

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 June 2014
Judgment handed down on 23 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR C A RIDGE

APPELLANT

HER MAJESTY'S LAND REGISTRY

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR CLIVE RIDGE
(The Appellant in Person)

For the Respondent

MR JONATHAN BERTRAM
(of Counsel)
Instructed by:
Flint Bishop Solicitors
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SUMMARY

CONTRACT OF EMPLOYMENT - Itemised pay statement

Where a payment by way of salary or wages for a period is reduced by the recovery of an overpayment in a previous period, that reduction is a “deduction” for the purposes of section 8 of the **Employment Rights Act 1996**. The deduction and its purpose should be identified on the itemised pay statement relating to the payment.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal raises a short point of law concerning the content of itemised pay statements. Is the recovery by an employer of an over-payment of wages or salary a “deduction” the purpose of which must be explained in an itemised pay statement?

The Background Facts

2. Mr Clive Ridge (“the Claimant”) was employed by HM Land Registry (“the Respondent”) as a Software Engineer between August 2001 and October 2010. He became unwell and had significant periods of absence. There came a time when he exhausted his full sick pay entitlement. So there were months when he worked and was entitled to be paid for some days but not others.

3. The Respondent paid its employees on the last day of the month by direct payment into a bank account. Each employee was given a payslip. On the left hand of the payslip would be the gross amount of pay the employee was entitled to receive. On the right hand would be specified deductions from pay such as tax, National Insurance, union contributions and the like. This case is concerned with the left-hand side of the payslip. There is no issue about any of the specified deductions on the right-hand side.

4. As a general rule, the gross pay in the payslip was based on one-twelfth of an employee’s gross annual salary, plus any allowances they were entitled to. Thus, on the left-hand side of the Claimant’s payslip each month there was a figure for gross pay against the word “Basic” and a further figure for gross pay against the word “ITALL”, which stands for IT allowance. These were added to give the figure for total pay.

5. When the Claimant ceased to be entitled to full sick pay but continued to be absent from time to time, the left-hand side of his payslip was affected in two ways.

6. Firstly, the figures for gross pay under “basic” and “ITALL” were sometimes lower. If, before the end of the month in question, the Respondent’s administration learned of and processed his absence, this would be the case.

7. Secondly, however, there were sometimes minus entries under “Basic” and “ITALL”. These occurred if the Respondent’s administration did not learn of or process his absence during the month in which it occurred. He would then be overpaid for that month and the overpayment would be corrected by making (to use a neutral phrase) a minus entry. An example of the left-hand side of a payslip showing minus entries is the following:

Basic A	406.79-
Basic	1396.64
ITALLA	79.21-
ITALLA	271.96
SSP	30.16
SSP	30.16

8. The Claimant complained to the Respondent about the way in which his payslips were presented. He thought that whenever his pay was adjusted because of his absence (whether it related to the same or a different month) an explanation should appear on the payslips. He pressed the Respondent. The purpose of the deductions was explained to him before he commenced proceedings. However, the Respondent did not make any changes to the form of its itemised payslip. Eventually the Claimant began Employment Tribunal proceedings under section 11 of the **Employment Rights Act 1996**.

The Employment Judge's Reasons

9. The Claimant's ET1 claim form made, essentially, two points. He said:

"In months where I have had a sick absence, I would have expected my normal gross pay to be shown on my pay statement along with a deduction of gross pay to the value of the unpaid days of sick absence, and the reason for the deduction.

...

Also, where monies are reclaimed for overpayment of wages in a previous month, no reason for the deduction is given."

10. The proceedings came on for hearing before Employment Judge Griffiths, sitting alone in the Exeter Employment Tribunal on 20 November 2009. By a Judgment dated 8 December 2009 he dismissed the claim and ordered the Claimant to pay the sum of £500 to the Respondent by way of costs.

11. As to the substance of the claim the Employment Judge's Reasons appear from paragraphs 4-6 of his Written Reasons:

"4. The claimant has had a long period of sickness absence. In November 2007 his entitlement to sick pay was exhausted and accordingly any subsequent absence resulted in a loss of pay. As a consequence the calculation, month on month, of his gross pay varied to take into account any absences in the preceding month. The amount of gross pay, therefore, itemised in his pay statement varied month by month to take into account those adjustments. He was unsure as to what the adjustments were or how they arose and that was the principal push of the enquiry.

5. Each itemised pay statement identified the gross pay for the month and set out full details of a number of deductions. The claimant has no query on those deductions. He says he knows what they were and agrees their amount. The payslip then sets out the net pay for the month taking into account all the deductions including tax and National Insurance.

6. Having considered a number of payslips and the provisions of s.8 Employment Rights Act 1996, I find it hard to identify how the itemised payslips did not comply with s.8 of the Act. It seems to me that each pay statement includes particulars of the gross amount of the wages and the net amount of wages payable. The claimant took the view, however, that the variations in the gross amount payable by reason of adjustments consequent upon his sickness absences amount to deductions. I find that those variations in the calculation of the gross pay are not deductions as provided for by s.8 but adjustments in the calculation of gross pay dependent upon the work that he actually carried out for which he was entitled to be paid month by month."

12. The Employment Judge went on to make an order for costs on the basis that the claim was misconceived.

The Appeal

13. The Claimant's appeal was originally brought on much wider grounds, but at a hearing under rule 3(10) of **the Employment Appeal Tribunal Rules 1993** the Claimant was represented by Mr Sinclair Cramsie, counsel instructed under the Employment Law Appeal Advice Scheme. He identified a substituted ground of appeal for which leave was given. It reads as follows:

“The ET erred in law in finding that the minus figures on the left hand side of the wage slip in Appendix 3 (and any other similar figures in other wage slips) were not deductions. It appears to be the Respondent's case that these were recoveries of overpayments in previous months. Such recoveries of overpayment are deductions for the purposes of section 8 of the ERA: see by way of analogy section 14(1). Further the ET should not have found the claim to be misconceived and should not have awarded costs.”

14. The Claimant submitted that a recovery of an overpayment from a previous month is a deduction from his current gross salary; that the “minus” sign was insufficient to tell him the purpose of the deduction; and that contrary to section 8(1)(b) of the **1996 Act** the payslip did not identify the purpose for which the deduction was made. By way of analogy he pointed to section 14(1) and section 27(4) of the **Employment Rights Act 1996**, which deal with the separate right conferred upon a worker not to suffer a deduction from wages.

15. The Claimant submitted that by way of remedy under section 11 of the **Employment Rights Act 1996** he was entitled not only to a declaration under section 12(3) but also to a payment not exceeding the aggregate of the unnotified deductions pursuant to section 12(4). In the course of argument I was referred to an Industrial Tribunal decision, **Milsom v Leicestershire County Council** [1978] IRLR 433, for the proposition that such an order may be made even where the deductions were in fact proper. I have myself noted, since the hearing, the case of **Scott v Creager** [1979] IRLR 162, which supports the Claimant's submission, saying that there may be a punitive element to an award under what is now section 12(4) although no such award was made in that case.

16. On behalf of the Respondent Mr Bertram submitted that section 8 did not require an employer to break down how the gross wage figure is calculated. All that is required is that the payslip states the gross wages due. Thus, where an employee is absent during a reference period and not entitled to be paid in respect of absence, the payslip does not have to identify the amount by which the gross wage for that period is reduced: there is no “deduction”. Mr Bertram recognised that it was difficult to apply this reasoning to the recovery of an overpayment from an earlier period; but he submitted that in reality the payslip always accurately stated the gross amount actually due. If there was any omission in the payslip it was only failure to attach a label to a deduction which was identified and which the Claimant in reality understood. Mr Bertram did not accept that any award under section 12(4) would be justified.

Statutory Provisions

17. The right to an itemised pay statement is conferred by sections 8-12 of the **Employment Rights Act 1996**, provisions now found within Part I of the Act. The provisions derive from the **Employment Protection Act 1975** and were introduced in 1977. Section 8 sets out the right to an itemised pay statement. It provides as follows:

“(1) An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of –

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable, and

(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.”

18. Section 11 makes provision for a reference to an Employment Tribunal:

“Reference to [Employment Tribunals]

(1) Where an employer does not give an employee a statement as required by section 1, 4 or 8 (either because he gives him no statement or because the statement he gives does not comply with what is required), the employee may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where -

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8, has been given to an employee, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the employee may require the question to be referred to and determined by an [employment tribunal]

(3) For the purposes of this section -

...

(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in such particulars.”

Section 12 makes provision for the determination of references:

“(3) Where on a reference under section 11, an [employment tribunal] finds -

(a) that an employer has failed to give an employee any pay statement in accordance with section 8, and

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

The Tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the employee during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the employee, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.”

