EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109447/2019

Held in Glasgow on 2 & 3 December 2019

Employment Judge F Eccles

Mr C McGaw	**Claimant** **Represented by:** **Mr M O'Carroll - Advocate**
XPO Supply Chain Limited	**Respondent** **Represented by:** **Mr N MacDougall - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent made an unauthorised deduction from the claimant's wages in the sum of **£1,097.91** (£706.87 + £391.04 (£433.55 - £42.51). .

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REASONS

BACKGROUND

1. The claim was presented on 6 August 2019. The claimant complained of unauthorised deduction from his wages, specifically sick pay during the period 16 November 2018 to 7 June 2019. The claim was resisted. In their response, accepted on 9 September 2019, the respondent denied making any unauthorised deductions from the claimant's wages on the basis that the claimant was not entitled to sick pay during the period in question. The claim was listed for a final hearing at which the claimant gave evidence. Brian Sorbie, HR Manager gave evidence on behalf of the respondent. The parties

provided the Tribunal with a Joint Bundle of productions. The claimant was represented by Mr M O'Carroll, Advocate. The respondent was represented by Mr N MacDougall, Advocate.

FINDINGS IN FACT

2. The Tribunal found the following material facts to be admitted or proved; the respondent provides transport services to major supermarkets across Scotland. The claimant is employed by the respondent as a Team Manager based at their distribution centre in Bellshill. The claimant has continuous employment dating from 1990. He was first employed by Christian Salvesen Distribution Ltd ("CSD"). His contract of employment was transferred from CSD to Norbert Dentressangle Ltd ("NDL") in or around 2005 and from NDL to the respondent in 2015. The claimant's average weekly pay is £600 gross and £496 net.

3. Around the time the claimant began working for CSD he was issued with a statement of his initial employment particulars ("statement"). The statement contained particulars relating to sick pay as follows;

"**<u>Sickness and Accident Scheme</u>**

You will be covered by the Company's Sickness and Accident Scheme details of which will be available from the Personnel Department.

The basis of the Scheme is as follows :-

Full salary payment minus State Benefits.

Duration of payment will be in accordance with the length of service i.e.

Less than 1 years service - 3 months maximum

1 or more years continuous service - 6 months maximum"

4. The claimant has been a trade union representative for most, if not all, of his employment with the respondent and predecessor employers. Around October 2006 he represented the GMB union in relation to a collective agreement concerning absence management (P6) ("2006 agreement"). The

2006 agreement provided a formula for monitoring employee absences. "*Total days"* is defined in the 2006 agreement (at Section 3.6 (ii)) as *"the number of days absence in any period up to 12 months and thereafter on a rolling year basis".*

5. While NDL operated the distribution centre at Bellshill, the company sick pay scheme (P7) for the claimant's post stated;

"**Clerical and Management – Monthly Paid Colleagues**

1) Scheme entirely discretion of the Company

2) "Entitlement" based on length of service in any rolling 12 month period

Length of Service	***Maximum Entitlement***
Up to 6 months	*Nil*
6 months and over	*26 x weekly contracted hours"*

6. The respondent employs around 1,000 people at their Bellshill depot. Their absence level is around 6% of which around 50% is long term (4 weeks plus). When absent from work due to sickness, the respondent pays employees with more than one year's service the equivalent of their salary including statutory sick pay for a maximum period of 6 months in any rolling year. This is consistent with industry norm for payment of contractual sick pay. A rolling year is the year immediately preceding the start of the period of absence due to sickness.

7. The claimant was absent from work due to sickness for a period of 23 weeks from 24 January 2018 to 6 July 2018. During this period the respondent paid the claimant sick pay equivalent to his salary including statutory sick pay. The claimant was absent from work due to sickness from 26 November 2018 to 7 June 2019. During this period the respondent paid the claimant £1,987.37 in December 2018 (which included 3 weeks contractual sick pay); £1,182.34 in January 2019; £ 879.23 in February 2019; £416.36 in March 2019; £2,038.33 in April 2019; £0 in May 2019 and £42.51 in June 2019 (P37). During the

above period the claimant was entitled to statutory sick pay of £92.05 in December 2018; £423.43 in January 2019; £423.43 in February 2019; £552.30 in March 2019; £0 in April 2019; £706.87 in May 2019 and £433.55 in June 2019 (P37).

