



EMPLOYMENT TRIBUNALS

Claimant: Miss T Wilson

Respondent: Alliot Wingham Limited

REASONS

**pursuant to the Respondent's request made after the Tribunal's
announcement of its Judgment at the Hearing on
1 February 2019**

The Claim

1. The Claimant pursues claims for unlawful deduction of wages of £153.44 deducted for sick pay and £431.55 for holiday pay which the Respondent had paid to her. The Claimant also pursues a claim of £430.75 for accrued holiday pay she claims was due to her. The Respondent resists these claims.
2. There was an Agreed Bundle of Documents (Exhibit R1) and the Tribunal received evidence from the Claimant who gave evidence in chief by written statement (Exhibit C1). The relevant documents referred to the Tribunal were the Claimant's Contract of Employment with the Respondent, the Respondent's Company Handbook and the Claimant's record of leave taken during her employment with the Respondent. There was no substantial dispute between the parties as to the relevant facts.

The Facts

3. The Claimant commenced employment with the Respondent as its Audit and Account Manager on 1 March 2017. She was provided with a written contract of employment to which conditions of employment were annexed. She was not provided with a copy of the Company handbook and was unaware that it was available in every room in the Respondent's office.
4. Under the terms of the Claimant's contract of employment each party to it was required to give one calendar months' notice to the other to terminate it. The Respondent was also entitled under its terms after receiving notice of termination from the Claimant to place the Claimant on garden leave and continue to pay her salary and benefits to the date of the termination of her employment, or to pay her in lieu of that notice or allow her to continue to attend work until expiry of that notice. The Claimant tendered her written resignation with notice by letter of 30 May 2018. The Respondent placed the Claimant on garden leave and during that leave she was paid her salary and benefits to 30 June.

5. The conditions of employment stated, inter alia, as follows:
 - "3. *In order to regulate the running of the Company the day to day conduct of its affairs is set out in the Company Handbook and any subsequent amendments notified by email. The Company Handbook contains information you need to know about the running of the Company, such as sickness procedures, and by agreeing to work for the Company you agree to be bound by the rules contained in it. The Company Handbook includes the disciplinary and grievance procedures which relate to this Contract of Employment but is not part of it".*
6. During the course of the hearing it became clear that the Respondent had misunderstood the arrangement for sick pay that applied to the Claimant in her capacity as a full-time employee. Mr Aireton, correctly and helpfully, conceded that the Claimant had been entitled to be paid for five days sickness absence and that the Respondent had made an unlawful deduction of £153.44 for overpayment of sick pay, as the Claimant had claimed.
7. The facts as to the Claimant's accrual of holiday pay, and the holiday she had taken during the relevant holiday year were agreed between the parties. The Respondent's holiday year runs from 1 November to 31 October each year. The Claimant was entitled to take 5.6 weeks holiday in each year which was her statutory entitlement. The Claimant had taken 15.5 days holiday up to the date on which she commenced garden leave, and had already booked six days further annual leave to be taken during what turned out to be her period of garden leave.
8. It was also agreed that the Claimant would have accrued a total of 18.6 days holiday leave up to the end of her employment and that if the holiday she had booked was taken into account she would have taken 21.5 days of her statutory holiday entitlement up to that date. The Claimant also agreed that the sum of £431.55 was a correct calculation for 2.9 days' pay. The parties also agreed that if no account was taken of the booked holiday, then the Claimant would have accrued holiday pay of £430.75 as she claimed.
9. The Claimant confirmed that she had gone away on holiday as planned. She informed the Tribunal that she had ensured that she could return to work if asked to do so by the Respondent because she understood this was an obligation she had to the Respondent during her period of garden leave.
10. The Tribunal considers that the position of the parties is clear from what is set out above. The Claimant submits that she complied with her obligations of garden leave and that she had taken less holiday than she was entitled to up to the commencement of that garden leave. She submits that not only should no deduction have been made but the Respondent should also pay her accrued holiday pay. Mr Aireton, relying on s.14(1) of the Employment Rights Act 1996 ("the Act") submits that this was an overpayment of wages equal to the excess holiday payment that the Claimant had received as a result of the holiday she had taken during her garden leave. He further submitted that the Respondent was entitled to set off the holiday pay the Claimant had received during garden leave against accrued holiday due and

that to conclude otherwise would result in a windfall for the Claimant.

