meant he could not return to work. The fact of his accident and the impact on his ability to do his job during the relevant period was not disputed before me.

27. When asked by me during his evidence as to when he believed that the situation had changed and that he was in fact working his notice as opposed to his contract continuing indefinitely, the Claimant was equivocal in his answers. He could not say exactly what made him realise that Ms Burgess did not in fact want him to return nor when he realised it. Whilst I understand that the accident was a shock and that the extent of the impact of his thumb injury must have been a further shock, I am not persuaded that the Claimant, at any point, genuinely thought that his contract was not coming to an end. Even by his evidence, he accepted that he was exhausted and that the relationship had finished by August 2022.

28. I accept that it is possible that he had a conversation with Ms Burgess on 13th July at which she expressed regret that he was leaving and asking him to think about reconsidering which he interpreted as being asked to stay. I also accept that he told a colleague that he was in fact staying; however I do not find, on balance, that this was in fact communicated to Ms Burgess in any unconditional way. Perhaps he said he would consider staying on if the notice period went well or if the payment issues he had been experiencing were sorted out. However I do not accept, on balance of probabilities, that there was a clear and unequivocal recission of his resignation to Ms Burgess at any time.

29. I reach this conclusion because of the way that the Claimant behaved in response to Ms Burgess' correspondence about him leaving and the retention payments. Had he been under the impression that he was not working his notice, I believe that he would have objected to the conversations about retention payments and/or he would have referred to the conversation on the 13th July in writing and asked why she had changed her mind about wanting him back. He did not do that. The Claimant said that he had given up but I do not accept this given the responses he gives and the challenges he makes to the subsequent payment schedules.

30. The Claimant's contract therefore has terminated and at its latest it terminated in August 2022. The last date of work was in July 2022.

31. The payments, and therefore the deductions, that are in dispute are for the months of May, June and July 2022. The Agreement states that the Claimant ought to have been paid on or around the 20th of the month following the amounts billed. So, he would expect to be paid for May's work on or around 20th June.

32. The Claimant cited multiple difficulties and delays in getting paid by the Respondent prior to his resignation. He relied on various messages between him and Ms Burgess to show that he could not be certain of whether the payment he received on 5 July was his May payment. Ms Burgess stated that the delays and difficulties in paying the Claimant arose because he made multiple errors on the system partly in relation to the lab work and partly in relation to how he marked work in terms of being done or not.

33. On balance, I find that the payment of 5 July was clearly intended to be in relation to his May work and that he understood it to be at the time. Whilst there may have been difficulties and delays in previous months and whilst he needed to go through the schedule to check that the payments were all accounted for and the deductions appropriate, I do not accept the Claimant's evidence that he reasonably believed it not to be in relation to his May work.

34. This was the last payment received by the Claimant. The Respondent did not then pay the Claimant any monies in respect of June and July because they were retained under their interpretation and calculation of the retention clause.

35. The monies retained by the Respondent related, they said, to the cost of remedial work that had to be done on the Claimant's patients. It was not in dispute between the parties that the contract allowed for deduction of 100% of the costs of remedial work from the retention fee.

36. There was also a subsequent clause under Schedule 5 and Clause 18 under which the Claimant indemnified the Respondent in respect of any other costs or payments made to the lab and any unpaid fees from clients.

<u>Amounts Billed</u>

37. The amounts billed across May, June and July were not agreed in the Schedules of Loss. The figures provided in the Claimant's May schedule and the Respondent's counter schedule were as follows:

Month	**Claimant**	**Respondent**
May	£31,960	£31,279
June	£29,950	£32,610
July	£29,235	£33,960

38. The Claimant based his on the schedule he put together, having reviewed the invoices provided to him, which was included at pages 228-232 of the bundle. The Respondent based their figures on the invoices that they had but no table of those numbers was provided. Mr Williams in his submissions provided me with page numbers for the relevant invoices in each month. Ms Burgess' statement unfortunately does not set out the figures before deductions and reductions were made which makes unpicking the maths difficult. The counter schedule of loss does not do that either. I have not gone through every single invoice in order to check the calculations of both parties as this was disproportionate in a situation where both parties are represented and I consider that I am entitled to rely on the figures provided to me in the Schedules of loss. The discrepancies between the parties are relatively small but not explained. The Respondent's figures are more favourable to the Claimant. On the basis that the Claimant has provided witness evidence as to the derivation of his figures as opposed to submissions and as I have not had the differences explained to me by the Respondent's witnesses or Schedule of Loss, I have preferred the Claimant's figures for this sum.

