



# THE EMPLOYMENT TRIBUNAL

---

**SITTING AT:** ASHFORD EMPLOYMENT TRIBUNAL

**BEFORE:** EMPLOYMENT JUDGE HARRINGTON  
(sitting alone)

**BETWEEN:**

MRS DONNA BARNHAM Claimant

and

DR FOROUZAN PESSIAN  
t/a DANSON PARK DENTAL PRACTICE Respondent

**ON:** 6 March 2017

**APPEARANCES:**

For the Claimant: In person

For the Respondent: Mr N Moore, Counsel

## **JUDGMENT**

1. The Claimant has suffered an unauthorised deduction in earnings. The Respondent shall pay the Claimant the sum of £5,255.80 (five thousand, two hundred and fifty five pounds and eighty pence).
2. The Respondent shall pay the Claimant the Tribunal fees incurred in bringing this claim in the sum of £390.00 (three hundred and ninety pounds).

## **REASONS**

### **Introduction**

1. By an ETI received by the Tribunal on 20 July 2016 the Claimant, Mrs Barnham, brings claims arising from her employment as a Practice Manager with the Respondent, Dr Pessian trading as Danson Park Dental Practice, from 26 March 2015 to 5 April 2016. It is noted that the dates of the Claimant's employment are agreed by the Respondent in the ET3 [16].
2. The Claimant brings claims for notice pay and other payments. In the Claimant's most recent Schedule of Loss, she claims the following sums:
  - 2.1 3 months notice pay £6,000.00
  - 2.2 1 weeks salary £ 450.00
  - 2.3 TV and remote control £ 350.00
  - 2.4 Unauthorised deductions for training course £ 88.00
  - 2.5 Bank charges incurred £ 89.00
3. The Claimant's total claim is £6,827 when taking into account the sum of £150.00 referred to within the Schedule as having been earned by the Claimant following the termination of her employment with the Respondent. In addition to this sum, the Claimant seeks an increase to her award of 25% because of the Respondent's alleged unreasonable failure to comply with the ACAS code.
4. In my consideration of this claim, I have been provided with the Schedule of Loss referred to, a statement of issues, written witness statements from the Claimant and Dr Pessian and a bundle paginated 1 - 122. All numbers appearing within square brackets in this text refer to pages from this bundle.
5. At the hearing, the Claimant appeared in person and the Respondent was represented by Mr Moore, Counsel. I heard evidence from both the Claimant and Dr Pessian and closing submissions from both parties.

### **Factual Background**

6. The Claimant was employed as a Practice Manager by the Respondent from 26 March 2015 to 5 April 2016. Upon the commencement of her employment the Claimant assisted with drafting her own contract of employment [25-40]. The contract of employment, which was signed by the parties on 7 April 2015, stated that the Claimant would be paid £15 per hour and that the basic hours of employment were 34.5 per week. In

October 2015 the Claimant's salary was increased to £18 per hour. It is also evident that during the Claimant's period of employment, changes were made to her hours of work. The Respondent submits that prior to her resignation, the Claimant was working 26 hours per week. During her evidence the Claimant told me it was 34.5 hours per week but it was later clarified that the Claimant's claim for notice pay was based on her working 27 hours per week. Accordingly the difference between the parties as to how many hours worked per week by the Claimant was 1 hour.

7. In respect of the issues before the Tribunal, the following clauses in the Contract are of particular importance:

9. Holidays

.....

A deduction will be made from your final pay on a pro-rata basis for any holiday taken in excess of your entitlement, at the date of termination.

17. Grievance procedure

Should you have any query, grievance or complaint regarding your employment or the terms and conditions relating to that employment, you should raise the matter initially with Forouzan Pessian.

The full procedure is set out in the Staff handbook.

20. Deductions from pay

The practice reserves the right to make deductions from your pay in the following circumstances:

1. to recover an overpayment of wages
2. if you have taken more holiday than your pro rata holiday entitlement
3. if you terminate your employment without giving your contractual period of notice
4. if the practice reasonably believes you have stolen practice property and / or equipment
5. if you fail to return practice property and / or equipment (including any keys and uniform) when your employment terminates
6. to recover any contributions the practice made towards the cost of training. If the practice pays for any courses, you are expected to stay with the practice for at least 1 year after the course. Should you wish to leave the cost of your training will be deducted per rata.

[26-28]

8. In addition to these clauses, the Contract recorded that 2 months notice of termination of employment was required. However, following the production of the contract, an amendment was made to the Claimant's notice period. It was agreed by the Claimant and Dr Pessian that the Claimant's notice period be extended to three months. The Claimant accepts that this change was made and that the contract was amended by hand and initialled to reflect this amendment.

