EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Ms E Mizerska	**AND**	One Health Medical Group

Heard at: London Central **On**: 19 December 2019

Before: Employment Judge Nicolle

Representation
For the Claimant: In person
For the Respondent: In person

RESERVED JUDGMENT

The Claimant's claim for an unauthorised deduction from wages is upheld and she is awarded the sum of £3,815.

REASONS

1. In a claim form dated 4 August 2019 the Claimant made various claims relating to her employment with the Respondent in the period 5 November 2018 to 3 July 2019. This included a claim for unfair dismissal which was struck out by an Order of Employment Judge Glennie on 18 December 2019 as result of the Claimant lacking the required qualifying service.

The Hearing

2. The Claimant gave evidence and Stephen Barnes, Director (Mr Barnes) gave evidence on behalf of the Respondent. He indicated that the original intention had been for Vicky Edwards, Director of Clinical Services (Ms Edwards) to appear as a witness but she was unavailable due to childcare commitments. He had therefore stood in at short notice given that the Respondent's application for a postponement had been refused.

3. There was an issue at the start of the hearing regarding the bundle with the Claimant's documents not having been included. This was resolved and the Tribunal had an unpaginated bundle comprising the combined documents of the Claimant and the Respondent.

The Issues

4. At the commencement of the hearing I sought to identify the outstanding issues between the parties. It was agreed that there was no outstanding claim in relation to accrued holiday entitlement. I identified with the parties that the only issue I needed to determine was whether the Respondent was entitled to make a deduction of the entirety of the Claimant's pay for the period from 1 June 2019 until the expiry of her four-week notice period on 3 July 2019. I was provided with a document produced by the Respondent which indicated that the Claimant's gross pay for this period would have equated to the sum of £3,815. As this figure was not disputed by either party I have therefore worked on the basis that this equates to the gross pay to which the Claimant would have been entitled to for this period had the Respondent not made deductions and therefore issued a final monthly payslip to the Claimant dated 1 July 2019 indicating net pay of £0.

5. The issue I need to determine is whether the Respondent had a contractual entitlement to make this deduction on the basis of the previous "overpayment" of salary to the Claimant. The Respondent's position is that the Claimant had not worked the minimum contractual hours and as a result there was a substantial sum of over £6,000 owing from her to the Respondent. It was on this basis that

the Respondent determined that there should be no final salary payment to the Claimant which had the effect, on the basis of the Respondent's position, of partially offsetting the sum owing from the Claimant to the Respondent.

6. I also needed to consider the question as to whether the Respondent had waived its contractual ability to make such a deduction for "overpayments" given the passage of time from the start of the Claimant's employment on 5 November 2018, and in circumstances where the Respondent had not previously made any such deductions from the Claimant's monthly salary payments, nor given her any indication that it proposed on doing so. The Claimant's position is that it was not until receipt of her monthly payslip dated 1 July 2019 and the Respondent's letter dated 4 July 2019 that she became aware of the Respondent's intention to make such a deduction and the basis upon which it was being made.

7. Whilst there was a dispute in respect of the duration of breaks taken by the Claimant, I indicated to the parties that I did not consider this to be material. In short, the Respondent's position is the Claimant took, or ought to have taken, longer breaks than those recorded on her monthly timesheets and that as a result she benefited from an "overpayment" of monthly wages. However, given the amount claimed as a deduction from wages and the Respondent's contention that there was an "overpayment" of over £6,000 I did not consider that the issue regarding breaks was material to the question I needed to determine. This was agreed by the parties.

Findings of Fact

8. The Claimant was employed as an Anaesthetic Practitioner. The Respondent is a clinic providing primarily cosmetic surgery (the "Clinic"). The Claimant worked alongside two scrub nurses, a health care assistant and a recovery nurse in providing necessary support to the surgeons undertaking procedures at the Clinic.

9. The Clinic operates Monday to Saturday with twenty-five operating days per month. It is always necessary for an anaesthetist to be in attendance and on

days when the Claimant was unavailable an anaesthetist would be engaged via an agency.

Contract of Employment

10. The Claimant was sent an offer letter dated 16 October 2018. This contained a summary of the principal terms and conditions but these are set out more fully in the contract of employment made on 16 October 2018 (the "Contract") but the one in the bundle had not have been signed by either party. Nevertheless, neither party argued that the Contract was not effective and therefore I find that the terms set out were applicable to the Claimant's employment. The relevant terms for the issue I need to determine are as follows:

> Hours of Work
>
> The agreed hours of work of the Employee will be 45 each week (40 less breaks), Monday - Sunday flexibly within a shift pattern; due to the nature of your job, your actual hours of work may differ from this and you will need to be flexible and provide additional working time where necessary which may include weekends.
>
> You will receive 30% additional for weekend hours and overtime payments
>
> Remuneration
>
> £42,000 per annum payable on a monthly basis at the rate of one twelfth of your annual salary.
>
> Deductions from salary
>
> The Company reserves the right to make deductions from your salary or to require you to repay money to the company in relation to:
>
> The list includes:

- any money due from you to the Company;
- excess of holiday day over entitlement; and
- excess of any other payment made to you by the Company.

