EMPLOYMENT TRIBUNALS

Claimant: **Ms. Marzena Stradomska-Slodcsyk**

First Respondent: **Alma Square Dental Limited**

Second Respondent: **Josefine Rytooja**

Third Respondent: **Zuzana Nemcik**

Heard at: Leeds by CVP video link on 2,3,4,5, and 6 August 2021
Deliberations in chambers: 6 September 2021

Before: Employment Judge Shepherd

Members:
Mr I Taylor
Ms L Anderson–Coe

Appearances:
For the claimant: In person
For the respondents: Ms Baylis

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim that the claimant was subjected to detriments on the ground that she had made public interest disclosures is not well-founded and is dismissed.

2. The claim of unauthorised deductions from wages is not well-founded and is dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Ms Baylis.

2. The Tribunal heard evidence from:

Marzena Stradomska-Slodcsyk, the claimant;

Josefine Rytooja, the second respondent.

3. An interpreter was provided to assist the claimant. This was Ms Thorpe on 2,3 and 4 August, Ms Teles on 5 August 2021 and Mr Juszczak on 6 August 2021. It was agreed that the claimant's son could also assist her in conducting the cross-examination of the second respondent on 6 August 2021.

4. The Tribunal had sight of medical evidence which indicated that Zuzana Nemcik, the third respondent, lacked the mental capacity to conduct court proceedings. The Tribunal had sight of a written witness statement of the third respondent which the second respondent confirmed had been provided when the third respondent had the mental capacity to provide it. The statement was not signed. As the third respondent was not able to give oral evidence and it was not possible for her evidence to be challenged, it carried much less weight than oral evidence.

5. The hearing was subject to a number of delays with regard to appointing a litigation friend for the third respondent and there were technological problems with the video link connection. This meant that there was inadequate time for the Tribunal's deliberations and the delivery of a judgment within the original time listed for the hearing.

6. The Tribunal had sight of a bundle of documents which, together with additional documents added during the course of the hearing was numbered up to page 548, together with a spreadsheet of hygienist referrals. The Tribunal considered those documents to which it was referred by the parties.

7. The claims and issues were set out following a Preliminary Hearing before Employment Judge Jones on 21 October 2019.

These were as follows:

8. <u>Protected disclosure detriments</u>

8.1. Was the contract between the claimant and the first respondent varied on 19 March 2018 and 1 October 2018 as alleged in the grounds of complaint? For that purpose, did Mr Kent have the authority (actual or apparent/ostensible) as agent to agree to variations in the contract?

8.2. Was the claimant a worker within the meaning of Section 230 of the ERA: it being accepted that there was a contract under which the claimant undertook to do or perform personally work and services for the first respondent. Was the status of the first respondent by virtue of that contract that of an individual or customer of the profession of the claimant, or a business undertaking carried on by her?

8.3. If the claimant was a worker did the following events occur:

8.3.1. An attempt on 11 April 2019 to vary her contract by the third respondent?

8.3.2. After the termination of the contract the making of complaints to the Police, Information Commissioner and General Dental Council about the removal by the claimant of confidential information by all three respondents?

8.3.3. A complaint of professional negligence to the General Dental Council by the second and third respondent acting vicariously for the first respondent?

8.3.4. Failing to rectify errors in the superannuation payments of the claimant (all three respondents)?

This was no longer claimed as a detriment. The issue had been resolved.

NB. It is accepted the claimant's contract was terminated.

8.4. If the above acts of failures to act occurred were they, and the termination of the claimant's contract, detriments?

8.5. Did the claimant disclose information in respect of the treatment of patients by the third respondent, to RK, the practice manager, NHS England, the CQC and the GDC?

8.6. If so, did it tend to show that the health and safety of individuals had been, was being, or was likely to be endangered?

8.7. If so, was that the reasonable belief of the claimant?

8.8. If so, was it in the reasonable belief of the claimant in the public interest?

8.9. If so, were the disclosures protected by reason of having been made pursuant to Sections 43(C) or (F) of the ERA to the respective individuals/bodies?

8.10. If so, were the detriments acts or failures to act because the claimant had made the protected disclosures?

Remedy

8.11. What losses has the claimant sustained as a consequence of any unlawful conduct, including financially and by way of injury to feelings?

8.12. What steps has the claimant taken to mitigate any losses, are they reasonable and if not, when would such reasonable steps mitigate any losses?

