



EMPLOYMENT TRIBUNALS

Claimant: Ms M De Pedro Almela

Respondent: Smileright Dencare Limited

Heard at: Cardiff **On:** 24 February 2020

Before: Employment Judge Harfield (sitting alone)

Representation:
Claimant: In person
Respondent: Mr Quail (CEO)

JUDGMENT

The claimant's claim of unauthorised deduction from wages is struck out on the basis that the Employment Tribunal has no jurisdiction to hear the complaint as the claimant concedes she was not a worker or an employee of the respondent.

REASONS

1. Employment Judge Beard identified at a case management preliminary hearing on 21 June 2019 (which the claimant did not attend) that claimant's case was whether there had been an unauthorised deduction from wages, and if so, how much was deducted. Employment Judge Beard identified that this would also involve deciding whether the claimant was an employee or a worker within the meaning of the Employment Rights Act 1996, noting the respondent's contention that the claimant was a self-employed contractor. Employment Judge Beard also identified there was a question as to what were the contractual terms in respect of a minimum payment under the contract and was that subject to a pro-rata deduction.

2. The full hearing was due to take place on 28 October 2019 but was postponed due to the non-attendance of the respondent. Employment Judge Frazer decided to grant a preparation time order in the claimant's favour and made directions for the claimant to prepare a schedule of the amounts she was seeking with provision for the respondent to respond. Employment Judge Frazer directed that the amount would be quantified at today's hearing. The parties complied with the directions but the respondent also made an application for reconsideration of the decision to grant a preparation time order. That application for reconsideration has not yet been referred to Employment Judge Frazer.
3. I clarified with the claimant at the start of the hearing that she was seeking 6 days' pay for a period when she says her working days, in breach of contract, were reduced from 4 days to 3 days a week and 8 days' pay when she says that her notice period was not properly honoured.
4. I then clarified with the claimant that the respondent asserts that the claimant was a self employed contractor and not a worker or an employee and that for the claimant to be able to bring a deduction from wages claim in the Employment Tribunal she had to be either an employee or a worker within the meaning of section 230 of the Employment Rights Act. I noted that to be a worker involves working under a contract where the worker undertakes to personally perform work or service for another party to the contract (where that other party is not a client or a customer). I brought to the claimant's attention that I understood the respondent was saying the claimant was not a worker (or an employee) because the obligation to perform work personally was not made out, because the contract between the parties gives the claimant [see page 42 of the bundle] the right in certain circumstances to appoint a locum or assign the agreement to another dentist.
5. I asked the claimant if her case was that this written agreement did not reflect the true position between the parties and whether she was saying that she was, at least, a worker. The claimant said that was not her case and that she accepted that she was self-employed but that she thought she was owed sums for breach of that self-employed contract.
6. I explained to the claimant that in those circumstances the Employment Tribunal did not have jurisdiction to hear her complaint of an unauthorised deduction from wages because to bring that claim she had to be a worker or an employee and the claimant was conceding she was not a worker or an employee¹. An individual who is truly self employed cannot bring an unauthorised deduction from wages claim in the Employment Tribunal. I identified to the claimant that to the extent she had any claim for breach of

¹ For the sake of completeness I should add that for the claimant to be able to bring a breach of contract claim in the Employment Tribunal she would also have to have been an employee.

contract (which I had not assessed) then it would appear such a claim would have to be brought in the county court not the Employment Tribunal. The claimant confirmed that she understood this, that she understood her claim could not proceed in the Employment Tribunal and that she did not have further submissions to make.

7. On my own initiative I therefore struck out the claimant's claim on the basis that it had no reasonable prospect of success as the Employment Tribunal does not have jurisdiction to hear the claimant's claim of unauthorised deduction from wages as a self employed contractor. As this decision to strike out is on a jurisdictional issue there has been no judicial determination of the substance of the claimant's claim and there is also no dismissal judgment under Rule 52 of the Employment Tribunal Rules of Procedure.

8. That left the time preparation order. I discussed with the parties whether I could assess the amount due to the claimant subject to the reconsideration application which needs to go back before Employment Judge Frazer. In the end I did not assess the amount as it seemed to me it was more proper for it to go back before Employment Judge Frazer. I was also concerned that some of the work the claimant was seeking to recover under the time preparation order would have had to be undertaken in any event for today's hearing and therefore from that perspective was not wasted time (save to the extent today's hearing was ineffective in any event because of the claimant's concession about her employment status). I therefore directed that the claimant should provide a further schedule within 14 days setting out the work/time she says was wasted or duplicated in having to get ready for the two hearings. The respondent has a further 14 days in which to provide any further comments in response. Both parties should also confirm whether they wish to attend a hearing in person or whether they are content for Employment Judge Frazer to decide the issues on the papers. The respondent's application for reconsideration of the time preparation order and (if relevant) the quantification of that order will then be considered by Employment Judge Frazer.

Employment Judge Harfield

Dated: 3 March 2020

JUDGMENT SENT TO THE PARTIES ON 4 March 2020

.....

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS