Case Number: 1601645/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms K Mayze

Respondent: Mid and West Wales Fire and Rescue Service

Heard at: by Video Link **On:** 4th November and 23rd December (in chambers) 2020

Before: Employment Judge R F Powell

Representation:

Claimant: Ms Williams, litigation friend

Respondent: Mr Roberts, of counsel

Judgment

The judgment of the Employment Tribunal is:

1. **The claimant's particulars of employment are amended to show that the date on which she commenced continuous employment with the respondent was the 29th February 2016.**

2. **In accordance with section 12 (2)(b) of the Employment Rights Act 1996, I determine that the claimant's particulars of employment are amended to show that the date on which she commenced continuous employment with the respondent was the 29th February 2016.**

3. **The claim for an unlawful deduction from wages is well founded and the respondent is ordered to pay to the claimant the net sum of £363.61.**

REASONS

Introduction

4. By a claim dated the 19th September 2019 Ms Mayze alleged that the respondent, her current employer, had made an unlawful deduction from her wages. That deduction was notified to her on the 22nd March 2019 and made in her April 2019 pay.

5. The character of the deduction concerned the respondent's application of its sickness pay scheme. That scheme provided differing durations of sick pay computed by the employee's length of service.

6. Because the respondent considered that the claimant's continuous service commenced on the 23rd January 2017 it reckoned her sick pay entitlement from that date.

7. The claimant reckons her continuous employment from the 29th February 2016. If that were the correct date, then her sick pay entitlement would have been more generous than that which the respondent paid her. This alleged shortfall in sick pay is the quantum of the alleged unlawful deduction.

8. It is common ground between the parties that the claimant was first employed by the respondent on a fixed term contract as a Temporary Youth worker and then, without any break in continuity of employment, as a Training Administrative Assistant on a four-month fixed term contract. That fixed term contract terminated on the 31st December 2016.

9. It is common ground that the claimant commenced employment with the respondent on the 23rd January 2017 and that, between the 31st December 2016 and the 23rd of January 2017 no contract of employment subsisted between the parties.

10. The claimant asserts[1] that the period in which she was not employed by the respondent was either a temporary cessation of work or the consequence of a deliberate act by the respondent in response to a grievance the claimant had raised on the 28th November 2016[2].

11. Thus, the resolution of this claim centres on my decision upon the character of the those intervening days.

12. The agreed list of issues for my determination are, as set down by Employment Judge Harfield, as follows:

"Unauthorised deductions

(a) What was the claimant's legal entitlement to:

(i) sick pay for the period 1 April 2019 to 12 April 2019; and

[1] See EJ Moore's synopsis of the claimant's case in her order of the 3rd February 2020, paragraph 2. The claimant's case at this hearing was consistent with that synopsis.

[2] The claimant's application to amend her claim to assert an act of victimisation was refused by EJ Harfield on the 13 August 2020. That decision has not been subject to challenge.

(ii) pay for the period 13 April 2019 to 30 April 2019?

What wages/sick pay were properly payable for that period?

(b) In relation to 20(a)(i) was that entitlement dependent upon the start date of her period of continuous employment and, if so, what was that date?

To what extent is that governed by section 212 of the Employment Rights Act or is it a matter of contractual interpretation? If so, what was the contractual agreement/how should the contract be interpreted?

(c) Did the respondent make a deduction or deductions from the claimant's properly payable wage between 7th January 2019 and the 30 April 2019 (which includes where the total amount of wages paid on any occasion is less than the total amount of wages properly payable)?

(d) if so, was the deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimant's contract or has the claimant previously signified in writing her agreement or consent to the making of the deduction (see sections 13(1) and 13(2) Employment Rights Act)?

(e) Was any deduction an excepted deduction under section 14 Employment Rights Act as reimbursement of an overpayment of wages?

(f) If the complaint is well founded the Tribunal must make a declaration to that effect.

(g) If the complaint is well founded should the Tribunal direct the repayment of any amount to the claimant and if so what amount? (The tribunal must order the employer to pay to the claimant the amount of any deduction made in contravention of section 13 save that the employer shall not be ordered to pay or repay to a worker any amount in so far as it appears to the Tribunal that the employer has already paid or repaid such amount to the claimant (sections 24 and 25 Employment Rights Act).

(h) Did the claimant suffer any other consequential financial losses? If so, should the Tribunal order the respondent to pay to the claimant an amount that is considered appropriate to compensate the claimant for any financial loss suffered by her attributable to the matter complained of? What is the appropriate amount? (Section 24(2)).

21. *Statement of initial employment particulars*

(a) Did any statement of employment particulars given to the claimant on or after 23 January

2017 not comply with what is required by section 1(3)(c) of the Employment Rights Act 1996?

(b) If so, what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section? (Under section 12(1) the employer is then deemed to have given the employee a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal).

(c) Has a statement purporting to be a statement under section 1 been given to the claimant and a question has arisen as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of Part 1 of the Employment Rights Act? (section 11(2) Employment Rights Act)?

(d) If so, the tribunal may confirm the particulars as included or referred to in the statement given by the employer, amend those particulars or substitute other particulars for them, as the tribunal may determine to be appropriate. (The statement is then deemed to have been given by the employer to the employee in accordance with the decision of the Tribunal), (Section 12(2) Employment Rights Act). "

13. My conclusion on the merits of the case is thus very much dependent upon the precise facts surround the 22 days which passed between the 31st December 2013 and the 23 January 2017[3] and the precise terms of the claimant's contact of employment

14. Before turning to the evidence, I note commencement of the hearing was delayed whilst the correct bundle was made available to me and, as the oral evidence did not commence until 12.10 there was insufficient time to deliberate or give judgment on the day. Secondly, after initial consideration, I sought further information from the parties and allowed supplemental written submissions upon such information. The parties complied with my direction by Friday the 4th December 2020. Due to other listed hearings, I was unable to commence my deliberations for several weeks after that date.

The Evidence

15. I heard evidence from the claimant, Mr S Rees, Human Resources Manager for the respondent and Ms K Jones, Head of Community Safety, manager of the claimant between 1st September and 31st December 2016.

16. I also considered documents within the agreed bundle to which I was taken during the course of the evidence and the parties' submissions.

Findings of Fact

[3] Sunday 1st January to Saturday 21st January 2017. Sunday 22 was the first day of the week in which the claimant's employment recommenced.

17. It is agreed between the parties that the claimant commenced full time employment with the respondent on the 29th February 2016. The role to which she was appointed was a temporary one, subject to a possible extension, it was intended end on 31st August 2016.

18. The claimant was provided with written particulars of her employment, within which (page 65 of the bundle) was the following:

3. PERIOD OF CONTINUOUS EMPLOYMENT

If you have previous continuous service with an organisation covered by the Redundancy Payments (Local Government) (Modification) Order (which covers local authorities and related bodies) this will be included in calculating your entitlement to a redundancy payment.

Previous service can count towards entitlements to certain conditions of service benefits i.e. sickness allowance, maternity leave and pay and annual leave. Details can be found under the relevant sections set out below or documents referred paragraph 2 above.

19. The clause does not define whether previous continuous service does count towards sickness allowance, nor how it might do so. I find that this clause was present in each of the subsequent statements of the claimant's terms and conditions of employment issued by the respondent.

20. Clause 2 states as follows:

2. TERMS AND CONDITIONS OF SERVICE

Your terms and conditions of employment (including certain provisions relating to your working conditions) are covered by existing collective agreements negotiated and agreed with a specified trade union or unions recognised by the Service for collective bargaining purposes in respect of the employment group to which you belong. These arrangements are embodied in the scheme of Conditions of Service of the National Joint Council for Local Government Services as supplemented by this Service's Local Agreements and rules as amended from time to time. Along with such other employment law legislation which will apply from time to time. Copies of the relevant documents are available for inspection in the Human Resources Department.

The Mid and West Wales Fire and Rescue Service undertakes to ensure that any future changes in these terms will be entered in these documents or otherwise recorded for you to refer to, within one month of the change.

This Statement of Particulars gives details of some of the main agreements and arrangements included in your terms and conditions of employment.

21. It is apparent that the content of the statement does not reflect the entirety of the terms of the claimant's contract of employment.