Should there, for any reason, be an overpayment of salary or expenses from the Employee the Company reserves the right to adjust future wage payments until the overpayment has been recovered and/or to require repayment.

Notice

Four weeks with provision that the Respondent is entitled to place the Employee on garden leave.

11. I was also shown a document (undated) entitled Working Hours Policy. The Claimant accepted that she had seen this document during her employment.

12. Relevant provisions within this document are:

- Standard working hours are 09:00 to 18:00 Monday to Friday

- Salaried staff must work their total hours, failure to do so will result in them owing the Company hours or having these deducted from their pay. Timesheets must be complete and will be used against the Company signing in book to verify staff attendance. Discrepancies will be challenged.

13. The Claimant's position is that she received an identical monthly salary in the gross sum of £3,500. Whilst Mr Barnes indicated that there may have been previous adjustments to the Claimant's salary on account of a shortfall in hours worked, I was provided with no evidence to support this, and the Claimant denied that this was the case. Also, I consider it relevant that in the Respondent's letter to the Claimant dated 4 July 2019 contained a detailed schedule setting out the

total sum owing by the Claimant to the Respondent and no deduction is made as a result of the previous claw back of overpayments. I therefore find that no previous deductions had been made from the Claimant's salary prior to that on the 1 July 2019 payslip.

14. In an email of 28 January 2019 to Ms Edwards the Claimant questioned why she had not received payments for overtime and a 30% premium for weekend work. She also enquired as to at what point she would become eligible for overtime. The Respondent's policy on overtime has not been explained and I find that at no point during her employment did the Claimant receive any overtime payments.

15. Ms Edwards responded to the Claimant's email later on 28 January 2019. She explained to her that she was required to work a 45 hours per week before breaks. This would therefore equate to a total of between 160-172 hours per month depending on the number of days in a month. She went on to state that wages are paid on the assumption that you work all hours each month and then the Respondent calculates the difference and overtime a month in arrears.

16. In her email Ms Edwards referred to the Claimant having been required to work a total of 308 hours up to the end of December 2018 but that she had only worked 242 hours therefore giving a deficit of 66 hours. She added that the Respondent often won't reclaim these unless there are occasions where staff are not working their share or the Company feel there is a lack of give and take or if it is required for training, meetings or reasonable patient list requirements.

17. In a further email from the Claimant on 14 March 2019 to Kelly Tivey, Administrator she stated that she had worked over 100 hours on weekends, but these had not been paid since November 2018. I was not shown a response to this email and given that the Claimant received flat monthly salaries I find that no enhanced payments for weekend work were made.

18. I was shown monthly timesheets for the Claimant from November 2018 to June 2019. Save for a dispute referred to above regarding the duration of breaks

taken the parties accept that these timesheets reflect the actual hours worked by the Claimant.

19. The evidence of Mr Barnes was that a monthly rota is prepared. He indicated that the provisional rota prepared would have involved the Claimant working additional days. The Claimant's position is that save for taking her allocated holiday entitlement and occasional unavailability to complete full shifts as a result of, for example, a medical appointment she did not decline shifts allocated to her. Her evidence was that she worked all shifts allocated and that any shortfall between hours actually worked and those required by the Respondent was as a result of the shift patterns determined by the Respondent to reflect patient lists rather than her refusing to work when requested.

20. No evidence was given by the Respondent that the Claimant had been reprimanded as a result of refusing to perform her duties when rostered. If this situation had arisen, I would have expected to see correspondence to this effect to include the email exchange between the Claimant and Ms Edwards on 28 January 2019. In the absence of any such evidence I find that the Claimant did not materially decline shifts allocated to her and therefore was not responsible for the shortfall in monthly hours.

21. The Claimant gave four weeks' notice of her resignation in a letter dated 5 June 2019. The Respondent's intention had been that the Claimant would work for the duration of her notice period. However, as a result of what the Respondent considered to be the Claimant's disruptive behaviour during the course of an inspection of the Clinic on 12 June 2019 it was decided that the Claimant should remain at home for the duration of her notice period. Mr Barnes gave evidence that this was communicated to the Claimant orally. There is no written confirmation of this and no record of the term "garden leave" being used. However, I do not consider this to be material.

22. Mr Barnes said that the expectation was that the Claimant would be paid as normal for her notice period. At this stage he was not aware that there was a shortfall in the hours worked by the Claimant.

23. The Respondent's position regarding the "shortfall" in hours worked is set out in detail in the letter to the Claimant dated 4 July 2019. The letter contained a schedule setting out the required and actually worked hours for each month of the Claimant's employment. In aggregate this showed required hours total of 1373 and actual hours worked (to include the notice period) of 1065.75. The schedule stated that the Claimant had worked 94.55 hours at weekends which entitled her to a 30% premium. The Respondent's position was that in aggregate the Claimant owed it approximately £6,000. This took account of a sum owing to the Claimant for the 94.55 hours worked at weekends at an hourly rate of £5.70 equating to £544.

