



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Anderson

v

Churchill Contract Services Limited

Heard at: Cambridge

On: 5 July 2019

Before: Employment Judge Tynan

Appearances

For the Claimant: Mr H Anderson Smith (lay representative)

For the Respondent: Mr R Kerr, Consultant

RESERVED JUDGMENT

1. The Tribunal declares that the Claimant's complaint under Section 23 of the Employment Rights Act 1996 is well founded.

RESERVED REASONS

1. The Claimant, Miss Anderson, claims that she is owed arrears of pay. She made a claim to the Employment Tribunal on 10 April 2018. She was represented at the hearing by her son.
2. Miss Anderson has significant difficulties with reading and writing. It is possible that she is entirely illiterate. She also has difficulties with numbers. When she gave her evidence at Tribunal it was clear that Miss Anderson has significantly impaired communication skills. That is perhaps not surprising given that she struggles to read and write. Mr Anderson Smith sat alongside her as she gave her evidence and read extracts from the documents to her. Even with his considerable assistance she could not participate fully in the hearing.
3. I reserved my Judgment so there would be a detailed written record of my decision that Miss Anderson's son could read to and explain to her.
4. It seems to me that this claim may well have ended up at a hearing precisely because Miss Anderson lacks the necessary communication skills to be able to raise any concerns effectively with her employer or to understand

any explanations given to her. I do not intend this as a criticism of the Respondent (who I will refer to as Churchill), but having seen Miss Anderson struggle at Tribunal to understand even basic questions and, in particular, the very significant difficulties she had in making sense of the letters, emails and pay slips to which she was directed, I would encourage Churchill to give further thought to how best to communicate with Miss Anderson in the future, including whether Mr Anderson Smith might be permitted to attend any important meetings or discussions. Even allowing for the fact that Mr Anderson is able to read letters on his mother's behalf, it may help to avoid future misunderstanding if he is given the opportunity to be present and also that all written communications with Miss Anderson are kept as simple as possible.

5. Miss Anderson had not made a written statement for the hearing. Given her impaired communication skills I doubt she is truly capable of making a detailed statement or of confirming its contents on oath. In accordance with the 'overriding objective' I proceeded on the basis that, with one important exception, I should accept the document at pages 46 – 51 of the hearing bundle in lieu of a formal statement from Miss Anderson and that it should be treated as if it was her evidence in this matter. Having first considered both side's representations, I decided however that this would not extend to allowing Miss Anderson to amend her claim. I reached this decision in accordance with the principles laid down in the case of Selkent Bus Company Ltd. v Moore [1996] IRLR 661. Mr Anderson Smith wanted to pursue a claim on his mother's behalf for unpaid holiday. However, Churchill came to the hearing unaware this was his intention. In particular, there was no claim to holiday pay in the claim form that Mr Anderson Smith had completed and submitted on his mother's behalf.
6. In deciding not to allow the claim to be amended I noted that there had been a Case Management Hearing on 4 December 2018 when Employment Judge Ord had clarified the issues in the case. I refer to paragraph 4(ii) of the Case Management Summary at page 28 of the hearing bundle. This records that further and better particulars were needed and also that the claim needed to be amended. Paragraph 4(iii) records the basis of the claim. Holiday pay was not identified as forming part of the claim (even once amended). Employment Judge Ord had given Miss Anderson until 11 January 2019 to amend her claim. An amended claim was never submitted. On 29 January 2019 Judge Ord made an Unless Order as Miss Anderson had failed to provide the further and better particulars that had been identified as needed at the Case Management Hearing. It seems that Employment Judge Ord allowed Miss Anderson a further opportunity to amend her claim as long as she first provided proper particulars of each and every payment she said she was due, but had not been paid. If she provided this information she could then seek permission to amend her claim, though Employment Judge Ord made clear that she would have to notify Churchill of this. No such notice was given to Churchill. Instead, Mr Anderson Smith simply applied at Tribunal for the claim to be amended. In my judgment this in itself would justify refusing the application to amend.

