



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Miss R Nogueira

NHS Central London CCG

Heard at: London Central **(by Cloud Video Platform)**

On: 1 October 2020

Before: Employment Judge Joffe (sitting alone)

Representation

For the Claimant: In person

For the Respondent: No appearance or representation

JUDGMENT

The judgment of the Tribunal is that:

1. There is no jurisdiction to hear the claimant's breach of contract claim.
2. The respondent unlawfully deducted sums from the claimant's wages for two days she worked on 1 and 2 October 2019 in the sum of £453.15 gross and must pay that sum to the claimant, subject to deduction of tax and National Insurance at the appropriate rate.
3. The respondent failed to pay the claimant for accrued but untaken annual leave under regulation 14 of the Working Time Regulations 1998 in the sum of £1721.97 gross and must pay that sum to the claimant subject to deduction of tax and National Insurance at the appropriate rate.

REASONS

1. This is a claim arising from the claimant's brief employment with the respondent, an NHS entity.

The issues

2. The issues to be determined were:

Unlawful deductions from wages

- i) Did the respondent make unauthorised deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 in the following respects:
 - a) Not paying the claimant for two handover days on 1 and 2 October 2019;
 - b) Not paying for accrued but untaken holiday when the claimant's employment terminated.

Breach of contract

Did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant

The claimant indicated in her claim form that she was not claiming any loss said to arise from breach but wished to have a finding that there had been breaches.

The Evidence

- 3. The respondent had not put in a response and did not attend the hearing. The claimant had submitted a 41 page statement for herself and a statement from a Ms Christina Clark, who did not attend the hearing. She had submitted a 250 page bundle. The bulk of the claimant's statement and her bundle related to her claim for breach of contract which I concluded I did not have jurisdiction to hear, as I explain in my conclusions.

Findings of fact

- 4. The claimant was employed by the respondent between 21 October 2019 and 31 January 2020 as workforce transformation implementation lead.
- 5. The claimant also worked for two handover days on 1 and 2 October 2019 and was told by Fiona Rowntree, Health and Social Care Workforce Lead, that she would be paid for those days.

6. The claimant's manager was Mr Delvir Mehet.
7. For reasons she explained in her statement, the claimant resigned on twelve weeks' notice on 11 November 2019. The claimant's contract of employment provided a twelve week notice period for staff at the claimant's grade.
8. The claimant was placed on garden leave by the respondent in a letter dated 2 December 2019 and told she would be paid in full until 31 January 2020. There was no reference to annual leave in the document notifying the claimant that she would be on garden leave and she was not at that stage or subsequently told that she would have to take her leave during her notice period. The claimant had not taken any annual leave by this point.
9. Mr Mehet told the claimant she would be paid for the two handover days, after she was told that she would be put on garden leave
10. The claimant had accrued leave as set out in her schedule of loss at the rates set out there
11. The claimant has not been paid her accrued holiday pay or the pay for the two handover days.
12. The claimant's calculations, about which she gave evidence, are as set out in this table, taken from her schedule of loss:

21 Oct 2019 - 31 Jan 2020	=	103 days
Annual Leave Entitlement Full Year	=	27 days
103 days / 366 days	=	28%
Annual Leave Entitlement Period Worked	=	7.6 days
Plus two additional day worked	=	2.0 days
Total Days	=	9.6 days
Total Hours	=	72 hours
Hourly Rate 2019/20 8B Point 37	=	£ 26.75
HCAS Inner £6,777 / 1,957.5 (Annual Hours)	=	£ 3.46
Total Hourly Rate	=	£ 30.21
TOTAL	=	£ 2,175.28

The Law

Unlawful deductions from wages

13. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise', with a number of specific exclusions.
14. The prescribed circumstances include where the deduction is required or authorised by a provision of the worker's contract.
15. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Holiday pay

16. Under regulation 13 of the Working Time Regulations 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.
17. Under regulation 14, where a worker's employment is terminated during the course of his leave year and 'the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu...' calculated in accordance with the formula set out in regulation 14(3).
18. Regulation 15(2) allows an employer to specify when an employee shall take leave. An employer's notice may be contained in the contract of employment and need not specify actual dates: Craig v Transocean International Resources [2009] IRLR 519.
19. By regulation 16, a worker is entitled to be paid for any period of annual leave he or she is entitled to at the rate of a week's pay in respect of each week's leave.

Breach of contract

20. The tribunal's jurisdiction to hear claims for breach of contract claims is conferred by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623. It is significantly more limited than the contractual jurisdiction of the civil courts.
21. By Article 3: 'Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any

other sum (other than a claim for damages, or for a sum due, in respect of personal injuries)...’ in breach of contract claims, subject to other exceptions.

22. It is clear from Article 3, that employment tribunals do not have jurisdiction to hear breach of contract claims where remedies other than pecuniary remedies are sought.

Submissions

23. I discussed the issues with the claimant. After I explained the limits of the Tribunal’s contractual jurisdiction she suggested that she could claim nominal damages and bring herself within the Tribunal’s jurisdiction. I considered that proposition when reaching my conclusions.

Conclusions

Unlawful deductions

24. The claimant worked two days for which she was promised but not paid wages. There is no evidence that the respondent had a right to deduct those sums.
25. Two days’ pay at 7.5 hours per day at an hourly rate of £30.21 (gross) is £453.15 and the claimant is entitled to that sum.

Unlawful deductions: Holiday pay

26. The claimant had accrued but untaken holiday and is entitled to be paid for that untaken holiday absent the respondent having required her to take the days during her garden leave. There was no evidence that that had occurred.
27. 7.6 days at 7.5 hours per day at an hourly rate of £30.21 (gross) is £1721.97

Breach of contract

28. Because the claimant has not sustained financial loss and was not claiming damages or some other sum due, I concluded that the Tribunal had no jurisdiction to hear her claim. I concluded that Article 3 was not intended to cover claims for nominal damages which, in the civil courts, are awarded where breach of a common law right is established but no special damage is shown. I concluded that Article 3 is properly to be interpreted as covering claims where a claimant is seeking financial recovery, ie special damages, rather than seeking to show breach of a right.

Employment Judge - Joffe

Date: 01/10/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/10/2020.

FOR THE TRIBUNAL OFFICE