19. In Part II of the **Employment Rights Act 1996** a distinct right with different statutory origins is given to workers not to suffer an unauthorised deduction from wages. To this general right there are exceptions. Section 14(1) provides:

“Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of -

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.”

Discussion and Conclusions

20. The purpose of an itemised pay statement is, I think, clear enough. It is to enable an employee receiving a payment of wages or salary to see, at a glance and in broad outline, how that payment is made up. In order to do so, deductions must be identified and explained. Hidden and unexplained deductions are not permitted. The statute does not require a detail of detail. It is enough to state gross and net salary and to identify the amount of any deductions and the purposes for which they are made.

21. In the vast majority of cases the obligation to pay wages or salary is periodic. In order to comply with the statute the employer must provide itemised pay statements periodically with the payments. I consider that where an employer reduces what would otherwise be the employee's wages or salary for a period in order to recover an overpayment for a previous period, he is making a deduction from salary for the purposes of section 8 and must identify the amount of the deduction and the purpose for which it is made.

22. This conclusion appears to me to accord with the natural meaning of the words “gross salary”: no employee, reading those words on an itemised pay statement, would expect the payment to have been netted down to recover a previous overpayment. It also accords with the purpose of the statute, which is to promote clarity and enable an employee to see in broad outline how his wages and salary are made up.

23. If I had any doubt that this conclusion accorded with the natural meaning of the words “gross salary” and “deduction” I would derive some support from section 14(1). This provision is not directly in point: it deals with a different right under a different part of the **1996 Act**. But it is plain that an exception was made in section 14(1) in respect of an employer’s reimbursement of overpayments because these would otherwise have been deductions for the purposes of section 13.

24. In this case the Respondent identified on the left-hand side of the itemised pay statements the deduction from gross salary which it was making in respect of overpayments. These were separately shown with a minus sign next to them. But the Respondent did not identify what the deductions were. It should have done so. It would not have been difficult. Some abbreviated words to make it clear that the sum was recovery of an overpayment would have sufficed.

25. The Employment Judge considered that the itemised pay statements merely contained “variations” in the gross amount payable. There were indeed sometimes variations in the pay for a period because the Claimant was absent from work and not entitled to be paid. Those were not “deductions”. Different considerations, however, apply to the minus figures set out on some of the payslips. These were recoveries of overpayments already declared to be salary in respect of earlier periods. These were, in my view, deductions and their purpose should have been identified.

26. It follows that the Claimant was correct in part of the argument which he mounted below. He is entitled to a declaration pursuant to section 12(3)(b) that the itemised pay statements, in particular the minus entries, did not contain the particulars required by section 8. It also follows

that the order for costs made against the Claimant must be set aside. While his claim was not entirely successful it was not misconceived.

27. In his original Notice of Appeal the Claimant asked for the matter to be remitted to the Employment Tribunal. In his argument before me the Claimant also asked for an order pursuant to section 12(4) for payment of a sum not exceeding the notified deductions. I have concluded that neither of these courses is required in this case.

28. Remission is not required for the purpose of making a declaration or setting aside the order for costs in favour of the Respondent. These remedies follow from the Judgment which I have given and the Employment Appeal Tribunal's order will deal with them.

29. Remission would only be required if it was arguably appropriate to make an order under section 12(4). I must apply the approach most recently set out in **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630, at paragraphs 16 and 20. I am sure it is not appropriate to make an order under section 12(4). It is plain that the Claimant in fact knew the purpose of the deductions before he issued proceedings. No reason was advanced before me to suggest that any of the deductions was in fact incorrect. While I accept that there may be a punitive element to an order under section 12(4) (see **Scott v Creager**) there is no requirement on the Employment Tribunal to make such an order. To my mind, an order under section 12(4) would be entirely disproportionate in this case where (1) the deductions were apparent from the payslip, (2) the Claimant was thereby alerted to them and (3) their purpose was explained to him before he commenced proceedings. In these circumstances a declaration in his favour to the limited extent that he has succeeded is plainly a sufficient remedy.

30. Finally, I note that the Claimant says he would, if he had been successful, have made an application to the Employment Tribunal for a preparation time order. He is entitled to make such an application, and the Employment Judge will not refuse it on time grounds, given that the Claimant was not in a position to make such an application until his appeal was allowed. However I should not be thought to be giving any encouragement to such an application. Costs are not generally awarded in the Employment Tribunal, and the Claimant was to a significant extent unsuccessful in his claim.