7. However, the matter does not finish there. It seems there was further correspondence with the Tribunal because on 12 May 2019 the Tribunal wrote to the parties at Employment Judge Ord's request. That letter is at page 34 – 35 of the Hearing Bundle. There is still no mention of a holiday pay claim in that letter. Notwithstanding Miss Anderson had originally been expected to amend her claim by 11 January 2019 and had been given a further opportunity to do so in the Unless Order, Employment Judge Ord gave Miss Anderson a further opportunity to clarify her claims. However, this was on the basis that she would set out in schedule form the monies she believed she should have been paid. Employment Judge Ord made clear that a full and proper explanation of the calculation must form part of the Claimant's witness statement. As I have noted already, there has been no such witness statement.
8. Mr Anderson Smith accepted before me that it had not been made clear to Churchill or to the Tribunal that there would be a holiday pay claim. It is evident from Mr Scott and Ms Hutchinson's statements on behalf of Churchill that Churchill had not prepared for the hearing on the understanding that they would have to explain what holiday Miss Anderson was entitled to and had taken in 2016, 2017 and 2018 and what holiday pay she had received. I decided that it would be unfair and unjust to expect Churchill to have to deal with a holiday pay claim stretching back over three years when it had not been given prior warning of the claim and would not be in a position to refer to its HR or payroll records at Tribunal. There is an obvious potential injustice to Miss Anderson if she has not in fact been paid her full holiday pay entitlement, but as she has had over a year in which to let Churchill know that she believes she is owed holiday pay, I concluded that Churchill would suffer greater unfairness and injustice if I allowed the claim to be amended on the day of the final hearing.
9. In which case, Miss Anderson's claim against Churchill remains as set out at paragraph 4(iii) of the 4 December 2018 Case Management Summary.
10. Having heard Miss Anderson's evidence at Tribunal, I believe her concerns can be very simply stated. She was employed by Cambridge City Council for many years. As I explain shortly, unless she worked overtime, Miss Anderson received the same amount of pay each month. After she TUPE transferred from Cambridge City Council to Churchill this changed. Her pay then fluctuated every, or almost every, month. To this day she does not understand why. Churchill have tried to explain this to her but her impaired communication skills have made it almost impossible for her to understand what has happened. I can understand why the changes in the way she is paid may have caused her worry and uncertainty, and led her to question whether she has been correctly paid. When she was employed by Cambridge City Council, Miss Anderson had certainty; she knew what monies to expect each month. I can well understand why that certainty would be especially important for someone such as Miss Anderson who has difficulties with reading and writing and with numbers. It is reasonable to assume that those difficulties mean that Miss Anderson also finds it more difficult to manage her financial affairs.