8. On 8 January 2019 the claimant was informed by a member of the respondent's HR that he had exhausted his company sick pay based on a calculation over a "rolling year" (P10). The claimant was upset and lodged a grievance with the respondent on 29 January 2019 (P15) as follows;

"Dear Julie,

I would like to submit a grievance in respect of my sick pay being exhausted, I base my grievance on the reason given and the method used to come to this conclusion.

I was informed at a Welfare meeting on the 8th January 19' by Christine Meechan that my sick pay was exhausted due to it being calculated on a 'rolling year'. I would also like to point out that when my Staff Representative Willie Bolton questioned why my sick pay had been exhausted by the 'rolling year' he was taken into the conference room and it was explained to him that I had been paid 26 weeks sick pay since January 18 till January 19', by Christine Meechan (under your instruction) it was also stated to Willie Bolton by Christine Meechan that she was not aware of the 'rolling year' being used on any other Staff member.

I believe that Willie Bolton stated at that time that he had never heard of a 'rolling year' and did not recall it as being part of any agreement or sick pay policy and as such this is what I am aggrieved by. I also believe it is not part of any agreement or sick pay policy and I have on a few occasions asked for confirmation as to where it was lifted from but have never received confirmation, therefore I believe my sick pay has been stopped incorrectly.

I would also like to bring to your attention that your calculation is based over 2 separate illnesses and not a 25 week continuous illness and that there was also 21 week gap between them, it should also be noted that my sick pay had

been stopped prior to myself being informed as the salary was processed on the 7th January 19' and I was not informed until the 8th January 19'."

9. The claimant attended a grievance meeting on 8 March 2019 with his trade union representative, William Bolton (P18). Robert Weldon, Produce Shift Manager attended the meeting on behalf of the respondent. The claimant asked for an explanation as to how his sick pay had been calculated. William Bolton asked for a definition of "rolling year" and where "rolling year" appeared in the respondent's sick pay scheme. The claimant confirmed that the outcome he sought from his grievance was to be paid company sick pay. Robert Weldon was unable to resolve the claimant's grievance at the meeting. He adjourned the meeting to consider the points raised by the claimant. At a reconvened meeting held on 27 March 2019 (P20) Robert Weldon referred the claimant to the 2006 agreement in relation to the meaning and application of "rolling year" to the respondent's sick pay scheme. The claimant was not persuaded that the 2006 agreement was applicable to his entitlement to sick pay. Robert Weldon confirmed that he was unable to resolve the claimant's grievance. On 28 March 2019 the claimant requested that his grievance be considered at the second stage of the respondent's grievance procedure (P21).

10. The claimant attended a stage 2 grievance meeting on 10 April 2019 with his trade union representative, William Bolton (P24). Alan Haggarty, Transport Manager attended the meeting on behalf of the respondent. The claimant informed Alan Haggarty that he wanted to know where "rolling year" had been "lifted from". He sought reinstatement of his sick pay. Alan Haggarty was unable to resolve the claimant's grievance at the meeting. He wrote to the claimant on 23 April 2019 (P29) to confirm that the respondent continued to use the "rolling calculation" and that he was unable to resolve the claimant's grievance. He informed the claimant of his right to appeal to HR.

11. On 23 April 2019 the claimant requested that his grievance be considered at the third stage of the respondent's grievance procedure (P30). The claimant attended a final stage – grievance appeal hearing on 23 May 2019 (P32). He was represented by Mr Adu Adigue of the GMB. He was also accompanied

by William Bolton. Andrew Hutcheson from HR attended the meeting on behalf of the respondent. The claimant advised Andrew Hutcheson that the term "rolling year" did not "ring a bell". Alan Hutcheson informed the claimant, that having read the 2006 agreement (P6), it was his interpretation that entitlement to sick pay was based on an employee's absence "*prior to 12 month period*". Adu Adigue stated that the claimant was contractually entitled to sick pay. The claimant referred to pay for six months followed by half pay for six months as the entitlement in his original contract . The claimant sought an explanation from the respondent as to the basis on which he had exhausted his sick pay entitlement. He sought reinstatement of his sick pay.

12. Alan Hutcheson wrote to the claimant on 24 June 2019 (P35) to confirm that his appeal had been unsuccessful. He identified the claimant's ground of appeal as *"you believe your company sick pay should be calculated in a rolling twelve months basis"*. Alan Hutcheson informed the claimant as follows:

"Having reviewed your personal file, I am unable to find any documentation to support your claim and you have been unable to provide me with any company documents to support your claim that your sick pay should be calculated on a rolling twelve months. However subsequently there are no documents which state this is calculated in a calendar year.

