



# EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101907/2023

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Held in Edinburgh on 18 and 19 April 2024

Employment Judge M Sutherland

Members J Lindsay

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S Currie

**Mehdiya Haider**

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**Claimant  
Represented by  
Ms H Hiram, Consultant**

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**AR 28 Limited**

**Respondent  
Represented by  
Mr Watt, Solicitor**

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that –

1. The Claimant suffered an unlawful deduction from wages and the Respondent  
30 is ordered to pay the Claimant the sum of £5,790 (gross).
2. The Claimant is entitled to statutory holiday pay and the Respondent is  
ordered to pay the Claimant the sum of £2,643 (gross).
3. The Claimant was not provide with a written statement of particulars or with  
itemised pay statements but it would not be just and equitable to make a  
35 monetary award

**REASONS**

4. A final hearing had been listed before a full panel to be heard in person on 16, 17, 18 and 19 April 2024 to determine complaints of detriment and dismissal under Sections 44/ 100 of the Employment Rights Act 1996, statutory sick pay, holiday pay, failure to pay employer pension contributions and unlawful deductions from wages.
5. The first day of the final hearing was converted to a preliminary hearing by CVP to determine various preliminary issues. At that hearing the claims against the First and Second Respondent were dismissed upon withdrawal by the Claimant; the complaints for pension and sick pay were dismissed upon withdrawal by the Claimant; the complaints under Sections 44 and 100 (1) (d) and (e) (detriment and constructive dismissal) of the Employment Rights Act 1996 were dismissed upon withdrawal by the Claimant; the Claimant's application to amend to include complaints under Sections 44 and 100 (1) (c) (detriment and constructive dismissal) was refused; and the application to allow the Response late was admitted of consent. Detailed reasons were provided in a written note of that hearing.
6. The remaining complaints against the Third Respondent (now the Respondent) for unlawful deduction from wages, holiday pay, failure to provide employment particulars and itemised pay statements were to be determined at a final hearing to be heard remotely by CVP on 18 and 19 April 2024.
7. Both parties had professional representation. The Claimant gave evidence on her own behalf. Riyadh Rawashdeh, Director gave evidence on behalf of the Respondent. Parties had prepared a joint bundle of documents. The Claimant lodged a very extensive supplementary bundle of documents part way through the hearing. Parties made brief oral submissions.

**List of Issues**

8. The issues to be determined were follows –
- Unlawful deduction from wages Section 13 ERA
- a. What was the total amount of wages properly payable to the Claimant on each occasion?

- b. What was the total amount of wages paid to the Claimant on each occasion?
- c. Were any of the deductions of wages excepted deductions (Section 14)?

5 Statement of particulars /of pay Sections 1/ 8 ERA

- a. Did the employer give to the worker a written statement of particulars of employment ?
- b. Did the employer give to the worker an itemized pay statement?

Holiday pay (Regulation 14 Working Time Regulations 1998)

- 10 a. What paid holidays were accrued but untaken as at the termination date?

9. The following initials are used by way of abbreviation in the findings of fact -

Initials	Name	Position
AA	Dr Ahmed Abdou	Dentist Practice and Owner of the Respondent
RR	Riyad Rawashdeh	Dental hygienist and Director of the Respondent

15 **Findings of Fact**

10. The Respondent is a dental practice. RR is dental hygienist and a Director of the Respondent. The Claimant qualified as a dentist abroad and had been in practice as a qualified dentist outside the UK. She was undertaking Vocational Training by Equivalence (VTE) to enable her to practice dentistry in the UK.
- 20 11. The Claimant was employed by the Respondent as an Assistant Dentist as part of her VTE from 11 July 2022 to 16 December 2022. She did not have normal working hours but worked an average of about 30 hours a week.
12. On 1 June 2022 the Claimant was provided with a written template contract for an Assistant Dentist. On 4 June 2022 the Claimant advised in writing she  
25 wanted to make three changes to that contract namely the duration, the

holiday notice and the restrictions on working elsewhere. The Respondent agreed to make these changes. The parties performed broadly in accordance with the terms of that contract. No final version of the written contract was issued or signed. On 12 October 2022 the Claimant asked to be provided with a signed contract so that she can sign it too.

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13. During the course of the contract both parties genuinely believed that the Claimant was self-employed. The Claimant received a net profit share of 45% paid 2 months in arrears (after monies were received); she was responsible for 50% of the laboratory costs, bad debts, cost of repairs to her work, and her income tax and national insurance contributions; and she was entitled to unpaid leave. This reflected the terms of the Assistant contract.

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14. The Assistant contract provided:

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*“The Practice reserves the right to retain a sum no less than £5,000 (“retention”) from any fees due to the Assistant, in the event of the Assistant leaving the Practice howsoever, within the first 24 months of engagement. Individual circumstances will be considered, however the Practice reserves the right to enforce this, in order to carry out remedial works and for the reimbursement of training”.*

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15. If dental work requires repaired within 12 months, the dental assistant who provided that work conducts those repairs without charge during the course of their contract. After termination the dental assistant is required to meet the cost of others performing that remedial work. The Assistant contract specified that a sum is retained to cover that cost. The Claimant discussed this clause with the Respondent and was reassured by them that they would only retain 5 -10 % of the last 6 months earnings for a period of 12 months.

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16. The Claimant was to be supervised by Dr AA. On or about 27 September 2022 Dr AA was imprisoned. The Claimant was concerned about the supervision she was receiving. On 14 November 2022 the Claimant resigned with notice effective on 16 December 2022.

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17. During the course of her employment the Claimant was paid the following sums –

- a. £1,837 and £112.50 on 5 September 2022 in respect of work undertaken in July 2022
  - b. £3,000 on 5 October and £1,918 on 10 October 2022 in respect of work undertaken in August 2022
  - 5 c. £5,975.45 on 7 November 2022 in respect of work undertaken in September 2022
  - d. £918.82 on 29 November 2022 in respect of work undertaken in September/ October 2022.
  - e. £4,094 on 6 December in respect of work undertaken in October 2022
- 10 18. These sums totalled £17,856 and were the net profit share of the work undertaken by her for patients who were coded to her. The Claimant had access to a spreadsheet or statement of the fees in respect of these patients.
19. The Respondent failed to make payments of £605 in respect of her net profit share of the work undertaken by her for patients who were not coded to her  
15 (including Denplan patients).
20. The Claimant was also entitled to the net profit share of the work undertaken by her in November and December 2022 (due to be paid in January and February 2023) for patients who were coded to her in sums of £5,123 and £992 respectively.
- 20 21. The sum total of the net profit share not paid by the Respondent to the Claimant was £6,797. The Respondent retained that net profit share in stated fulfilment of the retention clause.
22. On 12 December 2022 the Claimant wrote to the Respondent noting that the retention monies should be 5% of monies earned over the last 6 months  
25 namely £1,208.
23. After termination both parties received legal advice to the effect that for her work for the Respondent to qualify as vocational training it required to be as an employee under the terms of the Vocational Training of General Dental Practice (Scotland) Regulations 2004 ('the VT Regulations'). In light of this

parties subsequently agreed that she was employed by the Respondent notwithstanding the terms of the contract under which she had worked.

24. During the retention period (12 months after termination), the Respondent undertook remedial works at a cost of £930 in respect of dental work previously provided by the Claimant. The Respondent provided the Claimant with a schedule of these works.

25. Whilst the Claimant took unpaid leave during the course of her employment (per the terms of the Assistant Contract) she did not take any paid leave.

### **Observations on the evidence**

26. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

27. The Claimant came across as mainly credible in her evidence. Her evidence in relation to the assistant contract appeared somewhat rehearsed and her attempts to sever her negotiation on the three points from the background context of the assistant contract itself appeared disingenuous.

28. RR came across as wholly credible in his evidence. He readily accepted issues which were put to him that were contrary to his interests (e.g. that the salaried foundation contract was only an example; that the Claimant ought to have been given the balance of the retention monies)

29. The Respondent had asserted in their pleadings that foundation contract applied. RR explained in evidence that had he known she required to be an employee she would have been in receipt of a salary rather than a net profit share. He explained that the salaried foundation contract applied to NHS dentists and was simply an example.

30. Notwithstanding that the assistant contract was silent on these issues, RR explained how the retainer worked in practice namely that the sum retained

would be kept for a year, that the ex-Assistant would be provided with a record of the cost of all remedial works undertaken, and that any positive balance would be remitted to the ex-Assistant or a demand made for any negative balance. He explained that because of the legal dispute with the Claimant  
5 (her complaint of automatically unfair constructive dismissal, etc) that payment had not been made to her.

31. During the course of the hearing the Respondent accepted the Claimant's calculation of her net profit share.

### **The Law**

#### 10 Unlawful deduction from wages

32. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are  
15 excluded from protection by virtue of s14 or s23(5) of the ERA.

33. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

20 34. Under Section 27(1) ERA 1996 "wages" means any sums payable to the worker in connection with their employment. Payments in lieu of contractual notice are not wages since they are not payments made in respect of a subsisting contract of employment but are damages for breach of contract for failure to give notice *Delaney v Staples (t/a De Montfort Recruitment) 1992*  
25 *ICR 483, HL.*

#### Statement of employment particulars

35. Under Sections 1 and 4 of the Employment Rights Act 1996 a worker is entitled to a written statement of particulars of employment for the start of their employment (although there is no requirement for a contract of employment  
30 to be in writing).

36. Under Section 38 of the Employment Act 2022 a worker is entitled to compensation for failure to provide a statement of employment particulars if the claimant brings a successful qualifying claim for unfair dismissal, discrimination, etc. In other words there is no free-standing right to compensation.
37. Section 38 of the Employment Act 2002 provides that an employee is entitled to an award of 2 weeks' pay unless there are exceptional circumstances which would make an award unjust or unequitable. The tribunal may increase the award to 4 weeks' pay if considered just and equitable.

10 Itemised pay statement

38. Under Section 8 of the Employment Rights Act 1996 a worker is entitled to an itemised pay statement.
39. If a tribunal finds that a worker has not received a pay statement it must make a declaration to that effect. If the tribunal finds that unnotified deductions have been made it may also make a monetary award. In other words there is no free-standing right to compensation.

Holiday pay

40. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks leave in each holiday year.
41. Under Regulation 14 a worker is entitled to a payment in lieu of holidays accrued during the holiday year but unused by the termination date.
42. In the absence of a relevant agreement the holiday year begins on the date when the employee's employment began.
43. A week's holiday pay is calculated with reference to the average gross pay in the 52 weeks preceding termination.

**Claimant's Submissions**

44. The Claimant's brief oral submissions were in summary as follows –
- a. The foundation contract was never issued to the Claimant



- b. The Claimant only agreed to the three changes – she did not agree to the Assistant contract itself
- c. The deduction of the retention monies was not authorised by a written contractual provision and the Claimant did not signify her consent to deduction of the retention monies

### **Respondent's Submissions**

45. The Respondent's brief oral submissions were in summary as follows –

- a. The situation is a complicated mess because throughout the contract both parties thought the Claimant was self-employed
- b. The Claimant agreed to the Assistant contract subject to the three changes.
- c. The Respondent accepted that the net profit share constituted 'wages'

### **Discussion and decision**

#### Illegality of contract

- 15 46. During the course of the contract both parties considered that she was self-employed. The Claimant received a net profit share of 45% and she was expressly responsible for laboratory costs, bad debts, repairs to her work, and for income tax and national insurance contributions. This reflected the terms of the Assistant contract.
- 20 47. After termination and in light of the VT Regulations both parties agreed that she had employment status notwithstanding the terms of the contract under which she had worked. Parties had agreed employment status for the purpose of these proceedings. No determination has been made for tax purposes and we have no reason to believe that this agreement rendered the performance of her contract illegal retrospectively (because tax and NI was not deducted
- 25 by the Respondent but was instead met by her directly).
48. In the alternative, if that agreement had the effect of rendering the performance of her contract illegal retrospectively, it requires to be considered

whether that acts as a bar to her enforcement of the contract. Parties genuinely believed that she was self-employed, this belief was reasonable given the terms of the contract under which she worked, they were not attempting to circumvent their tax obligations, only after termination and in light of the VT obligations did parties agree that she was employed, and the Respondent did not assert an illegality as a defence to this claim. Applying the factors set out in *Patel v Mirza 2016 UKSC 42* it is considered that denial of her claim will not enhance public policy on tax evasion and would not be a proportionate response.

