EMPLOYMENT TRIBUNALS

Claimant: **Mr T Xerri**

Respondent: **ISS Mediclean Limited t/a ISS Facilities Services Healthcare**

Heard at: **Ashford**

On: **9th August 2019**

Before: **Employment Judge Pritchard**

Representation
Claimant: Ms C Meenan, counsel
Respondent: Mr O Tahzib, counsel

RESERVED JUDGMENT

1 The correct name of the Respondent is ISS Mediclean Limited trading as ISS Facilities Services Healthcare and the title to these proceedings is amended accordingly.

2 The Claimant's claim for breach of contract is dismissed upon withdrawal.

3 The Respondent made unlawful deductions from the Claimant's wages. The Tribunal makes an award of £227.06. The Respondent is ordered to pay this sum to the Claimant.

REASONS

1. The Claimant claimed unlawful deductions from wages. The Respondent resisted the claim.

2. The Tribunal heard evidence from the Claimant on his own behalf. The Tribunal heard evidence from the Respondent's witnesses: Chris Feeney (Head of People and Culture); and Russell Sherry (General Manager). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing the parties made oral submissions, Mr Tahzib making reference to his written skeleton argument.

The issues

3. The Claimant claims entitlement to payment for bank holidays which fall on days outside his usual shift pattern. The Respondent's case is that the Claimant is not entitled to payment for bank holidays falling on days he was not rostered to work.

4. At the date he presented his ET1 Claim Form, the Claimant claimed entitlement to payment for three bank holidays. The Respondent acknowledged that if the Tribunal were to find in the Claimant's favour, he would have a continuing entitlement. In light of this acknowledgment, the Claimant did not apply to amend his claim to add claims for payment of bank holidays which fell after the date of presentation.

5. The issue for the Tribunal is whether, by failing to pay the Claimant for the three bank holidays in question, the Respondent made deductions from wages which were properly payable to the Claimant.

Findings of fact

6. The Respondent is a large employer which contracts with various National Health Service Trusts for the provision of facility management services.

7. In September 2007, the Respondent concluded a collective agreement with the Unison, GMB and Unite unions at national level which set out the framework for the implementation of Agenda for Change whereby terms and conditions of employment would apply to staff employed by contractors which are no less favourable overall than those which apply to NHS staff**.** It was agreed that annual leave entitlement, in particular, would apply when funding was provided by the local NHS Trust.

8. In 2009, following negotiations between Unison, the Respondent and South London Healthcare NHS Trust, the Respondent agreed to implement the following:

Bank Holidays if not required to Work	Paid for standard hours at single rate (pro rata) if part time
Bank Holidays if required to Work	Paid for worked hours at double time (pro rata) if part time

9. The Claimant commenced employment with the Respondent in January 2009 as an Assistant Housekeeper. He continues to be employed by the Respondent as a Healthcare Cleaner at the Princess Royal University Hospital.

10. The Claimant's statement of main terms and conditions of employment which he signed in July 2009, provides:

HOURS OF WORK

Your contracted hours of work are 28. Normal working days and hours will be advised to you according to the roster in force

HOLIDAYS

You will be entitled to [ ] days holiday each year, exclusive of public holidays accrued on the basis completed months service. The leave year runs from January to December. Further details on holiday entitlements and the rules governing the booking of leave are set out in the accompanying handbook.

11. The Employee Handbook which sets out the terms and conditions of service provides:

HOLIDAY PAY

Your holiday entitlement is 22 days rising to 27 days after ten years service. To this is added 8 bank holidays on which those not required to work will receive a normal days pay.

From 1st April 2010, the following provisions will apply:

Entitlements are service related and in accordance with the following schedule:

Length of service	***Entitlement***
On appointment	*27 days*
After 5 years service	*29 days*
After 10 years service	*33 days*

In addition to the above, there are eight (8) public (bank) holidays for which employees who are not required to work on these dates shall receive a normal days pay.
…

In interpreting the terms and conditions of this employment, reference shall be made both: to the handbook (to the extent provided for within the National Agreement) and, to ISS Mediclean Limited standard terms and conditions of service.

12. During the first period of the Claimant's employment, his shift pattern required him to work Saturday to Tuesday each week. No issues arose as to his entitlement to payment for bank holidays in this period, not least because his shift pattern included Mondays, the day upon which most bank holidays fall.

13. In early 2011, the Claimant's shift pattern changed. By letter dated 25 January 2011 from the Respondent to the Claimant he was informed:

I write to confirm that with effect from Saturday 22nd January 2011 your hours of work are amended as follows:

Wednesday, Thursday, Friday, Saturday, Sunday 10.00 pm to 6.00 am

Your annual leave is amended as follows:

16 Weekends (5 extra)

6 Saturdays
5 Sundays

All other terms and conditions of contract remain unchanged.

