EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr V Barry	v	**Tenet Group Limited**

PRELIMINARY HEARING

Heard at: **Leeds** **On:** **22 May 2020**

Before: **Employment Judge Brain**

Appearance:

For the Claimant: **Written Representations**

For the Respondent: **Written Representations**

JUDGMENT

The Judgment of the Employment Tribunal is that the respondent did not make an unlawful deduction from the claimant's wages. The claimant's complaint is dismissed.

REASONS

1. The claimant presented his claim to the Employment Tribunal on 20 March 2020. Following receipt of the respondent's response on 26 March 2020 the matter was considered by Employment Judge Bright. She conducted an initial consideration of the claim form and response as required by Rule 26 of Schedule 1 to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.*

The issues

2. Employment Judge Bright sent out a Case Management Order on 2 April 2020. She had identified the complaints made by the claimant as:

   2.1. Unauthorised deductions from wages, in respect of company sick pay; and/or

   2.2. Unpaid holiday pay which was withheld on termination of employment.

   Her Order directed the parties to write to the Tribunal by 15 April 2020 should they disagree with the complaints identified by her. Neither party did so.

3. Employment Judge Bright's initial consideration of the scope of the claim having been notified to the parties without demur by the stipulated date 15 April 2020, I shall proceed upon the basis that the claimant's complaint is one brought under Part II of the Employment Rights Act 1996. It is his case that the respondent made an unauthorised deduction from his wages in particular: from company sick pay properly payable to him; and from holiday pay accrued due but untaken as at the date of termination of his contract of employment.

The relevant law

4. Part II of the 1996 Act is made up by sections 13 – 27B. These provisions set out the statutory basis for a worker to complain to an Employment Tribunal that the employer has made an unauthorised deduction from wages. (There is no issue that the claimant was not a worker employed by the respondent at the material time and thus entitled to the protection of the 1996 Act).

5. An employer shall not make a deduction from wages of a worker employed by him which are properly payable to the worker unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. (An agreement or consent signed by the worker does not operate to authorise the making of a deduction on account of anything that occurs before the agreement or consent was signified. In other words, the agreement or consent authorising the deduction from wages to be made has to be entered into before the event giving rise to the deduction).

6. A worker's right not to suffer an unauthorised deduction does not apply to a deduction from a worker's wages made by the employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

7. '*Wages'* for the purposes of Part II of the 1996 Act is widely defined. Wages includes any fee, bonus, commission, holiday pay or other emolument referable to employment and to statutory sick pay.

8. In her Order of 2 April 2020, Employment Judge Bright made various Case Management Orders. Amongst these was a direction for the parties to signify their consent to having the matter heard on the papers. On 21 April 2020, Employment Judge Rostant directed that the matter would be heard by an Employment Judge on the papers today. Pursuant to Employment Judge Bright's Orders, the respondent presented the Tribunal with a bundle of documents. I have read these. I have also read a witness statement from Emily Blain who is the respondent's group Head of HR and helpful submissions from the respondent's solicitor. I did not receive a witness statement from the claimant.

Findings of fact

9. The claimant was employed by the respondent with effect from 14 May 2018. He was employed as a field based financial adviser. The contract of employment is in the bundle at pages 46 -71. It was signed by the claimant on 30 April 2018.

10. Clause 8 of the contract refers to sickness absence. Clause 8.5 of the contract refers to the company sick pay scheme which appears within the staff handbook. This is at pages 40 – 45.

11. The company sick pay scheme provides that employees who are absent because of sickness will normally be entitled to receive statutory sick pay from

the respondent. In addition, the company sick pay scheme provides: that after six months of satisfactory service sick pay will be paid based upon normal basic remuneration less the amount of statutory sick pay to which the employee may be entitled for a period of six working weeks; followed by 60% of normal basic remuneration for a further seven working weeks. Thereafter, the employees' entitlement is to statutory sick pay only.

12. However, the company sick pay scheme sets out exceptions where the employee would not be entitled to benefit from the scheme. One of these exceptions was for those under investigation by the respondent either as a result of disciplinary or grievance procedures. For those falling within this category, only statutory sick pay would be paid.