10 Unlawful deduction from wages

49. The Respondent and the Claimant agreed her contractual terms namely the Assistant Contract subject to the agreed variation. Under that contract the Claimant received a net profit share of 45% paid 2 months in arrears (after monies were received); she was responsible for 50% of the laboratory costs, bad debts, repairs to her work, and her income tax and national insurance contributions; and she was entitled to unpaid leave.

50. Under the ERA “wages” means any sums payable to the worker in connection with employment including an “emolument referable to his employment” and would therefore would include the net profit share paid to the Claimant.

51. There is a deduction from wages where the total amount of wages paid on any occasion is less than the total amount of the wages properly payable by the employer to the worker on that occasion. The amount properly payable depends upon the worker’s legal entitlement. The Claimant was entitled to a net profit share of 45%. The total amount of her wages varied according to the net profits on the work she had done.

52. The Respondent failed to make payment of her net profit share of £605 in respect of the work undertaken by her for patients who were not coded to her. The failure to make those payments amounted to an unlawful deduction from wages.

53. After termination, her net profit share depended upon the cost of others performing any remedial works arising in the next 12 months. The due date

for payment of that final net profit share was 16 December 2023 (one year after termination).

54. Under the contract, after termination the Respondent was due to pay the Claimant her net profit share less the retention monies. The Respondent was entitled to retain up to £2,457 (10% of total earnings of £24,576 (£17,856 + £6,720)). (Alternatively, the retention monies was a deduction authorised by a provision in the workers contract advised in writing. Furthermore, the Claimant signified her consent in writing.)
55. Accordingly, the sum properly payable to the Claimant in January 2023 was £2,666 (her profit share of £5,123 for November 2022 less the retention monies of £2,457). The failure to make payment of £2,666 amounted to an unlawful deduction from wages.
56. The sum properly payable to the Claimant in February 2023 was £992 (her net profit share for December 2022). The failure to make that payment amounted to an unlawful deduction from wages.
57. The sum properly payable to the Claimant in December 2023 was £1,527 (the retention monies of £2,457 less the cost of remedial works of £930 in respect of dental work provided by the Claimant). The failure to make that payment amounted to an unlawful deduction from wages.
58. The Respondent is ordered to pay the Claimant the sum of £5,790 in respect of those deductions (£605 + £2,666 + £992 + £1,527). Under the terms of the contract that sum should be paid gross and the Claimant is responsible for making payment of the tax and NI contributions to HMRC.

#### Holiday pay

59. The Claimant is entitled to statutory holidays of 2.42 weeks holiday (5.6 weeks x 22.5/52 weeks). The Claimant's average weekly earnings were £1,092 (£24,576 /22.5 weeks). The Claimant was accordingly entitled to holiday pay in sum of £2,643. Under the terms of the contract that sum should be paid gross and the Claimant is responsible for making payment of the tax and NI contributions to HMRC.

Statement of employment particulars

60. The Claimant was provided not provided with a written statement of particulars of employment in full compliance with Section 1 but she was provided with a written contract. Both parties considered that she was self-employed and she was provided with a written contract which set out the full terms of that self-employment subject to the agreed variation which she had proposed in writing. The Claimant was aware of the particulars of her contract.
61. After termination and in light of the VT Regulations both parties agreed that she was an employee notwithstanding the terms of the contract under which she had worked. There are considered to be exceptional circumstances which would make an award unjust or unequitable.

Itemised pay statement

62. The Claimant was not provide with itemised pay statements but she had access to a spreadsheet or statement of the fees in respect of patients coded to her. Further there were no deductions for tax and NI. The Claimant was provided with a schedule of the cost of the remedial works. The Claimant was aware of how the payment had been calculated. It is not considered just or equitable to make a monetary award in these circumstances.

**Employment Judge: M Sutherland**  
**Date of Judgment: 24 April 2024**  
**Entered in register: 24 April 2024**  
**and copied to parties**