



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111193/2019 and 4101940/2020**

**Heard in Glasgow on 12 October 2020**

**Employment Judge S. Walker**

5 **Miss J Daly**

**Claimant  
In Person**

10 **Mr G Marshall**

**Respondent  
Represented by:  
Mrs C Marshall**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the tribunal is:

- 1 The claim for unfair dismissal is dismissed.
- 2 The claim for a redundancy payment is dismissed.
- 3 The claim for breach of contract in respect of notice pay is dismissed.
- 20 4 The employer's contract claim is dismissed.
- 5 There has been an unauthorised deduction from wages and the respondent is ordered to pay to the claimant the sum of £15390 in this respect, being £14022 in respect of wages for the period from January 2019 to September 2019 and £1368 as pay in lieu of accrued annual leave. These are gross figures. If the respondent  
25 is required to make any payments of tax and national insurance in respect of this payment, that should be deducted.

**REASONS****Background**

- 1 The claimant presented a claim on 23 September 2019 against the respondent.  
The claim was for holiday pay (12 weeks), notice pay (12 weeks), wages (41  
5 weeks up until 30 September 2020) and a redundancy payment.
- 2 No response was received and the claim was listed for a final hearing on 6  
January 2020. At that hearing, before Employment Judge Robison, it became  
clear that the claimant had now been dismissed on 12 December 2019. The  
claimant asked to amend her claim to include unfair dismissal. The address of the  
10 respondent was also amended as he was no longer trading from the address to  
which the ET1 had been sent. The hearing was adjourned and the respondent's  
comments were sought. The application to amend was subsequently granted.
- 3 The respondent asked to be allowed to present a response late, saying that the  
original claim had not been received. The application to extend time for a  
15 response to be presented was granted by Judge Whitcombe and the response,  
subsequently presented was accepted.
- 4 The response included an employer's contract claim which was accepted by the  
tribunal and intimated to the claimant. That contract claim is technically a separate  
claim with its own claim number (4101940/20)
- 20 5 There has been a considerable amount of correspondence since then including  
various applications by each of the parties. These were dealt with by Judge  
Robison in chambers on 15 July. There is no need to narrate the details here. The  
outcome was that a hearing was listed for 3 days in person to be listed once that  
was possible. The hearing was subsequently listed for 12, 13 and 14 October  
25 2020.
- 6 Various applications for orders were made by the respondent close to the hearing.  
Those which related to information and documents held by third parties were  
refused as it was too close to the hearing and it was not clear that these would be  
necessary. However there respondent was told he could apply again at the end  
30 of the evidence and the Judge would consider the matter again at that stage.

**The hearing**

7 The claimant attended and gave evidence on her own behalf. She also called Ms  
Nisbet, a dental nurse at the practice until 31 March 2017. Ms Marshall gave  
evidence for the respondent as she had been managing his affairs at the relevant  
5 times. Both parties provided the tribunal with documents. Although there is clearly  
a great deal of animosity between the parties, the evidence that was given by  
each witness appeared to me to be given honestly and in good faith.

**Findings in fact**

8 Having hearing from the witnesses and considered the documents provided to  
10 me, I make the following relevant findings in fact:

**Claimant's employment**

9 The claimant was employed as a dental nurse since August 1989 at a practice at  
Dougrie Drive, Castlemilk. Her employment had transferred twice under the  
Transfer of Undertakings (Protection of Employment) Regulations 2006. In 2002,  
15 on the second occasion, her employment transferred to the respondent.

10 There were 2 dental nurses at the practice, the claimant and Ms Nisbet. As there  
was now only one dentist, a system was worked where the 2 employees worked  
both as dental nurses and as receptionists and they alternated whether they  
worked mornings or afternoons in each role.

20 11 The claimant's contract of employment said that she was employed as "a dental  
nurse and dental receptionist" and set out the various duties to be undertaken in  
each role.

12 Her salary was £1483 (gross) per calendar month, £1395 (net). A week's pay  
would be £342(gross) and £322 (net)

**25 Registration**

13 The Dentists Act 1984 was amended, with effect from 1 August 2008, to include  
a mandatory system of professional registration for complementary occupations  
to dentistry, This included dental nurses and it became illegal to practice or hold

yourself out as one of these professionals without registration with the General Dental Council (GDC). The requirement came into effect on 1 August 2008 and there were various conditions to registration, including training and continuous professional development.

5 14 There were transitional “grandparenting” arrangements for 2 years to allow people, such as the claimant, who had been in practice for a long period of time to enter the register. The claimant utilised this provision and was registered on 1 August 2008.

10 15 From 2016, the Dentists Act was amended to require registered practitioners to have indemnity cover in place. For the claimant, this was provided by the respondent as part of his general policy. However, she was required to confirm each year that it was in place.

15 16 The Guidance from the GDC makes it clear that those registered under the scheme will be required to confirm that they have indemnity in place when they renew their registration each year. It also makes it clear that if the person is covered by someone else’s policy, it is the individual responsibility of the registrant to check this before making the declaration.

20 17 Communication about registration, including the annual renewal form were sent to the claimant at the practice address. It was also possible to check and amend registration details online. One of the obligations of registration is to keep details up to date.

18 Continuous professional development is required as part of registration. This was on a 5 year cycle and included self-study as well as course attendance. The courses were paid for and organised by the respondent.

25 19 The respondent paid the registration fee but the claimant was required to complete and submit the relevant form. From 2016, this including ticking a box on the form to say she had appropriate indemnity cover in place.

30 20 The claimant’s registration was due in August 2017. Payment was taken from the respondent’s account of £116. The renewal form was sent to the claimant at the practice address. As the practice was closed (see below) the mail was returned

to the GDC. The claimant was notified by the GDC that they intended to remove her from the Register as she had not complied with the indemnity requirements (by ticking the box to confirm she had appropriate cover). The claimant did not receive this letter as it was again sent to the practice address. The GDC then removed her from the register on 7 September 2017 and advised her by letter that his had occurred. Again, the correspondence was sent to the practice and the claimant did not receive it. She was unaware that of her removal until it was brought to her attention by Ms Marshall (see below.)

### **The respondent's health**

10 21 During 2012- 2013, the respondent's wife, Ms Marshall, was unwell resulting in the respondent taking a lot of time off to look after her. The respondent then suffered his own health problems and there were periods when he did little or no dental work.

15 22 In January 2017, he incurred a neck injury which meant he was unable to work, with the exception of a few emergency appointments. He continued to pay the two employees although they were, in the main, doing only reception work.

20 23 In March 2017, the other employee resigned. Her last day was 31 March 2020. The respondent texted the claimant on 31 March to say he was signed off for another 3 weeks and there was no need to come in the next week "unless something comes up". He indicated he would be advertising for a replacement nurse and it might take a month or so for interviews. He said he might look at getting a work mobile for the claimant.

24 For the next 6 weeks or so, the claimant went into the practice occasionally to collect mail but was otherwise not required to carry out any work.

25 25 On 11 May 2017, the respondent was called to the practice when the alarm went off. He was concerned there had been a break-in and arranged to have the locks changed. The claimant did not get a set of the new keys and did not go back to the practice again. Mail for the respondent was kept for them by the Royal Mail as the office was closed and there was no mail box. However, any other mail was returned.

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26 The respondent continued to pay the claimant her full salary although she wasn't  
working. He hoped he would be able to return and was receiving treatment for the  
condition. He had a business insurance policy that covered a year of the  
claimant's salary. Once that ran out, the respondent continued to pay the  
5 claimant's salary from his own savings up until November 2018, as he was still  
hoping he would be able to return to practice.

27 In September 2018, the respondent was told that his condition was now  
permanent. This affected his mental health which culminated in a serious incident  
on 20 December 2018 and an intervention by the crisis team. A factor in his  
10 distress was that he did not have enough funds to pay the claimant's wages that  
were due that day.

28 The respondent did not renew his registration in January 2019 and therefore has  
been unable to practise as a dentist since then.

29 When the claimant did not receive payment of her wages on 20 December 2018  
15 she contacted the respondent. Ms Marshall explained what the position was and  
what had happened to the respondent. The claimant phoned again 2 days later  
asking about her wages. The respondent was not in a position to deal with any  
business matters and Ms Marshall took over dealing with his financial affairs. She  
paid the claimant's wages for December and took advice about how to proceed.  
20 The respondent did not have sufficient funds to pay the redundancy payment to  
which the claimant would have been entitled had her contract been terminated.

30 Ms Marshall's initial plan was to make the business insolvent which would allow  
the claimant to reclaim the redundancy payment and unpaid wages from the  
National Insurance Fund. She was advised that the insolvency process could not  
25 be completed until the respondent had made an application for benefits and that  
had been processed. Ms Marshall wrote the claimant on 18 January 2019,  
explaining the position and saying she would try to raise funds to pay her wages.  
In the meantime, due to the respondent's "medical and social issues", Ms  
Marshall would be the point of contact and would update her weekly.

- 31 The claimant texted Ms Marshall for an update on 4 February 2019. Ms Marshall responded that there was no change and she confirmed this by letter on 4 February 2019 and again on 17 February 2019.
- 32 On 18 February 2019, the claimant wrote to Ms Marshall saying she had no funds to live on and her mortgage protection did not apply as she was still employed. She asked for he wages to be paid and to be made redundant.
- 33 Ms Marshall replied on 3 March 2019 saying the situation was the same and they had been unable to obtain funds to pay her wages.
- 34 The claimant contacted the respondent asking for an update. Ms Marshall wrote again on 8 April 2019 advising the position was unchanged and asking that any contact was with herself due to the respondent's medical status.
- 35 The claimant wrote raising a grievance on 7 May 2019 in relation to unpaid wages, redundancy and notice and stating she had been advised to raise a claim in the employment tribunal.
- 15 36 There was further communication between the parties. This included further attempts by the claimant to contact the respondent directly. At some point during this period, Ms Marshall found out that if insolvency proceedings were commenced, the respondent would lose his assets.
- 37 In July 2019, Ms Marshall indicated to the claimant that she was unwell herself and having difficulty dealing with things. She advised that the position remained the same, they were unable to pay the outstanding sums that were due to the claimant. She asked that the claimant stop contacting the respondent directly and said that, if she continued, she would refer the matter to Police Scotland as "harassment" and would commence disciplinary procedures.
- 20
- 25 38 The respondent then received information that the claimant had been on holiday and that she was working elsewhere for cash. They also found out that the claimant had been removed from the GDC Register. Ms Marshall wrote to the claimant towards the end of August 2019 asking for an explanation of the removal; from the register and confirmation that the claimant had not taken holidays and was not engaged in other work.
- 30

39 The claimant called the GDC and found out that she had been removed because  
of failure to provide an indemnity declaration. She wrote to Ms Marshall said that  
this was provided by the respondent and that she considered her removal came  
5 from the respondent's failure to notify herself or provide to put cover in place for  
the surgery. She said she had not taken any leave since 1 August 2017 and that  
she had not undertaken any other paid employment.

40 Ms Marshall asked for further details to confirm the reason for removal. She  
confirmed that indemnity cover had been in place and remained in place. She  
pointed out that it was the claimant's responsibility to keep up to date contact  
10 details with the GDC and to make the annual declaration and that this could not  
be performed for her by her employer.

41 The claimant presented a claim to the employment tribunal on 23 September  
2019 for unpaid wages from January 2019 to September 2019, notice pay, holiday  
pay and a redundancy payment.

15 42 Ms Marshall acting on the respondent's behalf, wrote to the claimant on 1 October  
2019 inviting the claimant to an investigatory meeting on 8 November. This was  
to take place at and address 147 Greenhead Street in Glasgow. The matters to  
be investigated were:

20 *1 The circumstances pertaining to the GDC removing you from the DCP  
register on September 2017*

*2 Your refusal to respond to a previous attempt to garner information by post*

*3 Your use of leave during the period from August 2017*

*4 Circumstances related to your "availability" for work during the period April  
2017 onwards*

25 *5 Your actions related to communication with management by text  
messages and post.*

43 The letter said that Claire Marshall would be the lead investigator and another  
neutral party would be present as notetaker. The claimant was advised that a



possible outcome was disciplinary leading to termination and potential civil action to recover wages already paid.

44 On 31 October 2019, the claimant's nephew attempted to contact Ms Marshall at work. When the claim was put through to Ms Marshall the line went dead. The  
5 receptionist complained that he had been rude to her.

45 The claimant responded by text on 5 November 2019 saying, "due to personal circumstances and concerns I won't be available". Ms Marshall asked if she wished to reschedule? The claimant did not reply and Ms Marshall conducted the investigation with the respondent in the claimant's absence. They concluded that  
10 the following matters that should go forward to a disciplinary hearing:

- 1 Being struck off the register on 7 September 2017 preventing the claimant from practicing as dental nurse in UK
- 2 Refusing to provide information to management preventing them carrying out a full investigation
- 15 3 Continuing to contact the respondent when having been asked not to do so and also providing her nephew with Ms Marshall's details leading to an inappropriate telephone call at work.

46 The claimant was asked to confirm she would attend the hearing. The claimant replied by text that she "had personal health issues that left her unavailable for meetings" She said she "did not wish to share this information with her employer's  
20 wife" and she would be in contact when she was "in a position to facilitate a meeting with the respondent."

47 Ms Marshall asked when she would be able to attend and asked her to note she was acting in the role of practice manager for the foreseeable future. There was  
25 no reply.

48 The respondent then wrote to the claimant inviting her to a disciplinary hearing on either 5 or 6 December 2019. The claimant was asked to indicate which was her preferred date. This was sent by recorded delivery. She addressed the claimant's reluctance to share information with "her employer's wife" saying that there had

been repeated communication between the claimant and Ms Marshall for 10 months with no objection, the respondent's health precluded him attending and there was no one else who could deal with business matters. She confirmed she was acting as practice manger and on behalf of Graeme Marshall.

5 49 The claimant did not reply and the meeting proceeded in the claimant's absence on 10 December 2019. The respondent and Ms Marshall decided to dismiss the claimant with immediate effect. The stated reasons for dismissal were that:

10 1 She was struck off the register and was unable to practice in the UK or use the title of dental nurse. This meant she was unable to meet the requirement so her employment contract.

2 She refused to provide written information or attend and investigatory meeting and a disciplinary meeting.

15 3 She was asked not to contact the respondent but continued to do so. She provided Ms Marshall's personal information to her nephew leading to an inappropriate telephone call at work

50 The claimant has not received any further payment from the respondent.

51 The claimant has not attempted to find other work and is now working as a full-time carer for her mother.

20 52 The respondent's holiday year ran from 1 January to 31 December and was for 4 weeks plus public holidays. The claimant did not ask to take any holidays in 2019.

### **Relevant law**

#### *Unfair dismissal*

25 53 This is a claim made under section 98 of the Employment Rights Act 1996 (the ERA). In a claim of unfair dismissal, it is for the respondent to establish a potential fair reason for dismissal under section 98(2). This includes a reason relating to conduct. Where there is alleged misconduct by an employee, the respondent does not have to prove to the tribunal that the misconduct occurred. They must show that they genuinely believed there was misconduct. The tribunal must also

be satisfied that they had reasonable grounds for that belief having carried out a reasonable investigation in all the circumstances. This is set out in the case of *BHS v Burchell* [1978] IRLR 379.

54     Once a potentially fair reason has been established, the tribunal has to consider  
5     whether in the circumstances (which include the size and administrative  
resources of the respondent) it was reasonable for the respondent to treat that as  
sufficient reason for dismissal. (section 98(4)). There are a number of cases  
including *Iceland Frozen Foods v Jones* 1982 IRLR 439 which make it clear that  
when assessing reasonableness, it is not for the tribunal to decide whether it  
10     would have dismissed the claimant but whether an employer acting reasonably  
could have. There is a “range of reasonable responses” to the same  
circumstances where one employer acting reasonably may dismiss but another  
acting reasonably may decide not to. Provided the decision is one that an  
employer acting reasonably could make, that is sufficient for section 98(4).

15     *Redundancy payment*

55     Where employment is terminated and the reason is redundancy, an employee  
with 2 or more years’ service is entitled to a redundancy payment calculated in  
accordance with section 162 of the ERA.

*Breach of contract (notice pay)*

20     56     Section 86 of the ERA sets out minimum period of notice when employment is  
terminated. The respondent is required to give one week for every year of  
employment up to a maximum of 12 weeks. However, this does not affect the  
right of either party to terminate the contract without notice by reason of the  
conduct of the other party where that amounts to a material breach of contract.

25     *Unauthorised deduction from wages including holiday pay*

57     Where an employee is paid less than the amount properly payable by way of  
wages, a claim can be made under s23 for the shortfall. This includes non-  
payment of holiday pay. The Working Time Regulations 1998 (WTR) provide for  
4 weeks annual leave plus public holidays (or an equivalent number of days  
30     leave). Statutory annual leave must be taken in the year in which it accrues and

does not carry forward unless it was not reasonably practicable for the employee to take the leave and may not be substituted with a payment in lieu except in respect of the year in which the employment terminated (Regulation 13 of the WTR).

5 **Decision**

**Unfair dismissal**

*Was there a potentially fair reason for dismissal?*

58 When considering a claim of unfair dismissal, the tribunal is looking at what the employer knew at the time (not information that came to light later) and assessing  
10 the reasonableness of their actions at that time. The tribunal should not consider whether it would have dismissed the claimant in the circumstances but whether no reasonable employer would have done so.

59 Three reasons were given for dismissal. These were:

- the claimant's failure to keep up her registration as a dental nurse,
- 15 • refusing to provide the respondent with information and refusing to attend and investigatory meeting and a disciplinary meeting
- continuing to contact the respondent directly having been asked not to do so.

60 In relation to the first of these reasons, it is not in dispute that the claimant was  
20 removed from the register. At the time of termination, it was not clear how or why that had happened. All that the respondent knew was that the GDC had confirmed that the claimant had been removed from the register for failing to comply with statutory requirements. The claimant stated in correspondence that this was due to failure to provide an indemnity declaration and she said that this was  
25 undertaken by the respondent "as a matter of custom and practice". Her position was that "my removal came from Graeme's failure to either notify myself or provide cover for the surgery".

61 The respondent knew that he had paid the fee for registration and that the  
indemnity was still in place. He was also aware that, while he may have assisted  
with the process in the past, professional registration is the responsibility of the  
individual. He was unaware of how the removal had come about or whether, in  
5 fact, the removal was simply related to indemnity as the claimant had stated. The  
claimant was not willing to provide any further information nor to engage with the  
investigatory or disciplinary process which may have explained the  
circumstances.

62 I consider, therefore, on the *Burchell* test that the respondent genuinely believed  
10 that the claimant was guilty of misconduct (by failing to keep up her registration  
to enable her to practice as a dental nurse), that it had reasonable grounds for  
that belief and, in circumstances where the claimant was not prepared to engage  
further, that he had carried out a reasonable investigation.

63 The second charge of misconduct relates to a failure to provide information or  
15 engage with the disciplinary process. After the initial information, the claimant  
refused to engage any further or to attend meetings as required by the employer's  
policy. The respondent was entitled to consider that misconduct. An employee  
should co-operate with an employer in a reasonable disciplinary process.

64 The third charge of misconduct related to the claimant having continued to contact  
20 the respondent having been asked not to do so. Although there is dispute about  
how often this happened, it is clear that the claimant did continue to try to contact  
the respondent directly having been asked not to and the respondent was clearly  
aware of that.

*Was it within the range of reasonable responses to dismiss for that reason?*

25 65 So, I accept that the respondent had a potentially fair reason for dismissal (a  
reason related to conduct) and that this was the reason for dismissal. The  
question for me is whether it was reasonable (or within the range of reasonable  
responses) for the respondent to dismiss the claimant for these charges.

66 Starting with the failure to maintain registration, this is a fundamental requirement  
30 for a dental nurse to be allowed to practice. The claimant maintains that this was

not a problem as she had not been acting as a dental nurse before the practice closed and was not doing so at the time she was dismissed. However, she was still employed as (and being paid as) a dental nurse. The fact that she was not being asked to undertake these duties at the time does not remove the requirement to keep up her registration. At the time the registration lapsed in September 2017, the respondent had still hoped to restart the practice. The lack of registration could have caused significant delay while that happened or if the respondent had decided to employ a locum or sell the business.

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67 At the time the decision to dismiss was being made, it is true that the practice had ceased to operate and the respondent himself had decided not to renew his registration. However, that did not alter the fact that the claimant had been employed as a dental nurse and had been paid as such for many months. Had the claimant engaged with the respondent and explained what had happened, that she had never received the renewal or that she had understood this was a matter dealt with by her employer, things may have been different. However, with the limited information the respondent had, I do not consider it was unreasonable to dismiss the claimant for this reason. I consider it was also relevant that the respondent had been paying the claimant under her contract as a dental nurse for over a year, at significant personal cost, when she was not, in fact, complying with her obligations under her contract.

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68 The second charge related to the claimant failing to provide information and to engage with the disciplinary process. The reasons given by the claimant during the hearing were that she would have been prepared to meet with her employer but she did not wish to engage with her employer's wife, that she was not prepared to meet an unnamed third party and she considered there were security issues in meeting in a flat. The first point, I do not consider impacts on the reasonableness of dismissal. While it would be unusual for an employee to be asked to attend a disciplinary process with someone other than her employer, these were unusual circumstances. It is always open to an employer to appoint someone to carry out an investigation and/or a disciplinary procedure on its behalf.

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- 69 The claimant knew that her employer was not fit to meet with her due to his mental health. This had been the position for almost a year. She was aware that Ms Marshall was dealing with his business affairs and she had been dealing with her for months without raising a concern. Ms Marshall confirmed to the claimant that she was acting as the Practice manager by the text message. It was reasonable for the respondent to require the claimant to engage with Ms Marshall in the disciplinary procedure.
- 70 If the claimant had genuine concerns about her security at the proposed venue or the attendance of an unnamed third party, as she suggested in her evidence, those would be legitimate concerns. However, the difficulty for Ms Daly is that she did not express any such concerns at the time as the reason for her non-attendance and I have to consider the respondent's actions based on the information available to him at the time. Had such concerns been expressed, I have no doubt Ms Marshall would have made different arrangements. Instead she was met with a blank refusal to attend. I consider it was not unreasonable to dismiss for this reason.
- 71 The third charge relates to continued contact with the respondent when asked not to do so. I understand that Ms Marshall and the respondent found this difficult and categorised it as "harassment". Without doubt it was insensitive of the claimant to contact the respondent about her wages within 48 hours of an attempt at suicide. She was also aware that the respondent was not in a position to deal with business matters. The claimant as aware that Ms Daly was dealing with the respondent's affairs yet she continued to contact the respondent directly. There were repeated requests by Ms Marshall for the claimant not to contact the respondent directly.
- 72 On the other hand, it has to be recognised that the claimant continued to be employed by the respondent and she was not being paid. This was causing her significant financial difficulties. It was not surprising that she was trying to get answers to when she might expect payment. Ms Marshall's focus was understandably on her husband's health and their precarious financial position. However, this meant she seemed to have little regard to the fact that the claimant, through no fault of her own, was in limbo. She was not being paid but the

respondent would not terminate her contract of employment and pay her a redundancy payment. While the claimant was still employed, she could not apply for benefits and could not receive the benefit of her mortgage protection insurance. I do not consider it was within the range of reasonable responses to dismiss the claimant for this reason.

73 However, as I have found that it was reasonable for the respondent to dismiss the claimant for her failure to renew her registration and for her failure to engage with the investigatory and disciplinary processes, that means that the claim for unfair dismissal does not succeed and is dismissed.

#### 10 **Breach of contract – notice pay**

74 The claim for notice pay is a claim for breach of contract, for dismissal without proper notice. Unlike unfair dismissal, where the claim is for breach of contract, the tribunal has to consider whether in fact there has been a breach. This is not about a range of reasonable responses.

15 75 If an employee is in fundamental breach of contract, then the other party (the employer) is entitled to terminate the contract without any notice. This applies equally to an employee who is not required to give any notice if the employer was in breach of contract. So, for example, as the respondent was not paying her wages, the claimant would have been entitled to resign from her employment without giving any notice.

76 The tribunal must make a determination as to whether there was a breach of a term of the contract and, if so, whether to was fundamental to the contract.

77 The respondent claims that the claimant was in breach of contract so that he was not required to give notice. Further he has made a counterclaim that the claimant should be required to repay the wages she was paid after her registration lapsed (so from September 2017).

78 Terms in contracts can be express (meaning they are set out in the contract) or they can be implied from the circumstances or by custom and practice. There is no express term in the claimant's contract requiring her be registered with the GDC nor to keep up her registration. However, I consider such a term relating to



5 registration is to be implied under the circumstances. The claimant was employed as a dental nurse and she was required to be registered in order to carry out this role. She was also required to complete the necessary continuous professional development. This term would be that the claimant would obtain the necessary registration and, having done so, would do whatever was necessary to retain her registration. This would include keeping the GDC informed of any change in details and completing any necessary paperwork. This is not affected by the fact that in August 2017 she was not practicing as a dental nurse. She could have been required to do so at any time and she was being paid her full salary under the contract. Similarly, there was no express term in the claimant's contract that stated that the respondent would pay her registration fee or provide her indemnity but, from custom and practice, it was part of her contract that these would be done. The evidence at the tribunal was that the respondent did both these things.

79 I accept that the claimant did not receive the renewal notice in relation to her registration nor the correspondence which told her she had been removed and that she was unaware, until the respondent asked her about it, that she had been removed from the register. I accept that she did not fully understand the requirement for indemnity cover and that this was her responsibility to ensure that this was in place. However, in a scheme of professional registration, the obligation to keep details up to date and to ensure registration is up to date is personal and lies with the registrant and not the employer. It is clear that the claimant gave no thought at all to her registration until the matter was raised 2 years later by Ms Marshall.

80 I consider the breach of this implied term goes to the heart of her contract of employment as a dental nurse and was therefore a fundamental breach of contract. A fundamental breach entitles the respondent to terminate her contract without notice. This means there is no entitlement to notice pay and the claim for breach of contract is dismissed.

### **Redundancy payment**

30 81 As I have accepted that the reason for the dismissal was a reason relating to conduct, it follows that the reason is not redundancy. Therefore the claimant is

not entitled to a redundancy payment. When the claimant made her original claim, it was unclear whether the claimant was saying that she had resigned by reason of redundancy (which she would have been entitled to do and claim a redundancy payment). However, it is clear from the evidence that she did not resign and  
5 instead that the contract continued until she was dismissed in December 2019. The claim for a redundancy payment is dismissed.

### **Wages**

82 This is a very unusual case. It is clear that the respondent could have terminated the claimant's contract fairly much earlier than he did. The difficulty for him was  
10 that this would trigger an entitlement to a redundancy payment which he did not have the funds to pay. Instead, he continued to employ the claimant (when there was no job for her to do) for many more months while exploring the possibility of an insolvency procedure. That is his choice but the consequence of this was that, unless there was any agreement with the claimant to the contrary, the  
15 requirement to pay the claimant's wages continued. The claimant could have resigned at any time but she did not do so and so the contract of employment continued. While the contract continued the claimant's wages were properly payable under it and any underpayment can be claimed under section 23 of the ERA as an unauthorised deduction from wages.

20 83 There is a claim is for 41 weeks wages up until 30 September, there has been no application to amend the claim to include later periods and so the order of the tribunal in this respect is that the respondent has made an unauthorised deduction from wages and is ordered to pay to the claimant the sum of 41 x £342, being  
25 £14022. That is a gross figure and assumes that the claimant will be responsible for her own tax. If the respondent is required to make payments to HMRC in respect of this payment, that should be deducted.

### **Holiday pay**

84 The claimant was entitled to the statutory amount of annual leave (4 weeks plus public holidays). There is no general right to roll over unused annual leave from  
30 one year to the next. Annual leave should be used or it is lost except in special circumstances where it has not been practicable for an employee to take leave.

There is no suggestion that this was the case here. The claimant could have taken leave at any time. She was receiving her full salary and there is no reason why the respondent would have refused that request.

5 85 The only time that payment in lieu of holidays can be made is where a contract is terminated and then for the current holiday year in which the termination take effect. The claimant's contract was terminated in December 2019. The holiday entitlement for the year was for 4 weeks plus public holidays and it appears that the claimant has not taken any of that leave, excluding public holidays which are set days.

10 86 I therefore award 4 weeks as payment for accrued but untaken annual leave being £1368. Again, that is a gross figure and assumes that the claimant will be responsible for her own tax. If the respondent is required to make payments to HMRC in respect of this payment, that should be deducted.

#### **Employer's contract claim**

15 87 The respondent in his employer's contract claim contends that as the claimant breached her contract by failing to keep up her registration, she is therefore not entitled to the sums she claims in respect of unpaid wages from January to September 2019. I do not agree.

20 88 If there was a fundamental breach of contract by the claimant (as I have found that there was), the respondent was entitled to terminate the claimant's contract without the requirement to pay notice. However, the respondent did not do so until December 2019 (not least because he was unaware of the position) and so the contract continued. While the contract is in place, there is a requirement to pay the wages under it unless both parties agree to vary the contract.

25 89 In addition, the respondent argues that the claimant was not entitled to the wages that were paid to her by the respondent after her registration lapsed in September 2017. He argues that wages paid from September 2017 to December 2018 should be repaid to the respondent. Again, I do not consider that is correct in law. This is a claim by the respondent for damages for breach of contract. To succeed in such  
30 a claim, the damages must flow from the breach of contract.

90 There certainly was a breach of contract by the claimant in failing to maintain her  
registration. However, the “loss” claimed by the respondent of the wages that  
were paid from September 2017 to December 2018 is not caused by the  
claimant’s breach of contract. The requirement to pay wages was simply a  
5 consequence of the fact that the contract of employment continued and was not  
brought to an end by either party.

91 The failure by the claimant to keep up her registration did not, as matters  
transpired, cause any loss to the respondent. Matters would have been different  
if, for example, the respondent had wished to reopen the practice and because  
10 the claimant was not registered, that was delayed or he had to pay for another  
nurse. However, in this case, that did not happen.

92 As it has not been established that the breach of contract by the claimant caused  
any financial loss to the respondent, the respondent’s employer’s contract claim  
is dismissed.

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Employment Judge: Susan Walker  
Date of Judgment: 21 October 2020  
Entered in register: 02 November 2020  
20 and copied to parties