24. The letter concluded by referring to the Claimant having acted "deceitfully", having manipulated the rota and fraudulently claimed for hours and unentitled annual leave during her employment.

25. It is clear from the tone of the letter and the evidence of Mr Barnes that there was a considerable antipathy towards the Claimant as a result of what was perceived to be her bad attitude. I consider, at least in part, that the decision of the Respondent to withhold the payment for the Claimant's notice period was a result of the circumstances given arise to her being sent home on 12 June 2019 and also as a result of a perception that she had not been pulling her weight during the course of her employment. However, in the absence of any documented performance concerns prior to the 4 July 2019 letter I find that if such concerns had existed that had not been acted upon by the Respondent.

The Law

26. Key issues involved in determining whether or not there has been a deduction that infringes the provisions of Part II of the Employment Rights Act 1996 (the "ERA") are whether the wages are 'properly payable' to the worker; and whether the payment of less than the properly due sum is authorised. The courts have consistently held that the question of what is properly payable to a

worker turns on the contract of employment. Consequently, many of the same considerations will apply to claims under Part II as apply to contractual claims.

27. If the employer reduces salary in breach of contract the relevant legislation is Sections 13 and 27 of the ERA.

S.13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) 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.

S.27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

28. Alternatively, was the reduction a breach of contract giving rise to a claim under the Employment Tribunals Extension of Jurisdiction Order 1994?

29. In certain circumstances, implied terms can be used to qualify express terms, or at least restrict the way in which express terms are applied in practice.

30. The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

- the term is necessary in order to give the contract business efficacy;
- it is the normal custom and practice to include such a term in contracts of that particular kind;
- an intention to include the term is demonstrated by the way in which the contract has been performed; or
- the term is so obvious that the parties must have intended it.

31. Another way in which employment tribunals and courts may imply a term into employment contracts is to look at how the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it.

32. The Respondent must not have affirmed any non-observation of the express terms of the Contract regarding making deductions for a shortfall in hours worked. An employer or employee may affirm the non-operation of an express term of the contract, or to put it another way the existence of an implied term as to how the express terms have been operated in practice, in various ways. The employer may demonstrate by what it says, does or does not do an intention that the contract operates in a particular way notwithstanding the

express terms of the original written contract. The duration over which the express term has not been applied is relevant.

Conclusion

33. Whilst the Respondent has a contractual right to make deductions for overpayments under the Contract, I find that an implied term exists that this express contractual entitlement will be exercised reasonably. This would involve prior notice being given to an employee as to the fact of, basis for and amount of a proposed deduction and the employee being given the opportunity to respond to such a proposal. I find that this did not take place. Further, I find that an implied term exists that any deductions will be made within a reasonable time of the deficit arising.

34. I also need to consider the question of affirmation. In other words, has the Respondent by its conduct, and the passage of time from November 2018, acquiesced to the Claimant receiving a monthly salary without deductions being made notwithstanding a shortfall in hours worked? I find that they had affirmed this position. In making this finding I rely on the fact that the Claimant submitted monthly timesheets and the shortfall in actual hours worked against required hours was therefore apparent to the Respondent on a monthly basis from December 2018 onwards, but no action was taken until after the Claimant's resignation.

35. In her email to the Claimant of 28 January 2019 Ms Edwards stated that the Respondent would calculate the difference and overtime a month in arrears. However, this did not take place. She also indicated that the Respondent would often not reclaim a shortfall in hours other than in specific circumstances where staff were not working their share, or the Company felt there was a lack of give and take. In circumstances where the Respondent made no deduction at that point, or at any stage during the Claimant's employment, I find that their ability to do so had been waived.

36. I find that the Claimant is entitled to the payment of her normal wages for the period 1 June until 3 July 2019 and that her normal monthly wages constituted "wages" under s.27 of the ERA.

37. A question then arises as to whether the Claimant would have an additional entitlement to the sum of £544 for weekend work or alternatively whether the Respondent was entitled to deduct this sum. The parties did not make any specific arguments in this respect. The question I therefore have to consider is whether the position in respect of the Respondent's ability to make a deduction in respect of a shortfall in hours applies equally to the weekend premium as set out above.

38. I consider that the position is different in that whilst the non-payment of wages for the period from 1 June to 3 July 2019 constituted an unauthorised deduction from wages pursuant to s.13 of the ERA there was no deduction made from the Claimant's normal monthly wages in respect of the non-payment of the weekend premium. In circumstances where the weekend premium would have accrued month by month throughout the Claimant's employment, I find that the Respondent was entitled to offset this sum, owed to the Claimant on a monthly basis in arrears, against a shortfall in actual hours worked. Therefore, on an individual month by month basis I find that there was no deduction from the wages to which the Claimant was entitled on the basis of the terms set out in the Contract and the Working Hours Policy.

Employment Judge Nicolle

Dated: **24 December 2019**

Sent to the parties on:

30/12/2019.....

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For the Tribunal Office