Case Number: 1306195/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss S Abbey **v** Staffline Recruitment Limited

Heard at: Birmingham Employment Tribunal **On**: 4 March 2020

Before: Employment Judge Johnson (sitting alone)

Appearances
For the Claimant: Miss Abbey (in person)
For the Respondent: Ms George (counsel)

JUDGMENT

1. The claimant presented her complaint of unlawful deduction of wages to the Employment Tribunal in time on 30 July 2019 and her claim was therefore accepted by the Tribunal correctly.

2. The claimant did not suffer any unlawful deductions of wages arising from the decision by DHL as hirer to make a number of discretionary payments to the respondent in accordance with its Accident At Work payments scheme (AAW pay). These payments arose from the claimant being absent from work with the hirer following an accident at the hirer's workplace on 1 October 2018.

3. The claimant received all of the AAW pay payments which the respondent received from the hirer and which she was entitled to.

4. The claimant's complaint of unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996 is unsuccessful. This means that claimant's claim fails.

REASONS

Background

5. These proceedings arise from the claimant's working relationship with the respondent company, Staffline Recruitment Limited.

6. The claimant was engaged by the respondent as a temporary agency worker from 22 March 2017. She was placed as a warehouse operative with the respondent's client DHL, who held a contract with Jaguar Land Rover Limited in Solihull, Birmingham. This client was the hirer in this arrangement. It is understood that at the time of this hearing, the claimant was continuing to work for the respondent at DHL/Jaguar Land Rover, Solihull, but that she was absent from work due to ill health.

7. A claim was presented to the Tribunal on 30 July 2019, following a period of early conciliation from 20 May 2019 until 1 July 2019. The claimant brought a complaint of discrimination on grounds of disability and a claim for arrears of pay. She advised in her claim form that she had an accident at work on 1 October 2018 and had not been paid accident at work pay. She was absent from work at the time the claim form was presented to the Tribunal.

8. A response was presented on behalf of the respondent on 13 November 2019. The response was accompanied by an application for an extension of time and which was granted Employment Judge Miller on 13 December 2019. In the Tribunal's letter of 13 December 2019, he noted that a preliminary issue in this case was whether the claim had been presented in time and there were clear issues in dispute. It was therefore in the interests of justice to extend time so that the response could be accepted. The respondent also submitted in its response that there was no contractual basis for the claimant to claim Accident At Work pay from the respondent and that in any event this claim was presented out of time. Additionally, the response questioned whether the claim of disability discrimination had been made in error, but for the avoidance of doubt this claim was also disputed.

The Hearing and Evidence

9. This case was listed for a full merits hearing on 4 March 2020 and at the beginning of the hearing, following the application of Ms George, I agreed that the respondent's name be amended to 'Staffline Recruitment Limited'.

10. A number of other case management issues arose concerning the witness evidence and documentary evidence. This had to be resolved at the

beginning of the hearing. This resulted in some delay before witness evidence could be heard in this case.

11. It was confirmed by the claimant that a complaint of disability discrimination was not being pursued and it was restricted to a claim of unlawful deduction of wages in respect of the alleged failure by the respondent to pay her all of the Accident At work pay to which she was entitled under her contract for services with the respondent.

12. In terms of witness evidence, I heard from the claimant, Kirk Gleeson (the claimant's former supervising manager) and Jason Hogan (the claimant's Unite representative). For the respondent, I heard from Madeline Rossiter, who was described as an Experience Manager with this company. An unsigned witness statement had been provided by Raj Sura who was the respondent's manager who heard the first stage of the claimant's grievance. However, he did not attend the hearing and his statement was unsigned. I informed Ms George that I would not be able to place much reliance upon this statement as not only would I not be able to hear Mr Sura give evidence orally under oath, but he had not even provided a signed statement incorporating a statement of truth.

13. The respondent had produced a paginated bundle for use at the hearing of some 125 pages. The claimant also produced papers for use at the hearing which consisted of approximately 17 stapled bundles of 'Evidence'. Reference was made to both bundles as appropriate during the hearing, although there was some duplication between them.

14. At the conclusion of this hearing, I had heard the evidence from the witnesses for the claimant and the respondent. However, due to a lack of available time, I was not able to hear final submissions from either party.

15. Judgment was therefore reserved in this case in order that I could hear from the parties concerning their final submissions. The following case management orders were uncontentious and effectively made at the end of the hearing by consent:

    a. The parties shall provide the Tribunal and each other with written submissions concerning the claimant's claim and the evidence heard at the hearing today by **4pm on 13 March 2020**.

    b. The parties may provide further comments concerning the other parties' written submissions provided in order 1.1 (above) [in this judgment marked as 'a'] and if so, these must be provided to the Tribunal and each other by **4pm on 20 March 2020**.

16. I allowed some additional time for these orders to be carried out by the parties. However, I had still not received any submissions by 20 April 2020. Accordingly, I decided that it would not be in the interests of justice to delay any longer in making my judgment.Taking into account the provisions of the overriding objective and the fact that I had heard the witness evidence on 4 March 2020, I determined that I could properly deal with the judgment without the final submissions having been received.

The Issues

17. Was the claimant entitled to be paid Accident at Work Pay ('AAW' pay) by the respondent following her accident on 1 October 2018?

18. If so, did the claimant receive all of the AAW pay that she was entitled to during the period of absence from 30 November 2018 to 11 January 2018?

19. If not, how much additional AAW pay should the respondent have paid the claimant?

20. Did this amount to an unlawful deduction of wages contrary to section 13 Employment Rights Act 1996 ('ERA')?

21. If so, did the claimant present her complaint to the Tribunal within 3 months of the date of payment of the wages? Alternatively, should time be extended to the date of presentation of the claim form on 30 July 2019 because the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented to the Tribunal before that date?

Findings of Fact

22. The respondent describes itself as a temporary work agency and it provides temporary staff to its commercial clients across the UK. The claimant was engaged as a temporary agency worker from 22 March 2017. She was placed with the respondent's client who was understood to be DHL, who in turn had a contract with Jaguar Land Rover at its Solihull factory. The claimant was engagfed in the role of Warehouse Operative. Ms Rossiter explained that the respondent would look for work assignments for its workers. If a worker was placed for a hiring client, he or she would be paid an hourly wage by the respondent, who in turn would invoice the hiring client for a fee in respect of the services provided. It is assumed that this would include the cost of the respondent paying its workers plus an additional fee in respect of the respondent's overheads and profit margin.

23. It appears that the claimant could be working with DHL and Jaguar Land

Rover employees. However, there was no dispute that while she worked at the Solihull factory, she continued to be supplied by the respondent and paid by them and the hirer was DHL.

24. The claimant had completed a 3 page contractor application form which provided the respondent with her personal details, the types of work she had previously carried out, her previous employment and engagements, available days when she could work and details of two referees. The claimant confirmed a 'yes/no' health assessment and she signed her agreement that she wished to 'opt out' of maximum weekly working time provision of the Working Time Regulations 1998. She also provided her bank details in order that her 'wages' could be paid to her by the respondent and the form was signed on 2 March 2017.

25. The respondent also provided the claimant with a contract of services and which was contained in the company handbook. The claimant signed a form on 2 March 2017 confirming that she agreed with the terms of the contract of services and agreed to be bound by its terms. A copy of the handbook and the signed form were included in the hearing bundle provided by the respondent. The claimant denied that she had received a copy of the handbook during cross examination, although the claimant had signed her agreement that she agreed with the respondent's contract of services and contractor handbook on 2 March 2017. This document was included in the respondent's bundle and the claimant confirmed it was her signature

26. Two further forms were completed by the claimant on 2 March 2017. One related to an agreement that she would be bound by the contractor's (Jaguar Land Rover's) shift patterns and with overtime paid at the contractor's rates. The respondent confirmed that it would ensure that its workers would not work in breach of 'working time regulations'. The other form related to the claimant's confirmation that she understood agreed to the respondent making a 'CRB' (sic) check.

27. The contractor handbook was 37 pages in length. However, the introductory section to the booklet stated that *'…save for the Temporary Workers Standard Conditions/Contract for Services at page 30, it does not form part of your contract with Staffline'.* It confirmed that the claimant would work for the respondent as a worker and not an employee.

28. In relation to sickness, the handbook explained that the claimant may be entitled to Statutory Sick Pay ('SSP'). It did not mention an entitlement to any contractual sick pay.