The Law

11. In the Company Handbook in the section entitled "Annual Leave Arrangements" it states at paragraph 14.7 as follows:

"If on termination of your employment you have taken in excess of your accrued holiday entitlement the company may deduct from any payments due to you one day's pay calculated as 1 / 260 th of your salary for each excess day taken".

12. The Act states as follows:

13 – Right not to suffer unauthorized deductions

"(1) An employment shall not make a deduction 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 worker's contract, or

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

(2) In this section "Relevant Provision", in relation to a worker's contract, means a provision of the contract comprised -

(a) in one or more written terms of the contract and which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion"

14 – Excepted deductions

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer when the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages,

13. Section 13(2)(a) of the Act applies to written terms authorising deductions which have been entered into before the deduction has been made. The provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker. This can be contrasted with s.13(2)(b) which provides that the employer must notify the worker about the existence and effect of the specific term. So, for example, where there is a written term

authorising a deduction contained in a Staff Handbook, the employer must ensure that prior to the deduction the employee has either received a copy of the Handbook (s.13(2)(a)) or been notified in writing about the existence and effect of the term (s.13(2)(b)).

14. The Claimant's evidence to the Tribunal was unequivocal and unchallenged. She did not receive a copy of the Handbook and had not been notified in writing about the existence and effect of the potentially relevant term in the Handbook. There was no enforceable deductions clause in her contract of employment, or the conditions of employment attached to it. Furthermore, the Company Handbook was not incorporated into the Claimant's contract of employment. Therefore, on the evidence before it, the Tribunal is satisfied that deductions made by the Respondent were not authorised by a relevant provision of the Claimant's contract and that the Claimant had not signified her agreement to such deductions being made in writing.
15. As already indicated Mr Aireton did not rely on s.13(1) and (2). He relied on s.14(1) of the Act and submits that the deduction had been made in respect of an overpayment of wages to the Claimant.
16. The Tribunal referred to the case of **Hill v Chapell 2003 IRLR19(EAT)** which concern the overpayment of wages in the form of statutory holiday pay under the **Working Time Regulations 1998**. This was a claim brought by H that her employer had failed to pay her wages for the final two months of her employment. H was successful in the claim but the Tribunal deducted five days' pay because by the date of her resignation she had taken 15 days statutory holiday during the relevant holiday year when she was only entitled to 10 days and the Tribunal held that the employer should be given credit for the 5 days holiday pay that had been paid in excess of that pro-rata entitlement.
17. The Employment Appeal Tribunal('EAT') held that there was nothing in the Regulations that entitled the employer to claw back the 5 days' holiday pay and that there was no relevant agreement in place for the purposes of Regulation 14(4) to do so. In considering the effect of the Act the EAT stated that the key issue was whether the payment of the 5 days' holiday pay constituted an overpayment for the purposes of s.14(1) of the Act. The EAT held that since H had been entitled to paid holiday under the Regulations in respect of all 15 days' holiday at the time when she took the time off, no overpayment of wages had occurred. Therefore, the EAT held that the Tribunal had erred in giving the employers credit in respect of 5 days' holiday pay and made an award to H on that basis.
18. There was no relevant agreement in place between the Claimant and the Respondent. They agree that the Claimant was entitled to have taken 15.5 days' holiday by the date of her resignation and that her statutory holiday entitlement had accrued to 18.6 days up to 30 June. The Claimant's position is directly comparable to that of H. The Claimant had been entitled to paid holiday under the Regulations in respect of all 21.5 days holiday at the time the holiday was taken. Applying the principle set out by the EAT in the **Hill** case there was no overpayment of wages to the Claimant to justify the deduction made by the Respondent.

19. This means that the Claimant's claim for unlawful deduction of wages for holiday taken by her during the garden leave period must succeed and the Tribunal makes an award accordingly.
20. The Tribunal considers that it will be obvious from what is stated above that the Claimant's third claim that she is also entitled to accrued holiday due to her at the date of her resignation must fail because she has been compensated by the Respondent for all accrued holiday pay due to her. This claim is dismissed.

Employment Judge Craft

Date: 6 March 2019 _____