Case Number: 3330800/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Agbeze	v	Barnet Enfield and Haringey Mental Health NHS Trust

Heard at: Watford **On**: 20 February 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Ms S Chan, of counsel
For the Respondent: Mr C Kennedy, of counsel

RESERVED JUDGMENT

The respondent did not make any unlawful deductions from the claimant's wages, contrary to section 13 of the Employment Rights Act 1996. The claim therefore does not succeed.

REASONS

Introduction; the claim and the history of the proceedings

1 In these proceedings, the claimant claims unpaid wages under section 23 of the Employment Rights Act 1996 "ERA 1996". His claim is therefore of an unlawful deduction, contrary to section 13 of that Act. The claim was the subject of an application to strike it out, on the basis that it had no reasonable prospect of success. That application was heard by Employment Judge Smail on 16 May 2019. It was rejected on the basis that in order to do "justice to [the] case, there [had] to be a factual enquiry and detailed consideration of the applicable law".

2 The parties attended the hearing before me on 20 February 2020 with witness statements and prepared to adduce oral evidence, but both counsel agreed that the case could be determined on submissions only. I had already formed that view, and I therefore heard no oral evidence.

The facts

3 The claimant was (and at the time of the hearing before me remained) engaged (to use a neutral term) by the respondent to provide services as a health care assistant. He did so as a "bank worker". His claim arose from the fact that between 22 January 2018 and 9 May 2018 he was not permitted to provide services as such a worker to the respondent because, as it was said in paragraph 11 of the grounds of resistance to the claim:

> "There was a concern that the Claimant had not reported [an assault] in contravention of the [respondent's] Management of Incidents Policy and Raising Concerns at Work policy for reporting incidents."

4 The claimant was permitted to resume providing services to the respondent as a bank worker after 9 May 2018 and he continued to provide such services at the date of the hearing before me.

The terms under which the claimant provided services to the respondent

5 The terms of the agreement under which the claimant provided services to the respondent as a health care assistant were at pages 175-180. They started in the following terms:

> '**1 The status of the Agreement**
>
> This Summarised Terms of Agreement constitutes a framework of terms and conditions that will apply on each occasion that you provide bank services to the Trust. This Agreement is not a contract of employment and save for paragraphs [17] and [18] the terms of this Agreement will not apply other than for the duration of periods when you are providing bank services to the Trust. For the avoidance of doubt the terms set out in paragraphs [17] and [18] will apply at all times including periods when you are not providing services to the Trust.
>
> There is no obligation on the part of the Trust to offer any work to you or for you to accept any offer of work made by the Trust under this Agreement.
>
> Any contract of employment that you may have with the Trust will be separate to this Agreement. References in this Summarised Terms of Agreement to "you", "your" and similar are references to the Worker.'

6 Paragraphs 17 and 18 of the agreement were not material for present purposes.

7 Clause 3 of the agreement was in these terms:

> "**Hours of work**
>
> There are no regular or fixed hours of work. You will provide bank services on an 'as and when' basis as required to meet the needs of the Trust from time to time and as agreed by you. The actual hours of your work will be agreed with your manager when you accept a particular assignment.
>
> If you have a separate contract of employment with the Trust or elsewhere you should not accept bank work under this Agreement that will conflict with such employment or that will cause you to exceed the working time limits set out in the Working Time Regulations 1998 of 48 hours per week unless you have signed an opt out agreement. It is your duty to ensure you are working safe shifts."

8 Clauses 5-9 provided:

> "**5 Duties**
>
> The principal duties that you will be required to perform will be provided to you at the commencement of each period of bank work under this Agreement. You will be expected to maintain the appropriate professional registration where applicable prior to carrying out any duties and to act only within your sphere of competence.
>
> **6 Remuneration**
>
> Your level of remuneration will be determined at the time of your appointment or when you are offered each assignment and will be based on Agenda for Change payscales according to the duties you are offered whilst providing bank services.
>
> You will be paid monthly by credit transfer into a bank or building society account on the 23rd day of the month.
>
> You may be entitled to pay enhancements depending on the hours you work and the shift pattern. This will be determined by the responsible manager that has agreed for you to work a specific shift which will be processed automatically through the e-rostering system.
>
> **7 Deductions from pay**
>
> The Trust shall have the right to make deductions from any payment due to you where an overpayment has occurred. The mistake will be rectified by

deducting a sum equivalent to the overpayment from the next following payment.

