EMPLOYMENT TRIBUNALS

Claimant: **Respondent:**

Ms A Kuzniar v Roxdent Ltd

Heard at: Victory House
On: 27 November 2024 to 6 December 2024

Before: Employment Judge Nicolle
Members: Ms Z Darmas
Ms J Marshall

Claimant: By lay representative, Mr Andres Romano Lukomski
Respondent: Mr A Rozycki, of Counsel

JUDGMENT

1. The claims for automatic unfair dismissal pursuant to s.103B of the Employment Rights Act 1996 (the ERA) and whistleblowing detriment pursuant to s.43B of the ERA fail and are dismissed.

2. The claim for unlawful deduction from wages pursuant to s.13 of the ERA succeeds in part and the Claimant is awarded the sum of £3,076 subject to any clarification of this figure between the parties in accordance with paragraph 103.

3. The claim for breach of contract in respect of the Claimant's notice period succeeds and the Claimant is awarded a sum to be agreed by the parties.

4. The payments to the Claimant pursuant to paragraphs 110 and 111 above are subject to deductions for tax and employee national insurance contributions alternatively if made gross the Claimant is responsible for making appropriate account to HMRC in this regard.

5. The Respondent's employers breach of contract claim fails and is dismissed.

REASONS

The Hearing

6. There were significant disputes between the parties regarding the compilation of the hearing bundle. The Respondent produced a bundle comprising of 2166 pages. There were some additional pages added during the hearing. The Claimant provided the Tribunal

with an addendum bundle comprising approximately an additional 800 pages. The Tribunal was referred to a relatively small proportion of the total documentation.

Witnesses

7. The Claimant gave evidence and submitted four supporting witness statements. However, it was only Ms Milka Grancharova, (Ms Grancharova) who attended to give evidence on her behalf.

8. Roksana Marcinkowska, (Ms Marcinkowska) and Anna Sacharko, (Ms Sacharko) gave evidence on behalf of the Respondent.

The Issues

9. There was an agreed list of issues. These will be referred to in the Tribunal's conclusions.

Opening submissions and chronologies

10. The parties provided the Tribunal with opening submissions and chronologies of events.

The Claimant's application in relation to the Tribunal's case management order dated 25 October 2024

11. The Claimant repeated her application that her letter to the Respondent dated 4 March 2023 should stand as further protected disclosures. The Tribunal considered that this application should properly be considered as one for the reconsideration of the ruling of Employment Judge Nicolle at the case management hearing on 25 October 2024 that an amendment application to include the 4 March 2023 letter should be refused. The Tribunal gave oral reasons for refusing the application.

The representation of the Claimant

12. The Claimant and Mr Lukomski adopted a dual role in cross examination. The Claimant focused on questions pertaining to her dental practice whilst Mr Lukomski's focus was primarily on the alleged fabrication, manipulation and misleading nature of the Respondent's documents and chronology of events.

Findings of Fact

13. The Claimant commenced work for the Respondent as a dentist in January 2022.

Contract for dental services dated 20 April 2022 (the Contract)

14. The Contract provided that the Claimant would provide her services as an independent consultant. Relevant provisions are as follows:

> Paragraph 2(a): The fees payable to the Independent Consultant for rendered service would be 50% of the gross income generated by the Independent Consultant.

Paragraph 4(b): As a self-employed the working hours are flexible. However, the parties agree that the Independent Consultant will work according to the surgery schedule to be agreed from time to time with the Practice Manager with a break for lunch to be taken at Independent Consultant's choice.

Paragraph 6: The Independent Consultant will inform and facilitate the needs of the Company by giving one month notice of any planned holidays.

Paragraph 7: In the event of sickness or injury the Independent Consultant must inform the registered Practice Manager before the start of her surgery time so as to make necessary arrangements for cover.

Breach of Contract

Paragraph 8

(a) Is accepted by the Independent Consultant that should commit a breach of the terms of this contract such as non-attendance or poor standard of service the monies lost by the Company due non-treatment or unsatisfactory treatment.

(b) The Company may terminate the Contract immediately as result of a breach of any of the provisions or terms of this Contract by the Independent Consultant or as a result of serious misconduct on the part of the Independent Consultant including a justified patient's complaint about the Independent Consultant.

(c) In the event of a patient's complaint the Independent Consultant shall either:

- Make a refund (of the fee that she has received for the consultation/treatment)
- If possible and agreed with patient offer another consultation or alternative medical services free of charge

Paragraph 9: Insurance, indemnity and liability

(a) The Independent Consultant shall have personal liability for any breach by her for any substitute engaged by her of the terms of this Contract including any negligent or reckless act, omission or default in the provision of the services.

(b) She shall indemnify the Company for any loss, liability costs, damages or expenses rising from any breach by her of the terms of this Contract including any negligent or reckless act, omission or default in the provision of the services.

Paragraph 13: One month's written notice on either side will be required excluding cases of breach of contract by either party.

Paragraph 25: Deposit - if any party terminates the Contract the Company is entitled to retain the deposit £500 for the period of six months' time which shall be deducted from last payment. If no complications appeared after the Independent Consultant

provided treatment to the patients the full amount of £500 will be transferred to the Independent Consultant's bank account.