13. On 29 November 2019 the respondent wrote to the claimant (pages 78 & 79). The claimant was required to attend an investigation meeting to be held on 3 December 2019. The letter says that, "*The purpose of this investigation meeting is to give you the opportunity to provide an explanation for the following matters of concern:*

    - *Significant performance concerns*
    - *Breach of compliance*
    - *Failure to cooperate with a reasonable management request, specifically, refusal to travel and BAU communication."*

14. The claimant was informed that within 14 days of the completion of the investigation he would be advised of the next steps. These could include an invitation to a meeting to discuss the outcome of the investigation or an invitation to a disciplinary hearing. In that eventuality, the claimant was informed that the respondent would give prior notification pursuant to its disciplinary procedure.

15. It is not clear to me what is meant by the expression *"BAU communication."* That said, it is plain on any reading of this letter that the claimant was under investigation by the respondent because of conduct matters that may lead to disciplinary action being taken against him pursuant to the respondent's disciplinary procedure.

16. I was not presented with a copy of the respondent's disciplinary procedure. However, it is plain that as at 29 November 2019 the claimant was under investigation in respect of matters which the respondent considered may render the claimant liable for disciplinary action. Therefore, the claimant's situation came within the ambit of the relevant exception to the entitlement to contractual sick pay as he was under investigation at the end of November 2019 pursuant to a disciplinary procedure being carried out by the respondent.

17. On 2 December 2019 the claimant sent to the respondent a note from his General Practitioner. This certified him as unfit for work for the period between 2 December 2019 and 2 January 2020 because of depression. The sick note is at page 86.

18. On 2 December 2019 the respondent wrote to the claimant (pages 83 and 84). By this letter, the claimant was required to attend another investigation meeting to be held on 6 December 2019. The purpose of this meeting was to discuss a concern that the respondent had about the genuineness of his sickness absence. Miss Blain says in paragraph 6 of her witness statement that prior to receipt of the sick note of 2 December 2019, *"At no point had the claimant made HR or his*

line manager aware of any mental health issues up to this point. We therefore had reasonable belief that this was a non-genuine illness in direct response to the invite to investigation, as an attempt to prevent or, at the very least, delay us from investigating the matter further".

19. The claimant did not attend the investigation meetings scheduled for 3 December or 6 December 2019. On the latter date, the claimant sent the respondent a letter from his GP dated 6 December 2019 (page 89). This confirms a diagnosis of depression. The contents of the claimant's GP's letter can give little doubt as to the seriousness of the claimant's condition.

20. In paragraph 9 of her witness statement Miss Blain mentions that on 9 December 2019 Jonpaul Reay, Group HR Manager, received a telephone call from the claimant's wife. Miss Blain says that Mr Reay informed her that the claimant was wanting to *"understand why her husband's pay was being withheld".* The call appears to have been prompted by what was said by Mr Reay in the letter of 2 December 2019 to the claimant at pages 83 and 84 to the effect that the respondent reserved the right to withhold sick pay benefits and had decided to withhold it in his case. Mr Reay, in an email to the claimant of 29 January 2020 (pages 100 and 101) mentioned the fact of his telephone call with the claimant's wife. There is nothing from the claimant taking issue with this assertion. Therefore, although I do not have the benefit of a witness statement from Mr Reay, I find as a fact that a telephone call did take place on 9 December 2019 in which the claimant's wife expressed concern about the respondent's position, in particular that sick pay entitlement was being be withheld.

21. Mr Reay also recorded at pages 100 and 101, that attempts were made to call the claimant on 12 and 19 December 2019. The claimant responded on 28 January 2020 (page 102) to the effect that he had not received any calls as his phone had been switched off while he was absent on sick leave. He took no issue with Mr Reay's assertion (in page 100) that he had discussed matters with the claimant's wife on 9 December 2019 (which reinforces my finding in paragraph 20).

22. The claimant supplied a further fit note on 30 December 2019. He was certified as unfit for work due to depression until 26 January 2020. A copy of the fit note is at page 90.