9. Accompanying the contract of employment was a procedure for raising a grievance. The relevant parts of that procedure stated as follows,

Please note that every attempt should be made to settle grievances informally before using the grievance procedure.

Stage 1 – Submission of grievance

An employee who feels aggrieved on any matter affecting his/her employment should write to making it clear that the first stage of the grievance procedure is being invoked and detailing the grievance.

[30]

10. On 23 March 2016 the Claimant emailed Dr Pessian seeking to book some dates off *for a personal matter*. The Claimant referred to not being able to work on 4 April 2016 and 7 April 2016 [43].

11. On 5 April 2016 the Claimant resigned her employment by email at 11.57 am [47]. The Claimant was no longer happy to work at the Practice because of what she saw as Dr Pessian's unprofessional behaviour towards her. In the email the Claimant referred to Dr Pessian talking about her behind her back with other staff, her constant interference and a constant stream of emails from Dr Pessian to the Claimant with various *'odd jobs'* for the Claimant to do.

12. In the final paragraph of her email, the Claimant referred to working her notice as follows,

*'I will of course work my 4 weeks' notice if you would like me to however, if you feel I should leave sooner please let me know?'* [47]

13. Dr Pessian responded to the Claimant's emailed resignation by a further email at 1.47 pm on 5 April 2016. She began her email to the Claimant with the words *'Don't do it We will talk!!!!!!!!!!'* [44]. Dr Pessian then raised a number of issues in the email including the fact that the Claimant had made her angry, that there had been a lack of care and attention to detail and that mistakes had been made making the Practice look *'like a bunch of incompetent ant people'* [45]. The email continued with the allegation that the Claimant had *'on many occasions'* lied before then setting out that Dr Pessian would be *'willing to reconsider'* the Claimant's resignation.

14. At 3.57 pm on 5 April 2016 the Claimant responded to Dr Pessian's email. She confirmed that she did wish to resign her employment and she provided comments to the points raised by Dr Pessian. In respect of her notice period the Claimant stated as follows,

*'If you would like to pay me garden leave for the remainder of the month that will be fine. If you think we can work together until my leave date, that is fine too.... I will leave it with you to confirm my last day.'* [47]

15. Early on the morning of 6 April 2016 the Claimant attended work as usual – as noted above, at this stage, the issue of the Claimant's precise leave date had not been concluded. The Claimant met with Dr Pessian upstairs at the Respondent's premises and it is the content of this meeting that remains disputed by the parties. The Claimant recalls that Dr Pessian asked her when she wanted to leave and pointed out that the Claimant's contract of employment required her to work a three month notice period rather than one month. The Claimant agreed that she would work her notice as required in the contract. The discussion then continued with reference being made to issues with Phil the builder and 'Folder 10 of CQC'.
16. The Claimant describes the issue of continued working being returned to and Dr Pessian said that it would probably be better if the Claimant left immediately. The Claimant recalls in her witness statement that Dr Pessian stated '*just leave, I do not want you here*'. In her oral evidence, the Claimant stated that Dr Pessian told her to '*get out*'. The Claimant stated that if she left then and there, the Respondent would still be liable to pay her three months notice and Dr Pessian told the Claimant that she knew that.
17. Shortly after this meeting the Claimant went downstairs and entered Dr Pessian's consulting room with a letter, which the Claimant had typed on the computer, confirming that she would be paid her 3 months notice period. It is agreed that Dr Pessian signed this letter although regrettably the letter has subsequently been lost. At 8.42am on 6 April 2016 the Claimant sent calculations for her final payment to Dr Pessian [48]. She referred to Dr Pessian having signed '*the letter of authorisation*'. The calculation detailed a gross amount due of £6,264.00 and a weeks wages (£420 net) which had been kept back at the start of the Claimant's employment [49].
18. Dr Pessian describes in her witness statement that she had accepted and agreed with the Claimant that she could give one month's notice. She says that she pointed out at the meeting that three months notice ought to have been given and that she would place the Claimant on garden leave for the remainder of the one month notice period, provided there was a handover. Dr Pessian then describes there being some aggression from the Claimant and that the Claimant criticised Dr Pessian for her leadership skills before Dr Pessian left to return downstairs to her room. In oral evidence, Dr Pessian stated that she told the Claimant that she was accepting the four weeks notice period although she did not raise a specific date in respect of the end of the notice period and that she did not say the Claimant would have to work for three months.
19. It is clear that Dr Pessian referred to a three month notice period during the meeting. She refers to having said that in her later email sent on 7 April 2016 [51].