Employee status

15. Following a hearing on 7 December 2023 Employment Judge Matthews determined that the Claimant was an employee and worker of the Respondent at the relevant time. Relevant findings within his reserved judgment dated 29 December 2023 included:

> The Claimant's earnings were calculated by reference to 50% of the gross income arising from the patients she treated. If there was a complaint and a refund was agreed with the patient that sum was deducted from the Claimant's earnings. The Claimant paid 50% of laboratory bills for items such as prosthetics and crowns, consistent with earning 50% of the income from that patient. The cost of the dental technician, if one was used, was shared with the Respondent.
>
> The Respondent had a considerable degree of control over the Claimant's day to day work including when and where she carried out the work.

The Respondent's practice

16. During the period of the Claimant's employment there were typically four dentists in the practice. This comprised Ms Marcinkowska together with three other dentists, including the Claimant. There were also dental nurses and a receptionist.

17. The dental practice comprised exclusively Polish staff and patients.

The Claimant's working hours

18. The Claimant typically worked three days per week. She contends that she was not provided with a regular lunch hour. The Respondent says that there was flexibility within the working day and the Claimant could eat and rest when she did not have patient appointments.

Claimant has Covid in February 2022

19. The Claimant contends that she was accused of fabricating her illness and planning an extended holiday. The Claimant suggested that she had been asked to attend work and conduct patient surgeries notwithstanding having Covid. This is denied by the Respondent. The Claimant did not attend work between 24-26 February 2022. She submitted her PCR result under cover of an email on 27 February 2022. In an email of 1 March 2022 Ms Marcinkowska thanked the Claimant for the information and test result and said: "No problem, we sorted it all out. Have a nice holiday and see you soon". The Tribunal finds no evidence that the Claimant was pressurised to work when suffering from Covid.

File note dated 18 June 2022

20. Ms Marcinkowska maintained a system of file notes of conversations with dentists. These were not provided to the Claimant. The Claimant denies that such file notes were

contemporaneously produced. However, the Tribunal finds no basis for this contention. Further, whilst the Claimant does not necessarily accept what is recorded as being the issue on the file notes there are elements of the conversations which she acknowledges took place.

21. In this file note Ms Marcinkowska recorded that the Claimant got angry and rude to a patient. Reference is made to the patient complaining about the treatment and behaviour of the Claimant. Ms Marcinkowska recorded as an action that the Claimant should pay attention about her bad behaviour towards the patient.

File note dated 20 June 2022

22. Ms Marcinkowska recorded that the Claimant should pay attention about the mistakes she had made and as an action that she should inform the patient about the mistake.

WhatsApp exchange between Ms Marcinkowska and the Claimant on 17 & 18 July 2022

23. In this exchange regarding a particular patient Ms Marcinkowska stated at 06:41 on 18 July 2022 “unless you’ve broken someone else’s tool”. As context the Respondent contends that the Claimant had an unacceptably high incidence of breaking dental tools.

File note dated 22 July 2022

24. The issue is recorded as that during root canal treatments the Claimant was breaking tools quite often. Further that she was leaving the surgery when the patient was on the dental chair. As actions Ms Marcinkowska asked the Claimant to focus on patients not on private issues and specifically not to use her personal phone and leave the surgery during treatment.

WhatsApp exchange of 17 August 2022

25. Ms Marcinkowska said the following to the Claimant:

> “I won’t do anything now. You could have called the girls earlier. Everything is done at the last minute, moving, etc. Generally, I don’t like it. When we make an appointment, I want it to be as you agreed, and not later make the receptionists look like idiots”.

File note dated 10 September 2022

26. The topic was recorded as the Claimant’s poor punctuality, schedule changes without informing owners, holiday absences without giving notice. As an action Ms Marcinkowska reminded the Claimant about the necessity of giving notice about planned holidays in required time as her leave between 15 August and 25 August 2022 was without mentioned notice.

File note dated 18 November 2022

27. As actions Ms Marcinkowska asked the Claimant to discuss treatments with the patients more carefully and provide them more details during consultations. She mentioned losses for the Practice and asked the Claimant to avoid this kind of situation in the future.

Reference for the Claimant dated 3 January 2023

28. Ms Marcinkowska was at this time recovering in hospital from a complicated and potentially dangerous caesarean delivery on 26 December 2022. The Claimant required a reference regarding her employment and earnings in support of her Costa Rican boyfriend's application for leave to remain in the UK. She drafted a form of wording for Ms Marcinkowska to sign which included that she was a "reliable and trustworthy dentist for the Respondent". Ms Marcinkowska says that she felt blackmailed to sign it. The Claimant seeks to rely on this reference as evidence that there were no issues regarding her performance at this time.

WhatsApp exchange on 16 February 2023

29. Ms Marcinkowska records that a patient was unhappy that she had a to come back for polishing and that she was willing to give up further treatment if it continues like this.

Claimant's letter to the Respondent dated 20 February 2023

30. The Claimant relies on this letter as her first protected disclosure. It is therefore appropriate to set it out in full.

> "It is with great regret that I need to inform you, that given the current circumstances at work I no longer feel safe to continue working. It is not safe for me nor the patients. I am taking sick leave. Due to anxiety and stress caused by the work place.
>
> The hostile and unsafe environment created in the work place has meant that I found it very difficult to concentrate on treatments.
>
> Every day I am facing verbal assaults, constant degrading comments and on many occasions I was prevented from doing treatments which patients requested. For instance, I am being forced to answer the phone during the treatment.
>
> However, I understand your concern about providing patients the best possible quality of service, but given the environment at work it is simply not possible to ensure quality treatment for patients when there is not a quality working environment. I am very professional at my work and expect to treated in this manner by my colleagues. To date, this has simply not being the case. Every day I have been faced with disrespectful and oppressive conduct and this is simply not somewhere I can work to my best ability. The lack of stability has caused me great anxiety as each day I come to work I am unsure what type of unprofessional behaviour I will be faced with.
>
> It is my intention to come back to work but my return must be planned according to my current health condition and my concerns must be addressed appropriately. I will not come back to work in the same hostile environment and therefore, it is essential that things change and that each issue is dealt with to create the best possible environment for my work and therefore for the patients care.

