



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101271/2022

Held by CVP on 12 and 13 July 2022

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**Employment Judge McFatridge
Tribunal Member J McCullagh
Tribunal Member A Shanahan**

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Audrey Kershaw

**Claimant
Represented by
Mr Oxtan,
Advocate
Instructed by
Mr J Goldman, British
Dental Association**

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Tayside Health Board

**Respondent
Represented by
Ms Craik,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

1. The respondent unlawfully deducted wages from the claimant in the sum
35 of Thirteen Thousand One Hundred and Ninety Nine Pounds and Fifty
Pence (£13,199.50). The respondent shall pay to the claimant the sum of
£13,199.50 being the wages unlawfully withheld.
2. The claimant's claim of indirect age discrimination does not succeed and
is dismissed.

E.T. Z4 (WR)

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had suffered an unlawful deduction of wages. The respondent submitted a response in which they denied the claim. Subsequently the claimant applied to amend her claim so as to include a claim of indirect age discrimination. This was objected to by the respondent but the Tribunal allowed the amendment. The hearing took place over two days by CVP. The claimant gave evidence on her own behalf. Dr. Curnow the respondent's Director of Dentistry/Clinical Dental Director gave evidence on behalf of the respondent. The parties submitted an agreed chronology and a joint bundle of productions which was added to by the respondent without objection. On the basis of the evidence, the productions and the agreed chronology the Tribunal made the following factual findings relevant to the claims before it.

15 Findings in fact

2. The claimant was born on 12 February 1965 and therefore had her 56th birthday on 12 February 2021. The claimant qualified as a dentist in 1987 when she completed a BDS Degree. At that time there was no requirement for an aspiring dentist to carry out vocational training prior to registration as a dentist. Vocational training had been introduced in England from around 1980 but was completely voluntary. This changed in 1993 and although technically a dentist may not need to do it if they were intending to only practice privately, in practical terms all dentists qualifying with BDS after 1993 would carry out a year's vocational training. VT usually involved working for a year in a general dental practice during which one required to attend various classes on a day release basis. Once they did this the dentist would be allocated a VT number. In order to obtain an NHS list number a dentist required a VT number.

3. In 1993 when VT became compulsory there were various grandfathering arrangements so that those already working in general dental practice could be allocated a number based on their experience without having to do the one-year VT course.

4. Having qualified in 1987 the claimant initially moved to England where she was trained in maxilla-facial surgery. In 1998 she returned to Scotland taking up a post at Dundee Dental Hospital working as an Oral Surgeon. In or about 2006 she was promoted to Associate Specialist in Oral Surgery at Dundee Hospital.
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5. The claimant did not carry out the VT course when she graduated in 1987 nor did she carry it out subsequently.
6. In or about 2016 the claimant resigned from her post as Associate Specialist at Dundee Dental Hospital and since then has essentially worked as a freelance Oral Surgeon. Up to 2020 the claimant did a mixture of private and NHS work as a Specialist Oral Surgeon.
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7. When she started doing this work in 2016 the claimant contacted Betty Jacks at Kings Cross Hospital in Dundee to discuss arrangements for her to be paid whilst carrying out NHS work. The claimant was aware that she would be unable to obtain an NHS list number in her own name as she did not have a VT number. Ms Jacks advised her that the appropriate procedure was for her to be put on part two of the list and work using a colleague's NHS list number in order to obtain payment for NHS work she carried out. Between 2016 and 2020 the claimant did sessions in various different practices. The work for this was charged to the NHS using the list number of a dentist in the practice where the work was done; usually the Principal dentist in the practice who would have a list number.
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8. The claimant's understanding was that in order to have a list number so as to allow her to bill for her services direct she would require to have carried out vocational training which she had not. The claimant understood that under the "grandfathering" system she could also obtain a VT number by showing that she had carried out general dental work for a period of five years. The claimant believed she would not qualify under this heading because she did not as a rule do general dental surgery. She worked as a Specialist Oral Surgeon. The claimant's understanding was that if instead of being a Specialist Oral Surgeon she was a Specialist Orthodontist then she would be able to obtain a VT number by this route since the restorative specialisms such as orthodontics were sufficiently
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similar to general dental work to allow someone who carried out these specialisms to meet the criteria.

