



EMPLOYMENT TRIBUNALS

Claimant: Mr C Kelly

Respondent: St Mungo Community Housing Association

Heard at: Bristol **On:** Thursday 7 March 2019

Before: Employment Judge Matthews

Members: Mr H Adam & Ms G Mayo

Representation:

Claimant: In Person

Respondent: Mr M Gullick of Counsel

UNANIMOUS RESERVED JUDGMENT

1. Mr Kelly's claim that the Respondent made an unauthorised deduction from his wages is dismissed.
2. Mr Kelly's claim that the Respondent breached his contract of employment is dismissed.
3. Mr Kelly's complaint of indirect age discrimination is dismissed.

REASONS

INTRODUCTION

1. These claims are brought by Mr Calum Kelly.
2. In a Case Management Summary sent to the parties on 23 October 2018 (27-33), Employment Judge Goraj recorded Mr Kelly's claims as "*(a) for arrears of wages/unlawful deduction from wages and (b) indirect discrimination on the grounds of age.*" The claim for wages (which included consequential loss) was also allowed to proceed as "a

breach of contract claim". As far as the indirect discrimination claim was concerned, the "provision, criterion or practice" ("PCP") relied upon was *"requiring the Claimant to work his notice during January 2018"*. Mr Kelly asserted that this *"put other people who are aged less than 35 at a particular disadvantage"*. In particular, the alleged disadvantage was that Mr Kelly, aged under 35, *"was not able to claim local housing allowance to assist with his rent during January 2018"*.

3. Employment Judge Goraj recorded that Mr Kelly was to confirm *"whether he is proceeding with his claim for indirect age discrimination and if so, provide an explanation of the basis for his claim including the grounds upon which he says that the respondent has placed him at a particular disadvantage because of his age."* Mr Kelly responded to this in an e-mail on 8 November 2018 (34-35). The PCP was a direction to *"all staff to extend their work at short notice in late December 2017 up to January 2018"*. Having heard the evidence, whilst we acknowledge there is a difference in wording, we see no material difference between what Mr Kelly means by this and the issue as originally recorded by Employment Judge Goraj.
4. As far as allegations of discrimination are concerned, we should record two other matters. First, towards the end of his e-mail of 8 November 2018 Mr Kelly added this: *"I intend to prove that St Mungo's threatened to take this money from me long before they came up with this overpayment idea. This demonstrates conscious, proactive discrimination on St Mungo's part which persists to this day."* We pursued this with Mr Kelly and it was agreed that Mr Kelly's reference here to *"discrimination"* was generic and not to an alleged act of discrimination under the Equality Act 2010 ("EA"). Second, during the course of the Hearing before us it seemed that Mr Kelly was raising a further allegation of indirect age discrimination in relation to the application of the Company's redundancy policy, this time in respect of redundancy payments (WS 39). This was no part of Mr Kelly's pleaded case. In order to be clear, however, it was explored with Mr Kelly who accepted, in the event, the Company's evidence that the policy had no such discriminatory effect.
5. The Company defends the claims. It accepts that it made deductions from Mr Kelly's wages saying that it was entitled to do so to recover overpaid wages. The Company relies on section 14(1)(a) of the Employment Rights Act 1996 ("ERA") saying that it disapplies section 13 of that Act in the circumstances. In the alternative the Company says that the deductions were permitted by section 13 ERA. The Company denies Mr Kelly's right to recover either wages or consequential loss under section 24(2) ERA. The Company denies any indirect age discrimination but, if any is found, says that it was a proportionate means of achieving a legitimate aim.

6. We heard evidence from Mr Kelly supported by a written statement. On behalf of the Company Mr Paul Hudson (Regional Head) and Ms Emma Jones (HR Admin Team Leader) gave evidence supported by written statements. There was an agreed bundle of documentation supplemented by pages 202-205 during the course of the hearing. References in this Judgment to pages are to pages in the bundle unless otherwise specified. Mr Gullick produced a skeleton argument.
7. The hearing was set down for two days. In the event it was possible to hear the evidence and argument in one day on the basis that Judgment was reserved.