> I'll send you the detailed letter stating the exact list of issues which need to be addressed within 7 days from the date of this letter.
>
> I regret I can't provide treatments to my patients at this time but it is my concern about their best interest which made me to make this decision. I will only work in a professional manner and right now that is not possible for me as a result of my stress and anxiety.
>
> I will provide my medical certificate within 7 days from the date of this letter if requested".

31. Ms Marcinkowska says that the receipt of the letter came as a surprise to her. The Claimant says that the letter followed the previous oral conversations when she raised her concerns with Ms Marcinkowska. However, it is significant that the letter does not make any reference to such earlier conversations and we find that had they taken place the Claimant would have done so. Further, it is significant that Ms Marcinkowska had been absent on maternity leave from mid-December 2022 and only returned to active employment on 3 February 2023.

Letter from Ms Marcinkowska to the Claimant on 20 February 2023

32. This letter refers to the Claimant's letter of 20 February 2023 and says that Ms Marcinkowska was looking forward to the Claimant's detailed letter so that she could undertake an effective investigation.

33. The Claimant says that the letter is fraudulent and was not received by her until it was included in the bundle of documents in April 2024.

Authenticity of documents

34. Given that on multiple occasions the Claimant and/or Mr Lukomski alleged that documents were fraudulent Employment Judge Nicolle suggested that it may be beneficial for the Respondent to provide evidence of the properties of the individual documents which would provide evidence as to when they were created and to the extent applicable modified. This evidence was produced but not accepted by the Claimant. For example, in relation to the Respondent's letter of 20 February 2023 the properties showed that it was created at 10:37am on 20 February 2023 and not modified until 30 November 2024.

35. The Claimant and Mr Lukomski argued that this was not conclusive evidence as the properties may relate to a document other than that shown. The Tribunal considers that there is no evidence to rebut Ms Marcinkowska's evidence under oath as to the creation of the documents as supported by the properties of those documents. An allegation of fraud, to include deliberately misleading the Tribunal and a witness giving false evidence, is an extremely serious one and would require a high threshold of evidence to be substantiated. The Tribunal finds no such evidence. The Tribunal was surprised that notwithstanding the properties of the documents being produced, and on the face of it providing irrebuttable evidence as to the creation date of various documents, that the Claimant and Mr Lukomski nevertheless persisted with their allegation of the manipulation and retrospective creation of documents.

Respondent's letter to the Claimant of 20 February 2023

36. The Respondent's letter of 20 February 2023 was according to the Respondent emailed to the Claimant under cover of an email of 16:08 on 20 February 2023. The Claimant says no such email was received. This was one of a number of incidences of emails sent by both the Claimant and the Respondent which the other claimed not to have received. There is nothing to suggest that the email addresses used were incorrect or any evidence that an undeliverable or bounce back message was received. As such the Tribunal is not able to make any finding as to whether or not such emails were received but for the purposes of its findings proceeds on the basis that such emails were sent but not received by the intended recipient.

Claimant's statement of fitness for work dated 22 February 2023

37. The Claimant was signed off as a result of anxiety, depression and stress at work from 20 February 2023 until 20 March 2023. The Claimant did not send this certificate to the Respondent.

The Claimant's absences from work

38. The Respondent says that the Claimant had an unacceptably high number of absences from work. It produced a schedule of her absences between 24 February 2022 and 16 July 2022. This included her absence as a result of holidays between 24 February 2022 and 9 April 2022 and 23 June and 16 July 2022. Ms Marcinkowska's letter of 20 February 2023 says that the commencement of a further period of absence, without certification, on 20 February 2023 was the last straw.

Decrease in the Respondent's turn over

39. Ms Marcinkowska contends that the Claimant's poor performance had contributed to a decrease in the Respondent's turnover. She contends that this was because of the Claimant's poor treatment of patients and that the reputation of the Practice had been damaged.

Letter from Respondent to the Claimant dated 1 March 2023

40. Ms Marcinkowska stated that further to her letter of 20 February 2023 that no communication had been received from the Claimant regarding her doctor's note and the detailed letter setting out her concerns. She advised that the Claimant was in breach of paragraph 8(a) of the Contract and as such it was terminated with immediate effect.

41. The Claimant does not accept that this letter was created on 1 March 2023. She says it is fraudulent. She does, however, accept that it was posted by the Respondent on 11 March 2023 and was received at her local post office on 13 March 2023 and that she collected the letter on 22 March 2023.

42. An identical version of the letter was sent dated 3 March 2023. The properties of this letter showed that it was created at 18:25 on 28 February 2023 and modified on 2 March 2023. The Respondent asserts that given this creation date the Respondent's decision to terminate the Claimant's engagement had been made on 28 February 2023. The Tribunal

accepts this evidence. The Tribunal rejects the contention that there is evidence that Ms Marcinkowska and the Respondent fraudulently manipulated the creation date of the letter so that it was before receipt of the Claimant's letter dated 2 March 2023. In circumstances where the letter 2 March 2023 did no more than repeat, in more summarised form, the allegations made by the Claimant in her letter of 20 February 2023, there would have been no basis for the Respondent doing so and in any event there is no evidence to support a serious allegation of fabrication and the deliberate misleading of the Tribunal.