39. The billing for the relevant months are therefore those under the 'Claimant' heading in the table above.

Deductions

40. There was significant disagreement between the parties regarding the deductions made from the Claimant's wages and whether they could be justified.

41. The amounts retained fell under the following allowed for heads of deductions; Laboratory charges, the cost of repairs and replacements of treatment and losses suffered as a result of negligence or breach of this Agreement. The Respondent also sought to deduct amounts in respect of Overpayments where they said that the Claimant had been paid in full for work he had then been unable to complete due to his accident.

42. Neither party has provided expert evidence in respect of the causation nor reasonable quantum assessments for any remedial work it is now alleged needed doing or any alleged negligence by the claimant. I had a report and witness evidence from Dr Master who attended the proceedings. However he was not giving evidence as an expert and he continued to work for the Respondent so cannot be considered an independent expert. I also had the invoices that he has submitted for the work he carried out that the Respondent says had to be done to correct the Claimant's work.

43. The Claimant accepted that on most occasions, where a patient was unhappy with his work, he would, had he still been working there, have carried out remedial works free of charge to the patient. It was not clear to me how or if he would have charged the Respondent for that work or paid for any laboratory work for those patients.

44. I have considered the evidence I was provided and have reached all my conclusions on the balance of probabilities. I have reminded myself that a Tribunal ought not to engage in a speculative exercise in respect of any deductions made without concrete evidence regarding the deductions.

45. I have addressed the disputed laboratory invoices in the order they arise in the Claimant's witness statement and Mr Williams' submissions helpfully addressed each one in that order too. Unfortunately, Ms Burgess' and Dr Master's evidence did not really focus on the value of the invoices or how they were incurred under each head of lawful deduction. Ms Burgess' witness evidence in respect of the invoices was very vague. However Mr Williams did address the disputed invoices thoroughly during his cross examination of the Claimant. In submissions, Mr Williams helpfully conceded that some of the invoices included did amount to duplications and where they were agreed I have not addressed them below. I have only addressed the disputed invoices. I have referred to the patients by their initials in order to preserve patient confidentiality.

46. Invoice number 4482 dated 3 May 2022 for the sum of £1200 in the name of LP (p 635) is under the name of Dr Yoselin. The Respondent asserts that the Claimant was the person working on LP and that there is evidence including the Claimant's own diary, which, on balance, confirms that he was the dentist undertaking this work. They state that the reason the invoice was under Dr Yoselin's name was that the Claimant had used the wrong name on the login. The Claimant states that this was impossible though he later asserts that another dentist had falsely logged in as him and that those amounts could not be assigned to him.

47. I find, on balance of probabilities that this invoice is for work undertaken by the Claimant as it is very unlikely that two different dentists would have carried out the same work on the same patient on the same day. This invoice is therefore one for which the Claimant is responsible.

48. RM, invoice 4526, dated 17 May 2022 has not been shown to be properly assignable to the Claimant. I had no evidence from the Respondent that this was the Claimant's patient.

49. AA, invoice number 4532 dated 18 May 2022 for the sum of £1650. I accept that this was incurred by Dr Yoselin and not the Claimant as it clearly states within the text of the invoice that "This case is done by Dr Yoslin but her name is not available on transactor". I accept the Claimant's evidence that he did not work on this patient and had not requested this lab work.

50. TB, invoice 4540 dated 24 May 2022 (p608) for a reshade was not accepted by the Respondent though its duplicate was. On balance I do not consider that the Respondent has demonstrated that this was not defective work by the laboratory and therefore find that this ought not to have been deducted from the Claimant.