I have also undertaken and reviewed two other employee's files who started at approximately the same time as yourself, I have been unable to find any documentation in their files to support your claim.

The site has been operating a rolling 6 months period of sick pay for a number of years for colleagues and managers and as stated in the absence policy the only differential would be a contractual agreement.

Having considered the allegations, the documentation, your responses and the outcome of the previous stage of the grievance procedure, I have concluded that the findings of the original grievance hearing should be upheld. My reason for this conclusion is as follows:

No documentation has been presented to support your claim and as the site currently has been operating a rolling 6 months period for a number of years for colleagues and managers, I believe this applies to all employees, where there is no documentation to state contrary to this.

The warehouse colleague's contact refers to the Christine Salvalsen sick pay policy which I have from a memorandum of agreement, this also does not state a fixed calendar year for sick pay calculations.

During the meeting William Bolton suggested that his contract confirmed a six month sick pay, having reviewed his contract of employment again it does not state calculation within a calendar year but that entitlement is based on length of service.

I have concluded that the findings of the original grievance hearing should not be overturned."

13. The respondent has notified the claimant of an overpayment of wages (P37) during the period from December 2018 to June 2019 of £3,914.51.

ISSUE

14. The issue before the Tribunal is whether the respondent has made a deduction from the claimant's wages in contravention of Section 13 of the Employment Rights Act 1996 ("ERA").

SUBMISSIONS

Claimant's submissions

15. Mr O'Carroll on behalf of the claimant provided the Tribunal with written submissions. What follows is a summary of the above submissions. Mr O'Carroll referred the Tribunal to the case of **Arnold v Britton & others 2015 UKSC 36** and in particular the judgment of Lord Neuberger at paragraph 15 where he states;

"15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person

having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC IIOI para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be asserted in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

16. Mr O'Carroll submitted that applying the normal and everyday meaning to the words in the claimant's particulars of employment results in an employee with more than one year's continuous service being entitled to six months sick pay in respect of periods of illness. In the absence of any restriction or qualification in terms of calendar year or rolling year, submitted Mr O'Carroll, the six months' pay provision applies in respect of each instance of sickness absence. The actual words used, submitted Mr O'Carroll, do not tolerate any other reasonable interpretation when given their ordinary meaning. It is not for the Tribunal, submitted Mr O'Carroll, to save the respondent from a bad bargain. The respondent may not like the contractual term – consider the inconclusive grievance procedure submitted Mr O'Carroll – but they are bound by the meaning of the words used in the contract.

17. Mr O'Carroll submitted that the respondent's evidence supported the claimant's position that, there having been no variation of his original particulars of employment, he was entitled to a maximum of six months' full pay for each period of sickness. Mr O'Carroll submitted that the Tribunal should reject Mr Sorbie's evidence that industry standard for sick pay is discretionary and usually on a rolling year basis. The Tribunal, submitted Mr O'Carroll, should also reject Mr Sorbie's evidence that he has identified three

current employees who like the claimant have exhausted their entitlement to sick pay after six months absence in a rolling year. Mr O'Carroll questioned why such evidence was not foreshadowed in the ET3 or supported by documentation. He submitted that this was strongly suggestive of the respondent being unable to advance a defence to the claim beyond the terms of the claimant's particulars of employment. The 2006 agreement, submitted Mr O'Carroll, is concerned with "policies and procedures", in particular absence management and is of no relevance to the claimant's contractual sick pay entitlement.

18. In terms of the alleged overpayment of wages, Mr O'Carroll referred the Tribunal to the case of **Avon CC v Howlett 1983 IRLR 171** on estoppel and the principles of equity and personal bar. Mr O'Carroll submitted that in circumstances where the respondent has led the claimant to believe that he was entitled to treat the money paid in error as his own; the claimant has in good faith spent the money to his detriment in that he cannot afford to repay it and the overpayment was due to fault on the part of the respondent, the respondent is not entitled to recover the overpayment.

Respondent's submissions

19. Mr MacDougall on behalf of the respondent also provided the Tribunal with written submissions. What follows is a summary of the above submissions. The claimant, submitted Mr MacDougall, does not have legal entitlement to the sums claimed because they are not "properly payable" to him in terms of Section 13 (3) of ERA. Mr MacDougall referred the Tribunal to the case of **New Century Cleaning Co Ltd v Church 2000 IRLR 27** for the meaning of "properly payable". Relying on the above case, Mr MacDougall submitted that it is for the claimant to prove that he has a legal entitlement, in this case arising from his contract of employment, for the sums claimed to be "properly payable" to him.