8 Paid leave

You are not entitled to any contractual leave. However, you will be entitled to paid statutory leave subject to the provisions of the Working Time Regulations 1998. [Payment in respect of this will be made by a supplement of 5.6/46.4 (12.07%) of your monthly pay and will be identified separately on each pay advice you receive.] You will not be entitled to any further payment in respect of this leave entitlement.

9 Sickness or injury

If you are unable to provide services that you have agreed to do because you are unwell it is your responsibility to notify the manager or shift leader for the service you were due to work as soon as possible to notify them of your absence. If you are unable to during office hours, for whatever reason, to contact the relevant department and request to speak to the most senior person on duty. As a bank worker you are not entitled to sick pay."

9 The only other provision of the agreement that I need to set out is clause 13, which was in these terms:

"**Disciplinary Issues**

During periods of bank work under this Agreement you will not be subject to the Trust Disciplinary Policy. However, in cases where issues of professional or personal misconduct occur, a brief investigation of the issues will be carried out and your ability to work on the bank may be reviewed in accordance. As a precautionary measure your account may be suspended in the interests of protecting you, other staff and/or patients. Where the information is found to warrant further action, you may be removed from the Bank and/or the professional regulatory body may be informed if deemed necessary to protect patient safety.

If you have another substantive contract with the Trust, and are disciplined for conduct issues, your membership of the bank may be reviewed and your ability to work on the bank maybe [sic] limited or suspended. Your conduct on the bank, periods of bank work, may also affect your substantive role."

The submissions of the parties

10 Ms Chan, who had not been instructed by the claimant at the preliminary hearing before Employment Judge Smail, in support of the claim relied heavily on the decision of Her Honour Judge ("HHJ") Eady QC (as she then was) in *Rice Shack Ltd v Obi* UKEAT/0240/17 (2 March 2018, unreported). There, HHJ Eady QC

had dismissed an appeal against a decision of an Employment Tribunal that the employee in that case, who was employed under what is termed a "zero hours contract", was entitled to be paid her normal average weekly wage during a period of suspension.

11 Mr Agbeze's claim was resisted by Mr Kennedy on the basis that there was nothing payable to the claimant under the contract under which he provided his services to the respondent unless he was engaged to provide those services. If, during any engagement under that contract, the claimant was suspended, then he would be entitled to payment for the rest of the previously-agreed engagement, but after it was ended, he had no entitlement to be paid.

12 It was Mr Kennedy's submission that if and to the extent that the claimant had any kind of viable claim which could be made in the circumstances, it was for damages for breach of contract, either in the form of a breach of clause 13, which I have set out in paragraph 9 above, or in the form of a breach of an implied term such as a term akin to the implied contractual term of trust and confidence, applicable to an employee (and therefore not the claimant).

13 Mr Kennedy relied on the primacy of the agreement between the claimant and the respondent, under which the claimant worked as a bank worker. In doing so, Mr Kennedy relied on what was said by the Court of Appeal in *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387 [2019] ICR 1279 about the primacy of the contract between the parties. There, in paragraph 54 of his judgment, Coulson LJ, with whose judgment Peter Jackson and Lewison LJ agreed, said this:

> 'I consider that the starting point for any analysis of the trust's attempt to deduct Dr Gregg's pay must be the contract itself: *R (Walker) v General Medical Council* [2003] EWHC 2308 (Admin); *Knowles* [i.e. *Kent County Council v Knowles* (2012) UKEAT/0547/11] and *Patерso*n [i.e. *Paterson v Heart of England NHS Foundation Trust* (unreported) Case No 1308845/2013, ET]. Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in *Miles v Wakefield Metropolitan District Council* [1987] ICR 368, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle—the "ready, willing and able" analysis summarised at paras 52–53 above—falls to be considered. But, in my judgment, a considerable degree of caution is necessary before concluding that someone like Dr Gregg, who was and remains the subject of an interim suspension imposed in the public interest, is not "ready, willing and able" to work, or is to be characterised as avoidably or voluntarily unable to work.'

14 Ms Chan relied on that passage in arguing that it was a matter of custom and practice, based on case law, “that if an organisation for whom a person is working suspends the person, then, in the absence of an express term to the contrary, the organisation has to pay the employee”.

A discussion

15 I referred myself and Ms Chan to the decision of the Court of Appeal in *Henry v London General Transport Services Ltd* [2002] ICR 910 in regard to the issue of whether there could properly be said to be a custom and practice of the sort on which she relied, but I did not find it of any assistance here.

16 In addition, as Mr Kennedy submitted, what Ms Chan was doing was seeking to rely on an implied term which flew in the face of the apparent purpose of the bank worker contract here, the material terms of which I have set out in paragraphs 5 and 7-9 above.

17 Those terms were to my mind clearly to the effect that the claimant was to be paid only for his time spent in fulfilling an engagement which he entered into under the terms, and not between such engagements. Thus, if the claimant was precluded by the respondent from working because it refused to enter into any engagements with him under the contract for a period of time, then he could not (whether or not he was a worker within the meaning of section 230(3)(b) of the ERA 1996, or an employee within the meaning of section 230(1) and (2) of that Act) make a claim of an unlawful deduction from his wages.

18 In general, wages are regarded as being for work done, or for time that has been devoted, either under a contract of employment or “any other contract” within the meaning of 230(3)(b) of the ERA 1996, to the employer or the party buying the worker’s services. In any event, contracts of employment such as those under which the employees in *Gregg* and *Knowles* were employed, which entitled them to be paid during their periods of suspension, provide for the payment of a salary or wages for agreed hours. Such contracts are different altogether from contracts such as that which was in issue here.

19 The only basis on which the claimant could here argue with any credibility that he was entitled to be paid during the period when he was precluded from being able to provide services to the respondent by reason of the investigation into his conduct referred to in paragraph 3 above, was the decision of HHJ Eady QC in *Obi*. Having looked at that case, I could see that there was very little material difference between the terms of the contract relied on there and the terms of the bank worker agreement here, except that the contract in *Obi* was called a contract of employment, so that the claimant had continuity of employment, whereas the contract in issue here was expressly stated not to be a contract of employment.

20 However, the decision in *Obi* that the claimant was entitled to pay during her suspension was made on the express basis that it was conceded by the respondent that the claimant was entitled to such pay. Moreover, the point in issue in the appeal was different: as HHJ Eady QC said in paragraph 1 of her judgment:

> "This appeal raises the question as to an employer's obligation to pay an employee working pursuant to a zero hours' contract during a disciplinary suspension, when – unbeknown to the employer – the employee has obtained other work."

21 In paragraph 4 of her judgment, HHJ Eady QC said this:

> "On 6 March 2016, the Claimant was suspended after an altercation at work. This was said to be pending a disciplinary investigation. After this, no shifts were allocated to the Claimant. As the ET recorded, there was nothing in the Respondent's contract with the Claimant expressly giving it the power to suspend and it was accepted by the Respondent's representative before the ET that if it did suspend the Claimant there was no basis for it to do so without pay unless there was an expressed contractual provision to this effect, which there was not."

22 In paragraph 14 of her judgment, HHJ Eady QC said this:

> "In oral submissions Mr Rees, for the Respondent, has accepted that where there was a disciplinary suspension at the employer's request, the employee would be entitled to be paid average earnings whilst that disciplinary suspension continued."

23 In paragraph 16 of her judgment, HHJ Eady QC said this:

> "There is no appeal against the ET's finding that the Claimant's contract of employment with the Respondent continued from 6 March until 13 December 2016, the Respondent having suspended the Claimant throughout that period. It is further accepted, as it was before the ET, that there was no right to suspend the Claimant without pay and that therefore she was entitled to be paid at her average weekly rate, and, to the extent that the Respondent failed to pay her, that amounted to an unauthorised deduction."

24 Ms Chan urged me to accept that I was bound by the outcome in *Obi* to find in favour of the claimant here. She relied in that regard on what was said (based on *Obi*) in both *Harvey on Industrial Relations and Employment Law* (paragraph AII[313.12]) and the relevant *IDS* Handbook (paragraph 2.55 of volume 13).