51. GK, invoice 4560, dated 2 June 2022 for the sum of £800. This was a complex case. The Respondent alleged that there were significant problems with various aspects of the treatment for this patient. The Claimant asserts that the lab had provided substandard products that he ought not have to pay for and that he only fitted them because the patient had a funeral to attend. He accepted that had he remained there he would have carried out remedial work including the fitting of new crowns. He does not accept the remaining assessment of his work.

52. I find, on balance, that the laboratory was responsible for failing to send the new crowns in time and that when they arrived they were not of the quality expected. The WhatsApp messages from the time include various voice notes from Ms Burgess which I was not played. However, at page 272 there is the following exchange:

"Claimant: This is getting to the point where it's not worth it, Nikki. Bank Holiday completely ruined by the thought of facing a perfectly reasonable patient that I've worked hard for and telling her that the crowns she's paid thousands of pounds for and already expected to be fitted now won't be ready for the funeral of her partner who's just been killed in a hit and run. No amount of money in the World is worth the stress that this lab is causing. I earn more at my other practice with zero hassle.
This lab produced shit work, too late, and I sent them perfectly good preps in plenty of time to deal with these things. If they needed any more information they had time to sort it out and I could and would have dealt with it. And now they're refusing to complete the job just before the rescheduled appointment at the last minute which was their fault in the first place!

Ms Burgess: I agree andy
I know exactly how you feel. Complete ruined the weekend.
Look we need to come up with a plan Monday I think."

53. In this exchange, Ms Burgess appears to agree with the Claimant's assessment of the lab work and therefore in respect of the invoice for lab work only, I consider, on balance, that this not a properly deductible amount from the Claimant's wages as although it is lab work of which he would be liable for 50% under the terms of the contract, it appears that this was not an amount that Ms Burgess agreed ought to have been charged in a situation where the work was agreed to be substandard. Ms Burgess' evidence on this point focussed on the remedial work that had to happen later, not on the lab's role in making the crowns late or badly in the first place.

54. There several invoices for AB. The Claimant's statement appears to refer to the wrong page references when dealing with them in his statement. There is one invoice in the sum of £880(p672), and a second in the sum of £70 - AB invoice number 4535, (p646) and a final one (No 4784 dated 23/10/22) for the sum of £40. The Claimant deals with invoices for AB at paragraphs 103 and 106 and 127 of his witness statement. The amount referred to at paragraph 103 is £800.

55. The Claimant stated that he never did whitening at the respondent's practice and as the invoice is for whitening trays he was not responsible. Mr Williams took the Claimant to the schedule of work at page 509 which confirmed that work was done in the Claimant's name for AB. On balance I accept that the Claimant performed work on AB but the amount to be deducted does not seem to clearly be £800 but I find that the £70 identified at page 646 was properly deductible.

56. SN, invoice 4597 dated 13 July 2022 for the sum of £110. The Claimant asserts that it was defective lab work. The Respondent maintains that it was properly payable. On balance of probabilities, given that the Claimant has not been able to set out how or why this lab work was defective, I find that this was a properly raised invoice.

Part Accepted Invoices

57. The respondent accepted that invoice number 4562 for MD dated 2 June 2022 was inaccurate and only £800 ought to have been charged for in the invoice.

58. Invoice 4678 dated 15 September 2022 for BH in the sum of £990 was dispute by the Claimant who said only £880 ought to be charged because one of the items was erroneously charged as there was a remake due to a laboratory error which had already been charged under invoice 4583. I accept that the Claimant has demonstrated, on balance of probabilities that he is being charged for a replacement item when he ought not to be so this invoice ought to be for £770.

59. The Claimant accepted during evidence that the sum of £220 was properly invoiced for invoice 4605, dated 1 August 2022 in the name of CM.

60. In total then the sums I have found that were properly deductible under this heading amount to £1040.

Overpayments

61. There were four patients where the Claimant had been paid in full but only completed part of the work due to his accident. They were SN, MB, MD and TN. The total amount the Respondent says was owed was £3,902.

62. The Claimant did not dispute that he had been overpaid for all of the above but could not put a figure on how much he had been overpaid because little evidence had been given as to what further work was completed by the next practitioners to complete it. He did not accept the numbers provided given that, in his view, some of the preparation work was in fact the lions share of any time spent with a patient and the completion took less time not more.