9. The claimant did do some general dental work during this period, in particular for a period of four months when she was working with a dentist based on the Isle of Bute, but in general terms the work she did was specialised so she was ineligible to obtain a VT number and thereafter an NHS list number via this route. Theoretically it would have been possible for the claimant to do a VT course however this would mean that instead of performing her specialist role she would require to carry out the same training as a recently graduated dentist without experience for a year.
10. In any event, the workaround which was suggested by Ms Jacks worked and the claimant was able to obtain payment of her NHS work without difficulty.
11. As is well known Covid broke out in or around March 2020. Routine dentistry ceased and then gradually restarted with decreasing restrictions over time.
12. In or about November 2020 the government announced that a vaccine had been developed and steps began to be taken at government level to deal with the task of vaccinating the population. On 30 November 2020 the Scottish Government issued a memorandum number PCA(D)(2020)14. The memorandum was sent to all NHS Boards. The covering letter with which it was sent stated

“This circular advises NHS Boards of the opportunity to involve NHS dental contractors in the Covid-19 vaccination programme.

NHS Boards are asked to:

- note the contents of this Memorandum;
- issue the Memorandum to this letter to all dentists and DBsC on their dental lists.”

The memorandum and covering letter were lodged (pages 43-45). The first paragraph of the memorandum stated

“This Memorandum advises NHS dental contractors (dentists and dental bodies corporate) of the arrangements and fees for participation in 2020-21 COVID-19 Vaccination Programme.”

5 The memorandum goes on to state that under section 36 of the Coronavirus Act 2020 dentists in Scotland may provide vaccinations and immunisations as set out in the National Health Service (Scotland) Act 1978 (as amended). The memorandum went on to say

10 “5. Participation in the Covid-19 immunisation programme, will be agreed locally by Boards and Area Dental Committees, depending on the overall requirement to deliver the programme. It is not mandatory for NHS dental contractors to participate and exact arrangements will vary between Boards. The target groups will be detailed in the upcoming CMO letter. The CMO letter will also contain clinical arrangements for the COVID-19 Vaccination Programme.

15 6. Dental Practitioners will be located at a vaccination hub to undertake this work and will be expected to explain the vaccine to patients, gaining their consent and to then administer the vaccination.

20 7. NHS dental contractors who decide to opt-in on the request of their NHS Board will be advised about local arrangements for the immunisation programme, including provision of appropriate PPE, in line guidance on the use of PPE for immunisation and vaccinations, stock control and distribution of vaccines and appropriate monitoring arrangements

25To enable participation of NHS dental contractors and to maximum Health Board’s use of NHS dental contractors contribution to the vaccination programme, a sessional fee will be offered to contractors participating in the 2020/21 Covid-19 immunisation programme set at £230 per contractor. The Scottish Government has agreed this fee with the Scottish Dental Practice Committee of BDA Scotland. Payments will be made through your NHS Board.

30 Training.

10. There will be online training being organised by NHS Education for Scotland and NHS Boards will arrange an additional half day training session ...

13. Any enquiries arising from this Memorandum should be taken up with your NHS Board.”

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13. The claimant signed up for and completed the training provided which was mainly online. The claimant then met with Karen Smith outwith work. Karen Smith was a manager with the respondent. She advised the claimant that they were struggling to get enough vaccinators and that given that the claimant had already undergone the training she wanted the claimant to help as soon as possible by doing shifts they were finding difficult to cover. The claimant very quickly started doing shifts. Mainly the claimant was involved in travelling to care homes and vaccinating residents and staff there or visiting other patients in their homes who were unable to travel to a vaccination centre because they were vulnerable. The claimant’s understanding at this time was that she would be paid £230 per session as per the Scottish Office memorandum. She obtained this information from the things she saw online and also from conversation with other dentists and colleagues.

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14. The claimant had her first shift on or about 4 February. On or about 9 February she sent an email to Morag Curnow who was known to her and was the respondent’s Director of Dentistry and Clinical Dental Director of Tayside Health Board. The email and the subsequent email exchange between the parties was lodged (pages 49-51). The exchange begins at 16:16 on 9 February when the claimant wrote

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“Hi Morag.

Been so long since I saw you - I hope all is good with you.

Can I ask if it is yourself that would be line manager for my COVID vaccinator role? I work under other dentists’ list numbers in Tayside.

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And can you tell me how much we are paid? And how we put in a claim for this?

Many thanks, Audrey.”

Dr. Curnow responded a few minutes later stating

“Hi Audrey

If you don't have a list number and aren't employed in NHST you would need to apply for bank. That is a matter for some contention at the moment as there is a suggestion that bank will be paid at AfC Band 5.

Have a think and let me know.

Morag”

The claimant responded

“Thanks Morag. I am already working as a vaccinator - done sessions in Kinross, Perth and Dundee.