29. A number of payslips from October 2018 to February 2019, were included in the bundle prepared by the respondent and they were printed on standard templates with the Staffline name. The claimant's name was

provided in the 'Employee Name' section and the respondent's name ('Staffline H1') was provided in the 'Employer' section. Payment was made on a weekly basis with a basic payment identified on the left-hand side of the payslip, based upon the number of hours worked and at the applicable hourly rate. The right-hand side of the payslip gave details of the relevant deductions that were made each week including income tax, national insurance and pension contributions. The cumulative pay and deductions to date were provided below this section and the net pay was provided in the bottom right hand corner of the payslip.

30. On 1 October 2018, the claimant had an accident at work whilst driving a vehicle on the Jaguar Land Rover premises. Another vehicle drove into the back of her vehicle which resulted in the claimant suffering a back injury. Ms Rossiter explained that usually the respondent would only pay SSP to its workers when they were absent from work due to sickness. However, she informed me that in the case of Jaguar Land Rover factories, the hirer had a discretionary arrangement in place where a worker is involved in an accident at work and where they sustain an injury through no fault of their own. This was described as 'Accident at Work Pay' ('AAW pay') and involved the hirer continuing to pay the respondent for the hours that the agency worker is unable to work because of their injury.

31. I understood that AAW pay would then be paid to the injured worker by the respondent and this arrangement could continue for as long as the hirer decided to pay the AAW pay. Ms Rossiter explained that because this arrangement was discretionary, AAW pay was not specifically recorded on the respondent's payslips, but the worker would continue to receive pay calculated at the usual hourly rate. She further explained that although the duration of AAW pay was variable, in her experience, it would be limited by the hirer to a period of 6 weeks.

32. I understood that although the claimant would have in principle would have been entitled to receive AAW pay (her injuries were caused at work and by the fault of another worker at Jaguar Land Rover), there was a delay in it being paid to her. Ms Rossiter explained that the respondent felt that she was being uncooperative and would not allow them to arrange a welfare meeting with her. Both bundles included a letter dated 9 October 2018 from Mr Jordan Reed of the respondent which informed the claimant that they had been trying to contact the claimant and to arrange a time to meet her in order that the accident could be investigated. She was advised that in order that she could receive AAW pay, she was required to cooperate with an investigation by the respondent and the hirer concerning the accident which gave rise to the injury. She was also advised that the respondent and the hirer would have to conclude the investigation based upon the information that it had and without any contribution by the

claimant. Nonetheless, she was given the opportunity within the letter to contact Mr Reed.

33. The claimant replied by email on 9 October 2018 and informed him that she felt distressed by the 'tone of the letter' which Mr Reed had sent. She suggested that she had been highly medicated when previous calls had been made and could not give a statement. She said she was happy for a visit to take place and to provide a statement.

34. In the meantime, discussions had taken place between Paul Goodlad, who is the DHL Health & Safety 'FLM' manager at Jaguar Land Rover and his colleagues and the respondent concerning the home visit to the claimant. His email on 12 October 2018 set out the chronology of events at that time starting with the accident on 1 October 2018 and ending with a visit by him, a union representative and a representative of the respondent to the claimant's home on 11 October 2018. It is understood that the claimant was surprised by the visit and she was not able to provide a statement. Accordingly, a further meeting was in the process of being arranged.

35. The view of Ms Rossiter in this correspondence was that she genuinely believed that the claimant was being obstructive. Richard McDonald for Jaguar Land Rover instructed the respondent not to pay the claimant any pay until the investigation issue was resolved. He said that '*[t]his was in line with how DHL would approach'.* Ms Rossiter confirmed that if the revised meeting took place, the claimant could receive backpay in respect of AWP for her absence. On 5 November 2018, it appeared that a meeting had successfully taken place and in an email to Ms Rossiter of 5 November 2018, Richard McDonald agreed that AAW pay could be backdated to the claimant '…*as an act of good faith'.* Ms Rossiter acknowledged the email and noted that a review would take place in 4 weeks.

36. What this email 'thread' indicated to me is that while the respondent understood the AAW pay process in relation to its workers that it supplied to Jaguar Land Rover, it was something which was controlled and which was within the discretion of DHL at the Jaguar Land Rover site. As such, I am satisfied that there was no contractual arrangement between the claimant and the respondent for AAW pay to be paid in the event of an absence caused by an accident at work.

37. The claimant was informed by Kaye Lakins at the respondent by email on 6 November 2018, that she had been authorised to pay the AAW pay.

