EMPLOYMENT TRIBUNALS

Claimant: Mr R TEBBUTT

Respondent: The Secretary of State for Justice

Heard at: Leeds **On:** 7 and 8 May 2019

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr S Brittenden, counsel
Respondent: Mr A Serr, counsel

CORRECTED JUDGMENT

1. The respondent made unauthorised deductions from the wages of the claimant by failing to pay to him in lieu of notice at his normal rate of pay.
2. The respondent shall pay to the claimant the sum of £6,316.56, being 12 weeks' GROSS pay AND WHICH IS SUBJECT TO THE USUAL STATUTORY DEDUCTIONS.
3. The respondent breached the terms of the claimant's contract in failing to make a payment to him in lieu of notice at the normal rate. There shall be no additional award of damages as it would duplicate the unauthorised deductions which are to be paid.

REASONS

Introduction

1. The issue in this case is whether the claimant was entitled, under the terms of his contract of employment, to be paid at his normal rate of pay in lieu of the notice period to terminate his employment in circumstances in which he was incapable of work due to ill-health.

2. The claimant contends that this is an entitlement upon a proper construction of the contract; that it was the common intention of the parties having regard to the documentation and the relevant background. Alternatively, he contends it amounted to an implied term either by reason of custom and practice/conduct, business efficacy or the so-called 'officious bystander' test.
3. The respondent argues that a benefit of this type would have to be included, clearly and expressly, in the contractual documentation. It was not and so no sensible construction of the materials permit of such an interpretation. In addition it is said that the requirements for implication of the terms are not met in any of the situations posed, on the evidence.

The evidence

4. The Tribunal heard evidence from Mr D Rogers, Assistant General Secretary for NAPO, the trade union and professional association which represented members working in probation and the family courts. For the respondent, Mr Martin Laird, formerly the National Probation Service team manager gave evidence as did Ms June Gray, deputy director of human resources in Her Majesty's Prison and Probation Service. The claimant submitted a witness statement but the respondent did not cross-examine him.
5. The parties submitted a bundle of documents amounting to 246 pages.

Background/facts

6. The claimant commenced employment in the probation service on 1 June 1998 and qualified as a probation officer in 2002. In 2016 he was placed in a court team as a probation services officer due to health issues. He commenced a period of sick leave on 26 April 2017. On 16 June 2017 the claimant applied for ill-health retirement. The Independent Registered Medical Practitioner certified that the claimant met the criteria, on 17 January 2018, and forwarded his report to the claimant on 24 January 2018.
7. On 16 April 2018 the claimant was notified by the National Offender Management Service (NOMS), by letter, that his ill-health retirement had been approved. He was told that his last day of service was 17 January 2018. The ill-health retirement pension was paid from 17 January 2018. He did not receive any notice of termination of his employment; nor did he receive payment for such notice in lieu.
8. Mr Laird, the claimant's manager, accepted that he should not have backdated the claimant's leaving date and this was an error. He believed that should have been 16 April 2018, when the decision to grant the ill-health early retirement pension was made. At the time he also completed a pro forma for ill-health retirement which included a section for the sum to be paid in lieu of notice. He entered nil. He said that was because he believed, incorrectly, that the claimant had exhausted his entitlement to sick pay at that time. Having checked the managers' guidance, on the respondent's intranet, he understood that any pay in lieu of notice should have been at the rate being received by the employee at the date of dismissal.
9. The claimant had received sick pay at the full rate for six months, up until 15 August 2017 and at half rate, until 15 February 2018. It then reduced to nil. In his witness statement Mr Laird recognised that, upon application of the guidance, he

had incorrectly completed the form. Had the 17 January 2018 been the correct date of termination he should have entered the sum for half pay on the form. Had he completed the form with the correct date of termination, as 16 April 2018, the figure nil would have reflected the rate of pay the claimant then received.

10. As a consequence of HM Government reforms to the probation service, on 1 June 2014, employees of Probation Trusts transferred to NOMS, an executive agency of the Ministry of Justice. This was governed by the Offender Management Act 2007 (Probation Services) Staff Transfer Scheme 2014 (STS). The STS was drawn up pursuant to specific powers under the Offender Management Act 2007 to provide a legal mechanism for the transfer. Its provisions preserved the employment rights of those staff transferred, in a similar way to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The STS expressly recognised the terms and conditions preserved included those in the collective agreement of the National Negotiating Counsel for the Probation Service and Standing Committee or Chief Officer Grades National Agreements on Conditions of Service, insofar as they had been incorporated into the employees' contracts of employment. The major distinction to a transfer governed by TUPE was that terms and conditions had effect after the transfer '*so far may be consistent with employment in the civil service of the State'*, see paragraph 4 (3) of the STS.

11. Until 31 May 2018, the point of transfer, the Probation Trusts paid those employees whose service was terminated because they were incapable to attend work and discharge their duties in lieu of notice at their normal rate of remuneration, notwithstanding they had previously been in receipt of no pay because their entitlement to sick pay had been exhausted. That arrangement was continued after the transfer by the managers of NOMS until 16 November 2016.

12. By letter of that date Ms Gray wrote to the trade unions with a view to clarifying the position. She stated that there had been a practice both prior and subsequent to the transfer of paying remuneration during the notice period at normal pay rates, even in circumstances in which the employee's pay had reduced to half or nil, when the notice was given. As to the future, Ms Gray gave notice that the approach would be different and in line with the entitlement of civil servants. That would mean that pay in lieu of notice would be at the rate which the employee was in receipt of at the time the notice was given; so that if an employee had exhausted his sick pay entitlement he would not be entitled to any pay during the notice period or in lieu of notice.

13. In correspondence the trade unions took issue with that approach. They contended that the previous practice was a contractual right which had been carried over under the provisions of the STS and it could not be unilaterally varied by NOMS.

The Law

14. By section 13 of the Employment Rights Act 1996 (ERA) an employee has the right not to suffer an unauthorised deduction from his wages by his employer. By section 13(3) of the ERA, such a deduction is defined as a deficiency where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable.

15. A former employee may bring a claim for damages for breach of contract in the employment tribunal for a sum which arises or is outstanding at the termination

of his employment, pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

16. In ***Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896*** the House of Lords held that in construing contractual documents the court should find the meaning which the document would convey to a reasonable person having the background knowledge reasonably available to the parties. Previous negotiations and declarations of subjective intent are irrelevant. The court shall not ascribe to the parties an intention which they could not have had.

17. In the recent case of ***Wood v Capita Insurance Services Ltd [2017] AC 1173*** the Supreme Court held that the court's task in interpreting a contractual term was to ascertain the objective meaning of the language in which the parties chose to express their agreement. Lord Hodge said, at paragraph 13:

> "*Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professional contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contract of the same type"*.

18. In ***Park Cakes Ltd v Shumba [2013] IRLR 800****,* the Court of Appeal identified the factors which will typically be necessary to determine whether a term must be implied by reason of custom and practice. They are [i] on how many occasions, and over how long a period, the benefits in question have been paid; [ii] whether the benefits are always the same; [iii] the extent to which the enhanced benefits are publicised generally; [iv] how the terms are described; [v] what is said in the express contract; and [vi] equivocalness.

19. A term will be implied into a contract if it is necessary for the contract to work or, as otherwise expressed, to give it business efficacy, see ***Ali v Petroleum Co of Trinidad and Tobago [2017] IRLR 432***.

20. A term will also be implied if it is so obvious that it goes without saying. If, for example, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "*Oh, of course*", see ***Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206**.