63. I was given no information or evidence as to how the figures were apportioned. The Claimant did however concede that some work would definitely need to be done in respect of these individuals and that he could not undertake that work.

64. I consider that the Respondent has not properly detailed to the Tribunal the respective value of the deductions it made. It is not possible for me to now apportion how much ought to have been paid for each stage of work. The burden is on the Respondent to prove the amount of its deductions and I do not consider that it has done. I accept however that on balance of probabilities, a significant proportion of at least 25% of the total would have been owed by the Claimant to the Respondent. That gives a total figure of at least £975.50.

Negligence

65. I was not provided with the necessary evidence (expert or otherwise) to determine at any level any negligence allegations now relied upon by the Respondent. I did not have sufficient information to determine breach of any duty of care, causation of any losses or the quantum of any such loss or damage. It was clear that all cases which were detailed as 'Complaints' against the Claimant's work constituted complex patient work with work done by multiple practitioners across various time periods, with complicated patient relationships. Dr Master's evidence demonstrated that he disagreed with the Claimant's treatment of certain patients and set out how he had invoiced the Respondent for the work that he then did for those patients. However he was not an impartial expert witness nor did he provide any sort of expert analysis of the entire patient history, what the Claimant had done negligently and what losses that had caused the Respondent. Ms Burgess' witness evidence did not cover this area either and as she is not a practitioner she could not comment on the validity of the treatment or the complaints brought by the patients in any event.

66. Further the Claimant was never given the opportunity to dispute these allegations in accordance with the terms of his professional indemnity insurance. The Agreement required the Claimant to have such indemnity insurance in place but at no point was the Claimant or his insurers given a proper opportunity to address the complaints or allegations of negligence now relied upon by the Respondent and certainly not in accordance with the terms of Clause 18.7 which states that the Respondent had to provide the Associate with the terms within 14 working days of the termination of the Agreement. Even taking into account the delay caused by the Claimant's accident in ascertaining when the Agreement was actually terminated, the Respondent did not provide the full information to the Claimant in accordance with this clause.

67. To make a decision as to what the proper value of these deductions may or may not have been would have required me to speculate as to all aspects of a negligence claim and I have declined to undertake that exercise.

68. Turning to the final contractual head of allowed for deductions described as "repairs and replacements of treatment". I accept that this could have a lower threshold of proof by the Respondent than any deductions for actual

negligence. I consider that the Overpayments section rightly falls under this head of damages. However the other 'complaints' patients were far more vague in value than the Overpayments.

69. During evidence, the Claimant refuted all allegations of poor quality work but also accepted that he would have carried out remedial work on various patients and would not have charged them for it.

70. His reasons for the disputing that he had caused the requirement for the work were various:

    (i) That he was simply following a treatment plan created by another dentist and therefore he had not decided on the work
    (ii) That the patient was responsible for any defects due to misuse (e.g. not using a mouthguard at night)
    (iii) The laboratory provided late and defective products
    (iv) That the subsequent remedial work was not all remedial work but often went on to take work further
    (v) That some of the work done was bound to 'fail' due to the nature of the work and that further work was always going to be necessary on those patients
    (vi) That he was attempting to put right negligent work by the Respondent

71. This has been a difficult matter to determine. However, on balance as per my conclusions regarding the alleged negligence, I do not consider that I have been provided with sufficient evidence to find that these alleged issues for the patients were properly attributable to the Claimant and/or that the Respondent has properly established that any poor treatment carried out by the Claimant has caused the level of loss or the cost of remedial treatment that they now seek.

72. I am not determining a breach of contract claim by the Respondent against the Claimant. I am determining an unauthorised deduction from wages claim. In circumstances where the balance of proof lies with the Respondent to establish that they are owed the deductions that they have made, I do not consider that they have provided me with sufficient evidence to make that determination without significant levels of speculation on my part.

73. Further, I consider that given my determination in respect of the calculation of the Retention Figure given below, there is no need to determine the value of any such allegations of negligence or most of the remedial work as it would make no difference to the final calculations regarding the value of the claim.

74. For the avoidance of doubt, I am basing this decision on the evidence and the case I have before me. My findings do not bind nor are they intended to bind any subsequent court or decision regarding any other case between the parties or the patients and either party in respect of negligence or breach of contract.