38. The claimant remained off sick from work for the remainder of 2018 and submitted a fit note from GP. The claimant accepted in her evidence that back pay following the accident which comprised of the AAW pay, was

then paid to her and she continued to receive AWW payments until early 2019. This would appear to be in excess of the 6 weeks typically paid to qualifying workers as suggested in Ms Rossiter's evidence.

39. The claimant did suggest that she was told by her union representative that Richard McDonald the senior manager with DHL at the Solihull site and the respondent had agreed that the claimant would continue to receive the AAW pay. While the claimant appears to have treated this as a commitment to continue paying her AAW for the duration of her sickness absence caused by the accident, I did not see documentary evidence supporting this contention. In reality, I think that the emails between Ms Rossiter and Mr McDonald suggest that there was an initial agreement to pay AAW and that it would then be managed in accordance with the Jaguar Land Rover AAW pay scheme. Ms Rossiter's indication in her email to colleagues it should be reviewed in 4 weeks indicated that the claimant's absence would be considered in due course.

40. Similarly, the claimant relied upon the witness evidence of Kirk Gleeson who was her supervising manager at Solihull and an employee of DHL. He asserted that he was authorised to manage the Kronos system which informed the respondent of the hours that the claimant worked and also the payment of AAW pay. However, I was shown a management structure for DHL which had been produced at the hearing by Ms George. The claimant seemed to question whether Mr Sidaway who was a HSE Senior Business Partner with DHL could make decisions concerning AAW.

41. Ms Rossiter gave evidence confirming a conversation she had with Kelvin Sidaway, on 11 January 2019. During the telephone conversation Mr Sidaway had told Ms Rossiter that AAW payments should cease and he confirmed that the claimant would be taken off the AAW pay scheme. In a subsequent email, Ms Rossiter confirmed to him that the hirer's AAW pay had stopped.

42. The claimant was informed of this decision when Mr Reed telephoned the claimant on 14 January 2019. He informed the claimant that she would now revert to SSP and he confirmed this decision in his letter to her dated 21 February 2019. The claimant's payslips from 1 February 2019 until 8 February 2019, only provided SSP of £92.05 for each of the two payslips and an income tax credit of £40.20.

43. The respondent received an email from Jason Hogan who is the claimant's Unite union representative on 19 February 2019. He enclosed a grievance which had been commenced by the claimant and in which she argued that she had suffered *'… A Victimisation / Discrimination and abuse of position also failing to follow a DUTY OF CARE as well as a breach of the Equality Act 2010.'* She also claimed that the respondent had not adhered to any

duty of care as well as unlawful deduction of wages and that the respondent and DHL had failed to adhere to a fair and consistent process.

44. In the grievance, the claimant expressed their unhappiness about the initial failure of the respondent to pay her AAW pay which she believed was caused by a miscommunication on their part, before being reinstated. She raised a number of issues concerning the way in which payments had been managed during her sickness absence by the respondent. She was unhappy that the respondent had decided to stop her pay again and that this had caused her additional stress. She believed that she had been laid off from 8 February 2018 without any warning and she believed that her absence was being used as an excuse to terminate her contract.

45. The letter was actually signed by Jason Hogan, but written in the first person as if it had been drafted by the claimant. It is assumed that this letter was produced with the involvement of the claimant, but it is understandable that it does create some confusion, especially in relation to the alleged decision that she would be laid off and which referred to conversations between Mr Hogan and an unnamed third party.

46. The respondent held a grievance meeting on 28 March 2019 and it was shared by its Experience Manager, Raj Sura. It does appear that Ms Rossiter was originally asked by the respondent to hear the grievance. However she had asked Mr Sura to take her place as she appeared to have concerns about a conflict of interest given that the nature of the complaint was connected with the staff line office and also that if an appeal was made against the grievance, she may well be asked to be involved at the appeal hearing. While it is a little unclear as to what Ms Rossiter is concerns were concerning her involvement in the grievance process, it does seem reasonable that she should not have been asked to be the grievance hearing officer given her earlier involvement in the decision making process regarding the payment of AAW pay to the claimant. As a consequence, Ms Rossiter provided answers to questions which Mr Sura had asked her to provide in writing. She acknowledged, Mr Hogan's letter to the claimant confirming his telephone conversation she will be reverting to SSP had taken too long to be sent and an apology should be given to the claimant. However, she was clear that there was no obligation placed upon the respondent to pay AAW pay to the claimant and as far as she was aware, the claimant remained engaged as a worker by the respondent.

