



EMPLOYMENT TRIBUNALS

Claimant: Mr E Apps

Respondent: Penine Acute Hospitals NHS Trust

HELD AT: Manchester

ON: 5 June 2018

BEFORE: Employment Judge Humble (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms Nowell, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent did not make unauthorised deductions from the claimant's wages.
2. The claims are dismissed.

REASONS

The Hearing

1. The Hearing took place on Tuesday 5 June 2018. Mr Apps represented himself and gave evidence on his own behalf. The respondent was represented by Ms Nowell of Counsel and evidence was heard from Professor Rowland, Deputy Medical Director of the respondent, and Mr Jonathan Lenton, the respondent's principal Human Resources Manager. There was an agreed bundle of documents which extended to 234 pages. Written statements had been prepared which were

taken as read. Cross examination and submissions were concluded on the afternoon of 5 June and judgment was reserved.

The Issues and the Law

2. The claimant brought a claim for unauthorised deduction from wages. The claim arose from a decision by the respondent not to pay the claimant between 7 June 2017 and 21 September 2017, a period during which the claimant was 'excluded' from work pending a disciplinary investigation. The claimant's case, in essence, was that there was no contractual right to withhold pay during a period of exclusion and he therefore claimed unauthorised deduction from wages in the sum of £19127.08. The words used by the respondent in its correspondence was excluded rather than suspended, and the significance of that is explained later in this judgment.

3. The issues in the case were therefore:

(a) whether there was a contractual term to the effect that the respondent was entitled to withhold pay during the period when the claimant was excluded from work; and

(b) if so, whether the respondent was entitled to withhold pay pursuant to that contractual term in the particular circumstances of the claimant's case.

4. Section 13 Employment Rights Act 1996 provides at sub-section (1):

"An employer shall not make deductions from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or

(b) the worker has previously signified in writing agreement or consent to the making of the deduction."

5. The tribunal were referred to the cases of Gregg v North West Anglia NHS Foundation Trust [2018] EWHC 390 and to Section 41A of the Medical Act 1983.

6. The tribunal reminded itself that the onus was on the claimant to prove his claim on the balance of probabilities.

Findings of Fact

The tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

7. The claimant was employed by the Pennine Acute Hospitals NHS Trust ("the respondent") from 1 August 2012 to 21 September 2017. The claimant was a junior doctor employed as a Specialty Registrar; his particular specialism was radiology and he was based at North Manchester General Hospital.

8. Upon commencing employment with the respondent, the claimant signed a written statement of particulars which contained the principal terms of the claimant's contract of employment, it was reproduced at pages 151-161. The terms relevant for the purposes of this case are as follows:

Clause 1(d) of the claimant's statement of particulars provides that:

"Your appointment is dependent on you continuing to hold a National Training Number and the continued satisfactory assessment/appraisal review on a regular (at least yearly) basis."

Clause 9 (a) stipulates:

"You are required to hold a Licence to Practice and be registered with the General Medical Council/General Dental Council throughout the duration of your employment. Failure to do so will result in you being unable to carry out your contractual duties, which may necessitate suspension from duty without pay and you may be subjected to disciplinary action up to and including dismissal."

Clause 14(a) of the contract, under the heading "deductions", which provides that:

"The [respondent] will not make deductions from or variations to your salary other than those required by law without your express written consent."

9. Two other documents were relevant for the purposes of interpreting the contractual terms in this case, which were: "Maintaining High Professional Standards in the Modern NHS" (pages 31-61) and "Handling Concerns about Medical Staff Policy" (62-150). The tribunal was satisfied that both documents were incorporated in to the claimant's contract of employment. The claimant had access to those documents through an internal intranet and he was aware of their existence. The former document was specifically referred to in the claimant's particulars of employment. The latter document contained the respondent's disciplinary and capability procedures and paragraph 17 of the particulars of employment provided that, in the event of behaviour or conduct issues, *"the matter will be resolved through the [respondent's] disciplinary and capability procedures..."* Further, the recent EAT case of Gregg v North West Anglia NHS Foundation Trust [2018] EWHC 390 held that the relevant parts of the former document had contractual effect in respect of the employment of a doctor in an NHS Trust (albeit a different trust to the claimant), and specifically paragraph 25 of Part II of that document was held to be incorporated. The tribunal were bound to follow that finding and therefore paragraph 25 of the document was incorporated in to the claimant's contract. That paragraph provides (at page 51):

"As exclusion under this framework should usually be on full pay, the practitioner must remain available for work with their employer during their normal contracted hours... In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad

without agreement).” A provision in very similar terms was contained in the “Handling Concerns about Medical Staff” document at paragraph 6.28 (page 111), the relevant part of which stipulates: *“Exclusion under this procedure will be on full pay, therefore the practitioner must remain available for work with their employer during their normal contracted hours...In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement).”*

10. In March 2015 the claimant was charged with criminal offences and as a consequence, on 5 March 2015, the respondent formally excluded him from work on full pay. The claimant remained suspended on full pay for over two years.

11. On 15 May 2017 the claimant pleaded guilty to offences contrary to section 10(1) of the Sexual Offences Act 2003 and he was convicted at the Crown Court to 18 months imprisonment, suspended for two years. The claimant was required to sign the sex offenders register and certain other restrictions were placed upon him.