20. Having carefully considered the entirety of the evidence available in respect of this aspect of the case, I prefer and accept the Claimant's account of the meeting. In particular, I am satisfied that Dr Pessian did not communicate her acceptance of the Claimant giving four weeks notice. Rather, I find that Dr Pessian referred to the contractual requirement for the Claimant to give three months notice. I am satisfied that the Claimant stated that she would give that longer notice period and then, shortly afterwards, Dr Pessian instructed the Claimant to leave, acknowledging that the Claimant would be paid in lieu of notice.
21. In reaching these findings of fact I have taken into account the oral and written evidence from both witnesses. In my judgment, the Claimant's evidence in respect of the pertinent events to her claim was clear and compelling. The Claimant made admissions where appropriate, for example when the figures set out in her spreadsheets were examined.
22. I also considered that Dr Pessian's account of the meeting on 6 April 2016 was undermined by the documentary evidence including her email on 7 April 2016 which stated '*I accept 1 month...*'. If Dr Pessian had already told the Claimant that one months notice was agreed, it is unlikely that she would have expressed it in this way in the letter. Further, if Dr Pessian had verbally accepted four weeks notice from the Claimant on 6 April 2016, it is very unlikely that she would then refer (in her letter dated 13 April 2016) to a contractual entitlement to three months notice and that the longer notice period would be honoured by the Respondent [54]. Dr Pessian told me that she wrote the letter of 13 April 2016 in those terms because she had been forced to sign the document on 6 April 2016. I was not satisfied by that explanation. In my judgment, if Dr Pessian had accepted the one month's notice period and had expressed that in the meeting on 6 April 2016, it was likely that she would have emphasised that in her later written correspondence rather than referring to honouring a three month notice period.
23. It also became apparent in evidence that Dr Pessian clearly told the Claimant to leave on 6 April 2016. When answering questions in respect of the Claimant's television, she said that she told the Claimant to take the TV and that she expected the Claimant to go because there was no way that the Claimant was able to work with her again.
24. Following the meeting on 6 April 2016, a stream of correspondence occurred between the parties. I shall summarise only the most pertinent aspects. On 7 April 2016 at 11.40am Dr Pessian emailed the Claimant [51]. In the letter Dr Pessian referred to an agreement reached on the afternoon of 5<sup>th</sup> April that the Claimant would leave with a full payment of her notice period '*which was a month*'. As noted above, I do not find that such an agreement was reached at that meeting. Dr Pessian further referred to only mentioning that the notice period was three months. She then set out a proposal of paying the Claimant one months notice together with a bonus.

25. In her emailed response, sent on 11 April 2016, the Claimant said that she was entitled to three months pay in lieu of notice [53]. It was following this email that Dr Pessian wrote a letter dated 13 April 2016. In the letter, Dr Pessian stated,

*'I can confirm that your contractual entitlement to notice is 3 months and of course that will be honoured following your resignation on 5<sup>th</sup> of April 2016.*

.....

*As stated, although you originally only gave 1-month notice, you are contractually entitled to 3 months' notice and we will of course honour this now you have advised you wish to serve your full notice term. Whilst initially I felt that we could offer garden leave for the duration of the notice period, having reviewed the business needs I can confirm that we will need you to work the remainder of your notice period in the practice. I therefore required you to return to work as of Monday 18<sup>th</sup> of April and to work as normal in accordance with the hours set in your contract for the remainder of your notice period.'*

26. As previously stated, I have concluded that Dr Pessian told the Claimant to leave on 6 April 2016 and that this was expressed as concluding the Claimant's employment with the Respondent to pay the Claimant in lieu of notice. I do not accept Dr Pessian's description in this letter that the Claimant was put on garden leave at that stage. The Claimant wrote a lengthy response dated 17 April 2016 [56]. In that letter the Claimant refuted that Dr Pessian was able to require her to return to work her notice period. The Claimant's calculations at this point were that she was owed the sum of £8,352.24 and £420.00 for a week in hand.