14. The Claimant felt aggrieved that because he was not being paid for bank holidays falling on Mondays he was being treated less favourably than other full time staff working Monday to Friday and he raised the matter with the Respondent. It was not until August 2013 that Carol Davis, the Claimant's manager, and Michael Calder, General Manager, met with the Claimant to discuss his concerns.

15. By letter dated 30 September 2013, Carol Davis, wrote to the Claimant as follows:

> *With regards to the recent discussions regarding payment for bank holiday.*
>
> *You do not work on a bank holiday and are not contracted to do so but on this occlusion* [sic] *we have decided that we will allocate you a day off and that you will be paid at the flat rate.*

16. The Claimant's evidence was that Carol Davis and Michael Calder had agreed he should be paid in respect of each of the five static bank holidays, and when the other three bank holidays fell on his day off, he would be permitted to take a day off at a later time and be paid for it. The Respondent relied on the terms of the letter to suggest that the agreement was limited to a one-off management authorised payment.

17. There was also a dispute between the parties as to the number of days the Claimant was thereafter permitted to take as paid holiday in lieu of the bank holidays. The Claimant's evidence was that he was paid for bank holidays until Mr Calder and Ms Davis left the business in about May 2018 after which the payments stopped. The Respondent's evidence was that the days allocated to the Claimant as holiday related to his contractual entitlement excluding bank holidays falling outside his usual shift pattern – except for five days' paid holiday which was granted.

18. The wage slips and other documents placed before the Tribunal do not help resolve the issue. However, the Tribunal has had regard to the holiday records which suggest that the Claimant was paid for 28 days' holiday in 2013, 33 days in 2014, 32 days in 2015, 33 days in 2016, 37 days in 2017, and 29 days in 2018.

19. The Claimant was not paid in respect of bank holidays falling on 9 May 2018, 30 May 2018 and 27 August 2018.

20. The Claimant wrote to Mr Sherry on 4 June 2018 about the issue but in the absence of a reply raised a formal grievance on 21 June 2018. Mr Sherry did not hold a grievance meeting but gave a written reply on 28 June 2018 informing the Claimant that since he had raised the grievance before he was not prepared to hold a further grievance meeting.

Applicable law

21. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified his written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.

22. The phrase "properly payable" suggests some legal, but not necessarily contractual, entitlement. See New Century Cleaning Company Limited v Church 2000 IRLR 27 CA.

23. Mr Tahzib referred the Tribunal to the principles governing contractual interpretation set out in Investors Compensation Scheme Ltd v West Bromwich Building Society 1998 1 WLR 896 as follows:

    23.1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

    23.2. The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

    23.3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

    23.4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945

    23.5. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the

language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 1985 1 A.C. 191, 201:

> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

24. If the wording of a contract is ambiguous, the contract should be construed more strongly against the person relying on it (the contra proferentum rule);

25. The Tribunal may imply terms if they are reasonable and equitable, obvious or necessary to give the contract business efficacy, they do not contradict express terms, and they are capable of clear expression. For a practice to have become an implied contractual term by custom and practice, it must be reasonable (meaning fair and not arbitrary or capricious), certain (meaning that it must be clear cut) and notorious (meaning that it is known and understood); see Devonald v Rosser & Sons [1906] 2KB 708. The Claimant has the burden of proving of the existence of such a term. The question is whether the employer's conduct (including anything said by him) was such, viewed objectively, as to convey to the employee that he intended to be contractually bound. In Duke v Reliance Systems Ltd 1982 ICR 449 it was stated that a policy adopted by management cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period.

26. In Solectron Scotland Limited v Roper [2004] IRLR 4 it was stated that a custom or established practice applied with sufficient regularity may eventually become the source of an implied contractual term. That occurs where the point is reached when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystallised into contractual rights. The parties must be shown to be applying the term because there is a sense of legal obligation to do so. For example, if a practice is adopted because a party does so as a matter of policy rather than out of sense of legal obligation then it will not confer contractual rights. See also Park Cakes Ltd v Shumba [2013] EWCA Civ 974.

27. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where in proceedings to which the section relates (which includes proceedings for unlawful deductions from wages) an employer has unreasonably failed to comply with the ACAS Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award by up to 25%.

Conclusion

28. The Claimant advanced his case on three grounds, namely:

    28.1. That the express terms of his contract provide him with the entitlement to be paid for bank holidays regardless of whether or not they fall on within his normal shift pattern; alternatively,

28.2. That the Respondent orally agreed with him in 2013 that he would be paid for bank holidays not falling within his normal shift pattern; alternatively

28.3. That there was a term in his contract implied by custom and practice that he would be paid for such bank holidays.

29. The conditions of service contained in the Employee Handbook require reference to be made to both the handbook (to the extent provided for within the National Agreement) and to the Respondent's standard terms and conditions of service. The terms and conditions of service explain that the handbook means the Agenda for Change NHS terms and conditions of service handbook. That document was not placed before the Tribunal and accordingly the Tribunal has not had the benefit of being able to refer to it.

