EMPLOYMENT TRIBUNALS

Claimant: **Mr E Evans**

Respondent: **Cygnet Health Care Limited**

Heard at: **Bristol** **On:** **2nd and 3rd March 2020**

Before: **Employment Judge O'Rourke**

Representation
Claimant: **in person**
Respondent: **Mr Mellis - counsel**

JUDGMENT

The Claimant's claim of unlawful deduction from wages fails and is dismissed.

REASONS

(Having been requested subject to Rule 62(3) Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant had been employed as a specialist doctor by the Respondent, for approximately twenty months, until his resignation, on three months' notice, on 1 June 2018.

2. While he had originally brought various claims of discrimination, these were dismissed on withdrawal, following an earlier case management hearing. This therefore left his two remaining claims, one of detriment following a protected disclosure and one of unlawful deduction from wages, in respect of sums allegedly due for 'on-call' duties. In respect of the protected disclosure claim, the Respondent accepted both that he had made a protected disclosure and had suffered detriment as a consequence (by being withdrawn from a job interview process). The Claimant sought only a declaration in respect of this claim and a form of words for that declaration was agreed between the Parties and accordingly given in judgment by the Tribunal, at the outset of this Hearing.

3. The Hearing thereafter continued (without members), to consider the unlawful deduction from wages claim.

The Law

4. Mr Mellis referred me to some legal precedent, which I shall refer to below, as I consider necessary.

The Facts

5. I heard evidence from the Claimant and on behalf of the Respondent, from Ms Zoe Beaney, a senior HR Business Partner, who dealt with the Claimant's protected disclosure and related matters and Ms Lindi Masilela-Sibanda, a Clinical Manager, who dealt with the Claimant's initial employment and was his line manager.

6. The Claimant commenced employment on 12 December 2016 and had been issued a contract of employment dated 7 November that year [86-94]. It was agreed evidence that that contract made no reference to any requirement for the Claimant to carry out 'on-call' duties. It was also common evidence that all the other doctors at the Claimant's place of work, the Respondent's hospital at Kewstoke, did have such a requirement in their contracts [example 407], stating '*you will also be required to do one on call shift per week and work one weekend in every six'.* There was no reference in the example contract to any specific payment for that duty, both the Claimant's and the example contract simply containing a clause, under 'hours of work', stating '*Due to the nature of the business, the actual times of work will vary according to the needs of the Company and may involve evening and weekend working. You may also be required to work a reasonable amount of additional hours when necessary in order to fulfil the requirements of your position, to the satisfaction of the Company*.' No reference was made, under 'Pay', to any enhanced payment for such additional hours, merely stating the annual salary amount. The contract also stated that any changes or amendments would be confirmed in writing, within one month of them occurring.

7. In his statement, the Claimant said that, before Christmas 2016, he was told by Ms Masilela-Sibanda that in January 2017, he should discuss '*his on-calls'* with Ms Lynn, an administrator. As he was unsure in respect of any such requirement, he spoke to a Dr Dobrzynkska, a consultant, who told him that all doctors were expected to do on-call duties, one day per week and one weekend in six. He countered that such a requirement was not in his contract, which Dr Dobrzynkska noted, telling him to discuss it with Ms Masilela-Sibanda. When he did so, she told him that the omission of such a requirement from his contract was a mistake and needed to be rectified. He said that she asked Ms Lynn to provide the Claimant with a revised contract, which he said she did, but he refused to sign it. He informed Ms Masilela-Sibanda of this decision, to which she didn't respond and he heard no more from her in respect of it. Subsequently, however, on discussing the matter with Dr Dobrzynkska, she

told him that he had to do on-calls, like every other doctor, or otherwise he would be '*sacked'*. Fearing that he might lose his job, he carried out the on-call duties over the following year and a half. He did not ask for payment for these duties, from month to month, although he felt it due to him, but '*decided to wait and request a payment for all of them after submitting my resignation.'*, which he did, as part of his whistleblowing complaint, in June 2018. The Respondent refused to make such payments, hence this claim.

8. In cross examination, the Claimant said the following:

    a. He agreed that there were various forms of 'on-call': 'standard' on-call, i.e. the one day a week, one weekend in six requirement, for which nobody was paid; 'additional' on-call, i.e. duties above and beyond that requirement, for which volunteers would be paid and finally, a payment of £100, if and when a doctor was actually called out to see a patient.

    b. As per his statement, he agreed that he had been doing the standard on-call duties throughout his employment, for which he was not paid, having been on the on-call rota from 4 January 2017 [331]. On the relatively few occasions that he was called out, he was paid the £100 fee. He agreed that none of the doctors' contracts contained any reference to such payments. The only written confirmation of this entitlement is in an email from the Respondent to several doctors (including the Claimant), of 9 August 2017 [110L], mentioning the entitlement to such a payment. He agreed that such an email, as it post-dated the entitlement being paid to those doctors who were called out, was not the 'source' of such entitlement, but simply evidence of it.