21. Part IX of the ERA provides for periods of notice to which an employee is entitled on termination of his employment. Section 88 provides:

> (1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—
>
> > (a) the employee is ready and willing to work but no work is provided for him by his employer, (b) the employee is incapable of work because of sickness or injury,(c) the employee is absent from work wholly or partly because of pregnancy or childbirth [or on [adoption leave, [shared parental leave,] [parental bereavement leave,] parental leave or]] [paternity leave], or (d) the employee is absent from work in accordance with the terms of his employment relating to holidays,
> >
> > the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

22. Section 87(1) of the ERA provides that section 88 has effect as regards the employer's liability to the employee for the notice provisions contained within section 86 when the employer gives notice, but section 87(4) disapplies these provisions when the requirement for notice is at least one week more than the requirement imposed by section 86. In other words, if an employee is entitled under his contract to more than the notice provided for in section 86 by at least a week, the requirement to pay notice pay under the statute, for example to an employee who is incapable of work because of sickness, does not apply, see ***Scotts Company (UK) Ltd v Budd [2003] IRLR 145***.

23. Section 191 of the ERA expressly defines those parts of the ERA which apply to those in Crown Employment. The provisions of section 86 to 89 of the ERA are not included.

Analysis and conclusions

24. The parties accepted that the contract included a term for payment in lieu of notice in circumstances in which an employee was having his employment terminated on grounds of incapacity through ill health. The issue was about the rate of pay. That involved construing the terms of the contract prior to the transfer taking place to NOMS (of the respondent) on 1 June 2014

25. It had been suggested by Ms Gray and Mr Paskins in correspondence with the trade unions of 16 and 17 November 2016, that because of the constitutional position of the Crown, those working in the civil service could not demand notice as of right when their appointments terminated. It was said that the transfer of existing terms was qualified by the STS to those *consistent with employment in the civil service of the State* and so no such notice entitlements could have survived the transfer.

26. This was not a position which was pursued by the respondent in the hearing; with good reason. Firstly, Mr Serr acknowledged that civil servants had legal entitlements to notice. These were not those contained within the ERA, because of the provisions of section 191[i], but those were provided for in the Civil Service Management Code and, in certain circumstances, under the Civil Service Compensation Scheme. Secondly, the qualification as to the transfer of terms and

conditions under paragraph 4(4) of the STS *so far as may be consistent with employment in the civil service* did not have the effect of defeating any more beneficial or alternative term or condition which was not replicated in the same form of a person in the employment of the Crown. Since 1 June 2014 NOMS and the trade unions have been engaged in a process of seeking to agree harmonisation of terms with other employees of the Crown, in particular those employed by in the prison service. Paragraph 11 of the STS specifically recognised the rights to harmonise terms and conditions. In his evidence, Mr Rogers gave the example of the term concerning the right to maternity and paternity pay which had been carried over. Before and without any subsequent agreement, the pre-transfer benefits continue to apply. One other example is the discussion to align notice periods. The respondent wished to extend the longest period of notice entitlement to 13 weeks for those employees who had transferred from their former contractual entitlement of 12 weeks. This was resisted by the unions, because they were concerned it would have the consequence of forgoing rights as to pay in lieu of notice in cases such as the claimant's.

27. The qualification as to those terms and conditions which transfer *so far as may be consistent with employment in the civil service* is to cater for incompatibilities with service of the Crown for public policy reasons such as a restriction on taking part in political activities. It does not have the effect of preventing the contractual right to pay in lieu of notice, as contended for, from transferring. If, on the other hand, there had been no such contractual right, the rights contained in section 87 and 88 of the ERA would not have applied after the transfer, because of section 191 of the ERA.

28. The starting point for the construction of the contractual terms is the collective agreement embodied in the National Agreement on Pay and Conditions of 31 May 2014 (NAPC); the basis for the 'textualism' referred to by Lord Hodge in ***Wood***. It was agreed by the parties that, as properly construed and where apt, these had been incorporated into the individual contracts of employment of the relevant employees. Neither party was able to produce a written copy of the claimant's terms of engagement or any other example of such particulars. The Tribunal was informed these could not be retrieved from the database of the respondent.

29. Section A of the NAPC contained provisions for notice. Under paragraph 11, headed 'Termination', "*A probation trust may exceptionally dismiss an employee with or without notice on the grounds of gross misconduct and may, for sufficient reason, terminate an employee's appointment by giving her or him not less than the statutory minimum period of notice subject to this being a minimum of one calendar month".* The statutory periods of notice were then set out in tabular form.

30. Section A8 contains provisions for the sickness scheme. An employee who was absent from duty owing to illness was entitled to pay for a defined period at different rates, depending on the level of continuous service. The maximum was 6 months' full pay and 6 months' half pay after 5 years' service, with a discretion to extend that in exceptional cases. Paragraph 26 of that section states, " *The provisions of this section shall cease to apply to an employee on the termination of her or his employment in pursuance of the Superannuation Act applicable to his or her case, whether by reason of permanent ill-health or infirmity of mind or body or by reason of age, but without prejudice to the right of an employee whose employment is terminated by reason of permanent ill-health or infirmity to receive the period of notice provided by her or his contract of service".*

31. Annex A to the NAPC provided that transferring staff would become civil servants from the point of transfer and be subject to the requirements of the Civil Service Code, the Official Secrets Act, the Civil Service Management Code and Business Appointment Rules.
32. The language of the text, contained in the NAPC, is silent on the question of whether payment at the normal rate was an entitlement for those who were unable to work notice because they were off sick. I was told and accept that all employees received such payment on termination prior to 1 June 2014. That is material to the contextualism, or factual matrix, referred to by Lord Hodge in ***Wood***. Ms Gray said that reflected no more than the statutory entitlement, pursuant to section 88 of the ERA, and was no indicator as to any contractual right. Mr Brittenden submits that the wording of NAPC would inevitably lead the parties to understand that there was not only a contractual entitlement to notice which was no less generous than the statutory equivalent in section 86 of the ERA, but also the same right within section 88 of the ERA, as reflected by the practice not only prior to the transfer but also subsequent to it. Furthermore, he submits, paragraph 26 of the sickness scheme was obviously designed to preserve rights relating to the notice period under the contract. It would be meaningless, he submits, if there was no right to protect. Employees who had permanent ill-health or infirmity would have exhausted their sick pay entitlement in most cases. Receipt of normal pay during their notice period was the only conceivable right of any value which paragraph 26 was designed to preserve.
33. Mr Serr contends that if this right were contractual, one would have expected it to have been clearly articulated within the NAPC. He submits that the absence of any express reference to that entitlement is fatal to the argument that it was the common intention of the parties to include such a term. In respect of paragraph 26 of the sickness scheme, he contended that it would specifically have referred to normal pay during the notice period if that had been intention of the parties. He makes the point that it only refers to those affected by the Superannuation Act and does not address those who may be dismissed for incapacity who do not qualify for any retirement pension.
34. I prefer the submissions of Mr Brittenden. Having regard to the text and the context I find there to have been a common intention to include a contractual right both to periods of notice and notice pay comparable to that provided within section 88 of the ERA.
35. Section A of the NAPC created a contractual entitlement to notice which was at least the equivalent of the statutory right under section 86 of the ERA; but it went further. There was, in all cases, a minimum of one month's notice. Under the statute an employee would have had to work for 4 continuous years to build up such a right and have worked for at least one month. The contractual entitlement to a month arose from the outset, day one.
36. There was no suggestion that prior to transfer the payment of sick pay during the notice period was restricted to those who qualified by reference only to the statutory criteria. For example, an employee who had worked for 3 years and who became permanently unfit to work would be entitled to pay at the normal rate of a month's notice under his contract. Such an employee would not qualify for such a payment under the statutory scheme. That is because section 87(4) of the ERA disapplies the section 88 entitlement in circumstances in which a week or more notice than the statutory entitlement is given. That employee would have received one months' notice under his contract which is more than a week greater than his

statutory entitlement. That defeats the point made by Ms Gray that any payments of normal pay during notice to those who had exhausted their sick pay but were unable to work because they were sick had been no more than a reflection of the former employer, the Probation Trust, discharging its statutory duty under section 88 of the ERA. In that example, for the reasons given, there would have been no such statutory entitlement.