47. The grievance hearing took place on the 28 March 2019, but was adjourned and continued on 10 April 2019. Jason Hogan of Unite supported the claimant at these hearings. The claimant provided a witness statement at the grievance from Kirk Gleeson where he argued that Jordan Reed told him that Ms Rossiter that no further AAW pay will be

made and that she had sacked the claimant. During the adjournment, Ms Rossiter had sought confirmation from Mr Reid that the claimant had not been informed by him that she had been dismissed while absent on sick leave. He denied that he had had a conversation with Mr Gleeson where he had told him that the claimant engagement with the respondent would cease. During cross examination, the claimant suggested that she received a P45 from the respondent, but I was not shown a copy of this document and the claimant was not clear as to when the P45 was received and suggested that it had been sent in error. When the claimant referred to being laid off in her grievance letter, it appeared that she was relying upon comments made by her union representative Jason Hogan to her on 19 February 2019, but which was not supported by an email or letter confirming this decision. On balance of probabilities, I do not think that the respondent terminated the claimant's contract at the beginning of 2019 as suggested in her grievance.

48. Mr Sura gave his decision concerning the grievance to the claimant in writing by a letter dated 24 April 2019. He confirmed the following:

    - *'Accident at work pay (AAW pay) is a discretionary payment by DHL who can withdraw this at any time, this is not a standard staff line payment and we are fulfilling our contractual obligation by paying statutory sick pay (SSP)*
    - *you are currently receiving SSP hence still employed by staff line*
    - *the decision to stop AAW was made by DHL senior management team, the senior management have authority [to] ask us to stop AAW pay*
    - *Steve Kelly and Mick Knowles entered the AAW pay onto Kronos [understood to be a personnel IT system] but they don't authorise payment*
    - *our statistics confirm, females do not receive less AAW pay in comparison to male… [colleagues]…; Female workers were paid an average of 109.5 days AAW pay and males paid 30.875 between 2016-present,'*

    The claimant was given a right of appeal in this letter. The claimant confirmed in her reply on 26 April 2019 that she wished to bring an appeal.

49. The director of the respondent Dylan Hughes wrote to the claimant on 3 May 2019 confirming that an appeal meeting will take place on 10 May 2019. She was informed that she could be accompanied by a trade union official. The claimant in her appeal had argued that the investigative methods used in the grievance procedure were not conducted correctly. The claimant wished to rely upon a further letter from Mr Kirk Gleeson dated 6 May 2019. He confirmed that he had not been contacted by the

respondent regarding the claimant's complaint. He argued that he paid and approved the claimant's AAW pay and followed all correct steps which included referring the matter to Mick Knowles the operations manager and to Steve Keeley the senior operations manager and Richard Macdonald the general manager. He argued that all three individuals were told that there was no change to the situation concerning the claimant's sick pay and that she should continue to be paid for AAW pay. He therefore confirmed that he authorised the payment of these amounts.

50. The appeal hearing took place on 10 May 2009 team. The meeting was chaired by Mr Hughes and the claimant was accompanied by Mr Hogan of Unite. During this appeal Mr Hughes informed the claimant that the respondent that the question of AAW pay is decided by DHL and the respondent would only pay what they were told to pay by DHL. During cross-examination the claimant accepted that this was correct.

51. On 23 May 2019 Mr Hughes provided his decision to the claimant by letter. He confirmed the outcome was as follows:

    - '*Accident at work pay (AAW pay) is a discretionary payment not a contractual payment. The payment is made by DHL and can be withdrawn at any time.*
    - *DHL assessed the circumstances of the accident and decided to cease paying AAW pay. In total you are paid six weeks AAW pay.*
    - *Staff line is fulfilling its obligation by paying statutory sick pay, staff line does not pay AAW pay.*
    - *I discussed with DHL senior management of the letter from Kirk Gleeson which you provided at our meeting. Mr Gleeson does not have the authority to authorise AAW pay.'*

52. I heard from Mr Gleeson who gave evidence on behalf of the claimant. While he believed that he was authorised to decide whether to pay the claimant AAW, his assertions are not supported by the documentation in the bundle. Having considered the evidence and on balance of probabilities I am not satisfied that Mr Gleeson gave reliable evidence in this case. I find on balance of probabilities, that Mr Gleeson simply uploaded details of the claimant's hours of work as her line manager. While he may have been instructed by his managers to record AAW payments, any actual decision making concerning entitlement would be made by either Mr Sidaway or Mr McDonald who were both senior managers within DHL and at a broadly comparable level in the structure. I therefore find that the decision to take the claimant off AAW was made by Jaguar Land Rover and/or DHL as the hirer of the claimant and not by the respondent. This was something which was within the discretion of the hirer and not the respondent.