    c. He was shown a document at page 264, dated 17 July 2017, entitled a 'change in circumstance' form, in which a box was ticked, stating 'yes' to a 'permanent change in contractual details' and under which an 'on-call' box was also ticked. The 'change in circumstance' was that the form marked the successful end of his probation period, entitling him to a pay rise. The Claimant had signed this form. It was suggested to him, therefore that by signing the form, he was indicating his confirmation that he was liable for on-call duties, as impliedly part of his contract and he said that he'd not been provided with a copy of this form at the time and had his doubts as to when the relevant boxes were ticked, with the implication that they could have been, after the event, for the purposes of these proceedings. He said that there'd been no discussion about on-call and the purpose of the meeting was to review his performance, while on probation. He accepted that he could not remember whether or not the relevant boxes had been ticked at the time he signed the form. Ms Masilela-Sibanda's evidence was that while she could not remember the meeting, it would have been her practice to complete the form with the employee and then to get him to sign it. She said that she would ticked

the 'on-call' box, because that was a standard requirement for all doctors, being unaware that such a requirement was not included in the Claimant's contract. I consider that her account is more likely than not to be correct.

d. By June 2018, the Claimant had decided to make a protected disclosure and at the same time, wrote to the General Medical Council, on 30 June 2018 [120G]. In that email he said that '*on the first day of work, despite agreed employment contract, I was notified by the Clinical Manager (Mrs Lindi Masilela) to who I report that I have to work more than 60 hours a week and receive the same agreed salary.'* He agreed that such a discussion did not take place 'on the first day of work' but perhaps before the Christmas holiday, in 2016. He also agreed that it was incorrect to say that he had refused to sign a form of consent to work over the maximum working week of 48 hours, as he had in fact so agreed to such a requirement, signing the requisite form. He accepted that when making a complaint to the GMC that the details be provided should be accurate.

e. He was then questioned as to the circumstances under which he was told of the requirement to do standard on-call duties. He said in a draft email of June 2018 [111N], intended for Ms Masilela-Sibanda that she '*tried against the law to force me to change my contract and threatened me that I will be fired if I do not do them'*. He also said, in his complaint to the GMC that she had said '*that I am going to be sacked immediately when not giving consent to her order.'* [120H]. He did not make this allegation in his statement and under cross-examination, he accepted that she had in fact never said such a thing, but that he felt, implicitly that the threat was there. When it was put to him that this was a serious accusation and unfair, when she hadn't said anything of that nature, he said that it was his '*feeling'*. When it was suggested to him that he was giving misleading information to both the Respondent and the GMC, he agreed that it was misleading, but it was not his intention to do so. He said, instead that in fact Dr Dobrzynkska had made this threat (despite being a very close friend of his), but that he had decided, to protect her, not to refer to her in the email in June 2018, instead transferring this utterance to Ms Masilela-Sibanda, only belatedly stating, late in his oral evidence, that Dr Dobrzynkska '*was operating under her* (Ms M-S') *influence in any event'.* When asked why he had not called Dr Dobrzynkska to give evidence on this point, he said that he didn't wish her to lose her job (being still employed by the Respondent). He said also that Ms Masilela-Sibanda had directed that a Ms Lynn, an administrative assistant should provide him with an amended contract, containing the on-call requirement, which she did, in due course, but he refused to sign it. In cross-examination, Ms Masilela-Sibanda could recall no discussion whatsoever, at any point, with the Claimant about

his on-call duties and said that she had never seen his contract until these proceedings and that in any event, neither she nor Ms Lynn had any authority to make changes to contracts, which would be done at head office only. She said that the first she was aware of this issue was when the Claimant raised it in his protected disclosure, which she said came as a surprise. When challenged as to her lack of memory of these events, she pointed out that they were three years ago and she dealt with many employees. The Claimant was pointed to an email he had written to his recruitment consultant at around that time (13 February 2017) [109J] and asked why, in this email, he had not made any reference to being forced to sign a new contract and he said that they had spoken later that day and he may have mentioned it then. He agreed however that he had not referred to this conversation in his witness statement. He was also challenged as to why if, as he now said, he was also concerned that his professional insurance might not cover these extra hours, there was no evidence of him raising this matter and he said that nonetheless, he would have raised it in discussions with the Respondent. However, despite then going on to say, in relation to this point that he had been reassured by Ms Masilela-Sibanda that as his contract allowed for the possibility of being required to work additional hours, that the insurance issue was no longer of concern, he nonetheless raised it again, for the first time, eighteen months later, threatening to report it to the GMC, or the Care Quality Commission. When asked why, after all this time, it had again become an issue, he said that he '*was just trying to give the full picture'* and '*to re-cap all my concerns, including past concerns'*. He agreed again that nothing in relation to this issue was included in his witness statement.