27. On 20 April 2016 Dr Pessian wrote to the Claimant. She described having accepted the Claimant's resignation as set out in the original email on 5 April 2016, in which the Claimant described giving four weeks notice. Dr Pessian further notes that the Claimant was now demanding a three month notice period with payment in lieu and she comments,

*'This is not legally enforceable as I had already agreed to your terms of resignation.'* [63]

She continues as follows,

*'Even though I have agreed to honouring payment for your amended 3 month notice period, I did not agree to the payment being made in lieu of the 3 month notice period. You were placed on garden leave and required to work this notice period when requested.'* [63]

28. Dr Pessian concludes her letter by stating that she will make a payment for four weeks' notice as originally agreed [64]. On 29 April 2016 the Claimant received a cheque in the sum of £1087.82.
29. Following this there was further correspondence with the Claimant's solicitor writing a letter to the Respondent dated 11 May 2016 [72] and the Respondent's legal advisors responding on two occasions [75] [78].

### **The Law**

30. An employee may resign with or without notice. A failure by an employee to give proper notice of resignation is prima facie a breach of contract. The statutory minimum period of notice to be given by an employee, who has been continuously employed for one month, is one week (s.86(2) ERA 1996) but the contractual period of notice to be given will, in many cases, be longer.
31. An employer may consider it desirable that the employee should cease work immediately and not work out his notice period. If an employee is asked to leave without notice, it is usual to give him pay in lieu of notice. Another possibility is to continue to pay the employee as usual, but to ask him to remain at home (garden leave).
32. No deductions from a worker's wages may be made unless it is either required or permitted by a statutory or contractual provision or the worker has given his prior written consent to the deduction (s.13, s.15 ERA 1996). The worker may bring a complaint to an employment tribunal if his employer breaches these provisions. A complaint may be made that an unauthorised deduction has been made contrary to sections 13 and 15 of the ERA 1996 (s.23(1) ERA 1996). Where an employment tribunal finds that a complaint under s.23(1) is well-founded, it will make a declaration to that effect and, where an unlawful deduction has been made, will order the employer to pay to the worker the amount of the deduction (s.24 ERA 1996). Pursuant to section 24(2) a tribunal may order the employer to pay to the worker 'such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of'.
33. Section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992 provides the employment tribunal with the ability to increase any award which it makes to an employee by up to 25%, if the tribunal concludes that an employer has unreasonably failed to comply with the 2009 ACAS Code of Practice on disciplinary and grievance procedures and it is just and equitable in all the circumstances. Pursuant to Schedule A2 of the Act, section 207A applies to the jurisdiction set out in section 23 of the ERA 1996 – namely unauthorised deductions and payments.



## Findings

34. The issues for the Tribunal to determine are whether the Claimant is owed the following: monies in respect of her notice period, a weeks pay kept back 'in hand' by the Respondent at the start of the Claimant's employment, the sum of £88 which was deducted in respect of a training course and the sum of £89 in bank charges incurred by the Claimant as a result of the alleged failure to pay her correct notice pay. A further issue is whether the Respondent unreasonably failed to comply with the ACAS Code of Practice, such that an increase to any award to the Claimant should be made.

### Notice Pay

35. When communicating her resignation, the Claimant identified that she would give four weeks notice. This notice period was changed when, during the meeting on 6 April 2016, the Claimant was reminded by Dr Pessian that she was contractually obliged to give three months notice. As detailed above, I am satisfied that Dr Pessian did not communicate her acceptance of the Claimant giving four weeks notice. Rather, I find that Dr Pessian referred to the contractual requirement for the Claimant to give three months notice. I am satisfied that the Claimant stated that she would give that longer notice period and then, shortly afterwards, Dr Pessian instructed the Claimant to leave, acknowledging that the Claimant would be paid in lieu of notice.

36. Accordingly, in my judgment, the Claimant is entitled to her three months notice pay. As set out in paragraph 6 of these Reasons, there is a discrepancy between the parties as to the hours worked by the Claimant. Having considered the parties evidence in respect of the sum claimed and the Claimant's detailed spreadsheets (for example, see [109]), I am satisfied, on the balance of probabilities, that the Claimant is owed the sum of £6000.00 in respect of her notice paid. The hours which the Claimant worked were subject to some variation and the Respondent's method of recording a set number of hours and then later adding to or subtracting from this, dependant on the reality of what an employee worked, was complex. However I am satisfied that a calculation of £6000.00 represents a fair average of three months earnings and is owed in respect of the Claimant's notice.

### One Weeks Pay

37. It is agreed by the parties that the Respondent kept the Claimant's first weeks pay back or 'in hand' at the start of the Claimant's employment. Although this is set out in the Claimant's Schedule as £450.00, the Claimant accepted in evidence that the weeks pay should be £420.00 and I am satisfied that this amount is owed to her.