53. The claimant was unwilling to concede during cross examination that her claim was essentially regarding the decision to stop paying her AAW pay and she suggested that she didn't receive all of the AAW pay before 11 January 2019. However, although there was a short delay in the payment of AAW pay due to problems concerning the investigation, I find that on balance of probabilities, this claim arose from the decision by Jaguar Land Rover/DHL and their instruction to the respondent to stop paying AAW to the claimant. The payslips in the respondent's bundle applying to the claimant from 5 October 2018 (immediately following the accident on 1 October 2018), to 8 February 2019 (following the cessation of AAW pay), show that AAW was not initially paid until the investigation had concluded, but was then paid in full (including back pay), until the hirer DHL decided to cease paying the AAW. The claimant started to receive SSP only from the payslips for 1 February 2019 and 8 February 2019 and this would be broadly consistent with the email sent by Mr Sidaway of DHL to Ms Rossiter on 11 January 2019 confirming that the claimant was being taken off AAW pay. The claimant's decision to raise a grievance on 19 February 2019 while focusing upon a range of issues, essentially concerned a perceived unlawful deduction of wages and a perception that she had been laid off following a conversation with her Unite representative, Jason Hughes. This would also have prompted her to ask Mr Reed to confirm the position concerning AAW and which would have confirmed to her that she would not receive any further AAW payments.

The Law

54. 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 her 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.

55. Section 13 does not apply in respect of an overpayment of wages.

56. Section 23 of the Employment Rights Act 1996 provides that a worker may present a complaint to a Tribunal that his employer has made a deduction from his wages in contravention of section 13, but that a Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. However, where a complaint is brought under this section in respect of a series of deductions or payments, the period of three months begins with the last deduction or payment in the series or to the last of the payments so received.

Analysis and Discussion

AAW pay and section 13 of the Employment Rights Act 1996

57. This claim is essentially about the payment of AAW pay to the claimant following her accident on 1 October 2018.

58. At all relevant times in this case, the claimant has been engaged by the respondent as a worker in accordance with section 230(3) of the Employment Rights Act 1996. This was not in issue between the parties. The claimant is concerned about whether the respondent was contractually required to pay her the AAW pay following her accident and her evidence was that she was entitled to receive this pay on a continuing basis for the duration of her absence from work due to the accident.

59. The claimant asserted that she was told by her line manager who was employed by DHL, that she would be paid AAW pay in full and that it was confirmed by email. Having heard the evidence in this case, while the claimant may have convinced herself that this was the case, I am unable to find that any promise was made to pay the claimant AAW for the entirety of her absence from work.

60. There was clearly a delay in paying the claimant the AAW and the respondent was under the impression that the claimant was failing to communicate with the hirer's management at DHL. The claimant also claimed that she was initially too unwell to be interviewed, but when reminded of her obligations to cooperate in the investigation by the respondent, she quickly agreed to be interviewed. This resulted in the claimant being paid the AAW pay that she should have received since the accident on 1 October 2018 and this continued while she was submitted valid GP fit notes until the beginning of 2019. This was accepted by the claimant in evidence and this is supported by the payslips which were included within the hearing bundle and produced by the respondent.

61. The AAW pay was triggered by the accident on 1 October 2018 and was at the discretion of management at DHL and it continued to be paid on a weekly basis until it stopped in January 2019. The claimant was entitled to AAW but only insofar as management at DHL decided to pay it to the respondent and for it in turn to be paid to the claimant. It was not something which formed a contractual part of the claimant's contract for services with the respondent, which only provided for a potential entitlement to SSP where applicable. The respondent only had an obligation to pay those AAW payments that DHL determined fell within its discretion. Once it ceased to exercise that discretion, no payments were made to the respondent which would be required to be added to the claimant's weekly payslip.