f. In respect of the Claimant's reaction, over the following eighteen months, to the on-call requirement and as already stated, he agreed that he carried it out in full and did not demand payment. He even, at one point, assisted in drawing up the rotas for the duty. He also agreed that he had never, in writing, or orally, until his protected disclosure, objected to doing so, despite asserting, without any supporting evidence that '*everybody knew'* about it. He agreed that he had not referred to any discussions with '*everybody*' (or indeed anybody) in his statement. He said he had decided against challenging the issue, as he feared for his job, if he did. The only such reference he could rely on was an email of 8 May 2017 to a Dr Buhagiar, a fellow doctor, not employed by the Respondent, who seems to have been a form of mentor, simply referring to him having to do these duties without pay, when his contract did not include that requirement, but which he goes on to describe as a '*mundane*' problem [110B]. This email indicates that in May 2017, he is accepting his lot and is doing the duties expected of him. He doesn't refer to being presented with a new contract and refusing to sign it. He reiterated that, in respect of him not disputing the non-payments at the

time, his '*strategy was that I would do the duties and then claim for them when safe to do so, as to do before would result in me being sacked'* and that he was doing so on legal advice.

9. Both parties made closing submissions and Mr Mellis submitted that there was clearly an implied on-call term in the contract, arising either from the need for business efficacy (**Hughes v Greenwich London Borough Council [1994] 1 A.C. 170 UKHL**), and/or custom and practice (**Garratt v Mirror Group Newspapers [2011] IRLR 591, EWCA**). Alternatively, there was an express term following the completion of the probation appraisal record, indicating the operation of the implied term prior to then. In any event, however, the Claimant having been aware of the position since January 2017, he had affirmed the contract and/or waived any breach of it, by his subsequent compliance with the on-call requirement for the following eighteen months. The Claimant stated that he was falsely being made out to be '*a liar'*, but it was never his intention to mislead. He sought to rely on the lack of any express term in his contract as to the on-call duties.

10. Conclusions. I find the following:

    a. Discussions in December 2016/January 2017. Ms Masilela-Sibanda could not recall any dispute or discussions with the Claimant at the time about the on-call duties and said that it came as a surprise to her when raised a year and a half later. She said that neither she nor Ms Lynn had any authority to change contracts. The Claimant's evidence on this period of time was contradictory and he accepted, misleading. Nor could he provide any corroborating evidence to support his assertions as to events at that time. The burden of proof being on him, I am not inclined to accept his account, beyond him being informed that regardless of what was in his written contract, he was required to do on-call duties. I do not accept that anybody threatened him with dismissal.

    b. Implied Term. The requirement to do unpaid standard on-call duties was clearly an implied term of the Claimant's contract. He accepted that all other doctors were required to do so and it was clear to me that such a requirement had simply been left out of his contract by mistake. He was happy, by way of contrast, to accept other implied terms, the payment of £100 when actually called out, or additional sums for volunteering for extra call-out, which are not shown in any of the written contracts provided. Clearly, it was part of the Respondent's business model that doctors did the standard on-call duties, without payment. Paying one doctor and not the others would have rendered this arrangement open to serious question and made it ineffective. It was also clearly, by conduct/custom and practice required that the doctors did so. Both they and the Claimant carried out these duties, without payment, over a lengthy period of time, pre-dating the Claimant's recruitment and for the

entire time of his employment and nobody, including him, was in any doubts as to what was required. By virtue of this implied term, therefore, the Claimant was required to carry out these duties, without additional pay.

c. Even, however, were there some breach of the Claimant's contract in this respect, he clearly, by both his actions and inactions, accepted/waived any such breach, by obeying the requirement to carry out on-call duties, not seeking payment and not disputing the requirement to do so, over an eighteen-month period. I don't accept that he was under duress to do so, as he was quite capable of disputing other matters, as when he stated in his email to the medical director, in November 2017, his wish to explore his '*rights, duties and obligations'* [110V], to include his hours of work and length of breaks and referring to possible breach of the Working Time Directive. This is not a person incapable of asserting his rights, or afraid to do so, but instead somebody who cynically decided to attempt to rely on the written terms of his contract alone, while refusing to take into account his behaviour for the vast bulk of his employment, all by way of a '*strategy*' to belatedly seek payments not contractually due to him.

11. For these reasons, therefore, the Claimant's claim of unlawful deductions from wages fails and is dismissed.

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Employment Judge O'Rourke

Dated: 3 March 2020