Unauthorised Deduction from Wages

8.13. Was the claimant a worker within the meaning of Section 230 of the ERA?

8.14. If so, did the respondent make unauthorised deductions from her wages in respect of sums due for work undertaken in April of £5,600?

With regard to the Protected Disclosure detriments claim, it was made clear that the Tribunal would also consider the extended meaning of worker pursuant to section 43K of the Employment Rights Act 1996.

9. The third respondent lacks capacity and there is a medical report to this effect. She had been unrepresented and had not put in a response. The second respondent has been given leave to provide a response out of time and has done so. The second respondent is the daughter of the third respondent. She has a lasting power of attorney and stated that she was willing to act as a litigation friend as there was no one else. She was a business adviser and competent to act as a litigation friend. The Tribunal was concerned about another respondent acting as a litigation friend but considered that, in these exceptional circumstances and, in order to preserve the hearing, it was appropriate, and the second respondent has no adverse interest to the third respondent.
Ms Baylis confirmed that she is now instructed to represent all three respondents as there was no conflict of interest between them.

10. It was agreed that an order would be made by consent that the second respondent would act as the third respondent's litigation friend and the present response was adopted by the third respondent and accepted by the Tribunal. In those circumstances, the third respondent's application for extension of time to present a response to 2 August 2021 was allowed.

11. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the findings are also set out in the conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

The Tribunal has anonymised the identity of those mentioned who were not parties and did not appear before the Tribunal or provide a witness statement.

11.1. The claimant qualified as a dental surgeon in Poland and has been practising in the UK since 2005.

11.2. The claimant's husband has a dental laboratory and informed the claimant that the first respondent was looking for a dental associate.

11.3. The claimant met with RK, who was the first respondent's Practice Manager, in March 2018 following which she entered into an associate agreement with the first respondent on 19 March 2018.

11.4. She initially worked for two days a week and also continued to work as a dentist in another dental practice in Filey.

11.5. The Associate Agreement was dated 7 March 2018. The claimant was required to produce Units of Dental Activity (UDA). The number of UDAs required for each year was specified. The claimant received payment on the basis of 3,000 UDAs per year. She was required to pay 50% of the laboratory bills. The agreement provided that the first respondent would provide the services of a dental therapist to the claimant and stated that the UDA split was of 2 UDAs to the associate and 1 UDA to the practice for all band 2 treatments.

11.6. The contract stated:

> "26. The Associate is required, in each NHS year, to provide the number of Units of Dental Activity (UDA) shown in schedule 1 to the agreement and for the period stated in the said schedule. For the purposes of this Agreement, and NHS year shall be from 1 April 1 year to 31 March in the next. If this Agreement is terminated for any reason during the course of NHS year, the number of UDAs the Associate is required to provide in the NHS year of termination shall be calculated as the proportion of the NHS year up to the date of termination."
>
> "54. The Associate consents to the Practice Owner making the following deductions from sums due under this Agreement from the Practice owner to the Associate.
>
> > (a) sums due from the Associate to the Practice Owner pursuant to this agreement
> > (b) sums due from the Associate to the Practice Owner arising from a breach of this Agreement by the Associate where that breach relates directly to the number of UDAs completed by the Associate or to the Associate's breach of clause 26 above."

11.7. A variation to the Associate Agreement was signed by the claimant and RK on or around 26 April 2018. This provided for the claimant to be paid a monthly fixed fee of 1/12 of the value of the annual UDAs in the sum of £3,500 and the first respondent would be responsible for the payment of the laboratory bills. A further temporary variation of the contract was signed by the claimant and RK on 21 September 2018 increasing the monthly payment to £5,625. The respondents deny that RK had the authority to enter into contracts on behalf of the first respondent.

11.8. The claimant said that she made disclosures about the third respondent's treatment of patients and professional negligence within the clinical notes of those patients. She also said that she made disclosures to Richard Kent verbally. The claimant provided a schedule of disclosures she had raised attached to her witness statement. These were all matters that had been placed in the clinical notes and verbally raised with RK and all related to clinical treatment of the patients.

11.9. Josefine Ryooja, the second respondent and third respondent's daughter joined the first respondent as a business adviser on 3 December 2018 and was appointed as Managing Director on 8 February 2019.