62. The payslips included within the hearing bundle demonstrate that initially following the accident on 1 October 2018, the claimant was in receipt of basic pay, but by 12 October 2018, she only received SSP. However, once it was agreed that she could receive AAW, she started to receive payments in November 2018 including back AAW pay for the period when it had been held back by management. She returned to receiving SSP only from the 1 February 2019 payslip and this no doubt continued until such time as the entitlement to SSP was exhausted. The claimant accepted that she received her back pay and taking into account the decision by the decision by Mr Sidaway at DHL to take the claimant off AAW pay on 11 January 2019, she received all of the AAW pay that she was entitled to in accordance with the extent of the discretion exercised by DHL as hirer, to pay this benefit.

63. While there was no entitlement for the claimant to be paid contractual sick pay by the respondent under her contract for services with them, it could be implied that there was an obligation by the respondent to pay to the claimant any discretionary payments which it received from a hirer in respect of AAW which applied to the claimant's absence. Any failure to pass these payments onto the claimant as part of her payslips, could amount to an unlawful deduction of wages contrary to section 13 Employment Rights Act 1996. However, the claimant has received everything that she was entitled to in respect of the AAW pay scheme and is not entitled to any further payments. There is no evidence to suggest that the respondent received AAW payments from the hirer which were not in turn passed onto the claimant and as such, there are no unlawful deductions of wages contrary to section 13.

<u>Was the complaint presented to the Tribunal within 3 months of the date of payment of the wages?</u>

64. The claimant presented her claim form to the Employment Tribunal on 30 July 2019. This was following a period of early conciliation with Acas from 20 May 2019 to 1 July 2019.

65. The claimant acknowledged that she was aware that AAW payments were ceasing following a telephone conversation with Jordan Reed of the respondent on 14 January 2019. She confirmed this in her email to Mr Reed on 21 February 2019 and by return, he replied enclosing a letter which confirmed their conversation of 14 January 2019.

66. While the claimant was on notice that a decision had been made to cease her entitlement to AAW pay on 14 January 2019, there does not appear to be any communication to her at this point as to when the payments will cease. Arguably, it could be said that she became of aware of the cessation of AAW when she received her payslip from the respondent

dated 1 February 2019 and which was restricted to SSP only. However, the absence of a formal letter confirming the cessation of AAW at this stage, combined with the previous issues concerning the non-payment of AAW in October 2018, would understandably have led to the claimant wanting to seek further details from the respondent as to what was happening. This was a matter where there appeared to some confusion on the part of the claimant and as a worker, she had a reasonable expectation for the respondent to confirm when these payments would cease to be included in her payslips. At this stage she believed she was entitled to AAW and which she believed the respondent had an obligation to pay her.

67. Her subsequent payslip of 8 February 2019 was also only restricted to SSP. In accordance with section 23 of the Employment Rights Act 1996, this formed part of the series deductions which at that time, the claimant believed were unlawful deductions from wages contrary to section 13 of the Act. It was only when she received the reply to her email from Mr Reed on 21 February 2019, which enclosed his letter of 21 February 2019, that she was properly notified of that she could not expect to receive any further AAW from the respondent. I therefore find that 21 February 2019 was the relevant date from when time began for the calculation of the 3 month period in accordance with section 23 of the Act. On this basis the claimant had until 20 May 2019 in which to present a claim. As the claimant notified Acas of a potential claim as part of early conciliation on 20 May 2019, she was (just), in time. The date of the early conciliation certificate was 1 July 2019 and this meant that the new limitation date for presenting a claim to the Tribunal was now 1 August 2019.

68. As the claim form was presented to the Tribunal on 30 July 2019, I find that the claim was presented in time. However, taking into account my findings above concerning the substantive claim relating to deductions contrary to section 13 of the Employment Rights Act 1996, this decision does not assist the claimant in terms of succeeding with her claim.

Conclusion

69. The claimant did present her complaint of unlawful deduction of wages to the Employment Tribunal in time on 30 July 2019 and I find that her claim was therefore properly accepted by the Tribunal.

70. I find that the claimant did not suffer any unlawful deductions of wages arising from the decision by the hirer to make a number of discretionary payments to the respondent in accordance with its Accident At Work payments scheme (AAW pay).

71. That the claimant received all of the AAW pay which the respondent received from the hirer and which she was entitled to be receive from them.

72. Accordingly, her complaint of unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996 is unsuccessful.

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Employment Judge Johnson
Date: 27 April 2020