Evidence of posting of the letter of 1 March 2023

43. The Respondent provided what it says is the receipt of a guaranteed next day delivery of the letter of 1 March 2023. This was sent to a post code LU11 JU which is the Claimant's cousin's house in Luton. The Claimant was living at two addresses and she says that she was not primarily resident at the Luton address. The Claimant strongly and repeatedly asserted that this evidence of posting was a badly constructed fraud. The Claimant placed particular reliance on what was contended to be a wholly unbelievable weight of 0.779 kilograms. The Claimant says that a two page letter would have weighed no more 0.022 kilograms. The Respondent sought to explain the weight by a particularly heavy perforated envelope.

44. Whilst the Tribunal accepts that the postage weight would appear inexplicable it does not accept that the Respondent manipulated this document. It would have had very little motivation to do so for reasons previously set out. In any event the Claimant accepts that the letter was posted on 11 March 2023. Further, if the Respondent had intended to create fraudulent evidence of posting it would have been an inexplicable error to have used such an apparently inconceivable postage weight. The Tribunal is not able to assess, without evidence from the post office, how such weights are calculated but does not consider it evidence of fraud.

45. A surprising element of the case was the amount of time that the Claimant and Mr Lukomski spent on challenging the authenticity of individual documents. This took far more time than arguments in respect of the Claimant having made protected disclosures. We do not consider that this best advanced the Claimant's case but rather pointed to the animosity and distrust which had arisen between the parties.

Letter from the Claimant to the Respondent on 2 March 2023

46. The Claimant referred to her working conditions as being unsafe. She asked to be provided with the grievance policy and the anti-bullying, harassment and violence policy. She said that until she had been provided with this document she would not be able to provide her detailed letter.

47. Ms Marcinkowska says that the Respondent did not receive this letter. The Claimant says it was attached to her email of 11:12 on 2 March 2023.

Letter from Respondent to the Claimant of 10 March 2023

48. Ms Marcinkowska said that the Claimant was not entitled to receive the grievance policy as it only applied to employees. Given that she expressly referred to a request made by the Claimant, and the only evidence of such a request was in the Claimant's letter of 2

March 2023, we find that on the balance of probabilities that the Claimant's letter of 2 March 2023 was received by Ms Marcinkowska.

Letter from the Claimant to Ms Marcinkowska of 23 March 2023

49. She said that it was with great regret to learn that Ms Marcinkowska had decided to terminate the Contract. She said that the Respondent's letter dated 20 February 2023 had not been received.

Respondent's letter to the Claimant dated 30 March 2023

50. Ms Marcinkowska stated that whilst calculating the sums owed to the Claimant it had come to light that there had been a great many errors and repeat treatments required for her patients. It also included reference to the Claimant breaching General Dental Council (GDC) Rules in that:

- She did not put patients' interests first;
- Did not explain treatment options, costs with risks and benefits to consent the patient; and
- There was no detailed consultation that patients could understand the procedures, materials and give valid consent for the treatment proposed.

The letter included Ms Marcinkowska 's saying that it had become apparent that over the previous 12 months there had been the following deficiencies:

- Lack of correct consent of patients;
- Lack of appropriate treatment planning;
- Lateness;
- Multiple failed treatments;
- Poor treatment planning;
- Poor treatment delivery.

She said that as a result of the above the Respondent had no option but to withdraw the Claimant's Contract for services on the grounds of no communication along with poor and unsafe treatment.

51. The letter was sent by Ms Marcinkowska to the Claimant as an email attachment on 31 March 2023. The Claimant contends that this letter was not received until being provided in the bundle on 9 April 2024.

The Respondent's referral of the Claimant to the GDC on 31 May 2023

52. Ms Marcinkowska says that following her return from maternity leave, and it becoming apparent that there were serious concerns regarding the Claimant's professional practice, that she and Ms Sacharko undertook a detailed review of the approximately 1000 patients the Claimant had treated. She says that this took between two and three months. Given the amount of material reviewed to include, but not necessarily limited to, treatment records, dental practice notes, x-rays undertaken, authorisations provided by patients etc, the Tribunal considers that this must have taken many hundreds of hours.

53. The referral to the GDC stated the Respondent's concern as follows:

> "She carried out CBCT scans without appropriate certificate, she misdiagnosed patients, she left patient-children unattended in the surgery during the treatment, she used her mobile phone during the treatments and carried on some conversations. My dental nurses reported to me all these incidents and we decided to finish cooperation in March 2023 with a notice-breach of contract. I have created lists of patients without medical notes, patients which were over dosing and misdiagnosing".

54. The evidence provided to the GDC by Ms Marcinkowska included patients who she alleged had been "over exposed" to x-rays.

Correspondence between the Respondent and the Claimant and patients and laboratories to obtain evidence for the purposes of the GDC and Employment Tribunal proceedings

55. It is apparent that from June 2023 onwards both the Claimant and the Respondent sought to obtain evidence from third parties. For example, the Respondent contends that a letter from a patient dated 30 June 2023 was in effect drafted by the Claimant with the patient's electronic signature added but nevertheless submitted as a document by the Claimant on the basis that it represented the patient's unsolicited commendation of her professional practice.

56. Ms Marcinkowska sent an email to the GDC on 3 July 2023 referring to the Claimant having put pressure on two dental laboratories to sign statements provided by the Claimant with fake information.