20. On the issue of onus of proof, Mr MacDougall submitted that there was a lack of evidence from the claimant including a contract of employment. Even if the Tribunal accepts that the claimant's contract was in identical terms to that of

William Bolton (P4), submitted Mr MacDougall, the clause relied upon in the contract sets out only the basis of the entitlement to sick pay and not the detail. The Tribunal, submitted Mr MacDougall, should reject the claimant's position that it need only look at the clause in isolation and not consider any other documents, in particular the respondent's sickness and accident schemes to which there is specific reference in the contract.

21. The Tribunal should therefore, submitted Mr MacDougall, take into account the NDL scheme (P5), when determining the claimant's entitlement to sick pay. While it is acknowledged, submitted Mr MacDougall, that the scheme was not in place when the claimant was first employed by CSD, it does expressly refer to payment being made on a "rolling basis". The Tribunal should also find, submitted Mr MacDougall, that the NDL scheme did not materially change any scheme in place at the time of the claimant's commencement of employment.

22. Mr MacDougall submitted that the Tribunal should reject the claimants' evidence that he had not seen the NDL scheme (P5) before. This was incredible, submitted Mr MacDougall, given the claimant's role as a trade union representative and the importance of sick pay entitlement to the workforce and their representatives. Mr MacDougall also referred to evidence before the Tribunal that the claimant did not claim an entitlement to payment beyond 6 months when first informed that his sick pay was exhausted in January 2019 and that he waited a month before bringing a grievance. The above evidence, submitted Mr MacDougall, supports the respondent's position that the claimant knew his sick pay entitlement was calculated on the basis of a rolling year.

23. Mr MacDougall submitted that the Tribunal should dismiss the claim, the claimant having failed to show that he was contractually entitled to more than 6 months sick pay in a rolling year. In the alternative, submitted Mr MacDougall, the Tribunal should find that the sum sought by the claimant is excessive and any sum to be paid by the respondent should take account of the sums already paid to him by the respondent during the period in question.

NOTES ON EVIDENCE

24. The Tribunal heard evidence from the claimant and Brian Sorbie from the respondent's HR. Overall the Tribunal did not find the claimant to be a particularly convincing witness. The Tribunal accepted the claimant's evidence that on balance he was issued with the same employment particulars (P4) as his colleague William Bolton. The Tribunal did not however accept the claimant's evidence that he had no knowledge of how the sick pay scheme was operated by the respondent in particular in relation to a rolling year. The claimant has been a trade union representative for a significant period of time. His name appears on the 2006 agreement in which reference is made to the concept of a rolling year. While the 2006 agreement is concerned with absence management as opposed to sick pay, the claimant's evidence that the first time he became aware of the concept of a "rolling year" was at the meeting on 8 January 2019 undermined his credibility. Similarly, the claimant's evidence that he knew nothing about the NDL scheme (P7) in which reference is made to "*entitlement*" to sick pay being based on "*any rolling 12 month period*" lacked credibility given his length of service and position as a trade union representative.

25. The Tribunal found Brian Sorbie to be a credible witness. He gave clear evidence about how the respondent operates its sick pay scheme. He was honest about his lack of knowledge about how the sums paid to the claimant from December 2018 to June 2019 had been calculated and that he could only assume that there had been "payment errors". The Tribunal accepted his evidence that he had identified employees in the same situation as the claimant who had exhausted their right to sick pay on the expiry of 6 months in a rolling year. The Tribunal did not agree with the claimant that Mr Sorbie's evidence should be rejected on the grounds that he had not produced any documents to support his findings in relation to the application of the scheme. His evidence was clear – employees are not entitled to a maximum of six months full pay for each period of sickness under the respondent's sick pay scheme; entitlement to a maximum of six months full pay is calculated by reference to a rolling year.

DISCUSSIONS & DELIBERATIONS

26. In terms of Section 13(1) of ERA, a worker has the right not to suffer unauthorised deductions from their wages. A deduction is defined at Section 13(3) of ERA as:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion".*

27. It was not in dispute that the claimant is a worker and that statutory sick pay and contractual sick pay are wages. The issue in dispute was what was "properly payable" by the respondent to the claimant from 26 November 2018 to 7 June 2019. It was also not in dispute that the claimant was entitled to be paid statutory sick pay on a monthly basis during the period in question. It was in dispute that he was entitled to be paid contractual sick pay throughout the period on question. Determining what is "properly payable" to the claimant requires the Tribunal to consider the terms - both express and implied - of the contract of employment between the claimant and respondent.