12. On 24 May 2017 the claimant was notified by the respondent that an investigation in to matters relating to his conduct would proceed, that investigation having been put on hold pending the outcome of the criminal proceedings. At that point the claimant’s exclusion from work was extended to 21 June 2017.

13. On 1 June 2017 the respondent was notified that the claimant had been suspended from the medical register by the General Medical Council following an Interim Order hearing on 31 May 2017 (page 163h-163i). The letter from the GMC stated that the claimant *“must not hold any appointment as a medical practitioner for which registration is required while his registration is subject to an interim order of suspension.”* The GMC stated that it would let the respondent *“know the outcome of [its] investigation.”*

14. The claimant’s exclusion from work was later extended to 4 July 2017 and, with effect from 7 June 2017, the claimant’s pay was withheld. An explanation for that decision was contained in an email of 6 June 2017 (190-191) which, in essence, said that it was because the claimant no longer held registration with the GMC. On 29 June 2017, the claimant received notice that his national training number was to be removed with effect from 14 July 2017 (page 166).

15. The claimant’s exclusion from work was extended on two subsequent occasions and, on 15 August 2017, his employment was terminated on three months notice since it was deemed that he was unable to meet the conditions required to practice. The disciplinary investigation was still ongoing at that point and it did not conclude until 21 September 2017 when the claimant was summarily dismissed by reason of gross misconduct. The circumstances of the dismissal do not concern us for the purposes of this case; the claim is restricted to one of unauthorised deduction from wages, under section 13 of the Employment Rights Act 1996, in respect of the period from 7 June to 21 September 2017.

Contractual interpretation and Conclusion

16. The claimant's principal argument set out in email correspondence at the relevant time (page 179 and 183), in his claim form and in submissions before the tribunal was that he was not "*suspended*" from duty but was instead "*excluded*". The word excluded was used by the respondent at the relevant time and the claimant's case was that exclusion could be distinguished from a suspension.

17. The tribunal had reference to the "Handling Concerns about Medical Staff" Policy which it held to be incorporated in to the claimant's contract of employment. That document provided, at paragraph 6.3 (page 107), that "*the phrase "exclusion from work" replaces the word "suspension" which can be confused with action taken by the Medical Practitioners Tribunal Service (MPTS) to suspend the Practitioner's name from the register as an interim order pending a substantive hearing of their case or as an outcome of Medical Practitioners Tribunal (MPT).*" This was the same explanation for the use of the term "exclusion" rather than "suspension" given by Professor Rowland in his evidence. In cross examination, the claimant had some difficulty distinguishing between the two terms, the closest he came was to a suggestion that exclusion meant a temporary removal from a place of work whereas suspension was a temporary removal from working altogether. The tribunal did not accept that distinction, it was clear from the contractual document "Handling Concerns about Medical Staff" that exclusion had the same meaning as suspension for the purposes of the claimant's contract of employment.

18. The tribunal were drawn to the Medical Act 1983 and in particular section 41A (11) which provides: "*...while a person's registration in the register is suspended by virtue of an interim suspension order under this section he shall be treated as not being registered in the register notwithstanding that his name still appears in the register.*" The effect of that provision is that under an interim suspension order, a doctor was to be treated as not holding a licence. It follows that clause 9(a) of the claimant's contract, which stipulates that a failure to be registered with the GMC "*may necessitate suspension from duty without pay*" was invoked and the respondent was contractually entitled to withhold the claimant's pay.

19. Paragraph 25 of Part II of "Maintaining High Professional Standards in the Modern NHS" and clause 6.28 of "Handling Concerns about Medical Staff" Policy are also relevant. These are the provisions that stipulate that during an exclusion "*in exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement).*" In Gregg v North West Anglia NHS Foundation Trust [2018] EWHC 390, the EAT held that being unavailable for work for the purposes of that clause required a "self-induced action by the employee" and it was not deemed to be an exceptional circumstance in that case where the employee was unavailable for work due to a suspension from the register by the GMC. The tribunal accepted the respondent's submission however that this case could be differentiated from Gregg because of the

circumstances under which the claimant was suspended. His suspension came about because of a voluntary act on his part, this was either the commission of the events which led to his conviction, or his subsequent decision to plead guilty. From that point he was unable to satisfy the terms of his contract since, under the order handed down pursuant to that conviction, he was prevented from having unsupervised contact with any female under the age of 18 year and from using a device capable of accessing the internet which rendered it impracticable for him to fulfil his duties other than in restricted circumstances. The tribunal held therefore that the particular facts of this case did fall within the exceptional circumstances envisaged at clause 6.28 and paragraph 25. It follows that the respondent was contractually entitled to withhold claimant's pay under those provisions as well as under clause 9(a).

20. It was not argued that clause 14 of the contract which provided that the respondent would "*not make deductions from or variations to your salary other than those required by law without your express written consent*" overrode clause 9 or 6.28. The tribunal were, in any event, satisfied that written consent was not required in the circumstances outlined above where there was contractual authority to withhold pay.

21. The tribunal therefore held that the respondent did not make unauthorised deductions from the claimant's pay.

22. The claim is dismissed.

Employment Judge Humble

Date 1st July 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 July 2018

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