### Deductions

38. The Respondent deducted the sum of £88.00 from the Claimant's pay in respect of attendance at a training course. There was little evidence

presented to the Tribunal in respect of this claim. The Claimant accepted that an amount of £53.66 was owed by her for training costs. The invoice included within the bundle shows a cost of £59.00 for the course [97] and the spreadsheet shows a deduction of £88 being made with the course costing £56 and travel costing £32 [109]. Dr Pessian did not address the specifics of the deduction made in either her written or oral evidence. There was certainly no clarity and very little evidence in respect of the travelling costs.

39. Clause 20 of the Contract of Employment permits course fees to be recouped in circumstances where an employee does not continue in his employment for at a least a year following the course. The Clause continues,

‘Should you wish to leave the cost of your training will be deducted per rata.’

40. On the evidence available to me, I am satisfied that the cost of £59.00 was incurred by the Respondent in respect of a training course provided to the Claimant, invoiced in October 2015. I am not satisfied as to any travelling costs incurred. There is simply insufficient evidence provided by the Respondent on this point.

41. Clause 20 of the Contract permits the Respondent to deduct training costs ‘per rata’. The Tribunal was not addressed on this point during the hearing, nor was it suggested by either party that something short of the cost of the training should have been deducted from the Claimant’s pay because of the time elapsed since the training during which the Claimant had remained employed. From the evidence I heard, it was clear that the parties understood that the training costs would be deducted if the Claimant did not remain in her employment for a year following the training. Accordingly, I accept that the Respondent was permitted to deduct the cost of the training but that the sum of this deduction should have been £59 and not £88. The Claimant has suffered an unauthorised deduction of £29.

42. In evidence, the Claimant made three admissions in respect of payments made by the Respondent. The Claimant accepted when looking at the figures, that she had been overpaid by 33 hours in March 2016 and that this overpayment was properly to be deducted from what she is owed. In addition the Claimant accepted that she had been overpaid for 20.4 hours of annual leave, which was more than she had accrued at the relevant time and she conceded that the pay for 7 April 2016 should be deducted as she had taken unpaid leave on that day. The relevant figures, which were agreed by the parties at the Hearing, are as follows:

35.1	Overpayment for March	£594.00
35.2	Overpayment for annual leave	£367.20

35.3 Overpayment for 7 April 2016 £171.00

Television

43. The Claimant claims the sum of £350.00 for a television and remote control. The parties agree that the Claimant lent the Respondent a television with remote control, which could be used as a monitor for powerpoint presentations. The parties also agree that during correspondence, the Claimant was given an opportunity to collect the television from the Respondent's premises following the termination of her employment. In evidence, the Claimant told me that she could not collect the television on the day offered to her.
44. I do not find this aspect of the Claimant's claim to be well-founded for the following reasons: firstly, the factual circumstances are such that the Claimant was provided with an opportunity to collect the television. Secondly, I am far from satisfied that this claim is properly to be made as part of a claim for notice pay and unauthorised deductions from earnings. Thirdly, and in any event, I have seen no evidence to support the valuation given to the television by the Claimant.

Bank Charges

45. The Claimant claims the sum of £89 in respect of bank charges incurred. This claim is set out both in her Schedule and detailed within her witness statement. The Claimant was not cross examined over this claim. I am satisfied that the Claimant did incur such charges and that the sum of £89 should be paid by the Respondent to the Claimant pursuant to Section 23(4) of the ERA 1996.

S. 207A Increase

46. The Claimant claims a 25 % increase to any award she receives pursuant to Section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992. I am not satisfied that the Respondent did unreasonably fail to comply with the relevant Code of Practice. The Claimant accepted in cross examination that Dr Pessian did invite her to talk through the issues and suggested that they talk. The Claimant did not indicate that she wished the formal grievance procedure to be followed (as required in the procedure annexed to her Contract of Employment). Having considered the Code of Practice, the parties evidence on this issue and my findings of fact, I am not satisfied that the Respondent unreasonably failed to comply with the ACAS Guide. Accordingly the Claimant's award is not subject to any increase.

Summary

47. The calculation of the Claimant's award is as follows:

47.1 Notice pay £6,000.00

47.2	a week's salary	£ 420.00
47.3	Training course	£ 29.00
47.4	Bank charges	£ 89.00
	<u>less</u>	
47.5	Overpayment for March	£ 594.00
47.6	Overpayment for annual leave	£ 367.20
47.7	Overpayment for 7 April 2016	£ 171.00
47.8	Sums earned in mitigation	£ 150.00
		_____
	Claimant's award	<b>£ 5,255.80</b>

\_\_\_\_\_  
Employment Judge Harrington  
Date: 20 April 2017