57. It is not necessary for us to refer to all of the correspondence between the parties and third parties regarding their respective views of each other. However, we do find that the Respondent was seeking expressions of negativity from patients and other third parties regarding the Claimant. For example, we refer to the statement from patient I dated 5 September 2023 in which she refers to being "a victim in the case of Dr Anna Kuzniar". His reference to the case we consider to be indicative that there had been a prior conversation with him regarding the Claimant's situation rather than this statement being provided on a spontaneous basis. That is not to say that what he says and complains of may not be valid but to put these various statements into a context of both parties seeking to protect their position and solicit evidence in their support or from the Respondent's perspective evidence to justify the referral made to the GDC.

GDC early advice dated 15 October 2023

58. This included reference being made to it being a rare occurrence for broken endodontic instruments to have happened six times in a one year period of the same clinician's treatment and suggestive of poor technique and below the standard expected of a competent dentist.

59. The GDC, following a review undertaken by Edward Bateman, recorded that significantly failures were apparent in the Claimant's treatment planning and outcomes,

record keeping, duty of all candour and radiographic practice, potentially including over exposure of patients to radiation as outlined.

Email from Ms Marcinkowska to the GDC of 31 October 2023

60. Ms Marcinkowska referred to the Claimant having raised a claim against her in the Tribunal. She suggested that this could put the Claimant in a light but does not present a good character. She said that the Claimant had provided the Tribunal with false documents – statements. She said that she was in possession of two letters from dental laboratories which the Claimant had fabricated.

Letter from GDC to the Claimant dated 1 May 2024

61. The Claimant was advised that the allegations that she had bullied staff members, failed to obtain informed patient consent in relation to prosthetics and had been responsible of misdiagnosis were not supported and therefore were discontinued.

Breakdown of the working relationship between the Claimant and Ms Marcinkowska

62. In response to a question from Employment Judge Nicolle Ms Marcinkowska said that there had not been serious concerns regarding the Claimant's performance prior to her going on maternity leave in mid-December 2022. Ms Marcinkowska says that it was only on a detailed review being undertaken of the Claimant's clinical practice following her return from maternity leave on 3 February 2023 that the extent of her alleged deficiencies became apparent. Nevertheless, the Tribunal considers that there were self-evidently some concerns regarding the Claimant's performance and conduct given the content of the various file notes referred to and WhatsApp conversations.

63. The Tribunal considers it apparent that the distrust and animosity between the Claimant and Ms Marcinkowska became increasingly vitriolic. This extended, in the Tribunal's view highly inappropriately, to the Respondent contending that Ms Sacharko's miscarriage and Ms Marcinkowska's early delivery were attributable to stress induced by the Claimant's conduct. There is no evidence to support this and further it is inconsistent with Ms Marcinkowska's evidence that there were no serious concerns prior to 3 February 2023.

The Law

A qualifying protected disclosure

64. Section 43B (1) ERA defines a protected disclosure as a qualifying disclosure as being "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more" of a number of types of wrongdoing. This includes, (b) "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" and, (d) "that the health or safety of any individual has been, is being or is likely to be endangered".

65. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under Section 43C, to the worker's employer.

66. In Kilraine v Wandsworth LBC [2018] ICR 1850 the Court of Appeal clarified that "allegation" and "disclosure of information" are not mutually exclusive categories. What matters is the wording of the statute; some "information" must be "disclosed" and that requires that the communication have sufficient "specific factual contents".

67. Whether a particular disclosure of information, "tends to show" a breach of a legal obligation in the absence of any reference to a legal obligation will be a question of fact in each case.

68. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one or more of the matters in S43B (1). In Kraus v Penna Plc [2004] IRLR 260 at para 24 the Employment Appeal Tribunal held that "likely" in this context means "more probable than not".

69. In the light of Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026 what is necessary is that the tribunal first ascertain what the claimant subjectively believed. The tribunal must then consider whether that belief was objectively reasonable, i.e. whether a reasonable person in the claimant's position would have believed that all of the elements of S43B (1) were satisfied i.e. that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail with the relevant legal obligation. The Court of Appeal emphasised that it does not matter whether the claimant is right or not, or even whether the legal obligation exists or not.

70. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the disclosure is made: Darnton v University of Surrey [2003] ICR 615.

71. It is necessary that the disclosure was in the "public interest". The Court of Appeal in Chesterton Global and another v Nurmohamed [2017] EWCA Civ 979 [2018] ICR 731 set out relevant criteria against which to assess the existence of the public interest to include:

- the numbers in the group whose interest the disclosure served;
- the nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed;
- the nature of the wrongdoing disclosed; and
- the identity of the alleged wrongdoer.

72. It is possible to aggregate separate incidents to amount to a composite disclosure: see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 340 EAT.

73. Section 47B ERA provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Whilst the burden is on the employer, the claimant must raise a prima facia case as to causation before the employer will be called upon to demonstrate that the protected disclosure was not the reason for the treatment; see Serco Ltd v Dahou [2017] IRLR 81 para 40. As such the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under S136 of the EQA.

Detriments for making protected disclosures

74. Under S47B ERA, a worker has a right not to be subjected to a detriment by any act, or deliberate failure to act, on the part of his or her employer done on the ground that the worker has made a protected disclosure.

75. A detriment is something that a reasonable worker would consider to be their disadvantage in the circumstances in which they have to work. Something may be a detriment even if there are no physical or economic consequences for the worker, but an unjustified sense of grievance is not a detriment: see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003[UK HL 11, ICR 337 at paras 34-35 per Lord Hope and at paras 104-105 per Lord Scott.

