EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Douglas

Respondents: Computer and Design Services Limited

Heard at: Southampton **On: 5** April 2019

Before: Employment Judge Jones QC

Representation:

Claimant: In person

Respondent: Mr Burns, Counsel

JUDGMENT

1. The Claimant's claim for unlawful deduction from wages succeeds.
2. The Respondent shall pay to the Claimant the sum of £1887.54 which comprises:
   (1) Five days of unpaid salary for the period 1 to 5 August 2018 inclusive;
   (2) Seventeen days of unpaid sick pay for the period 6 to 22 August 2018 inclusive; and
   (3) Two days of unpaid holiday pay for the period 23 to 24 August 2018 inclusive.
3. The claim for compensation for overdraft interest is dismissed.
4. The claim for compensation for stress and anxiety is dismissed for want of jurisdiction.
5. No uplift is made for failing to follow the ACAS code of practice.

REASONS

The Claims and Issues

1. The Claimant alleges that unlawful deductions have been made from his wages contrary to **Employment Rights Act 1996**, **s.13**. More specifically he alleges that he is owed:

(1) Five days of salary for the period 1 to 5 August 2018;

(2) Seventeen days of unpaid sick pay for the period 6 to 22 August 2018 inclusive;

(3) Two days of unpaid holiday pay for the period 23 to 24 August 2018 inclusive; and

(4) A bonus of £440.30 in respect of August 2018.

2. The Claimant seeks "repayment of interest fees (current and future) which are approximately £100 per month" that being potentially a financial loss of the kind envisaged under **s. 24(2)**.

3. The Claimant also seeks interest on the sums deducted.

4. The Claimant alleges that the deductions caused him stress and anxiety in respect of which he seeks compensation of £5,000.

5. The Claimant is also seeking a 25% uplift on compensation in respect of what he alleges was the Respondent's failure to follow the ACAS Code of Practice.

The Hearing and Witnesses

6. The case was listed, ambitiously, for one hour. In practice it took rather longer than that and I reserved my decision.

7. I heard evidence from the Claimant and from Mr Jonathan Fryett, who is a director of the Respondent company.

8. Each party provided their own bundle of documents.

9. At the outset of the hearing I heard a strike out application made by the Claimant. The Respondent had, by its own frank admission, failed to comply with a number of directions. The disadvantage arising from the failures was such that an adjournment of the hearing would have obviated it entirely. In the circumstances, I did not consider that strike out was a proportionate step to take. The Claimant did not want an adjournment and the hearing, therefore, went ahead.

Findings of Fact

10. The Respondent is a company specialising in software for use in the civil and structural engineering and scaffolding industries.

11. The Claimant joined the Respondent as a "front end developer" on 13 August 2018. His employment terminated on 24 August 2018.

12. The Claimant's terms and conditions of employment are set out in a written contract ("the Contract"), which he signed on 29 July 2012.

13. The Contract makes the following provision in respect of notice of termination:

> "4.1 Your employment may be ended either by you giving the Company or by the Company giving you one week's written notice within the probationary period. After the probationary period one month's notice is required to cease your employment from either side."

14. The Contract provides that the Claimant is entitled to 25 days' holiday in each holiday year. That is accepted by the Respondent to be an error: it should be 28 days. The Contract assumes that the entitlement is earned across the year. That is clear from the fact that it provides that if, on termination, the Claimant has taken more holiday than he has "earned" by the termination date, the Respondent can deduct the value of what it calls the "unearned holiday" from any final payment of salary.

15. In relation to sickness, the Contract provides as follows:

> "10 SICK PAY
>
> 10.1 Full salary will be paid for the first 20 days in total sickness in any one year. After that, statutory sick pay will be paid and/or any other payments at the discretion of the directors.
>
> 11 REPORTING SICKNESS ABSENCE
>
> 11.1 On the first day of any sickness absence you must ensure that your line manager is informed by telephone of your sickness at the earliest opportunity. You should also give details of the nature of your illness and the day on which you expect to return to work. You must inform the Company as soon as possible of any change in the date of your anticipated return to work.
>
> 11.2 Sickness absence of up to and including seven consecutive days must be fully supported by a self-certificate and thereafter by one or more doctor's certificates provided to the Company on a regular basis during the period of sickness absence.
>
> 11.3 You must inform your line manager on the first day of your return to work after a period of sickness absence and complete a self-certificate form if applicable.
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> 12. MEDICAL EXAMINATIONS
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> 12. The Company may require you to undergo a medical examination by a medical practitioner nominated by it at any stage of your employment and you also agree to authorise the medical practitioner responsible for the medical examination to prepare a medical report detailing the results of the examination …"

16. The Claimant was paid a monthly salary of £2392.20. In addition, each month he received a bonus payment. On the payslips shown to me the bonus has been consistently paid at a rate of £440.30 per month.