25 However, a concession which is not the subject of any argument at all cannot give rise to a binding precedent: that is the effect of the case law described at

pages 158-161 of the fourth edition (1991) of *Precedent in English Law* by Cross and Harris. At the end of that passage, the authors wrote:

> "The upshot of these decisions is a loosening in the doctrine of *stare decisis*. It does not encompass *rationes decidendi* where it can be inferred that the deciding court did not address its mind to a proposition of law, even if that proposition was essential to its decision; and that inference can be easily drawn from the absence of any (or even any adequate) argument on the point in question."

26 The effect of that case law has since that passage was written been developed, and it can now be said that that passage is so far as relevant correct. That is because in paragraph *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] 1 All ER 505, the Court of Appeal, in a single judgment, said this (the nub of the passage is in paragraph 136 and has been underlined by me):

> "[133] Like the Court of Appeal in the *Daventry* case, we recognise the immense respect due to an opinion expressed by Lord Hoffmann on a point of law which commanded the unanimous agreement of the House of Lords. Nevertheless, Lord Hoffmann's observations in the *Chartbrook* case were expressly acknowledged to be *obiter dicta* and are therefore not binding authority. In circumstances where Lord Hoffmann's opinion that a purely objective approach should be adopted in determining whether the parties had a 'common continuing intention' has been disputed by the Parent on this appeal, we think it necessary to decide whether it is correct in law.
>
> [134] We are satisfied that we are not prevented from doing so by this court's decision in the *Daventry* case because in that case the Court of Appeal proceeded on the basis that Lord Hoffmann's analysis was correct in circumstances where the parties argued the case on that assumption. Moreover, two members of the court expressed concerns about the reasoning in the *Chartbrook* case, suggesting that it may have to be reconsidered in a future case.
>
> [135] A similar question potentially arose in *Joscelyne v Nissen* [1970] 1 All ER 1213 at 1221, [1970] 2 QB 86 at 98-99, as to whether the Court of Appeal was bound by its previous decision in *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68 which approved the analysis of Simonds J, but did so in circumstances where the correctness of that analysis had not been disputed. On the question whether a binding precedent had nevertheless been created, the members of the Court of Appeal in *Joscelyne* expressed themselves 'attracted by a suggestion that the conceded point of law should be open to argument in another case', provided it was made plain that this would not apply where 'an argument, though put forward, had been only weakly or inexpertly put forward'.

[136] Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in *Joscelyne v Nissen* is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case). In *Re Hetherington (decd)*, *Gibbs v McDonnell* [1989] 2 All ER 129 at 133, [1990] Ch 1 at 10, Sir Nicolas Browne-Wilkinson V-C held that, as a first instance judge, he was entitled to decline to follow even a decision of the House of Lords in which a proposition of law necessary for the decision was not disputed. After a review of the authorities, he concluded that:

> '… the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense.'

See also *R (on the application of Kadhim) v Brent London BC* [2001] QB 955, [2001] 2 WLR 1674 (para [33]); *Rawlinson & Hunter Trustees SA (as Trustee of the Tchenguiz Family Trust) v Director of the Serious Fraud Office (No 2), Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1129, [2015] 1 WLR 797 (para [43])."

My conclusions on the facts and the result of the application of the law to those facts

27 I could see no good reason why the concession on the basis of which the claimant succeeded in *Obi* was made. The question whether the concession was correctly made was the subject of no argument at all – it was not argued even "weakly or inexpertly", to use the words at the end of paragraph 135 of the judgment in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*. Thus, that concession was in no way binding on me.

28 Turning, then, to the contract between the claimant and the respondent in this case, I concluded that it did not require, either expressly or by reason of an implied term, the respondent to pay the claimant during any period of suspension of the sort referred to in clause 13, i.e. of the claimant's "account". In my view, it was clear that the only kind of claim that could be made in respect of the fact that the claimant was precluded from working under the terms of the contract by his "account" being suspended (and whether or not such claim would succeed was not something that I considered, as I did not need to do so) was one for damages for breach of contract. Such a claim does not fall within section 23 of the ERA 1996: it is not a claim of an unlawful deduction from wages.

29 Therefore, the claim could not succeed, and had to be dismissed.

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Employment Judge Hyams

Date: 25 February 2020

Sent to the parties on:

.......10.03.2020......................................

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For the Tribunal Office