76. The EAT set out the requirements for a successful claim under s.47B(1) in London Borough of Harrow v Knight 2003 IRLR 140, EAT:

a) The claimant must have made a qualifying disclosure;
b) They must have suffered some identifiable detriment;
c) The employer must subject the claimant to that detriment by some act, or deliberate failure to act, and
d) The act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

Burden of proof

77. Should the claimant prove that she made a protected disclosure and that the employer subjected him to some detriment, the employer has the burden of proving that any such act or failure to act was not on the ground of a protected disclosure by the claimant: section 48(2) ERA 1996.

Unauthorised deduction from wages

78. If the employer reduces salary in breach of contract the relevant legislation is Sections 13 and 27 of the ERA.

S.13 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 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.

S.27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

79. Alternatively, was the reduction a breach of contract giving rise to a claim under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 (the Order)?

Employer's breach of contract claim

80. Jurisdiction to hear employers' contract claims is conferred on Employment Tribunals by the Order. Article 4 provides that an employer may bring proceedings before an Employment Tribunal for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) as long as it arises or is outstanding on the termination of the employment of the employee against whom the claim is made and that employee has already brought proceedings under the Order in a tribunal against the employer.

The parties' submissions

81. The parties provided written submissions which they then spoke to. There is no need to refer to these in detail as they largely rehearsed previous arguments and each made a contention regarding what they considered to be the lack of credibility of the others' evidence.

Conclusion and discussions

Did the Claimant's letter dated 20 February 2023 contain protected disclosures?

82. We find the letter did not contain protected disclosures. We reach this decision for the following reasons.

83. Whilst the Claimant made general allegations, for example, that there was a "hostile and unsafe environment" they lacked the required specificity and provision of information to fall within what is required for a protected disclosure pursuant to s.43B(1) of the ERA. In reaching this decision we take account of the guidance of the Court of Appeal in Kilraine

that some “information” must be disclosed and that requires that the communication have sufficient “specific factual contents”.

84. We take account of the fact that it is possible to aggregate separate incidents to amount to a composite disclosure but found no evidence that the Claimant made a series of oral disclosures to the Respondent prior to her letter dated 20 February 2023. Further, we take account of the fact that the Claimant stated that she would send a detailed letter setting out the exact list of issues within 7 days but failed to do so. We consider that this effect represented acknowledgement by the Claimant that she had made general allegations without detail.

85. We also considered that the Claimant’s letter of 20 February 2023 fell short of protected disclosures which would be considered as sufficient to be made in the “public interest”. This is on the basis that the concerns raised by the Claimant primarily related to her own working relationship, for example, being subject to verbal assault and degrading comments, and not primarily on the basis of specified concerns regarding patient safety.

Did the Claimant’s letter dated 2 March 2023 contain protected disclosures?

86. We find that it did not. This letter was much more general than that of 20 February 2023 and therefore fails to make the required threshold for the reasons set out above. It in effect relies solely on the Claimant’s reference to “working conditions that are unsafe” without any specific information being disclosed.

Whistle blowing detriment

87. Notwithstanding our findings that the Claimant did not make any protected disclosures we nevertheless consider whether she would have been subject to any detriments had she done so.

88. The Respondent accepts that had the Claimant made protected disclosures that its reporting of multiple alleged concerns pertaining to the Claimant to the GDC on 31 March 2023 would have been a detriment had it been motivated or influenced by such protected disclosures.

89. The Respondent asserts that the Claimant’s referral to the GDC was solely motivated by concerns for patient well being given evidence of the purported deficiencies in the Claimant’s clinical practice. The Claimant asserts that it represented an act of retaliation as a result of her having made the protected disclosures. We reject the contention that the Respondent was primarily motivated by the Claimant’s letters dated 20 February and 2 March 2023. It is self-evident that the Respondent had genuine concerns regarding the Claimant’s clinical practice and spent an enormous amount of time investigating these. It would be wholly improbable that Ms Marcinkowska and the Respondent would have incurred such significant time purely as result of the Claimant’s letters of 20 February and 2 March 2023 which it would have been unlikely to have perceived as being potential protected disclosures.

90. Further, had the referral to the GDC been retaliatory it would not have been supported by such extensive evidence, and in circumstances where if the GDC had considered the referral to be misconceived or improperly motivated, it could have dismissed it. However,

after an initial review Mr Bateman concluded that interim orders were appropriate with restrictions placed on the Claimant's practice.

91. We do, however, consider that Ms Marcinkowska became increasingly antagonistic towards the Claimant as the GDC and Employment Tribunal proceedings progressed. This became increasingly apparent when additional allegations were raised by Ms Marcinkowska with the GDC to include alleging that the Claimant had provided misleading documents/statements and that she was potentially of bad character as a result of bringing employment tribunal proceedings. This was inappropriate. However, we do not consider that it provides retrospective evidence that the initial referral to the GDC on 21 May 2023 was motivated by Ms Marcinkowska's perception that the Claimant's letters of 20 February and 2 March 2023 contained protected disclosures.

Reason for the Claimant's dismissal

92. As we have found that the Claimant did not make a protected disclosure, the claim that she was automatically unfairly dismissed, where the reason or, if more than one, the principal reason for the dismissal is that she made a protected disclosure does not apply. Nevertheless, for completeness we address our findings as to the reason the Respondent terminated the Claimant's employment. We find that it was as a result of the breakdown of the working relationship and that the Claimant's sickness absence, and a failure to provide doctor's certification, was the catalyst for the termination. We do not consider it was as a result of the Claimant's letter dated 20 February 2023 regardless of whether it contained a protected disclosure. It is apparent, even on the Claimant's own evidence, that her relationship with Ms Marcinkowska had become increasingly fraught and that this predated her letter of 20 February 2023.