23. On 27 December 2019 the claimant was paid the sum of £3,033.05. The payslip is at page 72.

24. By virtue of this payment, the claimant was paid his basic remuneration by way of sick pay. This was contrary to Mr Reay's position in the letter of 2 December 2019 (pages 83 and 84) in which he had said that the respondent had exercised the right to withhold sick pay benefit and that he had instructed the payroll team to withhold it. Miss Blain says that this error was noticed on or around 20 January 2020 (paragraph 12 of her witness statement).

25. On 28 January 2020 the claimant resigned with immediate effect (page 103). The claimant does not say in the letter at page 103 why he resigned. Further, I have no evidence from him as to the reason for his resignation.

26. The claimant submitted a further sick note on 24 January 2020 (page 104). This certified him as unfit for work until 23 February 2020. The Tribunal is satisfied that the claimant was certified as unfit for work by his General Practitioner for the whole of December 2019 and January 2020.

27. On 30 January 2020 the respondent wrote to the claimant (pages 107 and 108). The respondent said that the claimant owed it the sum of £681.45. In the letter, Kirsty Lloyd, HR Business Partner, acknowledged the claimant's entitlement to 13 days' holiday pay accrued but untaken at the date of termination of the contract. It is perhaps unfortunate that Miss Lloyd did not supply the claimant with a breakdown as to how the figure of £681.45 had been arrived at.

28. On 5 February 2020 the claimant wrote to the respondent (pages 110A and 110B). From this letter it appears that the claimant agrees that the accrued holiday entitlement untaken at the end of the contract of employment was 13 days. The claimant maintained an entitlement to be paid a further one month's basic remuneration for January 2020 in addition to the money that he had received for December 2019.

Conclusions

29. In order to determine the claimant's complaint, it is necessary first of all to decide what wages were properly payable to him for December 2019 and January 2020. The claimant was unfit to work in each of these months through ill health. However, his contractual entitlement (and the wages properly payable to him during those months) was to statutory sick pay only. I summarised the relevant provisions in paragraphs 10 to 12 above. The contract of employment is clear. From the end of November 2019, the claimant was under investigation as part of a disciplinary procedure. The relevant provisions, to which the claimant agreed as evidenced by his signature to the contract of employment, disentitles him to be paid basic remuneration by way of contractual sick pay. His entitlement is to statutory sick pay only as the investigation into his conduct was pending during both of those months.

30. The rate for statutory sick pay for the financial year 2019/2020 was £94.95 per week. The claimant was unfit to work through ill health from Monday 2 December 2019 (that being the first working day of the month) to the date upon which he resigned on 28 January 2020. This is a period of 8 weeks. He therefore has an entitlement to be paid statutory sick pay in a total sum of £754.

31. In addition, the claimant has a contractual entitlement to be paid holiday pay in respect of the holidays which he had accrued but which remained untaken as at the date of termination of the contract. It is common ground between the parties that he had 13 days of untaken holiday for which his net remuneration is in the sum of £2,040. It follows therefore that the wages properly payable to the claimant for December 2019 and January 2020 are in a total sum of £2,794.

32. The respondent paid the claimant the sum of £3,033.05 on 27 December 2019. Given my findings this is an overpayment. An employer may recover an overpayment from the employee's wages even without any agreement or consent from the employee before the event giving rise to the deduction. In any event, the contract of employment clearly provides an entitlement, pursuant to clause 22, for the deduction from pay (including holiday pay and sick pay) of any amounts owed by the claimant to the respondent. The claimant was overpaid in December 2019. He has a liability to repay it to the respondent. The respondent has a statutory and a contractual entitlement to recover it from him.

33. In my judgment therefore, the respondent is correct to say that the claimant in fact owes money to the respondent. The respondent was entitled to deduct the statutory sick pay payable to the claimant for January 2020 as well as the holiday

pay in order to defray the overpayment. By my calculations the sum of £239.05 is due from the claimant to the respondent. This is calculated by deducting from the £3,033.05 paid in December 2019 the sums due to the claimant of £2,040 for the contractual holiday pay and £754 for the statutory sick pay for December 2019 and January 2020.