11. I can deal with Mr Scott and Ms Hutchinson's evidence briefly. I accept their evidence without reservation. Mr Scott has provided a helpfully clear explanation of how Miss Anderson's monthly pay was worked out when she was at Cambridge City Council. Sadly, Miss Anderson cannot fully understand that explanation. In summary, before the start of each financial year in April, Cambridge City Council would calculate Miss Anderson's pay for the whole year ahead, taking account of various enhancements to her hourly rate of pay for Saturday, Sunday and Bank Holiday working. Cambridge City Council were able to do this calculation because it had Miss Anderson's fixed roster for the year ahead. It could work out her annual pay and then divide that figure by 12 to arrive at a fixed monthly amount with the result that Miss Anderson's pay did not fluctuate from month to month according to how many Saturdays, Sundays and Bank Holidays she worked in any given month. It only fluctuated to the extent that she worked additional overtime.
12. Churchill stopped this arrangement as soon as Miss Anderson transferred to it under TUPE. Instead, it paid Miss Anderson each month according to the days and hours she actually worked. Again, Miss Hutchinson's statement is helpfully clear. I am in no doubt that, with the exception of an underpayment of £675.64 as a result of a genuine error on the part of Churchill that was made good on 23 March 2018, the Claimant has been paid for the days and hours she has worked since she transferred to Churchill and that, over the course of any given year, her total pay at Churchill works out exactly the same as she would have been paid by Cambridge City Council. It is just not paid in 12 equal monthly instalments.
13. It seems there was a marked difference between what Miss Anderson was paid by Cambridge City Council during the first two weeks of June 2015 and what Churchill paid her during the second part of that month. Miss Hutchinson explains why this is at paragraph 28 of her witness statement and her explanation makes absolute sense. The payment from Cambridge City Council was artificially high but reflected a high level of bank holiday and other unsociable weekend working during April, May and June that year. Unfortunately, this was too complex for Miss Anderson to understand. Four years later she still does not understand why her pay in the second half of June was so much lower than in the first half of the month. However, the difference in pay is evidence to her that something is not right.
14. Churchill seem not to have given consideration to the fact that the change in Miss Anderson's pay arrangement contravenes the TUPE Regulations, specifically the protections given to employees under Regulation 4(4). Churchill did not adduce any evidence to the effect that there had been a legally effective variation of Miss Anderson's contract of employment that was either unrelated to the TUPE transfer or which was for an economic, technical or organisational reason entailing changes to the workforce. I note that Clause 5 of Miss Anderson's statement of written particulars (pages 53 – 61 of the Hearing Bundle) states that she would be paid monthly in 12 equal payments, an arrangement that seems to have been in place over many years. I find that the averaging arrangement which is described so

clearly by Mr Scott in his witness statement was a term of Miss Anderson's contract with her employer. There is no evidence before me that this term has been varied since Miss Anderson transferred to Churchill, even though they have not honoured the arrangement in practice.

15. Turning to Miss Anderson's specific complaints as identified by Employment Judge Ord on 4 December 2018:

a. & b. Alleged failure to pay for sickness absence at her full rate of pay on days when the Claimant was sick and / or payment of statutory sick pay on certain days when Miss Anderson was in fact working

If Miss Anderson is sick, she is entitled to her full pay for up to 6 months' sickness absence in any year. Clause 10 in her Statement of Written Particulars (page 56 of the Hearing Bundle) is clear that her entitlement is subject to complying with the rules of the sick pay scheme. These rules include a standard requirement that Miss Anderson must complete a self-certification form for sickness absence of up to 7 days and provide a medical certificate (or fit note) for sickness absence lasting 7 days or longer. In Miss Anderson's case it seems that the rules have been informally adjusted to accommodate her difficulties in reading and writing. Miss Anderson rings in if she is sick and when she returns to work she will be asked to sign a self-certification form which has been completed by her manager for her. The reality is that she cannot complete a self-certification form for herself. Having heard Miss Anderson's evidence I am satisfied that she always phones Churchill to let them know if she is unwell and that she signs whatever is asked of her on her return to work as confirmation that she has been absent. It seems to me entirely possible that there may have been occasions when the form has been over-looked because Miss Anderson is wholly reliant upon her manager to complete it for her. Be that as it may, Miss Anderson has not put forward any specific evidence to support her claim to unpaid sick pay. The only details which have been provided relate to June 2015. However, and as Employment Judge Ord also explained at the hearing on 4 December 2018, section 23(4)(a) of the Employment Rights Act 1996 limits any claim to the period of two years preceding the date that any claim is filed with the Tribunal. Accordingly, I cannot consider any claim by Miss Anderson for unpaid wages prior to 10 April 2016. I have no jurisdiction to consider any complaint relating to June 2015. Miss Anderson's claim therefore fails for this reason alone.

c. Underpayment of enhancement payments allegedly due to her

I do not uphold this element of the claim. For the reasons above, I agree with Churchill's analysis in its letter of 17 October 2017 and accept Ms Hutchinson's evidence. Churchill correctly identified that as a result of an error the Claimant had been underpaid the sum of £675.64 and this underpayment was made good on 23 March 2018.