11.10. On 4 February 2019 RK sent a letter of concern to the second and third respondent in that letter he referred to having noticed a gradual deterioration in the third respondent's memory and he expressed concerns about dental treatment. He said that another dentist had identified several cases where the patient had not, in their opinion, been treated correctly, and these had been brought to his attention. He suggested that a plan should be prepared for the third respondent to retire "with her reputation intact".

11.11. In a written note, a trainee dental nurse, stated that on 8 February 2019:

> "On returning for the afternoon session at 2 pm Marzena was in a very angry wound up mood. Marzena walked into surgery where I was cleaning down saying to me who does she think she is? She has no clinical knowledge. She knows nothing about my contract and she can't just change my contract. She does not even have a right to talk to me, she is nothing to me or the practice. If she carries this on I will report her mother (Dr Nernick) to the GDC'
>
> RK overheard the commotion being expressed in surgery 1. She then started repeating the same things to RK saying she would only deal with him and Dr Nernick and calling Josefine an idiot.…"

11.12. On or around 21 February 2019 RK sent a note to all staff as follows:

> "None of ZN patients are to be seen by MSS under any circumstances. I don't care how sorry you feel for them!
> The only exception to this is urgent treatment and the patient had better be in Agony before you give them an appointment with MSS!
> If the Patient is seen by MSS for urgent treatment then they are to be seen by ZN within 2 weeks even if this means rebooking and existing exam appointment.

IF YOU WANT TO KEEP YOUR JOB YOU WILL FOLLOW THESE INSTRUCTIONS."

11.13. On 11 April 2019 a meeting took place between the claimant, the second respondent and RK. The notes of this meeting show that there was mention of a new dentist coming to the practice. There then followed a discussion with regard to the claimant's contract terms and the respondent's requirements for the claimant to provide payment for therapist's fees.

11.14. On 12 April 2019 the claimant was provided with proposed amendments to the contract for services.

11.13. On 25 April 2019 claimant sent two letters to RK. She indicated that she did not accept changes or amendments to her contract, the existing Associate agreement and the temporary variations that she said remained in force. She also stated that she did not accept that she owed any money.

11.14. On 29 April 2019 the respondents wrote to the claimant indicating that it was noted that she did not wish to accept the proposed changes to her contract and setting out why the respondents required her to pay money.

11.15. On 30 April 2019 the claimant telephoned the Care Quality Commission raising concerns about the dental practice.

11.16. On 2 May 2019 an email was sent from the GDC acknowledging the claimant's complaint. This set out a copy of the submission which referred to the claimant having reported to the practice manager, RK on many occasions that due to wrongdoing, lack of professional skills or possible problems with health like dementia a senior dentist, Zuzana Nemcik, may not be fit to practice. It referred to complaints against her from patients, registered nurses and a dental therapist.

11.17. On 2 May 2019, a trainee dental nurse, provided a letter of concern. The Trainee Dental Nurse said that during the conversation with the practice manager, RK, she became aware that files/copies of patients' files were not to leave the premises. This concerned her because on several different occasions the claimant had insisted that she had printed specific patient files which were taken from the practice. It was said that this had been on several occasions, starting in December 2018.

11.18. Also on 2 May 2019 RK wrote to the claimant thanking her for raising concerns verbally regarding the care provided to patients by the principal on 2 May 2019 and stating that he was investigating these concerns.

11.19. On 3 May 2019 the third respondent wrote to the claimant stating as follows:

> "I am writing to confirm we are terminating your services with Alma Dental Ltd under the terms of our agreement dated 21 September 2018 due to a breach of clause 40 of the attached agreement.
>
> Due to your failure and refusal to pay the sum of £8,880 (392 UDAs) to the Practice in accordance with your contract dated 21 September 2018 your actions have been in direct contravention of clause 40(c). Your conduct is likely to significantly prejudice the interest of the business of the Practice Owner or the Practice.
>
> In addition, your actions in talking derogatively about the Practice Owner in front of patients and other staff is also in direct contravention of clause 40(c) of the agreement dated 21 September 2018. We believe this further demonstrates your breach of clause 40(c).
>
> Furthermore, it came to our attention on the 3rd May 2019 that you printed off clinical records and removed them from the premises. We have reason to believe that this has occurred on multiple occasions. Please also confirm that copies have been made. As you are aware this is a breach of your confidentiality agreement and GDPR, and shall you not be forthcoming with the patient's notes, we will have to report the matter to ICO (Information Commissioner's Office) and the GDC.
>
> Under the terms of our agreement, no notice is required and therefore our agreement is terminated with immediate effect and any monies due to you will be issued within 30 days of receiving an invoice for your services.
>
> You will be required to return all the property of the clinic in your possession in accordance with clause 45, in person or by recorded delivery to Alma Square Dental Practice, 19 Alma Square, Scarborough YO11 1JR."

11.20. On 9 May 2019 the claimant replied to the third respondent in respect of the letter of termination. She denied talking in a derogatory manner to staff or patients. She said that she had had cause to express her concerns with the appropriate authorities in respect of the practice having discussed it with the third respondent. The claimant also said that she had not printed off or downloaded any records from the practice. Some records had been printed off by or for the practice manager. The amount that had been clawed back was not lawfully capable of being demanded and the variation to the contract overrode the provision to pay a fixed fee for the number of UDA treatments.

11.21. The claimant said that she was entitled to 2 months' notice and was owed holiday pay and outstanding pension contributions.

11.22. On 10 May 2019 the second respondent provided a report of potential breach of data protection to the Information Commissioners Office.

11.23. On 20 May 2019 the General Dental Council wrote to RK at the medical practice indicating that they were looking into concerns about treatment provided by a registered dental professional. It was indicated that they required full dental records of a number of patients.

11.24. On an unknown date a report was made to the police that the claimant had unlawfully removed confidential information from the practice.

11.25. On 14 June 2019 a patient of the first respondent made a complaint to the General Dental Council about the way in which treatment had been carried out on him by the claimant.

11.26. On 22 August 2019, following the ACAS Early Conciliation process the claimant presented a claim to the Employment Tribunal.

11.27. The complaint to the GDC was sent to NHS England and the claimant provided a response on 17 September 2019.

11.28. On 19 September 2019 NHS England confirmed that they would not be taking any further action at that point and were awaiting the outcome of the GDC investigation.

The law

12. Section 230(3) Employment Rights Act 1996 provides that an individual is a worker if he or she works under a contract of employment, or 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.
Section 43K provides:

> (1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –
>
> (a) works or worked for a person in circumstances in which –
>
> (i) he is or was introduced supplied to do that work by a third person, and
>
> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall under section 230 (3) (b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"…

(2) For the purposes of this Part "employer" includes –

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged…

Protected Disclosure Claim

13. Section 43B(1) of the Employment Rights Act 1996

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
(a) that a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged; or
(f)that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

14. Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

15. Section 43K provides an extended definition of the meaning of "worker" in order to bring a claim of detriment on the ground that the worker has made a protected disclosure pursuant to section 47B.

16. Section 43K was considered by the Employment Appeal Tribunal in **Croke v Hydro Aluminium Worcester Ltd [2007] ICR1303.** The EAT reached the conclusion that, in construing the definition of "worker" in section 43K, it was appropriate to adopt a purposive approach. Accordingly, where an individual supplied his services to an employment agency through his own company and the employment agency, in turn, provided the services of that company to an end-user, it may be that in appropriate circumstances the individual is a "worker" of the end user for the purposes of section 43K.

17. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must usually consider in turn. In view of the Tribunal's conclusions in respect to whether there was a disclosure, it was not necessary for all of these elements to be considered.

Disclosure

18. In **Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37** Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings…….the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

19. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

> "I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy

between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

Public interest

20. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

"I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the **1996 Act** by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above)…… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied".

Reasonable Belief

21. In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said:-

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

22. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying."* In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

23. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

24. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about

> that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Method of Disclosure

25. The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith

26. It is, in some cases, appropriate to distinguish between the disclosure of information and the manner of its disclosure but in so doing the Tribunal must be aware not to dilute the protection to be afforded to whistleblowers by the statutory provisions: **Panayiotou –v- Kernaghan 2014 IRLR 500.**

27. Mummery LJ in in the well-known Court of Appeal case of **NHS Manchester v Fecitt & Others [2011] EWCA Civ1190** made it clear that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detriment.

> "In my judgment, the better view is that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so…
>
> Where the whistle-blower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical eye – to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation."

28. Section 13 of the Employment Rights Act 1996 provides as follows:

> "Right not to suffer unauthorised deductions
>
> (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 the 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."