22. The Sickness pay scheme is addressed in clause 10 as set out below:

10. SICKNESS ABSENCE & PAYMENTS

If you are absent from work due to sickness then you should follow the procedure set out in P&OD Standing Order P&OD 03 20 – Sickness and Absence Monitoring Procedures, which you will receive on your first day of employment.

Failure to comply with the Sickness Absence Policy could result in a loss of sickness benefit and may lead to disciplinary action. All periods of sickness absence will be closely monitored and whilst counselling and advice on attendance levels will be given, failure to attain agreed attendance levels will be dealt with under the agreed procedures.

Your entitlement to payment during any absence due to sickness or injury are set out in the NJC agreements referred to in paragraph 2.

23. The relevant "NJC" clause reads as follows:

14. Continuous Service

14.1 For the purposes of entitlements regarding Annual Leave, the Occupational Sickness Scheme and the Occupational Maternity Scheme continuous service will include continuous previous service with any public authority to which the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999 applies.

24. The Respondent is a Fire Authority for the purposes of Schedule 1, Section six, paragraph 1 of the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999.

25. The effect of the above order modifies the words of the Employment Rights Act 1996 in respect of the calculation of statutory redundancy payments and maintains statutory continuity for "successive" employments with relevant bodies. It does not address or modify the purpose or effect of sections 210 to 217 of the Employment Rights Act 1996.

26. Thus, neither the written statement of the claimant's terms and conditions of employment, nor the incorporated collective bargaining terms (insofar as the parties have adduced such evidence) make any express reference to a method of calculating an employee's length of service for the purpose their entitlement to sickness absence benefits.

27. I do note that, whilst the claimant's statement of her terms and conditions are silent on the issue of "breaks" in the continuity of employment in respect of sickness absence benefits, there is an express reference to that subject in respect of the calculation of holiday pay: [67].

Continuous service with two or more local authorities, including fire and rescue services, police forces and river authorities (up to 6 weeks break in employment will be discounted), and all previous local authority service of women who left such employment for maternity reasons (provided no permanent full-time paid employment intervened) will count towards the calculation of holiday entitlement.

28. On the face of the document, it appears that, where the respondent wished to express a particular formula for the inclusion of periods of previous employment (for the calculation of benefits) it did so expressly or through incorporation.

29. The scope of the incorporation recorded in the above statement is twofold:

    a. The National Joint Council terms (frequently referred to as the "green Book") and

    b. "Such other employment law legislation which will apply from time to time".

30. It is common ground that the claimant applied for a second role with the respondent on the 6th August 2016 [73]. This was a temporary role working as an administrative assistant which helped to facilitated a fulltime firefighters' training course. That course was one which would occur following the recruitment of new firefighters; an irregular but reasonably frequent process.

31. The claimant was successful in her application [80] and commenced the administrative assistant role on the 1st September 2016 without a break in her continuity of employment with the respondent. The offer of employment stated expressly that the period of employment in this role would terminate on the 31st December 2016.

32. It was agreed that the claimant submitted an application form to the respondent [92-99] dated the 18th October 2016, for a further temporary role as a youth worker. And on the 29th November 2018, in response to an email from the claimant, the respondent informed her that the recruitment for that post had been put on hold [100].

33. On the 14th December 2016 the claimant was required to take her accrued annual leave so that she had no outstanding entitlement at the end of her contractual term; 31st December 2016.

34. The claimant asked that she could continue to work up to 31st December 2016 and referred to her application for the youth worker post as a suitable alternative to dismissal. She also commented that a grievance which she had raised on the 28th November 2016 could not be addressed whilst she was on annual leave [112].

35. The respondent did not agree to the claimant's proposal; she was required to take her contractual leave during the term of the contract of employment. At that time the recruitment process for the youth worker vacancy remained on hold.

36. In light of the email evidence of the 20th December 2016, I find that the recruitment process was, perhaps informally, progressing [114-115].

37. It is agreed that the claimant's employment terminated on the 31st December 2016 and that a p45 was issued in respect of that termination.

38. I find that by the 6th January 2017 [117] the claimant was the remaining candidate for the position of youth worker and the recruitment process for that post was able to progress.

39. Although the claimant had been directed to return the respondent's property and uniform before the 31st December 2016 [113] the claimant had not done so by that date and, on the 9th January 2017, she was informed by a junior manager of the respondent to retain the uniform pending the outcome of the recruitment process [117], which by that time had recommenced.

40. It is also common ground that the claimant was offered the position on Friday 19th January 2017 [123] and commenced employment with the respondent on Monday 23rd January 2017 [124].

41. Lastly it is common ground that the claimant was provided with new statement of her principal terms and conditions. The date of the claimant's continuous service was recorded as the 23rd January 2017. Save her job title and salary, the relevant clauses (for this dispute) were identical to those she had previously had 125-135].

42. The above form my principal findings of fact. Both parties raised other matters in cross examination and I will address that evidence in the context of my analysis and conclusions.

43. I first address the dispute which is common to both claims before me; the character of the 22 days between the 31st December 2016 and the 23rd January 2017.

The Relevant legal matrix

44. An employee's period of employment is presumed to last unbroken from start to finish unless and until the contrary is shown; Employment Rights Act 1996, section 210(5)). This presumption applies for all purposes for which continuity is relevant but it can be rebutted by any evidence, whether adduced by the employer or the employee.

45. The presumption will be rebutted if the evidence discloses that during the allegedly continuous period there was a week of employment (Sunday to Saturday) which:

(i) did not count for the purposes of continuous employment under ERA 1996 Pt XIV Ch 1 *and*

(ii) in relation to which continuity is not preserved by a provision in Ch 1 or regulations made under it.

46. If there is a week which satisfies *both* conditions, then the presumption is rebutted, continuity is broken, and the employee's period of continuous employment is computed from the Sunday immediately following the last interrupting week.

47. Irrespective of the actual hours worked (if any) during the week, a week counts if during the whole or part of the week the relationship between the parties is governed by a contract of employment: for an example of the application of this principle see *ABC News Intercontinental Inc v Gizbert [2006] All ER (D) 98 (Aug)*, *UKEAT/0160/06*.

48. In this case the claimant asserts that exception 212(3)(b) applies:

212 Weeks counting in computing period.

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(2) . . . . . .

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a)

(b) absent from work on account of a temporary cessation of work, or

(c)

An employee may count towards his or her total period of continuous employment a week during which, or during part of which, s/he was 'absent from work on account of a temporary cessation of work', notwithstanding that the relationship between the parties was not, during any part of that week, governed by a contract of employment.

49. The claimant argues that the three weeks in question amount to a temporary cessation of work. In particular she relies on the judgment of the Employment Appeal Tribunal in Holt v EB Security Ltd (In Liquidation) UKEAT/0558/11/CEA and the three questions which that division of the EAT held were pertinent to determining whether a cessation was “temporary”; paragraphs 12 to 15 of HHJ Peter Clark.

50. The Respondent avers that the factual findings in Holt were particular to that case, that neither party was represented and the respondent did not take part in the proceedings. I consider the Holt judgment and the respondent’s submission in the context of the judgment of Langstaff P, in Welton v Deluxe Retail Ltd t/a Madhouse (in Administration) [2013] IRLR 166, which reached the same conclusion and gave thorough reasons for that decision. The facts in Welton were somewhat similar, to those in *Holt* but that is not the material point of the judgment.

51. The respondent referred me to the two judgements of the House of Lords and one of the Court of Appeal in respect of the proper construction of section 212(3)(b); Fitzgerald v Hall, Russell & Co Ltd [1970] AC 984, Ford v Warwickshire County Council [1983] IRLR 126 and Byrne v City of Birmingham District Council [1987] IRLR 191.

52. From the above I have drawn the following principles:

53. I should judge this case with the benefit of hindsight; not from the contemporary perspective of the parties at the time of the cessation[4].

54. The employee's absence must be "on account of "a "temporary cessation " of work; the operative reason for the absence of the employee must be the cessation of the employee's work (regardless of the wider function of the business). Thus, the employee's absence for a reason which was not "on account of "a temporary cessation of work would not fall within the scope of subsection (b).

55. The Respondent reminded me that the expression 'cessation of work' denotes that an amount of work which has, for the time being, ceased to exist with the consequence that the work is no longer available to the employer to give to the employee. I was referred to *Byrne v City of Birmingham District Council* wherein the Court of Appeal rejected the argument 212(3)(b) applied in <u>any</u> circumstances where the employee did not work for at the insistence of the employer. In the Byrne case the redistribution of work (as against its cessation) was not held to fall with 212(3)(b).

<u>Conclusions on the Issue of Continuity of Employment</u>

Was the claimant's termination "on account of a temporary cessation of work"?

56. In respect of the elements of section 212(3)(b) set out above I find as follows:

57. The claimant's role, according to paragraph 4 of the witness statement of Mr Rees, was; "to assist the [respondent's] running of a Wholetime recruits' course. That course came to an end in December 2016."

58. Mr Rees' statement went on; "Karen was therefore explicitly employed to support a specific task – a task that came to an end in December 2016".

[4] That was the approach of Lord Parker in Hunter v Smith's Dock Co Ltd (1968) 1 WLR (page 1869H) and approved by the House of Lords in Fitzgerald (page 1003G). Lord Parker's judgment also set out guidance on relevant considerations when addressing the nature of a cessation; I have adopted that guidance.

59. I find that the claimant's employment was terminated on the 31st December 2016 and coincided with the cessation of the task for which she had been employed.

60. I therefore conclude that the claimant's absence from respondent's employment was on account of a cessation of work.

Was the cessation of that work temporary?

61. The respondent urges me to consider that the expiry of the claimant's fixed term temporary contract was not a "temporary cessation"; it was a permanent cessation of her work. her employment as temporary assistant ended and never recommenced; her January 2017 role was a quite different job.

62. Whilst my task is to consider, with the benefit of hindsight, whether such a cessation was temporary, I nevertheless find that the respondent and the claimant were, at the time of the dismissal, aware that the cessation of the training of recruits in the respondent's service was not a permanent state of affairs as recruitment is continuous consideration and a repeated and foreseeable course of action.

63. I reach the above conclusion because I accept the oral evidence the claimant gave, that such courses were repeated on, annually or bi-annually basis, depending on the respondent's need to recruit firefighters. I am aware that the respondent's area of responsibility covers six of the counties of Wales and that it recruits "On Call" and "Wholetime" firefighters.

64. I find as a fact, the cessation of the claimant's work on the 31st December 2016 was on account of a temporary cessation of the respondent's ongoing, if irregular in pattern, recruitment of firefighters.

65. Although I have made my finding on this issue, I will address the argument raised by the respondent that the *Holt* case was very much a case "on its own facts;" a factual matrix which could be distinguished from the case before me.

66. I have also noted the careful comments in Harveys (as referenced by HHJ Clarke in E B Holt]) which suggest, on the first principles of statutory construction, that it is the temporary nature of the cessation of the work, not the temporary nature of the employee's absence, that is the critical issue. On this occasion my finding of fact is consistent with that approach.

67. I considered the Respondent's argument in light of the dicta in Welton, on this point which I set out in some detail:

"35. The Appellant submitted that whether the cessation of work was temporary or not could only be approached with the benefit of hindsight. This he took from Ford v Warwickshire County Council [1983] ICR 273, H.L. Lord Brightman (at 289 B-C) described it as "fundamental" to the construction and application of paragraph 9(1)(b) (the statutory successor to the paragraph 5(1)(b) considered in Fitzgerald) that: "One looks backwards over the period of employment the continuity of which is in question and views the events which have happened, and then asks oneself whether the proper interpretation of those events is that, with hindsight, the employee has been 'absent from work on account of a temporary cessation of work.' As Lord Diplock put it (285 C- E): UKEAT/0266/12/ZT -14-

"… continuity of employment for the purposes of the Act in relation to unfair dismissal and redundancy payments is not broken unless and until, looking backwards from the date of the expiry of the fixed term contract on which the employees claim is based, there is to be found between one fixed term contract and its immediate predecessor an interval that cannot be characterised as short relatively to the combined duration of the two fixed term contracts. Whether it can be so characterised is a question of fact and degree…"