FACTS

8. The Company is a charity and a company limited by guarantee. It helps homeless people by providing a wide-ranging network of projects and services.
9. Mr Kelly started work for the Company on 19 January 2015 as a High-Risk Offenders' Floating Support Worker at the Company's New Street Centre in Bristol. Mr Kelly's employment was terminated on 22 January 2018 by reason of redundancy.
10. There is no relevant dispute about where Mr Kelly's salary was on the Company's pay scales prior to July 2017. Reference to Mr Kelly's pay slips for the months of February and March 2017 show his basic gross monthly pay to be £2,141.17 (177-178).
11. With effect from 1 April 2017 Mr Kelly was awarded a 1% pay rise in accordance with the NJC Pay Scales (121.1).
12. Reference to Mr Kelly's three pay slips for April to June 2017 show his basic gross monthly pay to have increased to £2,162.59 (179-181). This exactly matches the 1% pay rise.
13. On 19 June 2017 Mr Kelly attended a "Moving into Management" course, which he believed to be a precursor to a move to a management position with the Company (91).
14. Mr Kelly's six pay slips for July - December 2017 show his basic gross monthly pay to have been £2,595.17 (182-187). This is an increase of £432.59 a month, being some 20%.
15. When questioned about this, Mr Kelly did not deny that he had noticed the increase. In his statement Mr Kelly attributed the rise to the April pay rise and to some other unspecified "small increase in wages" (WS 9 and 10). In his evidence to us Mr Kelly also attributed the rise to a promotion of some sort to a management position. Mr Kelly accepted,

however, that any such promotion had not been notified in writing nor was it evidenced in any change in the workplace.

16. Our finding is that Mr Kelly was fully aware of an unexplained increase in his pay and chose to say nothing.
17. By late 2017 it was clear that the funding the Company relied on to run the project Mr Kelly was employed in was not going to be renewed and Mr Kelly was put at risk of redundancy and subsequently made redundant. An outline of the sequence of relevant events follows.
18. On 25 September 2017 Mr Peter Anderson (Safer Bristol Manager – Bristol City Council) sent an e-mail to Mr Hudson (127). Mr Andersen gave notice on the High-Risk Offenders – Floating Support Accommodation Service contract to expire on 30 November 2017. This was the contract that Mr Kelly was working on.
19. Mr Kelly appears to have seen that e-mail or, at least, found out about its content. In any event, perhaps because of the way that Mr Kelly was briefed, Mr Kelly took from it that he would be made redundant on 30 November 2017. This was a misunderstanding of the position. The notice period required meant that the earliest date the contract could be ended was 31 December 2017. In addition, there were exploratory moves to preserve the service, or parts of it, with other agencies.
20. This misunderstanding by Mr Kelly was the primary cause of the problems he subsequently experienced in positioning himself for the future. Apart from the misunderstanding, there was another factor in play. Mr Kelly, who had been made redundant twice before, wanted to move on as quickly as possible. This was entirely understandable for someone in Mr Kelly's position and Mr Kelly is to be commended in tackling his likely redundancy by planning to mitigate it in the way he did. Unfortunately, Mr Kelly got himself ahead of events.
21. Mr Kelly rented a flat in Bristol. The monthly rental was £500 of which £330 was met from a local housing allowance. Mr Kelly judged that his savings would quickly disappear if he had no income but still had to meet the monthly rent. Mr Kelly, therefore, gave his landlord notice and moved out of the flat on 25 November 2017. This, of course, was predicated on the erroneous assumption of a leaving date of 30 November 2017.
22. We do not know when Mr Kelly gave notice on his flat but it must have been before 24 November 2017, on which date he had his first redundancy consultation meeting with Mr Hudson. There is a note at 140. Mr Hudson gave Mr Kelly's last day of work as 11 January 2018. Mr Kelly says this was a change. However, on the evidence before us,

it was the first formal indication to Mr Kelly of his last day at work. Mr Kelly made it clear that he was not seeking an alternative to redundancy. In fact, Mr Kelly was planning a move to Japan to teach English.