17. On 18 July 2018, the Claimant booked holiday to cover the period 13 to 24 August 2018.

18. On 27 July 2018, the Claimant gave written notice of termination of his employment. The letter stated that he would continue to work for the following 4 weeks and that his employment would end on 24 August 2018. He undertook to "endeavour to make the transition as smooth as possible by continuing to work hard on the timesheet app and passing my knowledge on to the rest of the team."

19. On 30 July 2018, Claimant contacted Nikki Townend, who is employed by the Respondent in a human resources role. He asked her whether he had enough holiday entitlement to cover

the holiday he proposed to take. Ms Townend informed him that he did not. He had 2.5 days of entitlement left and would have to take the other 7.5 days as unpaid leave. The Claimant responded to explain that he needed to take the time off or he would face childcare difficulties and said that he would take the time off unpaid if necessary. Ms Townend suggested that the Claimant check with Mr Fryett that he could take the time off and copied the email chain to Mr Fryett so that he was aware of the issue.

20. The parties do not quite agree about what happened next. According to Mr Fryett, on or about 31 July 2018 the Claimant approached him to say that HR was being "awkward" about his taking holiday and that he needed to take it for reasons relating to childcare. In the account given in the ET3, but not in Mr Fryett's witness statement, Mr Fryett "queried whether that [i.e. the childcare] was actually anything to do with [the Respondent]". Mr Fryett says that he pointed out that absence would create difficulties for the Respondent and was inconsistent with what the Claimant had said in his resignation letter about seeking to ensure a smooth transition. Mr Fryett says he invited the Claimant to come back and speak to him further the next day but he did not do so. For his part the Claimant denies that there was any such conversation. I find, on balance, that there was. Given that the question was a matter of significance for the Claimant and that he had been specifically advised to approach Mr Fryett, I think it more likely than not that he would have done so. Mr Fryett appears to have a specific recollection which was substantially unchallenged in cross-examination.

21. Also on 31 July 2018, Mr Fryett emailed the Claimant in the following terms:

> "As you are well aware the company has experienced a number of problems with the Scaffolding App on which you have been working for the last year which has affected sales and so it has been decided to postpone the review of your salary for a while so that we can assess whether the work that the Apps Team has recently carried out has solved those problems. All being well we will be able to carry out that review in the very near future."

Given that Mr Fryett knew that the Claimant was due to leave employment a little over three weeks later, it is not clear what the purpose of the email was. Any salary review would be academic unless it occurred before 24 August 2018 and was back-dated. In the context of the case, the email has a different significance. It is relied upon as indicating that there was some dissatisfaction with the work that the Claimant was doing which would justify not paying him a bonus for August 2018. I return to that point later in these reasons.

22. On 6 August 2018, the Claimant failed to attend work. He commenced a period of sickness absence. Strictly, he was required by his contract of employment to inform his line manager by phone and to provide details of the nature of his illness and the date on which he expected to return to work. It is not in dispute that the Claimant sent an email making it clear he was unwell and that he would not be in that day. He told me that he also contacted his line manager, Terry Roberts, by phone and told him that was feeling unwell (specifically, that he had not slept) and that he was going to see the doctor. Whilst Mr Burns, on behalf of the Respondent, expressed some scepticism as to whether any contact had in fact been made with Mr Roberts, there is no evidence to the contrary. What does not appear to be in dispute is that the Respondent did not, at that point, make any further enquiry of the Claimant. Nor was it suggested to him that he had failed to comply with his contractual reporting obligations.

23. On 7 August 2018, the Claimant sent a further email stating that he had seen his doctor and that he had been signed off for "2 weeks initially so it [was] unlikely that [he would] be back". Again, the Respondent does not appear to have made any further enquiry. There was no suggestion of any failure on the Claimant's part to comply with his obligations; no more specific enquiry was made about his health; nor was any attempt made to explore whether it might be possible for the Claimant to perform some work despite his condition.

24. On 8 August 2018, Ms Townend made contact to discuss the return of equipment belonging to the Respondent. It seems, therefore, that the Claimant's illness was being taken at face value and that it had been accepted that he would not be returning to work. There does not seem to have been any attempt to chase for a fit note or to enquire whether the Claimant's health was improving.

25. On 21 August 2018, some 3 days before his employment was due to end, the Claimant provided his fit note (ie his "Statement of Fitness for Work"). The note stated that the Claimant was unfit for work. The statement allows a doctor to certify that the patient is fit for work taking account of certain advice which might include, for instance, that he be given amended duties or reduced hours. That option is struck through. It follows that, on its face, the statement certified that the Claimant was unfit to perform any duties.