I maybe wrongly assumed that I would be paid the same as my dental colleagues? I don't have a list number due to the loophole of being a specialist in oral surgery with no VT number as I qualified before VT came about. Any way I can be paid through Chris Barrowman's number?

Your suggestions welcomed.

Best, Audrey.”

Dr. Curnow responded six minutes later saying

“Who signed you up? I'm not sure of the legality of paying you through someone else's list number as he would have to falsely claim to have worked. Just wondering if whoever signed you up had a plan!”

The claimant responded three minutes later stating

“Hi Morag.

I would never want to falsely claim - I was just thinking the way I could claim NHS oral surgery fees.

Not sure who signed me up. I was dealing with Karen Smith - do you know her?

Thanks again, Audrey.”

Dr. Curnow then responded saying

“OK - I’ll ask her how she planned to pay you and let you know.”

15. Dr. Curnow primarily saw the claimant’s issue as being a matter of practical bureaucracy in finding a way to allow the claimant to be paid. She was not concerned over the amount of any payment. One of her roles meant she was head of the Community Dental Service in Tayside. The Community Dental Service consists of dentists who are employed by the NHS. She was aware that arrangements had been made for dentists working in the Community Dental Service to work as vaccinators during any time they were not meant to be at work. Generally speaking, dentists employed by the NHS would only be able to work as vaccinators during their non-contracted hours since they were required to do their normal job during the pandemic. NHS employed dentists who worked on a full-time basis would be paid at their normal out-of-hours contractual rate for any vaccination work done out of hours. If an employed dentist was employed on a part-time basis then it may well be that they would only be entitled to be paid at their normal rate (i.e. not the out-of-hours rate) for extra sessions done up to the point where they would qualify for the out-of-hours rate. She decided that the way to deal with the claimant was to try to get the claimant temporarily recruited to the emergency dental service.

16. At the same time as dealing with the claimant Dr. Curnow was also dealing with a number of recently graduated dental students who were undergoing their VT training but were eligible to carry out vaccinations. Dr. Curnow thought to adopt the same solution for these individuals since like the claimant they did not have their own VT number or list number. On 10 February 2021 Dr. Curnow wrote to the claimant at 16:57 stating

“Hi Audrey
We think we may have found a way to pay you! There will be forms, but I’ll get them to you once we are totally sure.
Morag.”

The email was lodged (page 55). On 12 February Dr. Curnow wrote to the claimant. She stated

“Could you complete and return this, please? Just so Becky can put you on the system.”

17. Two blank forms were sent to the claimant as an attachment to this email. These were the two forms the completed versions of which were lodged
5 at pages 53 and 54 of the bundle.

18. On the morning of the hearing the respondent lodged a document which contained a covering letter with terms and conditions in addition to the two forms. The Tribunal decided, on the evidence, that all that was sent to the claimant was the two forms and not the covering letter with terms and
10 conditions.

19. The first form was something called an IRMER Declaration which was simply a declaration confirming the claimant’s knowledge of radiological regulations and procedures. The second form was headed “Acceptance by Independent Contractor – Emergency Dental Service”. It stated

15 “I [claimant’s name] confirm that I accept and agree to abide by the above-mentioned provisions for services. I also accept that NHS Tayside can vary these provisions and will inform me in writing of the same.”

There were then short particulars attached, the claimant’s name, the name
20 of her practice which was stated to be “Infinity Blu Dunkeld”, her telephone number and mobile number and NHS email address together with the name of the Practice Manager Principal Dentist. The claimant signed the form and scanned it and sent it to the respondent.

20. The claimant was not paid at the end of February nor was she paid at the
25 end of March.

21. On 5 March 2021 the Scottish Government issued a document described as an addendum which was an addendum to the PCA(D)(2020)14 memorandum referred to above. The first part of the letter essentially clarified that staff who are already employed by the NHS should not be
30 offered a rate of pay for vaccination work which was above the rate of pay they would get for their normal job. Potentially this meant dentists

employed by the NHS who would be paid £119 per session for their normal job would receive the same amount if they worked as vaccinators. The letter then goes on to state

5 "I also wish to offer further clarification on the basis on which dentists, optometrists and pharmacists (other than those employed by Boards) can be engaged to support the programme. In the case of dentists and optometrists, there is no need for individuals to have a pre-existing contractual relationship with Boards in order to be engaged on the basis of sessional rates previously agreed, no
10 formal distinction is drawn between high-street and locum dentists, as there are very few locum dental practitioners. Any other staff from within dental or optometry practices who are keen to support the programme can register with a bank at Band 5 or Band 3 respectively, dependent on their expertise."

15 There is then reference to the circular previously mentioned.

22. At some point in early April 2021 Dr. Curnow was advised that the Scottish Government would not permit individuals to be recruited to the Emergency Dental Service purely so that they could act as vaccinators.

23. On 16 April 2021 Dr. Curnow wrote to the claimant stating (p63)

20 "I guess you won't have received any payments yet as you were not on pay roll and don't have a list number.
We have enrolled you and had intended this to be as a dentist. Unfortunately, we are not permitted to enrol anyone into PDS or EDS if their sole role is to be a vaccinator so you will be moved over
25 to the Band 5 vaccinator role. This will pay significantly less than you will have been expecting – sorry about this but it's an absolute edict."

24. On 13 May 2021 questions were asked in the Scottish Parliament by Jackson Carlaw MSP relating to the issue. Both of these questions and
30 answers were lodged (pages 76-78). There was a question asked for what reason some vaccinators delivering the same service were reportedly paid less than others. Humza Yousaf the relevant Minister responded stating

5 “The Scottish Government has set sessional rates of £230 and £231 for independent contractors (GPs, dentists, optometrists and pharmacists) taking part in the COVID-19 vaccination programme. These rates reflect both the market conditions for hiring these professionals, and the roles being filled in the programme.”

A further question was answered on 7 June and the full answer stated

10 “Hourly rates of pay for Agenda for Change Staff are published online. Bank staff participating in the programme who do not also hold contracts of employment with the host health board are paid at the grade and pay band as specified in their bank contract, relating to the role profile pursuant to which they are being deployed.

15 The Scottish Government has set sessional rates of £230 and £231 for independent contractors (GPS, dentists, optometrists and pharmacists) taking part in the COVID-19 vaccination programme. These rates, which cover a 3.5 hour session, reflect both the market conditions for hiring these professionals and the roles being filled in the programme.”

20 25. The claimant wrote to the respondent on 11 June 2021. The email was lodged (p62 and at various points in the bundle) and it is probably as well to set it out in full.

25 “Dear Morag,
I hope you are doing well. Many thanks for your email as below, and apologies for my delay in getting back to you. I appreciate the complexity of the situation and what you have done to help.

30 As you are aware I began working as a vaccinator at the beginning of the year and following messages from you, I believe that I’d be paid at the agreed dentist rate. I have previously been paid this rate when working with NHS ‘Out of Hours’ service for Highlands and Islands. Due to having qualified before the introduction of the VT number system, and for having spent so long as a GDC registered Specialist in Oral Surgery in the hospital service, I am ineligible for an NHS list number. Therefore, when working under

this service, I am paid through Cameron McLarty's list number. I also currently do NHS work with a number of practices (in Aberdeen, Dundee, Perthshire, Isle of Bute) and I am paid through my colleagues' list numbers.

5 I had believed my rate of pay to be confirmed following your email on 10/2/21, where you said you thought you had found a way to sort the payment issue and would forward me the forms once you were totally sure. I duly received the engagement forms and took this as confirmation. I filled out the forms and then sent to Melanie.
10 Then, as directed, I sent the claims form on a monthly basis, and believed that everything was in order.

I would usually have asked for a signed copy of my contract before starting work, but with everything going on, and the necessity for a rapid start-up of vaccination programme, I didn't push for this.
15 Having been told I was being paid at the dentist rate, and being keen to assist in the vaccination program, I turned down work opportunities elsewhere.

I was quite surprised by your email on 16/4/21 detailing that I wouldn't be being paid at the rate previously discussed. As I
20 mentioned, I understand the complexity of the situation, but I really do feel that I should be paid as a dentist as originally agreed. I would really value your comment and input to helping me resolve this.

Thanks so much - I know that you must be very busy, and I truly
25 really appreciate you giving me your time and input."

26. Dr. Curnow responded shortly thereafter on 11 June (page 70). She stated

30 "I fully appreciate your concerns which are shared by everyone who doesn't have a list number. Unfortunately, I am not able to change the payment system or influence the decision makers. You can be assured that I have tried and at the highest level.

There is no prospect of the contractor fee being paid to any dentist who is not a contractor with an NHS list number."

Subsequent to this there was a correspondence between Dr. Curnow and Mr Goldman of the British Dental Association who had been instructed by the claimant to deal with the matter on her behalf. Mr Goldman referred Dr. Curnow to the answers to parliamentary questions and to the Scottish Government documents referred to. On 22 July Dr. Curnow wrote to Mr Goldman stating

“These links clearly state that contractors receive the contractor rate. You will be aware that contractors in terms of dentistry are GDPs with a list number.

The extract from the letter is less clear and I see the potential for confusion here so I have referred this back to the author for clarity.”

Dr. Curnow did contact the author of the addendum letter from March 2021 seeking clarity by sending an email on 23 July to the Depute Director of Health Workforce (page 69). In this email she stated

“Can you clarify the part in italics, which is copied from your letter as attached. I am reading this as being no disparity between contractor and locum dentists but the BDS and Dr Kershaw appear to view it as referring to any dentist.

I’m pretty sure I’m not the appropriate person to be dealing with these discussions but, as Director of Dentistry, was the person who first encouraged dentists to enrol as vaccinators in Tayside. I would be more than happy to pass the correspondence to someone else.”

27. Dr. Curnow did not receive a response to this email.

28. There was subsequently an email correspondence between the claimant and Dr. Curnow where the claimant sought payment for her travel expenses. The claimant stated in an email sent on 21 June (page 65)

“Thanks Melanie.

Yes I have used my car for many home visits. When I thought I was being paid the dentist rate I didn’t bother to claim but now this is not the case.

I was told by Scott Sweaton that I would be paid my mileage.

I look forward to hearing from you.”

The claimant was subsequently advised that she would not be paid her mileage.

29. The claimant was paid at the end of April, May, June and July 2021. Her payslips were lodged. The claimant worked a total of 246.75 hours for the respondent between 4 February to 20 August 2021. It was common ground between the parties that the claimant had not been paid at all for 65.75 hours which she had worked. The claimant was paid for the remaining hours (181 hours) at the bank 5 rate. Had the claimant been paid at the rate of £230 per session (£66 per hour) then she would have been entitled to receive a total payment of £16,285.50 in respect of the hours worked. As it was the claimant only received £3086. The difference claimed by the claimant as an unauthorised deduction of wages was therefore £13,199.50.

30. The claimant considered that the reason she was not paid the sessional rate as a dentist was because she did not have a VT number and this was related to her age. The claimant was upset by this. She felt undervalued and demeaned by not being paid. She felt intimidated and very demoralised by the whole situation.

Observations on the evidence

31. The Tribunal believed that both witnesses were genuinely trying to assist the Tribunal by giving truthful evidence to the best of their recollections. Both witnesses expressed some difficulty in remembering precisely events and thoughts processes from 17 months before. There was a dispute between the parties as to whether or not the claimant had been sent any documents along with the two forms sent by Dr. Curnow on 12 February. The claimant's evidence was that she could not remember clearly but her impression was that all she had received was the two forms for completion. Dr. Curnow indicated she had no recollection whatsoever. Although the claimant's evidence was not as clear cut as one would have wished, the Tribunal's view was that on the balance of probabilities only the two forms had been sent. This is all that is referred to in the covering email. There was some difference of view between the parties as to the importance of having a VT number in order to get an NHS list number. Dr.

Curnow's own experience was that she had actually carried out VT training shortly after she graduated BDS in 1980. She explained that at that time she was working in Thames Valley and this was the only area of the country which offered VT training. She also said that she was in the second yearly cohort group to undergo this. She said that she herself had an NHS list number but was not an NHS contractor. Her view was that the reason the claimant did not have a list number was that she was not engaged in general dental practice. This was because she was a Specialist Oral Surgeon. Her view was that it was this specialism rather than the claimant's age which was the reason she did not have an NHS list number.

32. Although the claimant set out her view as to the importance of a VT number no documentation was referred to in order to support the contention that the respondent operated a provision, criterion or practice where one required a VT number. Her evidence was to the effect that nowadays virtually all dentists do vocational training immediately after graduation even if they are intending to work privately. She then said that younger practitioners in her specialty of oral surgery therefore obtain a VT number. She also indicated that they tend to keep this up by doing general dentistry. She did accept that there were grandfathering arrangements for those who had qualified before VT became compulsory but accepted that she would not qualify for these arrangements because she did not carry out appropriate general dental work. The Tribunal were not given any details in relation to the grandfathering arrangements or precisely what would be required. The claimant in evidence indicated that she believed there were around eight people in her situation that she was aware of but declined to give their names or any details. Dr. Curnow's evidence was that if the health board gave a dentist a list number then they would be expecting that dentist to do general dental work which included all aspects of dentistry and the dentist would effectively be licenced to do this. It was therefore necessary for the NHS to ensure either that the dentist had carried out VT training or had carried out enough of the work recently to qualify for one of the grandfathering schemes designed for those who had entered the profession before VT became compulsory.

33. It is probably as well that the Tribunal sets out the view which we came to with regard to this evidence in our discussion of the indirect discrimination claim below.

Submissions

- 5 34. Both parties submitted detailed written submissions which were of high quality and expanded upon orally. Rather than seek to summarise them the Tribunal will refer where appropriate to the submissions in the discussion below.

Issues

- 10 35. There were two claims being made. The first claim was a claim for unlawful deduction of wages. It was common ground between the parties that the case of *Weatheritt v Cathay Pacific Airways Limited* [2017] ICR 985 and others gives the Employment Tribunal the right to construe contracts where required in the context of a claim for unlawful deductions.
- 15 Each party set out their view as to the contractual position. The claimant's view was that she was entitled to be paid the sessional rate of £230 per session. The respondent's view was that the claimant was entitled to be paid at the rate applicable for Band 5 bank staff which was 16.83 per hour which equated to £58.90 for a three-and-a-half-hour session. As noted
- 20 above it was common ground between the parties that the claimant had not been paid at all for 65.75 of the hours she had worked and it was the respondent's position that the claimant should be paid for this at the bank rate of £16.83 per hour.
- 25 36. The claimant also claimed that she had been the subject of indirect age discrimination. It was the claimant's position that the respondent operated a PCP that only a dental practitioner with a VT number was eligible for a list number. The claimant was in the group of those aged 51 and over who had qualified prior to VT becoming compulsory in 1993.

Discussion and decision

- 30 37. It is appropriate to deal with both claims separately.

(i) Claim of unlawful deduction of wages

38. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him. Section 13(3) states

5 “Where the total amount of wages paid on any occasion by any
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
10 treated for the purposes of this Part as a deduction made by the
employer from the worker’s wages on that occasion.”

It was the claimant’s position that this was what had occurred in this case, the last such deduction having been made in the claimant’s final payslip which was issued on 30 September 2021 (page 61). Essentially the question for the Tribunal in this case was to establish what wages were
15 ‘properly payable’. Was it £230 per session as contended for by the
claimant or some lesser amount as contended for by the respondent? The
respondent took no point as to the employment status of the claimant and
the Tribunal accepted that at the very least the claimant was a worker
providing services personally to the respondent under either a contract of
20 employment or some other contract to provide the service personally. The
essential question was what were the terms of that contract so far as
remuneration was concerned. It was the respondent’s position that the
Tribunal required to consider all the relevant circumstances. She referred
to the Scottish Law Commission Report on the Review of Contract Law
25 which defined a contract is “an agreement between parties which they
intend to have legal effect which contains all the essentials of the kind of
contract they are seeking to conclude and which is sufficiently certain in
its content as to be legally enforceable.”

39. The respondent’s representative referred to the need for “consensus in
30 idem” between the parties. It was the respondent’s position that although
there was an intention that the claimant be engaged as a vaccinator there
was no consensus reached by the parties in relation to the rate of pay at
least from 4 February until 16 April 2021. It was the respondent’s position

that at the outset the claimant had not known the rate of pay. Although the claimant asked in her initial email of 9 February how much is to be paid the Tribunal accepted the claimant's evidence given at the hearing that she was simply being polite and that it was her clear view, based on the information she had at the time, that she would be paid at the sessional rate for a dentist of £230 per session. The respondent's position was that there had never been any intention on the part of Dr. Curnow that the claimant be paid at £230 per session but that Dr. Curnow had hoped that by recruiting the claimant to the emergency dental service on a temporary basis then the claimant would be paid at a rate of £119.90 per session. The Tribunal's view was that although this may at some point have been Dr. Curnow's intention this was never communicated to the claimant before these proceedings. The claimant's understanding at the time was that if she completed the forms then she would be paid at the rate of £230 per session. The respondent's view was that the rate of £230 per session was only for dental contractors as the term was defined in the 2011 regulations which were lodged by the respondent. The claimant's position on the other hand was that the documentation in this case in the form of the memorandum and addendum should be read in the normal way. The term dentist and dental contractor appears to be used interchangeably. There was also a specific statement in the addendum that it is not required that a dental practitioner has an existing contractual relationship with the Board in order to be paid the sessional rate of £230. The addendum makes clear that locum dentists are also included.

40. The claimant referred to various paragraphs from **Chitty** on the law of contract as an aide to interpreting the position in this case. The Tribunal considered that since **Chitty** deals with English contract law those paragraphs although helpful required to be treated with caution and our analysis of what had occurred in this case does not depend on following the analysis found in **Chitty**.

41. The Tribunal's starting point was that the contract between the claimant and the respondent was formed at around the time the claimant started working as a vaccinator. This appears to have been on or about 4 February. The claimant's recruitment appears to have been done on a

fairly informal basis. At the time the information available to both the claimant and the health board would be that contained in the Scottish Government Memorandum of 30 November. The Tribunal accepted the claimant's evidence that in her mind there was really no question but she was going to be paid £230 per session. There was absolutely no evidence from the respondent to suggest that the person who recruited the claimant had any different view. The Tribunal accept that the term contractor is used in the Scottish Government Memorandum but it is not invariably used and sometimes the word is omitted. In any event, there are different types of contractor. It can be argued that in the normal meaning of the word the claimant became a contractor the moment she started providing her services to the respondent. The Tribunal do not accept that the memorandum used the word contractor exclusively as meaning an NHS contractor defined in terms of the 2011 regulations. If they had wanted to do this then there is no doubt the Scottish Government could have included this in their memorandum. Looking at the memorandum more generally it does appear that the word contractor is sometimes used and sometimes omitted and we would agree with the respondent's representative that it could not be said to have any specific meaning. The Tribunal's view therefore was that at the point where the claimant contracted with the respondent there was no real doubt in anyone's mind that the rate she was going to be paid was £230 per session.

42. The claimant then contacted Dr. Curnow in order to discuss how she would slot in to the system and she asked if Dr. Curnow will be her line manager, presumably to deal with things like holiday requests etc, and she also asks about arrangements for getting paid. By this time it would appear the claimant understood that for those dentists who had a list number it was simply a question of them submitting an invoice with their list number on it in the usual way. It is clear from the correspondence that her initial view is that she would be able to submit invoices containing the list number of the dentist she was working for in the same way as invoices were submitted in respect of her general work as an oral surgeon.

43. The Tribunal's view was that much of Dr. Curnow's evidence was essentially a red herring. A contract between the parties had already been

formed. Dr. Curnow appears to have made the decision that the claimant had to be an NHS contractor (as defined in the 2011 regulations) before she would get the £230 but that she would be able to get her a halfway house type rate by recruiting her to the emergency dental service on a temporary basis so that she could then carry out vaccination work for £119 per hour. She never mentioned this to the claimant at the time and in any event it appeared the Scottish Government vetoed this suggestion.

44. The Tribunal considered that the addendum which was published by the Scottish Government in March clarifies that the claimant's interpretation and the Tribunal's interpretation of the original Scottish Government memorandum was correct. Dr. Curnow cannot be correct in saying that the memorandum only applies to NHS contractors as defined in the 2011 regulations when the Scottish Government is saying in clear and unequivocal terms

“There is no need for individuals to have a pre-existing contractual relationship with Boards in order to be engaged on the basis of sessional rates previously agreed”

It is clear from this that whatever local instructions may have been given to Dr. Curnow the only reasonable interpretation of the respondent's intention at the time the claimant was hired was that she be paid the sessional rate of £230 per session applicable to dentists. For this reason the Tribunal considered that the amount properly due under the claimant's contract with the respondent was the sessional rate of £230 per session. It therefore follows that the claimant has suffered a series of unlawful deductions from wages, the last of which took place on 30 September 2021. The claimant was entitled to be paid at the sessional rate of £230 per session which as we have noted above would mean she received total pay of £16,285.50. She was only paid £3086. Unlawful deductions amounting in total to £13,199.50 were therefore made. The respondent shall pay this sum to the claimant.

(ii) Indirect age discrimination

45. The claimant's position was that the relevant pool was all dentists who possessed a recognised specialism that does not require them to possess an NHS list number and who chose to be vaccinators. It was the claimant's position that within that pool the respondent's PCP put people such as the claimant over the age of 51-52 in 2021 to a disadvantage because of the requirement to have a VT number in order to get a list number. The PCP was stated to be that in order to qualify for the higher pay rate the claimant needed to be an NHS contractor with an NHS list number. The claimant's position was that she was placed at a disadvantage by that PCP because the way to obtain an NHS list number was to have a Vocational Training number (VT number), in order to get this the claimant would have needed to have completed vocational training so as to have a VT number and VT only became a compulsory requirement in 1993. The claimant also stated that another way to obtain an NHS list number was for the dentist to show that she had relevant experience in general dentistry. Her experience must have been obtained in the five years prior to application and it was the claimant's view that this criterion placed specialist dentists such as the claimant who were born before 1970/71 at a disadvantage for this reason too.

46. The respondent's position was that there was really a dearth of hard evidence before the Tribunal in order to demonstrate the disadvantage claimed by the claimant and that this disadvantage had anything to do with her age. Essentially it was the respondent's position that if it were found that the respondent did adopt the PCP in question the reason she was unable to comply with it was because she was a specialist and had nothing to do with her age.

47. The Tribunal's starting position was that clearly on the basis of our findings in the unlawful deductions case we were of the view that the respondent did not in fact apply the PCP claimed. What we have found is that the respondent misinterpreted the contract between the parties by seeking to impose a condition that the claimant be an NHS contractor before she would qualify for the higher rate. That having been said, it is clear that the respondent was put to some upset as a result of not being paid the

sessional rate of £230 the first time of asking and has in fact had to go to an Employment Tribunal to obtain payment of what she is due. The Tribunal therefore proceeded on the basis that the claim of age discrimination required to be moderated to the extent that the respondent discriminated by seeking to impose a PCP which they would not have imposed on a younger specialised oral surgeon and the disadvantage suffered by the claimant was that of having to go to a tribunal to obtain the money she was due. Even with this formulation however the Tribunal had to agree with the respondent's representative that there was really a dearth of evidence on the subject.

48. As the claimant's representative correctly pointed out the burden of proof rules apply in this case. The initial burden is however on the claimant to adduce facts from which the Tribunal could draw an inference of discrimination. Although the 2016 regulations on mandatory training were lodged (pages 40-42) the Tribunal were not taken to them in any detail and it is not at all clear from reading these how these relate to the requirement for a VT number to be obtained. There was also very little congruence between the evidence of the claimant and the evidence of Dr. Curnow in relation to this. The claimant's evidence was that any dentist who qualified after 1993 and decided to specialise in oral surgery would have a VT number by virtue of having carried out VT training immediately after graduating. She accepted in evidence that VT training was not compulsory to go into the specialism nor if one wished to do private work. It was only necessary in order to do general dentistry. It was however her evidence which we accepted that most dentists do it. The evidence of Dr. Curnow was that the key point was competence and that even if a dentist has carried out VT training they will require to undertake various steps to prove their competence after they have been out of general dental practice for as short a period as a year. There will be further additional training after five years before they wished to return to general dentistry.

49. The Tribunal's view was that we would have preferred to have heard much more evidence in relation to precise difficulties which the claimant would face simply based on her age rather than the fact that she had been out

of general dental practice for some time. The claimant was asked about carrying out the NEST training and indicated that she would be required to do work which she was well capable of doing but would be below her skill level and essentially a waste of her time. The Tribunal's view on
5 balance was that on the basis of the evidence we heard, the reason the claimant was ineligible for a list number was because the claimant did not carry out general dental work but was a specialist oral surgeon. It may well be the case that other dentists who qualified after her and have a VT number takes steps each year to carry out enough general dental work to
10 maintain their competence in terms of the regulations and therefore qualify for having an NHS list number. It is clear however that if this was something which (prior to 2021) was important to the claimant then the claimant would have been able to take steps to demonstrate her competence in terms of the 2016 regulations and obtain a list number. It
15 appeared to the Tribunal that the claimant had entirely failed to demonstrate why her failure to take whatever steps were necessary to demonstrate competence and obtain a list number was based on her age. It would appear that the reason she did not have a list number was because she was a specialist oral surgeon and could not demonstrate her
20 competence in general dental surgery to the extent required by the regulations. We accepted the evidence of Dr. Curnow that if the claimant had qualified after 1993 and thereafter carried out VT training and had a VT number she would still not be able to get on to the NHS list unless she complied with the requirement to demonstrate continued competence on
25 an ongoing basis in general dental surgery by regularly carrying this out. The claimant's own evidence was that although her "grandfather rights" gave her the opportunity to get a list number without a VT number after carrying out general dental work for a period of five years her evidence was that she did not actually meet this qualification. The Tribunal's view
30 therefore was that the claimant had failed to adduce sufficient facts from which we could make a finding that the PCP adopted by the respondent indirectly discriminated against her and those of her age group. The claim of age discrimination therefore fails. We should say that had the claim of age discrimination succeeded, the claimant would not have been entitled
35 to double accounting and the only compensation she would have received

would be a payment of compensation for injury to feelings which we would have assessed at £1000 being towards the low end of the lowest Vento band. In the event however the claim of indirect age discrimination does not succeed and is dismissed.

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	Employment Judge :	I McFatridge
	Date of Judgment :	26 July 2022
10	Date sent to parties :	26 July 2022