23. It seems Mr Kelly was told after that meeting that, taking account of outstanding annual leave and time off in lieu, his last working day would be 22 December 2017.
24. Having learned that his likely last day at work was 22 December 2017, it appears Mr Kelly made arrangements to continue living in Bristol.
25. Mr Kelly attended a final consultation meeting with Mr Hudson on 11 December 2017. The note is at 144. Mr Kelly was handed his notice of redundancy (145-146). There was a discussion about Mr Kelly's last day at work. The notice of redundancy gave the date for the termination of Mr Kelly's employment as 22 January 2018. Mr Kelly explained that, taking account of annual leave and time off in lieu, he was not expecting to work after 31 December 2017. Mr Hudson had originally made a mistake in giving Mr Kelly's notice period as four weeks when it was, in fact six. Notwithstanding, taking account of annual leave and time of in lieu, Mr Hudson thought Mr Kelly could cover the period from 1 January to 22 January 2018. Mr Hudson was to check. The note records that on 12 December 2017, after the meeting, Mr Hudson told Mr Kelly that Mr Kelly's last day at work would have to be 5 January 2018.
26. Mr Kelly says that this change meant he had, yet again, to find a means of continuing to live in Bristol at short notice.
27. At his request, Mr Kelly had a follow up meeting with Mr Hudson and Mr Paul Housden (Floating Support Services Manager) on 18 December 2017. Afterwards, Mr Kelly sent an e-mail to Mr Hudson on 19 December 2017 (151-152). Mr Kelly wanted the Company to pay him in lieu of notice for the period 12 to 22 January 2018. This request was refused.
28. On 19 December 2017 Mr Kelly was signed off work by his GP for six weeks and did not return to work with the Company. Mr Kelly was paid up until and including 22 January 2018.
29. In light of our conclusions below, we will not record the detail of the steps that Mr Kelly took to pursue his plan of working in Japan. For the sake of completeness, we simply note that, during January 2018, Mr Kelly was working on a visa, booked to travel to Japan on 24 January 2018 and to stay there for two weeks to make preparations for a later move. Mr Kelly says that, instrumental to him being able to take the

opportunity in Japan, was his expectation of receiving his final pay cheque and redundancy pay.

30. On 19 January 2018 it was brought to Ms Jones' attention that Mr Kelly had been overpaid since July 2017. What Ms Jones ascertained had happened was this. Mr Kelly's pay on the Company's payroll system had mistakenly been increased to a higher spinal point in the pay scales with Inner London weighting. This was the result of the misposting of a salary amendment request for another employee with the same surname (WS 6).
31. It is unsurprising that Mr Kelly says he was "*utterly shocked*", quickly panicked and became distressed when he received a phone call on 22 January from Ms Meera Visakan (HR Administrator with the Company) to say that the Company intended to make deductions from his final payments in respect of past salary overpayments. This was confirmed in an e-mailed letter timed at 1704 (161-162). The letter explained that the overpayment totalled £1,546.16 net in respect of salary between July and December 2017.
32. Mr Kelly asked for an explanation and expressed a grievance that was responded to on 26 January 2017, with apologies, by Ms Sarah Clark (Deputy Director of People and Governance) (166-169). Mr Kelly says that the Company did not give him enough information for him to understand how the deduction was calculated. It seems to us that Ms Clark's letter was clear on the subject.
33. The deduction was subsequently made from payments due to Mr Kelly on 25 January and 2 February 2017.
34. The parties have not been able to find a copy of any contract of employment signed by Mr Kelly although it seems there was one. However, Mr Kelly did not demur when it was put to him that the contract at 47-64 was in the form his contract would have taken. Specifically, Mr Kelly agreed that his contract would have included provisions similar to the following (49 and 59):

"6"...."In the event of St Mungo's Broadway mistakenly making an overpayment to you in respect of any salary/wages, expenses or benefits (to include holiday pay, statutory or contractual sick or maternity pay, or any other emolument referable to your employment) St Mungo's Broadway will deduct the amount from subsequent salary payment(s) made to you."

