EMPLOYMENT TRIBUNALS

Claimant		Respondent
DAVRON HACKNEY	**v.**	**RM ESTATES LIMITED t/a MALKINS BANK GOLF CLUB**

FINAL HEARING

Heard at: **Birmingham Employment Tribunal** On: **21 November 2019**

Before: **Employment Judge McCluggage**

Appearances
For the Claimant: **Mr Jones** (solicitor)
For the Respondent: **Mr Maratos** (consultant)

JUDGMENT

1. Pursuant to sections 11(2) and 12(2) of the Employment Rights Act 1996 the Tribunal determines that the following term is substituted in respect of the particulars provided by the Respondent in respect of sick pay in the Claimant's contract of employment:

   "Sickness: You are entitled to one month's full pay and (after 4 months' service) 2 months' half pay during your first year of service, rising to 6 months' full pay and 6 months half pay after 5 years' continuous service"

2. It is declared that the Respondent unlawfully deducted from the Claimant's wages the sum of £4,892.45.

3. The Respondent shall pay to the Claimant the said sum of £4,892.45 by 23 December 2019.

4. No increase to the award above is ordered pursuant section 38 of the Employment Act 2002 as it would be unjust and inequitable to do so.

REASONS

1. I am required to decide the Claimant's claims for:

    a. A determination of the correct term in his statement of particulars of employment in relation to sick pay pursuant to 12 of the Employment Rights Act 1996.
    b. Unlawful deductions pursuant to section 13 of the Employment Rights Act 1996.
    c. An award in respect of a failure to provide an accurate written statement of employment particulars under section 38 of the Employment Act 2002.

2. I was provided with an agreed bundle of documents.

3. Witness statements were provided by each party. The witnesses were:

    a. From the Claimant, who also gave oral evidence.
    b. From Collette Doyle of the Respondent, whose statement was agreed and so did not need to give oral evidence.

4. The Claimant had made an application to strike out the Response on 26.9.19. This was on the basis that the Respondent had supplied documents 1 day after the date ordered by the tribunal, serving the documents on 25.9.19 when they were due on 24.9.19. On reflection the Claimant decided not to pursue that aspect of the application. The application was extended orally to include the fact that the Respondent had only served the witness statement of Ms Doyle at 7pm on the evening before the final hearing and in unsigned form. I observed that it was not for the Claimant to strike out but for the Respondent to apply for permission to rely upon a statement served in what appeared to be unsatisfactory circumstances. On close perusal of what was a very short statement, Mr Jones acknowledged that it said nothing controversial and at its highest referred to a document minuting a meeting some years earlier at which the witness was not present and indeed prior to her joining the Respondent. Given that the statement did not take the matter any further forward, Mr Jones saw that the most efficient way forward was simply to agree the evidence and thus obviate the need for Ms Doyle to be called at all. As there was no request for Ms Doyle to give evidence beyond the remit of her statement that was the end of the issue.

5. I granted permission for the ET1 and Amended Schedule of Loss to be amended to bring the loss suffered by the Claimant up to date. A sum of £4,892.45 in unpaid sickpay was sought.

Facts

6. After hearing evidence and submission, I found the following facts:

6.1 The Respondent is a limited company which operates a golf club.

6.2 The golf course/club was initially a 'public golf course' run by Cheshire East Council, who were the Claimant's employer.

6.3 The Claimant initially worked as an assistant club shop manager and then later his job title was changed to "Golf Club Assistant", evidenced by a letter from Cheshire East Council dated 2 August 2011.

6.4 On 30 August 2011, Cheshire East Council sent a Statement of Written Particulars to the Claimant in respect of his role as Golf Club Assistant. This annexed "General Terms and Conditions of Employment" which contained a term as to Sickness Absence (section 9) which read:

> You are entitled to one month's full pay and (after 4 months' service) 2 months' half pay during your first year of service, rising to 6 months' full pay and 6 months half pay after 5 years' service …

6.5 In 2011 the club was sold to a private entity, the Respondent. There has been a recent change of senior management and ownership.

6.6 According to a council letter, on 1 September 2011 the Claimant's employment was transferred to the Respondent pursuant to the *Transfer of Undertakings (Protection of Employment) Regulations 2006* ('TUPE').

6.7 In the letter advising the Claimant of the transfer from the council it was expressly said that terms and conditions would stay the same unless there was an economic, technical or organisational reason entailing changes in the workforce.

6.8 In an undated letter from Mark Wheelton, the Leisure and Greenspace letter, it was then said that the transfer was to be effective on 1 October 2011. I conclude that this was the likely date of transfer.

6.9 The Respondent produced a new contract of employment, informally referred to during the hearing as 'the Malkins contract'. This was sent to the Claimant on 21 February 2012 (page 64 of bundle). The covering letter was curiously worded. It purported to be an offer of employment of "Golf Club Assistant" though this was already the Claimant's job title. The letter states:

> "Your employment continues on from your Cheshire East Contract which commenced on 1st April 2002 subject to:

Please see below for details of items enclosed with this letter together with information we need from you:

Enclosure/document	What you need to do
Your contract	Sign and return"

6.10 The letter did not draw attention to the fact that the written document contained significant differences to the existing terms.

6.11 For present purposes the relevant term pertaining to "sickness and absence" in this document stated:

> "Subject to eligibility, the Company will pay statutory sick pay (SSP) in the event of absence due to ill health, but that the first two weeks of any eligible time off due to ill health are to be at the Employee's full weekly pay and with the additional amount paid over and above the statutory sick pay for this period to be repaid to the Company as banked hours based on the Employee's hourly rate…"

6.12 Plainly, this was much less favourable that the Cheshire East existing term.

6.13 The Claimant signed the Malkins contract on 28 March 2012 and sent it to the Respondent. His evidence within his witness statement was that he was told he should sign and return it and he said in oral evidence that he did not read the contract before doing so.

6.14 In October/November 2014 the Claimant was off sick, from 27 October 2014 to 10 November 2014. There were two return to work meetings, the first on 8 November 2014 and a second on 14 November 2014.

6.15 The Claimant met with Mr Kevin Read, a director of the Respondent on both meetings.

6.16 A handwritten note of the first meeting (p74 of bundle) was not illuminating as to the issues I had to consider. The second meeting on 14 November 2014 was relevant. The handwritten minute of the meeting (p75 of bundle) stated Mr Read said that the Claimant would be paid 3 weeks SSP until 18th November and any excess due would be deducted from the hours banked by him to the company.

6.17 There was reference to the Claimant being given a copy of his contract and the staff handbook as requested by him.

6.18 I concluded that the Claimant will have been aware at this time what the 'Malkins
Contract' had said. Though the Claimant was cross-examined about what happened

at the meeting and sought to recollect some details, I was satisfied he could remember nothing of substance about it.

6.19 The Claimant's job title changed twice more in the years following but he was not issued with any further contractual documents. On 29 March 2016 his job title became "Memberships Manager" but this was only a change of job title. In April 2017 his job title changed again.

6.20 The Claimant was off work initially on bereavement leave from January 2019 and then on sick leave from 15 February 2019. There were various employment issues arising between him and the Respondent around this time and in due course he raised a grievance dated 5 April 2019. One of the issues raised was his entitlement to sick pay. It is plain from the grievance letter that the Claimant had received legal advice by this time and there is mention of TUPE and that his original Cheshire East terms should be reserved.

6.21 The Respondent did pay the Claimant a sum of £1,360 as a 'goodwill gesture' on 16 April 2019 which the parties accepted was to be set off against any sum of sick pay found to be unlawfully deducted.

6.22 Within the grievance procedure, initially and on appeal, the Respondent concluded that the Claimant was bound by the new March 2012 contractual terms signed by him and thus asserted he had been paid the appropriate amounts.

6.23 I heard no evidence relating to an Economic, Technical or Organisational reason that might have been applicable in 2011/2012 and so was unable to make any factual findings on such an issue.

Law

7. Section 13 of the Employment Rights Act 1996 gives an employee a right not to suffer unlawful deductions. Wages includes sick pay.

8. Part I of the Employment Rights Act 1996 requires an employer to provide written particulars of employment covering a range of important terms including particulars of entitlement to sick pay [s.1(4)(d)(ii)]. Section 11 of the Act entitles an employee to bring a reference to an Employment Tribunal to determine what term should be included within particulars and section 12 empowers the tribunal to confirm, amend or substitute a relevant term.

9. Section 38 of the Employment Act 2002 requires an employment tribunal to make payment of a minimum amount of two weeks' pay and up to four weeks' pay if just and equitable, where the employer was in breach of his duty under section 1(1) or 4(1) of the Employment Rights Act 1996 save if there are exceptional

circumstances which would make an award or increase under the section unjust or unequitable.

10. The TUPE Regulations 2006 apply where there had been a relevant transfer of an undertaking where there is a transfer of an economic entity which retains its identity [regulation 3(1)].

11. Regulation 4(4) and (5) of the Regulations state:

> (4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.
>
> (5) Paragraph (4) does not prevent a variation of the contract of employment if—
>
> (a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
>
> (b) the terms of that contract permit the employer to make such a variation.

12. The well-known ECJ case of Foreningen Af Arbejdsledere I Danmark v. Daddy's Dance Hall [1988] 315 held that a worker cannot waive the rights conferred upon him by the mandatory provisions of the Transfer of Undertakings Directive (as was then in force).