29. The Tribunal had the benefit of written submissions provided by the claimant and Ms Bayliss. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

30. The evidence that the Tribunal heard in this case was unsatisfactory. The lack of evidence from RK made matters more difficult. At the Preliminary Hearing on 21 October 2019, at which the claimant had been represented. Her solicitor had indicated that the claimant might apply for a witness order in respect of the practice manager. He did not give evidence and no explanation was provided. He was not joined as a respondent. He was involved throughout the claimant's association with the respondents and heavily involved in most of the incidents considered.

31. The third respondent lacked capacity to give oral evidence. In her written witness statement which was provided when she had mental capacity, she said that a great deal of information was made inaccessible to her in a bid to keep control of the first respondent by the practice manager who would clearly involve the claimant in his plans moving forward. It was submitted by Ms Baylis that, at least initially, the claimant had a positive relationship with RK. The second respondent became involved in the business in order to help her mother, the third respondent. She joined the first respondent in December 2018 as a financial adviser and then became a director in February 2019.

32. The third respondent had indicated that the claimant and RK were working together and had both signed the temporary variations of the claimant's contract without her knowledge even though she was the sole shareholder of the first respondent. The variations of the claimant's contract were entirely in the claimant's favour and were not detriments to her.

33. Ms Baylis submitted that by the time of the Tribunal the claimant's opinion of RK had changed and she described him as being 'on the respondents' side' although it was not clear which 'side' he was on from the documents, and his actions have at times caused problems for both the respondents and the claimant.

34. The claimant's evidence was poor and lacking in credibility. She failed to answer many of the questions that were asked in cross-examination. She would regularly give a lengthy answer that did not cover the question that was asked.

35. When Josefine Rytooja gave evidence she had extreme difficulty following the questions. The Tribunal also found that the questions were difficult to follow. She tended to answer the question she thought had been asked.

36. The Associate agreement states that it is "a non-exclusive licence" which meant that the claimant could work for another practice when she was not working for the first respondent. The contract envisaged that it would be covered by the Working Time Regulations 1998 which applies to workers as defined in section 230(3) as it indicates that "For the purposes of the Working Time Regulations 1998 (as may be amended), the Associate agrees that 10.77% of their NHS income shall be their holiday pay". The contract also provides for study leave for Continuing Education. The contract provides for maternity/adoption leave.

37. The claimant was to use every reasonable endeavour to use the practice facilities during specified working hours. The claimant was provided with patients by the first respondent and there were obligations on both sides. The first respondent was to introduce sufficient patients to allow the claimant to meet the Unit of Dental Activity (UDA) and payments would be made to the claimant for the UDAs. There is provision for an annual UDA target and the first respondent may require the claimant to pay an amount equivalent to the shortfall in UDAs.

38. The claimant was paid by reference to the UDAs and, even in the varied agreements the payment is still by reference to the contracted UDAs.

39.There was no effective ability to substitute another worker. The claimant said that there had been some talk of the appointment of a locum, but it was not clear whether that locum would be provided by the claimant or the respondent. The discussion went nowhere as RK, the practice manager, indicated that there was no possibility of finding a locum.

40. The claimant used the respondent's equipment. A new dentist's chair was purchased for the claimant's use. The claimant carried out day-to-day supervision of the first respondent's staff. The payments to the claimant would be reduced by the claimant making payments for therapist's fees.

41. Taking these factors into account the Tribunal finds that the claimant was a worker within the meaning of section 230(3) and, in those circumstances, there is no need for the Tribunal to consider the extended definition of worker in section 47K. However, the Tribunal is satisfied that the claimant is protected by section 43B of the Employment Rights Act 1996 and section 13, the right not to suffer unauthorised deductions from wages.

42. The Tribunal has given careful consideration with regard to the alleged disclosures in the confidential clinical notes. There were no precise details of what was actually said to have been put in the notes. There are references to such things as not solving problems leading to severe deterioration of patient's teeth and indications that patients needed extractions and/or antibiotics. There were no records of the notes. The claimant provided a schedule of alleged disclosures but the entries in the clinical notes appeared to be in respect of clinical issues which were included in patient's notes which may or may not come to the attention of the next dentist providing treatment to the patient which may or not have been the third respondent. This does not establish that there was a disclosure made to the employer.