28. The Tribunal was satisfied that the claimant's contract of employment included an express term that, as an employee with more than one year's continuous service, he was entitled to company sick pay at the rate of his full salary minus state benefits for *"6 months maximum"*. Parties were in agreement that this should not be interpreted as meaning that while employed by the respondent the claimant's entitlement to contractual sick pay was limited to a total of 6 months. It was necessary to consider other factors such as those identified in the case of **Arnold v Britton** *(supra)* to determine what was meant by *"6 months maximum"*. The clause relied on by the claimant refers to the respondent's sickness and accident scheme. The version of the scheme produced by the respondent (P7) provided that entitlement to the equivalent of 6 months' pay *is "based on length of service in any rolling 12 month period"*. The Tribunal was satisfied that this was a term of the scheme

for at least the period during which the claimant was employed by NDL. It was the claimant's position that his entitlement under the scheme had not varied throughout the period of his employment. There was no evidence before the Tribunal of any employees being in receipt of sick pay for more than six months in any rolling 12-month period. The Tribunal accepted Mr Sorbie's evidence that he had identified employees in the respondent's employment who, having been absent for six months in a rolling year, had exhausted their entitlement to sick pay in accordance with the sick pay scheme. The respondent's explanation of their sickness scheme makes commercial sense; the claimant's submission that he is entitled to a maximum of six months' full pay for each period of sickness does not. In all the circumstances, the Tribunal determined that the claimant is entitled to 6 months sick pay in any rolling 12-month period. His entitlement to contractual sick pay therefore ended in December 2018 after he was paid three weeks sick pay. The Tribunal was not persuaded that any further sick pay was "properly payable" to the claimant during the period to June 2019.

29. The Tribunal was however persuaded that statutory sick pay remained "properly payable" to the claimant throughout the period in question. The Tribunal found that statutory sick pay was not paid to the claimant on each occasion when it was "properly payable". In particular, the respondent did not pay the claimant any statutory sick pay in May 2019 and only £42.51 in June 2019. The statutory sick pay due to the claimant on the above occasions was, according to the respondent, £706.87 in May 2019 and £433.55 in June 2019. The Tribunal considered whether failure to make payment of statutory sick pay on the above occasions was because of an error of computation on the part of the respondent. Under Section 13(4) of ERA, Section 13(3) does not apply where the deficiency in wages is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion. Mr Sorbie referred to the amounts paid to the claimant as "payment errors". He was not in a position however to show how the amounts had been miscalculated or how there had been any errors by the respondent affecting the computation of the amounts paid to the claimant in May and June 2019.

In all the circumstances, the Tribunal was not persuaded that Section 13(3) of ERA does not apply to the deficiency in payment of statutory sick pay to the claimant due to an error of computation.

30. The Tribunal also considered whether failure to make the payment of statutory sick pay in May and June 2019 was because of previous overpayments and therefore an authorised deduction under Section 14(1) of ERA. This was not advanced as a reason for the deduction by the respondent and in his evidence, Mr Sorbie referred to the variation in amounts paid to the claimant as "payment errors" as opposed to deductions for overpayment. From the evidence before it, the Tribunal did not find that the respondent deducted statutory sick pay to which the claimant was entitled because of an overpayment of wages. The claimant therefore suffered an unauthorised deduction from his wages in the sum of £1,097.91 (£706.87 + £391.04 (£433.55 - £42.51)).

31. It is the respondent's position that they are due a payment of £3,914.51 from the claimant. There is no counter claim before the Tribunal as the claimant remains in the respondent's employment. The claimant submitted that the Tribunal should find that the respondent is not entitled to recover the above sum from him. The Tribunal was not persuaded that it was entitled to make such a finding in the present proceedings. The claim was concerned with unauthorised deduction from the claimant's wages. The amount which the respondent is entitled to recover from the claimant is not therefore something about which the Tribunal considered it had jurisdiction to make a decision in these proceedings.

CONCLUSION

32. In all the circumstances, the Tribunal concluded that the total amount of wages paid to the claimant in May 2019 and June 2019 by the respondent was less than the total amount of the wages properly payable to the claimant on those occasions. The amount of the deficiency was £706.87 in May 2019 and £391.04 (£433.55 - £42.51) in June 2019, which sums shall be treated as deductions made by the respondent from the claimant's wages.

Employment Judge: F Eccles

Date of Judgement: 18 December 2019

Entered in Register,

Copied to Parties: 19 December 2019