"24. DEDUCTIONS:

St Mungo's Broadway may deduct from salary or other sums due to the employee:"....

"(c) The amount of any accidental overpayment to you."....

"St Mungo's Broadway shall notify you in writing of the details of any such deduction and provide you with copies of any supporting documents reasonably requested in connection with the deduction."

35. APPLICABLE LAW

36. Section 13 ERA, so far as it is relevant, provides:

"13 Right not to suffer unauthorised deductions

(1) An employer 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,"....

"(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 of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question,"

37. Section 14 ERA, so far as it is relevant, provides:

"14 Excepted deductions

(1) 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,"....

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

38. Section 19 EA, so far as it is relevant, provides:

"19 Indirect Discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-

age;"

39. Section 23 ERA, so far as it is relevant, provides:

"23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal-

(a) that his employer has made a deduction from his wages in contravention of section 13..."

40. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, so far as it is relevant, provides as follows:

"3 Extension of jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

41. We were not referred to any authorities.

CONCLUSIONS

42. The claim for wages

43. The £1,546.16 was deducted from Mr Kelly's wages by the Company for the purpose of reimbursing the Company in respect of an overpayment of wages. As such, it falls within section 14 ERA and is excepted from the scope of the section 13 ERA protection of wages provisions.

44. If we were to be wrong about that and section 13 ERA is fully engaged, Mr Kelly's claim for wages would still fail. There was a relevant provision of Mr Kelly's contract authorising the deduction. Mr Kelly says that he received the overpaid sum in good faith and altered his position by spending the money in his preparations to move to a new job in Japan believing the money to be his own. Our finding, however, does not support that. Our finding is that Mr Kelly turned a blind eye to the mistake made by the Company. He may have thought any issue would be overlooked but, when he made his plans to move to Japan, he did not do so in ignorance of an obvious and material overpayment.

45. Mr Kelly also says that the Company should have, at least, agreed a phased repayment plan with him. Whilst we have every sympathy with his point of view in his particular circumstances, there was no contractual or other legal duty on the Company to do so.

46. The contract claim

47. Any claim for breach of contract must rely on just that. A breach of contract. No breach of contract by the Company has been established. We think the claim rested on the potential breach of contract in making an unlawful deduction from wages. That claim, however, has failed and there was no breach of contract in that respect. We see no other breach of contract on which the claim can be founded and it must, therefore, be dismissed.

48. The claim of indirect age discrimination

49. The protected characteristic is Mr Kelly's age. Mr Kelly was aged under 35 at the relevant times.

50. The Company required Mr Kelly to work out his notice period. On the evidence this was the Company's general position and it is a PCP.

51. That PCP applied, or would apply, to persons aged over 35.
52. However, it has not been established that the PCP puts, or would put, persons aged under 35 at any particular disadvantage. The problem, in short, is this. Mr Kelly says that persons under 35 are in a more disadvantageous position than those over 35 when it comes to the receipt of local housing allowance. There is an issue about whether or not we can accept that on the basis of the evidence before us. Leaving that aside and assuming that we can, there is still no demonstrable disadvantage. Prior to notice of termination of employment being given, persons are in whatever position in relation to receipt of local housing allowance being aged under 35 or over 35 they are in. After notice is given, they remain in exactly the same position. They remain in receipt of income until their termination date and nothing changes. There is no disadvantage attributable to the PCP in this respect.
53. If that analysis is wrong, the PCP did not put Mr Kelly at that disadvantage because he, personally, was in receipt of income from the Company up until and including his last day of employment.
54. If the above analysis is wrong, we should add for the sake of completeness, that it seems to us that any indirect discrimination found on the facts would be a proportionate means of achieving a legitimate aim. The legitimate aim is to utilise an employee's services during a contractual notice period. It would seem proportionate for an employer to exercise its contractual rights in such circumstances.
55. The claims are, therefore, dismissed.

Employment Judge Matthews

Date: 14 March 2019