26. The Respondent was sceptical about the statement. There were two principal reasons for that scepticism. The first reason was that the definition of the condition is very vague. It simply says: "Personal Problem". The Claimant says that he was suffering from anxiety and was not sleeping. He says counselling was recommended and that he was offered medication, which he refused. His GP had originally intended to describe his condition as "mental health issues" but he had asked him not to use that term because he was concerned about the stigma that can attach to those with difficulties with their mental health.

27. The second reason for scepticism was that the period of absence recommended came to an end on 22 August 2018. That was two days before the Claimant's employment was to end and the Claimant had two days of holiday left to take. I agree that it is unlikely that that is entirely coincidental (although according Ms Townend's email of 30 July 2018, he in fact had 2.5 days of holiday left to take). However, it does not, in my view, take matters much further than making it likely that the Claimant had told his GP that his employment was coming to an end and that he was going to take the last two days of his employment as holiday.

28. Mr Burns urged me to go much further and to conclude that the medical opinion recorded in the statement as to the Claimant's inability to work was not genuine. He told me that many tribunals "do not go behind sick notes" and that that had led to "widespread abuse". He told me that "doctors are far too keen to issue sick notes on a flimsy pretext and that this is one such case". I should conclude, he said, that on the balance of probabilities that the Claimant was not ill at all – he had secured the time of he needed for childcare with the help of an "obliging doctor". After the employment had ended, the Respondent wrote to the Claimant's GP asking for further information, specifically more detail about the Claimant's condition. The Claimant did not permit his GP to answer. That, Mr Burns suggests, is not what an honest person would do.

29. I conclude on the balance of probabilities that the Claimant was unwell. My principal reason is that I found his oral evidence on the point persuasive. Mr Burns is right, of course, that a Tribunal must not apply an irrebuttable evidential presumption that the opinion expressed in

a fit note is genuine. Ultimately, a decision must be made on the evidence before me. In that regard I have the Claimant's testimony on oath and the fit note from a general practitioner whose integrity I have no positive reason to doubt. Against it I have three things. The first is the fact that the original description of the condition was non-specific. However, I accept the Claimant's evidence as to why that was. Secondly, I have the fact that the period of absence recommended runs up to the point at which the Claimant was otherwise going to be first away from work and then out of employment altogether. But there would have been little point in certifying that he should be refrain from work for a period when he was going to be absent in any event and no point at all in certifying that he should refrain from work for a period post-dating the termination of his employment. In the circumstances, therefore, I do not consider that this coincidence of dates carries with it the sinister implication contended for by the Respondent. Thirdly, and finally, I have the assertion that an honest person would consent to his GP disclosing further details of his often-stigmatised medical condition to a former employer. I do not consider refusing to consent to the release of sensitive personal information of this kind to someone who no longer employs you carries with it any implication of dishonesty.

30. The Claimant's last payslip should have been for August 2018. His July 2018 payslip shows monthly gross salary of £2392.80 and "discretionary bonus" of £440.30. The Claimant's June 2018 pay slip contains the same figures. The parties are in dispute as to whether the Claimant could expect to receive a discretionary bonus for August 2018. The Claimant says he received the bonus every month and that is was simply part of his salary. The Respondent says that the sum was paid at its absolute discretion. During the course of cross-examination, the Claimant accepted that the payment was a discretionary one. That does not, of course, mean that no unlawful deduction claim can lie in respect of it. I return to that question in the discussion below.

31. The Respondent did not make a payment in respect of August 2018. The Respondent accepts that the Claimant worked for three days in August, i.e. 1 to 3 August and, if wages accrue day to day, since the first day of absence was 6 August 2018, entitlement to 5 days of salary had accrued by then. Further, the Respondent accepts that 23 and 24 August were taken as holiday and must be paid for. For his part, the Claimant accepted in cross-examination that if paid for those days he would have received his full entitlement. He seems, in effect, to have waived his entitlement to the additional 0.5 days pay that Ms Townend's email of 30 July 2018 would suggest he was entitled to. The Respondent concedes, therefore, that there has been an unlawful deduction. The question is what the extent of the deduction is. I turn to that question immediately below.

Discussion and conclusions on liability and remedy

(1) Unlawful deduction

32. The first matter upon which the parties are disagreed is whether the Claimant was entitled to pay for the period 6 August 2018 to 22 August 2018 inclusive. In other words, there is a dispute as to whether he was entitled to contractual sick pay.

33. The Respondent's principal argument was that the Claimant was not absent as a result of sickness and therefore has no entitlement to contractual sick pay. I have determined that question in the Claimant's favour above.