34. The respondent made an application to amend its response to include a counter-claim against the claimant seeking to recover the overpayment. This application was refused by Employment Judge Deeley as notified to the parties by letter dated 7 May 2020. With respect to Employment Judge Deeley, this was legally correct. The claimant has brought a complaint that he suffered an unlawful deduction from wages only. This was a claim brought pursuant to the Employment Rights Act 1996. He has not brought a breach of contract claim. Had he done so, then it would have been open to the respondent to make a counterclaim. The legal ability to make a counterclaim does not arise where the complaint is one of unlawful deduction from wages only brought under the 1996 Act. The Employment Tribunal thus has no jurisdiction to consider the respondent's counterclaim.

35. The claimant sought to amend his complaint to include losses said to arise from the provision of a reference tendered by the respondent to a prospective new employer of the claimant. The Tribunal has no jurisdiction to consider such a claim. A breach of contract claim on the part of the employee may only be brought in the Employment Tribunal in respect of matters that were outstanding upon termination of the contract or which arose upon termination. Therefore, insofar as the claimant seeks to bring a complaint of breach of contract in respect of post-termination events, that is a matter that is outside the jurisdiction of the Employment Tribunal.

36. The claimant also presented a schedule of loss which appears at page 34 of the bundle. The claimant advances a claim of in excess of £400,000. On any view, this is unrealistic.

37. The claimant has not brought a complaint of wrongful dismissal alleging that the respondent acted in breach of contract. Employment Judge Bright, upon considering the matter under Rule 26 of the 2013 Rules did not identify the claimant as having pursued such a claim. Her Order provided that the claims would proceed as identified by her unless the parties notified the Tribunal by 15 April 2020. The claimant did not protest that he was seeking to bring a wrongful dismissal claim. His claim was therefore limited to the holiday pay accrued due and contractual sick pay for January 2020 only.

38. Had a wrongful dismissal claim been brought then given that the claimant resigned his position, the complaint would have had to be one of constructive wrongful dismissal. The claimant would have had to demonstrate on the evidence that the respondent was in fundamental breach of contract and that he resigned as a consequence. As I say, no constructive wrongful dismissal complaint has been brought by him.

39. I do have some sympathy for the claimant upon the issue of the respondent's dealings with him around his notification of his sickness absence and the respondent's reaction to that notification. It is difficult frankly to see any reasonable and proper cause for the respondent to have sought to go behind the claimant's General Practitioner's certification of the claimant's unfitness as the respondent did by way of its letter of 2 December 2019.

40. In my judgment, had he presented evidence and had he brought a breach of contract claim then the claimant would have had a reasonable argument that by instigating further disciplinary investigation against the claimant upon receipt of the sick note at page 86 the respondent acted in breach of the implied term that the respondent would not conduct itself, without reasonable and proper cause, in the manner likely to destroy or seriously damage mutual trust and confidence.

41. If the Tribunal were satisfied that the claimant had not affirmed the contract by delaying his resignation until the end of January 2020 (and therefore waiving his right to resign in response to a fundamental breach) then in my judgment the claimant would have had a respectable argument that he was constructively wrongfully dismissed. However, the claimant's breach of contract claim would have been limited to the four weeks' notice period, that being the contractual entitlement to which he was entitled under the contract of employment.

42. As the contractual notice entitlement is more than a week in excess of his statutory notice period of one week under the 1996 Act, then his losses would be limited to four weeks' statutory sick pay in the sum of £379.80. That would have been the limit to his claim and there is no scope for any award of the other sums set out in the claimant's schedule of loss. This is in fact in excess of the amount owed by the claimant to the respondent. This may be a matter that the respondent will wish to consider before taking any further action in this matter.

43. On 19 May 2020 the respondent made an application for an order that the claimant shall pay the respondent's costs of the claim. By a letter sent to the parties on 20 May 2020 Employment Judge Wade indicated that directions to deal with the application would follow. The respondent' solicitor shall write to the Tribunal and the claimant within 14 days to confirm that the application is pursued and if so shall provide any additional grounds upon which basis the application is pursued. The Tribunal shall then give directions to the claimant to provide a response.

Employment Judge Brain

1 June 2020