Breach of Contract

Did the Respondent breach the Claimant's contract by not paying her one month's notice?

93. We find that it did. We have to consider whether at the date of the Respondent's letter to the Claimant of 1 March 2023 the Claimant had committed an act of gross misconduct warranting the summary, or immediate, termination of her employment for cause. We find that the Claimant's conduct had not crossed this threshold.

94. As at 1 March 2023 the Respondent was relying solely on the Claimant's failure to provide her doctor's note evidencing the reasons for her absence.

95. The Respondent relies on s.8(a) of the Contract which refers, interalia, to non-attendance. It does not specifically provide for a failure to provide a doctor's note in the event of ill health absence. Whilst the Respondent might have perceived that the Claimant's sickness was not genuine this represented pure conjecture. She had not provided the doctor's certification of her grounds of absence. However, given that the Claimant has found to be an employee, it would have been appropriate for her to be provided with written notice that a failure to provide the doctor's medical certificate may result in disciplinary action against her. Given that the Tribunal is unable to reach a conclusion as to whether the Respondent's letter dated 20 February 2023, in which it was stated that it would be prudent to have your medical certificate so that this can be added to your personnel records, was actually received by the Claimant we are not able to reach

a finding that such notice had been given. In any event this letter fell far short of warning the Claimant that a failure to do so would result in disciplinary action potentially culminating in her dismissal.

96. The Claimant is therefore entitled to a month's pay. As the Claimant's monthly salary varied according to the number of treatments undertaken we find that her average weekly renumeration should be calculated in the period of 12 weeks ending with the last complete week before the calculation date in accordance with s.224 (2) of the ERA.

97. The Tribunal accepts the Claimant's evidence that the Respondent's letter dated 1 March 2023 was not received at her local post office until 13 March 2023. Whilst the Claimant did not collect the letter from the post office until 22 March 2023 we consider it would have been reasonable for her to do so by 14 March 2023 given that she was not working. We therefore take this as the date upon which notice should be deemed to have been communicated to her. However, given that the Claimant would have received no wages for the intervening period between ceasing to provide her services on 20 February and 14 March 2023 there is no basis for awarding her any compensation for breach of contract in respect of this period.

98. The Claimant is therefore entitled to an award for breach of contract calculated in accordance with s.224 of the ERA. Given that the Tribunal does not have the information to calculate the Claimant's average weekly renumeration in the period of 12 weeks prior to the calculation date the parties are asked to undertake this exercise to reach an appropriate figure. The payment of this award should be subject to any appropriate deductions for tax and national insurance contributions, or if paid to the Claimant gross she should account for tax and employee national insurance contributions.

Unlawful deduction from wages

Did the Respondent unlawfully deduct £4,372.50 from the Claimant's wages by not paying her monies which the Claimant alleges were due to her on 14 March 2023?

99. Under s.13 of the ERA an employer is only entitled to make a deduction from wages of a worker where the deduction is authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

100. The Respondent relies on s.8 of the Contract. We consider that s.8 (a) is too vague to provide any entitlement to the Respondent to make deductions. Mr Rozycki accepts that it is poorly drafted. It makes no reference to a deduction being made but merely refers to circumstances the Respondent contends would constitute a breach of contract. That is insufficient.

101. Clause 8 (b) also does not refer to deductions but rather circumstances constituting a breach of contract.

102. It is therefore only clause 8 (c) which provides for a deduction and that is specifically in circumstances where a patient has made a complaint regarding the Independent Consultant. It then refers to a refund being made to the patient for the cost of the consultation treatment or alternatively another consultation being provided free of charge. We therefore find that the right of deduction only applies where there has been a complaint.

We interpret this as being a formal written complaint as opposed to a situation where a patient orally expresses dissatisfaction regarding treatment outcomes. That is in our opinion too vague and would be inherently uncertain. It will often be the case that patients attend multiple appointments during which treatment is refined and finessed. It is not a perfect process. That is not a complaint it is merely part of the dialogue between patient and dentist.

103. Given that we have found that it is only in the event of a patient's formal written complaint that the right of deduction arises it therefore follows that any deductions made in respect of laboratory costs, other than in circumstances where such laboratory costs could be attributed to a patient's formal written complaint, are not matters in respect of which the right of deduction arises.

104. The Claimant's claim for deductions in respect of patients A, B, D, F, G and AP succeed save in circumstances where the Respondent can demonstrate the existence of a formal written complaint. The parties are invited to agree this sum between them to include ascertaining whether, if applicable, any formal written complaint existed in relation to the patients in question.

105. The claim for deductions made as a result of the Claimant being stopped/prevented from doing treatment by other members of staff fail and are dismissed. We do not consider that this constituted a deduction from the Claimant's wages as opposed to the loss of opportunity of earning additional fees.

106. We accept that the Claimant's reference to patient AP, is in fact a reference to patient K. It involved the provision to the patient of a corrected service free of charge. Further, we find that it was significantly out of time. It relates to February 2022 and does not form part of the series of deductions which the Claimant.

107. We do not accept the Respondent's argument that the Claimant's claims for antibiotics and painkillers would constitute expenses on the assumption that they were attributable to deductions made pertaining to individual patients. However, on the assumption that such deductions were made, absent a formal written complaint, they would be recoverable by the Claimant as unauthorised deductions from her wages.