34. The Respondent's secondary argument is that the entitlement to sick pay is dependent not just upon the Claimant being sick but upon his being too sick to perform any useful work at all whether at the office or from home. There are a number of problems with this argument. The first is that no such condition of entitlement is spelt out in the Contract and I do not think that an officious bystander would consider such a condition to be implied. Nor is such an implied requirement necessary for the business efficacy of the Contract. I do not think a sick pay clause would ordinarily be understood to operate only where an employee is completely incapacitated. It would always be possible to identify some minor task that even a seriously ill employee could be pressed to take on if the test were whether an employee could do anything at all. In any event, this argument fails on the facts: it was open to the Claimant's GP to identify work that he was capable of doing – indeed that is the point of a "fit note" - but he instead certified that the Claimant was unfit for work without further qualification. There was during cross-examination a suggestion that some failure strictly to comply with the contractual obligations in respect of sickness reporting might justify a failure to pay sick pay. Insofar as that argument was maintained it founders because, I conclude, there is nothing in the express wording of the Contract that creates any such precondition and no basis for implying it. It is telling that there was no contemporaneous suggestion of any breach on the Claimant's part; strict adherence was not insisted upon; nor was there any suggestion that any notification failure was the reason why sick pay was not being paid.

35. In the circumstances, I conclude that the Claimant should have received sick pay for the period 6 August 2018 to 22 August 2018 inclusive.

36. The second matter in dispute is whether the Claimant should have received a bonus for the month of August 2018. The burden is on him to demonstrate on a balance of probabilities that the bonus was "properly payable" within the meaning of **ERA 1996**, **s. 13(3)**. The Claimant accepted that the bonus was paid at the Respondent's discretion. That alone is not decisive against the claim. The definition of "wages" set out at **s. 27** includes any "bonus … referable to his employment whether payable under [the worker's] contract or otherwise". It can include sums to which a claimant is not contractually entitled provided he would normally expect to received them (see **Kent Management Services Ltd v Butterfield** [1992] ICR 272). The Claimant says he invariably received a bonus and therefore he would normally expect to receive it. Since he received the same sum each month there is no difficulty quantifying the sum claimed (see **Adcock v Coors Brewers Ltd** [2007] EWCA Civ 19).

37. However, the Respondent says that the sum was not properly payable because it had exercised its discretion not to make the payment in the light of the concerns that had arisen about the app (for which see Paragraph 21 above). Those concerns were expressly identified as reason for not awarding a bonus in a letter from the Respondent to the Claimant dated 3 October 2018. Although the Claimant in evidence was dismissive of the concerns and about his responsibility for any difficulties encountered, I have not felt able, on the basis of the evidence before me, to dismiss the concerns as concocted. Nor, in my view, did they make any decision not to award a bonus irrational. In the circumstances, I find the failure to pay a bonus did constitute an unlawful deduction.

38. It follows from the Respondent's concessions and the analysis above that the Respondent has unlawfully deducted 24 days' pay. That consists of ordinary pay for the period 1 to 5 August 2018; sick pay until 22 August; and holiday pay for the last two days of employment. The Claimant's gross monthly pay was £2392.20. That equates to a daily gross pay of £78.65. The deduction, therefore, was £1887.54.

(b) Loss of interest

39. The Claimant alleges that failure to pay him his salary for August 2018 left him with an overdraft and caused him to have to pay interest. He seeks to recover a sum in relation to that loss on the basis that it is a Financial loss sustained by him which is attributable to the unlawful deduction within the meaning of **ERA 1996, s. 24(4)**.

40. The claim fails on the evidence. The Claimant would not have received his pay until the end of August 2018. He has produced bank statements showing that he was overdrawn in August 2018 but has not produced bank statements for any period after 23 August 2018. It is impossible to know, therefore, whether he was still overdrawn at the date on which his salary would have been received and, if he was, whether the payment would have lifted him out of overdraft, alternatively if it would, how long he would have been overdraft-free. The question is complicated by the fact that the Claimant appears to have quickly started with another employer who was paying much more. In the circumstances, any loss is simply impossible to calculate for want of evidence.

(c) Interest on loss

41. The Claimant asks for interest on the sums unlawfully deducted. However, I have no power to award interest in unlawful deduction claims.

(d) Compensation for Anxiety

42. The Claimant says the unlawful deduction caused him stress and anxiety. My powers to compensate under **ERA 1996**, **s. 24** are limited to ordering the repayment of the deduction and compensating the Claimant for consequential financial losses. I do not have the power to award the sum sought.

(e) Uplift for failure to follows ACAS Code of Practice

43. Since this is not a case in which the Claimant raised a written grievance and it is not a case in which he was subjected to any disciplinary proceedings, the ACAS Code of Practice 2015 is not applicable and an uplift is impossible. The Claimant's complaint is that the Respondent failed to respond when contacted by ACAS as part of the early conciliation process. That is not a matter that falls within the scope of the Code and therefore I have no power under **Trade Union and Labour relations (Consolidation) Act 1992**, **s. 207A** to make an uplift.

Employment Judge Jones QC
2 May 2019