43. It was submitted by Ms Baylis on behalf of the respondent that the notes were not written by the claimant but by the nurse on duty in the dental surgery and the signed by her so they could not be the claimant's disclosures. The practice manager had the ability to go in to edit notes which he had been accused of doing. For the third respondent to see them, the patient would have to return to the surgery and be seen by her which was by no means guaranteed. It was submitted that we have absolutely no idea who wrote these notes, who edited these notes, who saw these notes and when, for what purposes these notes were written and what they actually said.

44. The Tribunal is not satisfied that the entries in patients' clinical notes were disclosures qualifying for protection under section 43B.

45. The same applies to the allegations of verbal disclosures to RK. Also, the claimant said that she would ask RK to arrange another booking for the treatment of the patient with the third respondent. If he was not available she would ask the receptionist. They were all clinical issues. RK was not a dental clinician.

46. The letter of concern dated 4 February 2019 from RK does not suggest that a public interest disclosure had been made by the claimant. It refers to another dentist where the patient had not, in their opinion, been treated correctly. this indicates that there were subjective opinions about clinical issues.

47. In the schedule of disclosures attached to the claimant's witness statement she referred to 11 April 2019 just before the meeting with the second respondent and RK. This referred to disagreement with the third respondent's diagnosis in respect of urgent treatment being needed. During the subsequent meeting the claimant stated that she would like to stick to her own patients' book rather than taking on the third respondent's as "I have a slightly different pattern probably of my work to Zuzana… We are different but I would like to keep it". The Tribunal finds that this does not show that there was a protected disclosure. There was a difference of opinion with regard to clinical treatment.

48. In respect of the events of 2 May and 3 May 2019. Once again, in respect of the information the claimant alleges was given to RK the Tribunal finds that that she was asking him to review the clinical records and said that, if it was not dealt with she would be making complaints to the GDC and CQC. However, she had already complained to the CQC at this time.

49. The claimant assumed that RK had told the second and third respondents about the complaints to the GDC and CQC. This remained a suspicion that the claimant held, the second respondent denied that they were aware of the alleged disclosure.

50. The Tribunal is satisfied that the decision to terminate the agreement was made as a result of the dispute between the claimant and the respondents in respect of the payments for UDAs, the contract disputes and the claimant taking the printed copies of the patient notes.

51. The disclosures to the CQC and GDC were the most likely to be protected disclosures but the respondents were unaware of those disclosures when the decision to terminate the contract was made. The Tribunal accepts that they only became aware of the alleged disclosures when they were contacted by the GDC on 20 May 2019. The Tribunal is satisfied that the alleged disclosures had no material influence on the termination of the claimant's contract or any detriment.

52. In respect of the claim of unauthorised deduction from wages, the claimant was required to repay the proportion of the UDAs in respect of the therapist. She was of the view that the variation of the contract released from that requirement. However, that was not the case. The Tribunal did see a copy of a text message between the claimant and RK in which there was reference to a figure in the claimant's payslip. She asked what "68" in her payslip stands for. The response was that RK had given the claimant the wrong one and it was a copy he had been working on. It was said that 68 was the number of UDAs for the therapist.

53. The notes of the meeting on 11 April 2019 include discussion of the amount to be paid for the UDAs. The claimant raised a concern that she was being asked for these

payments after 12 months and it was indicated that in the future, they would do this on a monthly basis.

54. The claimant's case with regard to the unauthorised deduction of wages was based on the fact that she was no longer bound by the requirement as a result of the variations to her contract. However, the variations of the contract were with regard to monthly payment by reference to the annual UDAs and laboratory fees. The claimant did change her argument towards the end of her cross-examination when she alleged that the therapist's fees had already been deducted by the dental practice. The claimant acknowledged, in her witness statement, that, under the contract, the payment of therapist fees would be offset when calculating UDA targets and pay.

55.There was a clause in the contract providing that the claimant consented to the deduction of sums due under the agreement. The claimant signed that agreement and, pursuant to section 13 of the Employment Rights Act the deduction was authorised by a relevant provision of the claimant's contract. In those circumstances, the claim for unauthorised deduction from wages fails.

56. In these circumstances, the claims of detriment on the ground that the claimant had made public interest disclosures and the claim of unauthorised deduction from wages are not well-founded and are dismissed.

Employment Judge Shepherd
15 September 2021

JUDGMENT SENT TO THE PARTES
20 September 2021