



EMPLOYMENT TRIBUNALS

Claimant: Mr A Cusick

Respondent: Electrical Power & Generation Ltd

Heard at: Cardiff **On:** 31 January 2020

Before: Employment Judge Harfield (sitting alone)

Representation:

Claimant: In person
Respondent: Mr Cater (legal representative)

JUDGMENT

The claimant's claim of unauthorised deduction from wages is not well founded and is dismissed.

WRITTEN REASONS

1. This complaint of an unauthorised deduction of wages came before me on 31 January 2020. I delivered an oral judgment on the day. Both parties subsequently made a request for written reasons.

Introduction and clarification of the issues in dispute

2. This is a claim, presented on 29 September 2019, brought under section 23 of the Employment Rights Act 1996 in which the claimant says that the respondent made a deduction from wages¹ in contravention of section 13 of that Act. The respondent filed an ET3 response form denying the claim.

¹ See box 8.2 of the ET1 claim form at page [6]

3. I had before me a hearing bundle extending to 94 pages. Page references in brackets [], are a reference to page numbers in the hearing bundle. I had written witness statements from the claimant and from Ms Oliver on behalf of the respondent. At the start of the hearing I spent some time clarifying the issues with the parties which enabled us to identify what was actually in dispute in the case, as set out below. Resolving the dispute did not appear to turn on the evidence of witnesses and therefore, with the agreement of the parties, I did not hear oral evidence. I reached my decision on the written documents and statements before me and the parties' oral submissions. I took these fully into account.
4. The claimant worked for the respondent as a Business Development Manager until resigned with effect from 12 July 2019. It is not in dispute between the parties that on termination of employment, prior to the question of deductions, there was an agreed expectation that the claimant would receive:
 - (a) a net base salary payment of £425.53 (the gross figure would appear to be around £479.08 looking at the payslip at [91]);
 - (b) a dividend of £1122.86
 - (c) A tax contribution of £1265.13
5. In respect of the tax contribution, the respondent states there was a contractual dispute over the claimant's entitlement to this. However, they agreed to pay it as a matter of goodwill and it is therefore not in dispute that it was due to the claimant.
6. Section 27 of the Employment Rights Act provides a definition of "wages." Both parties agree that of the above sums agreed as due to the claimant on termination, only the base salary constitutes wages for the purposes of Section 27, and therefore also Sections 13 and 14 of the Employment Rights Act.
7. It is also not in dispute that the claimant took approximately 16 days holiday in December 2018 which was in excess of his holiday entitlement² (as the holiday year ran from January to December and the claimant had only been in employment with the respondent since the start of December). It is not in dispute that the claimant had taken more paid annual leave than he was entitled to.
8. Turning to what is in dispute, the respondent's position is that there was an overpayment of wages to the claimant in respect of holiday pay of

² See the claimant's schedule of loss at [33]

£766.53. The respondent's position is that when this overpayment was deducted from the salary due to the claimant it reduced the base salary payment entitlement down to a negative figure of -£143.73³ and that therefore there are no wages, within the meaning of section 27, due to the claimant. The respondent says that the treatment of the dividend and the tax contribution cannot be before me in a claim for unauthorised deduction from wages, as they are not wages.

9. The claimant's position is that the respondent promised to pay him £2244.26 [82]. This is on the basis that he was due a dividend of £1122.86 and a tax contribution of £1265.13 with the overpayment of holiday being deducted only from the salary element producing a negative figure of -£143.73 for net salary due to the claimant. Ms Jones, office manager at the respondent, said those were the figures provided by the respondent's accountants in an email to the claimant of 26 July 2019 found at [82]. She said at the time: "I will put the amount owed on the normal pay run." The total she said was being paid to the claimant was £2244.26.
10. On 31 July 2019 Ms Jones sent the claimant a further email to say there was a revised additional calculation for the overpayment of 16 days holiday. She said this had a value of £1584.66 meaning that the balance due to the claimant was £659.60 [83].
11. Basically, the original figure given to the claimant only offset the overpaid holiday pay against the claimant's base salary reducing it to £-143.73. There was no overpaid holiday offset against the tax contribution and the dividend. The amended calculation, whilst it does not set the workings out within it, I accept, was seeking to offset the overpaid holiday pay against the other elements due to the claimant.
12. The claimant says that the respondent should not have done this. The claimant says that the respondent should only offset the overpaid holiday pay against the base salary element alone. He says this means that the tax contribution and the dividend are due to him in full. He says that they took the sums from his "PAYE element" and that the respondent should not have done so, and it is a unauthorised deduction that should be returned to him. The claimant seeks the sum of £1584.66 being the difference between the amount he says he is owed of £2244.26 and the amount paid of £659.60.⁴

The relevant legal principles

13. Section 13 of the Employment Rights Act states:

³ See payslip at [91]

⁴ See schedule of loss at [33]

“(1) An employer shall not make a deduction from the wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction...

(3) 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 for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

14. Section 14 of the Employment Rights Act says:

“(1) Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
made (for any reason) by the employer to the worker.”

15. Section 27 of the Employment Rights Act sets out the definition of “wages.” It says:

“(1) In this Part “wages” in relation to a worker, means any sum payable to the worker in connection with his employment, including –

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise...”

Decision

16. I do not find that the analysis that the claimant seeks to make, as identified above, is within my jurisdiction in an unauthorised deduction from wages claim.

17. To assess the claim in the way in which the claimant invites me to do so, in effect, involves me finding that there has been an improper offsetting of

- overpaid holiday pay against the dividend and the tax contribution and to award those sums back to the claimant, even if he labels it as reinstatement of his "PAYE." However, both parties agree that the tax contribution and the dividend are not "wages" and are not in my jurisdiction in an unauthorised deduction from wages claim. In my judgment I have to look at the substance of what the figures represent and the claimant is asking me to reinstate something that is not wages.
18. It may be (I have made no assessment of this) that the claimant has arguments to say that the overpaid holiday pay should not be offset against what he was due for a dividend and tax contribution but they are not within my jurisdiction in an unauthorised deduction from wages claim. They would appear to be, if anything, a contractual dispute either for the Tribunal in a breach of contract claim (subject to time limit considerations) or in the jurisdiction of the county court. However, on the unauthorised deduction from wages claim before me, I do not find that claim well founded. The respondent was entitled, under section 14(1) to deduct the agreed overpaid holiday pay (which does fall within the definition of "wages") from the final salary due to the claimant. This meant that there was no positive figure of wages due to the claimant and that there was no unauthorised deduction from wages when the overpaid holiday pay was offset. The claim is dismissed.

Employment Judge Harfield
Dated: 23 June 2020

JUDGMENT SENT TO THE PARTIES ON 6 July 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNAL