



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Duggan  
**Respondent:** RCH Care Homes Limited  
**Heard at:** East London Hearing Centre  
**On:** Wednesday 2 December 2020  
**Before:** Employment Judge Gardiner

## Representation

**Claimant:** In person  
**Respondent:** Ms K Zakrzewska, Litigation Consultant

# JUDGMENT

The judgment of the Tribunal is that:-

- 1. The claim for unpaid notice pay is not well founded and is therefore dismissed.**
- 2. The claim for unauthorised deduction of wages in terms of unpaid commission is well founded and succeeds in the sum of £1800 gross.**

# REASONS

1. This is a claim brought by Ms Duggan in relation to her employment with the Respondent. Ms Duggan claims that she has been underpaid in two respects. First, she says she has not been the notice pay to which she was entitled. Secondly, she says she has not been paid the commission to which she was entitled.
2. Both turn to a large extent on the relevant terms of her contracts, coupled with the sums that were actually paid to Ms Duggan.

3. So far as notice pay is concerned, the parties agree that Ms Duggan was entitled to receive one week's notice if she was still in her probationary period, and three months' notice if she was no longer in her probationary period. There is a dispute about whether her probationary period had been extended, such that she was still in her probationary period when she was dismissed. Ms Duggan maintains that the probationary period expired automatically six months after her employment started. As she was dismissed on 23 April 2020, she argues that by that point she was a permanent employee and therefore was entitled to three months' notice. On behalf of the Respondent, it is said that the effect of an email on 27 March 2020 was to extend the probationary period, such that she was still in her probationary period when she was dismissed. The wording of the email is as follows:

"Dear Maggie,

Sorry to hear you are unwell, I hope you are looking after yourself.

As you are aware, your probation period is due to expire on 30<sup>th</sup> March 2020, due to you being off self-isolating until next Friday we will not be able to hold the meeting.

I will make contact with you next week to see if you are better and returned to work and then arrange a meeting.

Regards,

Pauline"

4. My conclusion is that the effect of this email was to extend the probationary period until a probationary review meeting had taken place at which it had been confirmed that probation had been successfully passed. I have reached that conclusion for the following reasons. The email refers to the probation period as being due to expire on 30 March 2020 when ordinarily there would be a probation review meeting. Because Ms Duggan is self-isolating that meeting cannot take place and so is being postponed until Ms Duggan is better and able to return to work. The ordinary effect of postponing the meeting was to postpone confirmation that the probation period has been successfully passed and that employment has been made permanent. If, as Ms Duggan argues, employment automatically became permanent on 30 March 2020, there would be no need for a meeting ordinarily held at the end of the probation period to be rescheduled to a later date. Therefore, the effect is that when she was dismissed, Ms Duggan was still in her probationary period when she was dismissed and was therefore only entitled to one week's notice. As she has already been paid this, there is no further notice pay due to the Ms Duggan.
5. So far as commission is concerned, the dispute concerns a difference between what Ms Duggan recalls she was told in her interview and what is recorded in the paperwork she received from the Respondent after the interview. If there is a

conflict then the later paperwork must prevail. This is because the formal offer of employment is confirmed in the document sent on 23 September 2019. The position is subject to the terms in the document of 23 September 2019. If there is a difference between the discussion and the subsequent document, then the document sets out the contractual position. There is no evidence from the Claimant that she challenged the accuracy of the document as differing from what she was previously told at interview. Rather she agreed to accept employment and start work without making any objection. This document dated 23 September 2019 confirms that there is commission payable by way of bonus of £300 for every permanent private resident placed, and a commission of £50 for every local authority resident placed. The logic of this distinction is probably that someone in Ms Duggan's position has to work harder to persuade the family of a private resident to pay the full fee, rather than merely to pay the top up fee in circumstances where an enquiry has come in from the local authority. It is common ground that the homes did not accept residents who could only provide the minimum funding that the local authority were prepared to pay. Rather these residents were topped up by the families so that the total payment was broadly similar to what would have been paid if the families were paying privately.

6. There is no reference in the document sent on 23 September 2019 to any payment for respite care. I do not accept that there was any subsequent oral variation of the contract to include an entitlement to commission for respite care. There is no clear evidence of any such offer and acceptance either in the Claimant's witness statement or in her oral evidence before the Tribunal. For whatever reason, the Respondent mistakenly thought that there may have been an entitlement of £50 and wrongly made some payments in that respect. Very fairly, the Respondent is not now seeking to have those payments refunded. Those payments may be why the Claimant, quite reasonably, thought she had become entitled to £50, but I find that there was no contractual entitlement to such commissions.
7. The contract is silent on whether there was any commission payable where the enquiry and all the funding had come from the NHS. I find, on a construction of the contractual paperwork, that there was no commission payable in these circumstances, because it is not dealt with in the relevant section and it is not necessary to imply such a term.
8. Ms Duggan accepts that where Ms Manning has designated a resident as a local authority resident on the spreadsheet on page 53, then the resident was a resident which had been offered by the local authority and part funded by the local authority. Such a resident attracts a commission of £50 under the contract. In all cases, if Ms Manning is correction, those £50 commissions have already been paid.
9. What it is agreed has not been paid is commission of £300 for 6 residents, namely a total of £1800. This sum is to be paid. I accept that the analysis undertaken by Ms Manning on page 53 of the bundle is accurate. Before she recorded her position on the spreadsheet, she had checked the position against the underlying documents and with the administrator. Where there is a dispute between the accuracy of the

evidence of Ms Duggan and that of Ms Manning, I accept the evidence of Ms Manning.

10. I can understand why Ms Duggan feels frustrated by the way she has been treated. She has not had any review meetings during her probation period nor have there been any warnings given to her about underperformance. Quite reasonably, she feels that it was unfair for her employment to be ended when it was, particularly in circumstances where another employee apparently had their probation period extended. As I discussed in the course of the evidence, this may have given rise to a basis for an unfair dismissal claim, if the Claimant had the required two years' service and had brought such a claim. It does not give rise to a claim for wrongful dismissal, which is limited to a claim for the notice pay that ought to have been paid. As already stated, the correct notice pay has already been paid.
11. Therefore, the sum that is payable to the Claimant is a sum of £1800 gross for unpaid commissions.

**Employment Judge Gardiner  
Date: 3 December 2020**