13. Delabole Slate Ltd v. Berriman [1985] IRLR 305 is authority for the proposition that the change in the workforce is part of the economic, technical or organisational reason required by regulation 4(5) of TUPE. Merely rationalising contracts, for example, by producing consistent rates of pay across a workforce would not satisfy this definition.

14. In Hazel v. The Manchester College [2014] EWCA Civ 72, the Court of Appeal confirmed that the effect of Council Directive 2001/23/EC was that the right of employees to preserve their existing terms must prevail over the interest of the employer in achieving harmonisation when 'connected with the transfer' (see §28, per Underhill LJ).

15. In Wilson v. St Helen's Borough Council [1998] ICR 1141 the House of Lords held that a variation may be ineffective due to (what is now) regulation 4 even if the variation comes at a time after the transfer.

Analysis

16. The Respondent raised limitation/jurisdiction issues in submissions. The thrust of the argument was that it was unfair to require the Respondent to show an

Economic, Technical or Organisational reason given the relevant transfer occurred back in 2011, the 'Malkins contract' was signed in 2012 and the company had recently been taken over with significant senior management staff turnover. However, as the Claimant correctly riposted in closing submissions, this was not a submission based on legal principle. I agree that the claim was brought in time in respect of both the unlawful deduction claim by virtue of section 23(2) and (3) of the Employment Rights Act 1996 and in respect of the section 11 Employment Rights Act 1996 claim pursuant to s.11(4) which allows the claim to be brought up to 3 months after employment has ceased. This claim was commenced prior to termination of employment. I note generally, for the Respondent's benefit, that the employment tribunal as a creature of statute is not permitted to depart from the primary statutory timescales for bringing a claim on a general equitable basis in absence of an express statutory power to do so. There is no such power in respect of these claims and indeed I am unaware of such a power elsewhere within this jurisdiction. The practical reality is that the residual effects of a TUPE transfer would have been a subject for due diligence for the new purchasers of the business.

17. There was no dispute between the parties that there had been a valid transfer of the golf course business in terms of an economic entity pursuant to TUPE in 2011.

18. Where identification of the correct sick pay term is concerned, the question is whether the 'Malkins contract' (see paras 6.9 to 6.13 above) was effective in varying the existing sick pay term which was otherwise intact following the transfer by virtue of regulation 4 of TUPE.

19. Pursuant to regulation 4(4) of TUPE as set out above, any variation of a contract of employment is void if the sole or principal reason for the variation is the transfer. Though there was no direct evidence on the subject, I conclude that it is overwhelmingly likely that the sole or principal reason for the 2012 variation was the transfer given the contents of the Respondent's letter set out at para 6.9 above and the timing of the change, only 4 ½ months post-transfer.

20. The question is then whether the Respondent can show that the attempted variation had as its sole or principal reason an ETO reason entailing changes in the workforce.

21. The difficulty for the Respondent is that no evidence going to ETO considerations was placed before the Tribunal and as noted above I was so unable to make any relevant factual findings. The highest the Respondent's representative could put it in submission was that the new term was cheaper. That does not involve changes in the workforce as required by regulation 4(5) as interpreted by Delabole.

22. The fact that the Claimant signed the 'Malkins contract' is neither here nor there given the Daddy's Dance Hall principle. As I pondered out loud during submissions, while acquiescence might allow for variation in some contractual contexts, it would be difficult to envisage circumstances in which a party could effectively acquiescence to a term void in law by reason of reason of statute.

23. Thus I conclude that the Cheshire East sick pay term was the relevant term within the Claimant's contract of employment.

24. Accordingly, using my power under section 12 of the Employment Rights Act 1996 I determine that the wording of the clause of the Cheshire East contract set out at paragraph 6.4 above is to be substituted within the particulars provided by the Respondent in the Malkins contract.

25. It follows that there has been an unlawful deduction of wages, as the Claimant's sick pay was not paid in accordance with that term. As the arithmetic was agreed by the parties, I order the Respondent to pay to the Claimant the amount of the deductions totalling £4,892.45.

26. While considering the mandatory requirement of section 38 of the Employment Act 2002, I have concluded that this is one of those rare situations where there are exceptional circumstances that in my view make it unjust and inequitable for the Respondent to be required to pay two additional weeks' wages. Transfer of the Claimant's employment was from a council to a golf club which did provide particulars of employment about which no complaint was made for many years until the midst of a more general employment dispute between Claimant and Respondent. Here the Respondent's complaint about the passage of time has some weight. In the circumstances I decline to increase the award.

Employment Judge McCluggage

05/12/2019