108. We therefore find that the claim for unauthorised deduction from wages of £3,076 succeeds subject to the Respondent being able to demonstrate the existence of a formal written complaint in relation to any of the patients in respect of whom deductions were made and any evidence being provided that the schedule of deductions provided by the Claimant in respect of these patients under the headings second invoice – work in progress – paid deposit in February 2023 and patient F, treatment provided between November 2022 – February 2023 are inaccurate or in respect of which payments, or part payments, have been made by the Respondent.

109. The Tribunal invites the parties to agree this figure given that it does not have adequate information to do so but considers that it has provided sufficient findings and conclusions for this sum to be capable of relatively easy calculation and finalisation.

110. For the avoidance of doubt, the Tribunal does not accept that any practice existing pursuant to the Contract, whereby deductions were made from the Claimant's wages in

circumstances beyond those set out above, provided grounds for doing so pursuant to s.13 of the ERA.

Employer's breach of contract claim

Refunds to patients

111. The Respondent claims these sums as an alternative to its contention that it was entitled to make deductions from the Claimant's wages. However, we find that the terms of the Contract are such that it was only where there was a formal written patient complaint that the right of deduction, and as a corollary, a contractual right of reimbursement arose. This claim therefore fails absent evidence of a formal written patient complaint in respect of the refunds given.

Payments to dental laboratories

112. Clause 9 of the Contract provides for the Independent Consultant to indemnify the Respondent as result of any "negligent or reckless act or omission or default in the provision of the services". There is no suggestion that the Claimant was reckless so it would only be if her actions were considered to be negligent. We apply a relatively high standard to the definition of negligent. It goes beyond a careless error. Further, we are very mindful of not trespassing on matters which are the proper preserve of the GDC regarding the Claimant's professional competence. We do not consider that the threshold of negligence has been made out by the Respondent in its breach of contract claim for expenses incurred to dental laboratories. Therefore this element of the claim fails and is dismissed.

Wasting of 37 hours 15 minutes of surgery time

113. We consider this to be wholly speculative. Had the Respondent considered that the Claimant was wasting surgery time we would have expected this to have been raised with her during her employment rather than afterwards. Further, it is a wholly subjective concept as to what "wasting" surgery time would comprise. There will be various reasons as to why the surgery will not be fully utilised and it is not possible, without detailed scrutiny, to attribute such an underutilisation to the culpability of an induvial dentist. In any event the right of indemnification only applied where the dentist was negligent. The non-utilisation of surgery time may be attributable to factors such as lack of patients, patients cancelling at short notice, treatments being completed quicker than expected, the sickness of the dentist and so on. In any event there is no evidence that such deductions had been made during the course of the Claimant's employment and therefore we do not consider such a practice existed by the agreement of the parties based on custom and practice.

Respondent's lost income in January 2023 when the Claimant was working alone with patients

114. We consider this to be wholly speculative. The Respondent points to a very substantial reduction in income from, for example, £93,085 in February 2022 to £31,519 in February 2023 and seeks to attribute this loss solely to the Claimant's deficiencies. This is wholly speculative. There are a variety of potential reasons as to why such a reduction may have occurred not least that the practice caters to a virtually exclusive Polish clientele

and the Tribunal gives judicial notice to the fact that the number of Poles in London has diminished post Brexit. The Respondent's argument that such a reduction was due to the deficiencies of the Claimant is inconsistent with its own evidence that there were no significant concerns regarding the Claimant's practice prior to Ms Marcinkowska's return from maternity leave on 3 February 2023. The claim therefore fails

The Claimant's absence over 64 days

115. This claim is again wholly speculative and fails. Had the Respondent considered that the Claimant was in breach of contract in taking 7 and 4 week holidays in 2022 it should have been formally raised with her at that time. There is no evidence that it was. This would also have been the case if the Respondent considered that any of the Claimant's absences were in breach of contract. We consider that the Respondent's attempts to attribute a share of all fixed costs to the days of the Claimant's absences is wholly misconceived. It does not reflect the terms of the Contract.

Final conclusions

116. The claims for automatic unfair dismissal pursuant to s.103B of the Employment Rights Act 1996 (the ERA) and whistleblowing detriment pursuant to s.43B of the ERA fail and are dismissed.

117. The claim for unlawful deduction from wages pursuant to s.13 of the ERA succeeds in part and the Claimant is awarded the sum of £3,076 subject to any clarification of this figure between the parties in accordance with paragraph 103.

118. The claim for breach of contract in respect of the Claimant's notice period succeeds and the Claimant is awarded a sum to be agreed by the parties.

119. The payments to the Claimant pursuant to paragraphs 110 and 111 above are subject to deductions for tax and employee national insurance contributions alternatively if made gross the Claimant is responsible for making appropriate account to HMRC in this regard.

120. The Respondent's employers breach of contract claim fails and is dismissed.

121. We consider that we have provided sufficient conclusions for the parties to resolve any outstanding disagreement regarding the precise sums to be deducted from the Claimant's wages. In the event that the parties cannot resolve this issue and the sum to be paid in respect of the breach of the Claimant's one month notice period they should write to the Tribunal and if necessary a half day remedy hearing would be listed before Employment Judge Nicolle sitting alone. However, the Tribunal does not consider that this should be necessary.

Employment Judge Nicolle

8 January 2025 (and reconsidered pursuant to Rule 69 or the initiative of EJ Nicolle to add paragraph 92, which had been inadvertently omitted from the original judgment).

Sent to the parties on:

14 January 2025

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For the Tribunal:

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