- d. Unlawful deduction equating to 5 minutes' pay in respect of the Claimant's lunch break each working day

Miss Anderson's 2005 Statement of Written Particulars refers to a daily lunch break of 55 minutes (which is unpaid). However, in calculating Miss Anderson's pay, Churchill have treated her as taking a one-hour unpaid break. The question I have to decide is whether and, if so, when Miss Anderson's contract was varied. Mr Scott believed it had been varied when she was employed by Cambridge City Council but could not give definitive evidence on the point. However, Mr Scott was able to confirm and I accept his evidence in this regard, that before her employment transferred from Cambridge City Council to Churchill, the Council calculated her pay on the basis of a one-hour lunch break. In which case, I am satisfied on the balance of probabilities that Miss Anderson's contract of employment was lawfully and effectively varied at some point during her employment by Cambridge City Council, so that she became entitled to an increased unpaid daily lunch break of one hour. If she has not been in the habit of taking her full lunch break whilst at Churchill, that is not because Churchill have prevented her from doing so. On the contrary, they have been paying her on the basis that she was taking a one-hour break. I am not satisfied that Miss Anderson has been working five minutes each day in excess of her contracted hours at Churchill's request, and in those circumstances, I do not uphold her claim that Churchill has been making an unlawful deduction equating to five minutes' pay for every day that she has been working for them. As a result of this Judgment Miss Anderson will at least have the certainty of knowing that she is entitled to a one-hour break each day.

- e. Failure to pay salary etc in 12 equal monthly instalments throughout the year

Section 13(3) of the Employment Rights Act 1996 provides:

"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 the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."

Miss Anderson's contractual right, preserved on her TUPE transfer to Churchill, is to be paid one-twelfth of her projected annual earnings each month. It does not matter that over the course of a year she is paid by Churchill the same total amount she would have been paid had she had continued in Cambridge City Council's employment. The fact is there will have been months when her wages will have been less than the wages properly payable to her "on [that] occasion". Pursuant to section 13(3) of the Employment Rights Act 1996, each of those deficiencies amounts to an unlawful deduction from Miss Anderson's wages on that occasion. Section 24 of the

Employment Rights Act 1996 requires that I make a declaration to that effect and further requires that I order Churchill to pay to her the amount of any deduction made in contravention of section 13. I am supported in this conclusion by two decisions of the Employment Appeal Tribunal – Pendragon plc v Nota EAT 0031/00 and Laird v AK Stoddart Ltd 2001 IRLR 591. The fact that an employee has not suffered a reduction in the overall level of their pay does not excuse what is otherwise an unlawful deduction from wages. As the employers found to their cost in these two cases this can give rise to the potentially harsh outcome that an employer is ordered to make payments to an employee who has not suffered any financial loss. That is the case here.

16. Regrettably there is insufficient information before me to be able to make an Order under section 24(1)(a) of the Employment Rights Act 1996 and finally dispose of these proceedings. Unless the parties can agree the matter between themselves I shall require further information from them as to: (a) the monthly amounts the Claimant would have been paid on or after 10 April 2016 had she been paid in accordance with her established contractual rights on transferring to Churchill; and (b) the monthly amounts she was actually paid by Churchill, in order to calculate whether there was an unlawful deduction from wages on each occasion she was paid and, if so, the amount of the unlawful deduction.
17. I appreciate that this will not be an entirely straightforward exercise and accordingly I propose to allow the parties a reasonable opportunity to undertake the necessary calculations and to try to agree these between themselves. I shall separately issue further case management orders in case the parties are unable to settle the matter by agreement with a view to bringing the case back before me to determine what order should be made under section 24(1)(a).
18. In the meantime, unless and until Miss Anderson's contract is validly varied, if a further claim is to be avoided Churchill will need revert to the pay arrangements in place when Miss Anderson's employment transferred to it in 2015 and which are documented at clause 5 of the Statement of Written Particulars, namely a fixed monthly sum, to be calculated at the beginning of each financial year by reference to Miss Anderson's expected work roster for the year ahead.

Employment Judge Tynan

Date: ...21.08.19.....

Sent to the parties on: ..10.09.19.....

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For the Tribunal Office