30. Applying the principles set out in Investors Compensation Scheme, the Tribunal finds the following background information relevant.

31. The Working Time Regulations 1998 were amended with effect from 1 October 2007 increasing the statutory minimum entitlement to paid annual leave from 4 weeks to 5.6 weeks, with a maximum entitlement of 28 days. This entitlement can include bank holidays. Although the parties told the Tribunal that the provisions of the Working Time Regulations were not applicable in this case, they provide background knowledge which would reasonably have been available to the parties at the time the contract was made.

32. Mr Feeney told the Tribunal that the terms and conditions of service had been issued to about 10,000 employees. A reasonable person would conclude that the Respondent, in particular given its size and resources, intended to comply with its legal obligations towards it employees.

33. It is unsurprising, therefore, that the terms and conditions of service provided, until 1 April 2010, an initial holiday entitlement of 22 days with 8 bank holidays added. In order to comply with its legal obligations before 1 April 2010 towards its full time employees, the Respondent would have been required to add at least 6 days' bank holiday (or the equivalent number of days) to the 22 days' holiday entitlement regardless of whether or not the employee in question was rostered to work on those added 6 days.

34. The initial holiday entitlement provided in the terms and conditions of service was increased to 27 days from 1 April 2010. This still fell short of the statutory entitlement for a full time employee unless at least one bank holiday (or equivalent day) was added. Ms Davis' letter of 25 January 2011 sets out the Claimant's entitlement to annual leave totalling 27 days. This is consistent with the Claimant's entitlement under the terms and conditions of service excluding bank holiday entitlement. The letter states that "all other terms and conditions of contract remain unchanged".

35. The terms and conditions of service in relation to employment both before and after 1 April 2010 provide that employees who are "not required to work" on bank holidays will receive a normal day's pay. In the absence of an amendment to the wording, it would be reasonable to assume that the parties objectively intended the meaning of those words to remain the same.

36. The terms and conditions of service make provision for change from time to time. Hours of work are as directed by the manager with prior consultation. When the Claimant's shift pattern changed, he was "no longer required to work" on bank holidays falling on Mondays.

37. Both before and after 1 April 2010, the terms and conditions of service provide for "entitlements" which include 8 public / bank holidays. The heading to the relevant provision in the terms and conditions is "Holiday Pay" which suggests that the provision is intended to convey more than a mere entitlement to the number of days' leave in a leave year.

38. Having regard to the relevant background and the natural and ordinary meaning of the words used, the Tribunal concludes that the terms and conditions of service, reasonably understood, provided the Claimant with an entitlement to be paid for bank holidays whether or not he was rostered to work them. It is enough that the Claimant was not required to work on bank holidays. Payment for bank holidays form part of his contractual, and hence legal, entitlement.

39. The case of McMenemy v Capita Business Services Ltd [2007] IRLR 400 referred to by the Respondent does not assist the Tribunal. The fact that, in that case, the employer would not pay employees who did not work on bank holidays does not lead to the conclusion that the interpretation contended for by the Claimant in this case does not accord with business common-sense. Indeed, it might be thought that the interest of harmonious industrial relations for an employer to provide equivalent paid annual leave entitlement to all full time employees regardless of whether they usually work on a bank holiday makes good business sense. McMenemy was a case concerned with the interpretation of the Part Time Workers legislation, not a contractual provision.

40. The fact that Mr Feeney was unaware of the argument about bank holidays having been raised in the past 12 years does not have any relevance to the issue to be decided.

41. The Tribunal concludes that the Claimant had a contractual entitlement to be paid on the three bank holidays he was not required to work and in respect of which he claims to this Tribunal.

42. To the extent that the words "not required to work" might be thought ambiguous, the Tribunal would in any event apply the contra proferentum rule. The Tribunal does not understand Mr Tahzib's comments during submissions that the rule has no application because the Respondent was not relying on the clause as a defence.

43. Having reached this conclusion, it is unnecessary for the Tribunal to consider the Claimant's alternative submissions.

44. The Respondent made deductions from wages properly payable to the Claimant. The Claimant's basic daily rate of pay was £60.55. The total unlawful deductions totals £181.65.

45. Mr Sherry unreasonably failed to comply with the ACAS Code of Practice by not holding a grievance meeting with the Claimant. It is just and equitable that the award be increased by 25%.

Employment Judge Pritchard

Date: 26 August 2019