37. Mr Serr responded to this point by submitting it was a hypothetical situation which was not established by any actual example in the evidence. This would have some force if I were assessing whether the term could be implied by custom and practice. The number of instances of the application of the custom or practice is an important factor in determining whether it had assumed, by implication, a contractual right.

38. In contrast, construing the meaning of a contract by reference to its text and the context involves assessing what the parties understood, or a reasonable person would have taken them to understand, at the time the contract was made. The evidence from Mr Rogers, as confirmed by Ms Gray herself in her letter of 16 November 2017 to the trade unions, was that staff on reduced pay had previously reverted to normal pay when notice was given. It was not that most staff had received such pay, but not those who had three or fewer years of service. In other words, the understanding was that all would have received their normal pay in lieu of notice. Admittedly, I have no evidence form the National Probation Trust which employed the claimant prior to 1 June 2014, but I must rely upon the evidence I have. I am satisfied, particularly given Mr Rogers involvement at the time, that the evidence I have is sufficient to make the finding about the understanding of the parties.

39. I accept the argument of Mr Brittenden that the inclusion of paragraph 26 of the sick pay scheme would have been pointless, or otiose, if it was not carving out for protection an entitlement which the contract of service had already included. Taken in the round, the reference under paragraph 11 of Section A to '*not less than the statutory minimum period of notice*' was a shorthand way of referring to the statutory rights relating to notice as to both its duration and what amounts were to be paid. That wording is plainly incomplete and insufficient to allow of such an interpretation of itself, but considered in the wider context which I have set out is what, objectively, the parties intended. It is reflected by what was done by the employers before the transfer. The context for what was reduced to writing in the NAPC includes what happened over many years of the employment relationship. Infelicity of language in the text is illuminated by the background.

40. It was also the approach taken by managers of NOMS after the transfer, for a period of nearly two and a half years, until November 2016. Strictly speaking, it can be said this is of no assistance, because I am considering the common intention of the contracting parties, not the employer to whom the employees transferred. Its relevance is limited to reflecting what the respondent's managers, as reasonable people, took to have been the common intention of the former employers and the contracting employees.

41. It is open to the respondent to suggest that what occurred in practice was a misunderstanding or a mistake about the true contractual position and what the parties had intended. For the reasons I have provided I do not accept that was the case. Nor is it a position which the respondent has taken previously. Ms Gray wrote to the unions on 22 August 2018 concerning a pay offer. In a detailed and carefully worded letter she included a section about '*Alignment of terms and conditions'*. She

made reference to pay in lieu of notice which the respondent wished to align with the practice of the civil service. She wrote, at paragraph 25, "*At present there is no clear policy on the calculation of the payment, and the NPS applies the statutory minimum notice period when exceptionally considering PILON, and applied the full rate of pay, even where the individual may have dropped onto half or nil pay due to a long period of absence. This is an anomaly, not consistent with HMPPS and wider Civil Service policy and is in scope for alignment".* She also expressed the wish to extend the notice period to 13 weeks for those in employment for 13 years or more, as a further alignment with HMPPS policy. After November 2016 the unions had made it very clear that they did not agree with the change which Ms Gray had put into effect and they disputed that it reflected the correct legal entitlement of their members. I recognise that her observations are contained within a document which sets out areas for discussion and negotiation. That said, the reference to it being '*in scope for alignment*' is not consistent with the case advanced before me, that there was no such contractual entitlement. The term would already have been a common one needing no further discussion.

42. I therefore find that the sum properly payable to the claimant during his notice period was his normal pay, notwithstanding his entitlement to sick pay had expired by the time his notice was given on 16 April 2018. There was therefore an unauthorised deduction from his pay. The respondent breached the claimant's contractual entitlement to notice pay. The parties agreed the GROSS sum would be £6,316.56, SUBJECT TO THE USUAL STATUTORY DEDUCTIONS. No right to set off arises under Part II of the ERA.

43. In the light of my finding, it is unnecessary to consider the alternative arguments concerning implication of terms.

Employment Judge D N Jones

Date 29 July 2019