Conclusions

75. Neither party took me to significant amounts of case law in their submissions. I accept that in large part, the exercise in this case is an interpretation of the contract and that there is a disagreement as to how it should be interpreted. In reaching my conclusions I have had regard to various contractual principles but also to the protection that the Employment Rights Act intended when it enshrined in statute the protection of wages.

76. For the avoidance of doubt, I have only reached conclusions regarding the case in front of me which is an unlawful deduction from wages claim. This is not a claim for breach of contract and there is no counter claim by the Respondent. I have therefore expressly not made factual findings or reached conclusions in relation to any such possible claim. I do not accept, as appears to have been put forward by Ms Burgess in her answers to cross examination, that the Respondent is entitled to some sort of equitable set-off. Firstly there is no counter claim and secondly there is no provision within the ERA that allows for any such set off.

77. In Murray v Strathclyde Regional Council 1992 IRLR 396, EAT, it was established that S.13(3) ERA places emphasis on the amount of wages payable on a particular occasion. The entitlement to wages must be considered separately to any debts to the employer. The EAT held that a tribunal was not entitled to refuse the claimant relief under the wages provisions simply because it would be unjust for him to recover them. In that case the EAT held that the wages provisions did not allow an employer to set off cross-claims for damages against wages otherwise due.

78. I accept that in this case there are contractual provisions allowing for some deductions. However, in interpreting the clauses of the contract I have born in mind that a Tribunal ought to scrutinise any deductions carefully given the disparity in power between and an employer and an employee or worker. (*Yorkshire Maintenance Company Ltd v Farr EAT 0084/09)*. This also accords with general contractual principles which is that where there is uncertainty, it ought to be interpreted according to the weaker party's benefit. Although the Respondent sought to assert that the Claimant was an equal, professional party in this contract I do not accept that. The Claimant is an individual dependent on the Respondent for the supply of work and for payment for that work. He was asked to sign a contract that the Respondent's advisers had written. This means that he was the weaker of the two parties regardless of his experience or education levels and any ambiguities in the wording or understanding of the parties regarding the terms of the contract need to be considered in light of that imbalance.

<u>Retention Figure</u>

79. The way in which the Retention Figure ought to be calculated was disputed. The Respondent asserted that it was entitled to withhold 40% of the average amount of professional fees charged over the last 3 months of employment. The Claimant's witness statement said that they were only entitled to retain 40% of his actual monthly wage i.e. 40% of the 40% he was actually paid. In submissions and cross examination however Ms Ahari's case was another different construction of the contract namely that the Respondent could only

withhold 40% of the Average Monthly Contribution which was defined in the Definitions of the contract as the Amount Charged for Licence. This is set out in full below.

80. It was the Respondent's submission that the Claimant was a highly educated professional who was urged to seek legal advice as to the meaning of the contract before signing. They said that it was standard practice, within the industry, for the retention figure to be calculated in the way that they had interpreted it – namely that they were entitled to withhold 40% of the entirety of the treatment fees billed for in the last three months. The Retention Figure clause says:

Retention Figure
40% of one month's Average Monthly Contribution (the Average Monthly Contribution shall be calculated as an average of the last three months of work prior to the Termination Date).

81. The Respondent appears to rely upon the sentence "*as an average of the last three months work"* as being sufficient to cover all work billed.

82. The Claimant disagreed. His witness evidence on this is set out at paragraph 5 of his additional statement. Ms Ahari, during cross examination took Ms Burgess to the relevant clauses within the contract and in particular to Schedules 1-3 and the definitions applicable to the contract.

83. Schedule 1 defines 'Average Monthly Contribution' as the average monthly total Charge for Licence (calculated over the most recent 3 months).

84. In turn, Charge for Licence is defined in Schedule 3 as:

Item	***Amount Charged for Licence***	***Remittances to the Associate***
Private Treatment Fees	*60%*	*40%*

85. It was put to Ms Burgess that the Amount Charged for the Licence was 60% of the private treatment fees. She disagreed, but I accept that this is the correct interpretation of the contract.

86. This was a convoluted contract with clauses across different schedules and definitions needing to be read in turn to glean the meaning. Even if there is some ambiguity due to the inclusion of the sentence "*as an average of the last three months of work prior to the Termination Date"* in the definition of Retention Payment, any ambiguity ought to be interpreted in favour of the weaker party who, in this case, is the Claimant.

87. I also do not accept that there is ambiguity. I agree that it is a confusing contract and I agree that it may not be the most obvious calculation to make. However, it is clear in Schedule 3 that the Amount Charged for Licence is not 100% of the treatment fees as now argued by the Respondent, but 60% as defined in the

table at Schedule 3. This reflects the fact that this was the amount that the dentists 'paid' the Respondent each month as a 'Charge' for working at the Respondent. Mr Williams during submissions said that he accepted that the wording of the contract was not particularly clear but that I ought to bear in mind the industry norms and the overall reality of the situation between the parties. I was provided with no evidence of what the industry norms were. The Claimant was asked during cross examination whether this type of clause was common in such contracts. He accepted that they were and that some people in the industry interpreted them in the same way that the Respondent was during these proceedings. That may be the case but I have not been taken to those other contracts nor provided with any evidence as to the way that they are interpreted or operated across the industry. When Ms Burgess was asked why she believed she was entitled to interpret it in this way and what clause in the contract she was relying upon to support her interpretation she answered that she was relying on the advice that she had been given. She could not point to a clause which set this out and neither did Mr Williams in submissions.

88. I conclude that in this particular contract if each definition clause and table is followed logically, each month the Respondent retained 60% of the private fees that the Claimant billed for and this was called the Monthly Licence Charge and that is what the Agreement refers to under the definition of the Average Monthly Contribution.

89. The Retention Figure is defined as 40% of the Average Monthly Contribution. I accept that this is meant to be 40% of the average of the last 3 months of the amount Charged for Licence and not 40% of the average of the professional fees billed over the last 3 months before termination. The Respondent was therefore only contractually entitled to withhold 40% of the 60% Charge for Licence and not 40% of the private fees collected.

90. To calculate the appropriate figures I must first ascertain what the average Monthly Charge for Licence was in the 3 months prior to termination. Both parties had different figures for the amounts billed in May, June and July 2022. As set out above I have preferred Claimant's figures in this regard.

91. Had the Claimant been retained, then the Respondent would have kept 60% of those fees (the Monthly Licence Charge) and the Claimant would have kept 40%. Both were then subject to the deduction of laboratory fees but that is a separate matter not necessary for the calculation of the Monthly Licence Charge as defined.

92. The average monthly charge ought therefore to be calculated as follows:

Month	**Claimant**	**60%**
May	£31,960	£19,176
June	£29,950	£17,970
July	£29,235	£17,541

93. The average of those 3 '60%' figures is £17,684.

40% of that figure is £7,073.60.

94. This means that the total amount that the Respondent could lawfully retain as a Retention payment, in accordance with the contract, was £7,073.60. Any amount over that would need to be sought by way of a separate recoupment process given that the Claimant had indemnified the Respondent against certain costs and accepts that certain deductions ought to be made such as appropriate laboratory fees.

95. The Respondent has not sought to do that. They have just deducted the entirety of the Claimant's monies in June and July 2022. The Respondent cannot simply assert that it is entitled to deduct or withhold certain amounts from a worker's wages because it would not be equitable to pay it to them. They have conflated their belief that they are entitled to certain monies in respect of suggested poor work, lab fees or negligence with their entitlement to withhold wages under the contract. No doubt this has arisen because they did not view the payments as wages and saw this as a purely contractual relationship. That was not how EJ Tinnion viewed it in his judgment on the Claimant's worker status.

96. Saying that you are equitably entitled to retain an employees wages does not accord with the protections set out at s13 ERA 1996. Nor, in any event, has the Respondent, for the purposes of these proceedings, properly established that all the monies it has withheld to date stand up to the necessary scrutiny a Tribunal must apply to such deductions.

<u>Deductions from the Retention Figure</u>

97. Subject to how much the Respondent could lawfully withhold as a Retention payment, the Claimant has analysed the invoices and accepts that the Respondent has provided valid invoices in the sum of £5,992.50. He gives a breakdown of each and every invoice that he disputes and why. The respondent's evidence on this is more general and vague.

98. In her evidence, Ms Burgess refers to invoices which she says the Claimant owed. She does not say how she came to that conclusion other than to say that as the amount ends of exceeding the amount that they withheld, the Claimant is in fact better off. This has made it difficult to ascertain the basis upon which they say the amounts fall under the heads of deductions that they can retain from the Claimant in accordance with the Definition of Further Amounts.

99. The Respondent had the contractual right to deduct any amounts if they fall under the headings set out below. These types of expenses of payments could lawfully be deducted from the lawfully withheld figure of £7,073.60.

Credit card commission charges = [50]% to be deducted
Treatment finance costs = [50]% to be deducted
Bad debts = [50]% to be deducted
Cost of repairs and replacements of treatment = [100 %] to be deducted
Compliance contribution = £[200] deducted annually
Laboratory charges = 50% to be deducted

Data Protection Registration Charge = £[35] to be deducted
DBS Update Service at the current rate = £[13] to be deducted annually
See clause 18 of this agreement for other potential charges

The relevant part of Clause 18 is 18.7 [my underlining]:

18.7 The Practice Owner shall be entitled to deduct from the Associate's remuneration any sums which he may owe to the Practice Owner including without limitation losses suffered by the Practice Owner as a result of his negligence or breach of this Agreement. The Practice Owner shall provide the Associate with a breakdown of the deductions to be made from the sums due to the Associate within 14 working days of termination of this agreement and save for manifest error the Practice Owner's calculation shall be final and binding.

100. In respect of either the allegations of negligence or the cost of repair and replacements alleged by the Respondent against the Claimant, the parties have put the Tribunal in a difficult situation. On balance however, I have declined to make findings of fact in respect of these allegations save for the Overpayments on the basis that firstly the Respondent has not properly evidenced the deductions and secondly because it would take the Tribunal no further given that the below Laboratory work deductions take the total up to the allowed for Retention Figure in any event and any further deductions are not provided for within the contract and therefore amount to unlawful deductions.

101. I accept that in accordance with Schedule 4 of the Agreement, the Retention Figure , "*Half of the balance remaining of the Retention Figure will be paid to the Associate 6 months after the Termination Date and the remaining balance together with any interest which has accrued will be paid a further 3 months after Termination Date."*

102. I conclude that any amounts that arose as due to the Respondent that occurred after 9 months after 7 October 2022, could not be deducted from the Retention Figure either. At that point, if a balance remains, that balance must be reimbursed and any subsequent amounts owed to the Respondent need to be sought through an alternative process.

103. I do not believe that any of the deductions that make up the £7,073.60 allowed for arose after either the 6 month or 9 month period allowed for above. No specific submissions were made on this point. If that is correct then they are not excluded by the passage of time.

104. I have found that the Respondent has demonstrated its entitlement to deduct £1040 in respect of laboratory work (50% of the amounts I have found properly invoiced as the Claimant is only liable for 50% of the laboratory fees) and at least £975.50 in respect of overpayments. This gives a total of:

£5,992.50(conceded) + £975 + £1040 = £7943.

105. The total allowed for deductions under the Retention Figure are £7073.60. The Respondent was therefore allowed to withhold the entire Retention Figure of £7073.60 as this is less than the deductions which the Respondent has proven on balance of probabilities above. However just because they have demonstrated them this does not mean that they were entitled to withhold them as they did not have the contractual right to do so beyond the ceiling figure of £7073.60 and t here is no equitable right to withhold wages under the Employment Rights Act.

106. The total payable to the Claimant according to the figures is as follows:

Month	**Claimant's billing figures**	**40%**
May	£31,960	£12,784
June	£29,950	£11,980
July	£29,235	£11,694
Total		£36,458

107. Deducting the full Retention figure of £7073.60 gives £29,384.40.

108. The Respondent therefore has unlawfully deducted the sum of £29,384.40 from the Claimant's wages.

Employment Judge Webster

Date: 31 December 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

3 January 2025

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FOR THE TRIBUNAL OFFICE