36. The Employment Judge did not, in her paragraph 29, make a decision of fact as to whether the cessation of work was temporary. She reached the decision as a matter of principle – that the section simply did not apply to a situation where one employment ended and another started. If that is precisely what she meant to say, it is plainly wrong: for temporary cessation of work never falls to be considered under section 212 unless there is no contract governing the relations between the employer and employee at the time. There will necessarily have been a resumption at some time – and hence initially under a new contract. I consider what she meant, in context, was that cessation of work because of the closure of one store, and the opening of another elsewhere could not fall within the section. Applying Fitzgerald, however, the proper view depends upon the employee working for the same employer, and not upon where or in what circumstances he does so. As the Appellant urged upon me, Lord Denning said in Wood v York City Council [1978] ICR 840 at 843a:

"Even though a man may change his job from, say, manual work to clerical work, even though he may change the site of his work from one place to another, even though he may change the terms of his contract of employment and enter into a new contract of employment, as long as he is with the same employer all the way through, then it is continuous employment… the fact that a man changes his job and goes to a different department does not mean that he has broken the continuity of his employment so long as he stays with the same employer."

37. The Employment Judge should therefore have assessed whether the cessation of work was temporary, viewed in hindsight, comparing the length of absence from work with the period of work which came before, and fell after it. Because of the approach she took, she never considered that factual question. Had she done so, there could on the facts of this case be only one conclusion which she could properly have reached: that the cessation of work was, so viewed, temporary.

68. Despite the sterling efforts of the respondent's counsel, I consider myself bound to follow the reasoning of the Employment Appeal Tribunal in Welton.

Was the cessation temporary?

69. I find as follows; the claimant had worked for the respondent for nine months prior to the cessation of her employment on the 31st December 2016. The period of the cessation was three weeks. The claimant was then employed on a third temporary contract which commenced on the 23rd January 2017 and was made permanent on the 1st September 2017.

70. The total period of her employment commenced on the 29th February 2016. At the date of the presentation of her claim she had been employed for three and a half years with in which there was a break in her employment of three weeks. That break amounted to less than 1/52 of her overall employment.

71. As of the date of this hearing her current cumulative employment with the respondent is a little over four and a half years.

72. In my judgment that above findings are sufficient to determine the dispute but I am wary that the authorities guide the Employment Tribunal to take in account all relevant matters. These are reflected in the following additional findings of fact on matters which were emphasised in cross examination between the parties.

73. At the date of her dismissal the claimant did not have an expectation that she would be reemployed to her former administrative post. She did have a hope, and a reasonable one, that she would be recruited to a vacant post of the sort which she had held between February and September 2016.

74. By the 9th January 2017 the respondent's junior manager, involved with the claimant's recruitment share that hope and through her text messages, increased altered the claimant's outlook from hope to expectation; a mutual outlook between the two.

75. The claimant was offered the role without interview; without references and her hours of" flexi time", which she had accrued prior her dismissal, were carried froward into her new role [135].

76. I find that the respondent's decision to put the above recruitment process "on hold" was unrelated to the claimant's personal circumstances or a grievance she raised on the 28th November 2016.

77. I set out the above to reflect all the circumstances of the case. I take all of the above into account and weigh the "mathematical approach" as one consideration amongst all the circumstances of the case.

78. Taking into account all my findings of fact I consider that the claimant's cessation of work between the expiry of the claimant's fixed term contract and the commencement of her next contract with the same employer was a temporary cessation of employment for the purposes of section 212(3)(b) of the Employment Rights Act 1996

79. I therefore find that the claimant's continuous period of employment with the respondent commenced on the 29th February 2016.

Determination of the claimant's reference under Section 11(1) of the Employment Rights Act 1996

80. It is common ground that the statutory statement of initial particulars of employment were provided to the claimant in the document titled; Statement of Particulars of Terms of Employment Local Authority Staff (Excluding Uniform Fire Service Personnel). [128-135]

81. Paragraph 3 of that document recorded the date on which the claimant's continuous employment with the respondent commenced as the 23rd January 2017.

82. The claimant seeks a determination of that paragraph. She argues such information is required under section 1(3)(c) of the Employment Rights Act 1996 and that respondent's statement at paragraph 3 of the particulars does not comply with what is required and, under section 11(1) seeks a determination of what particulars ought to have been referred to so as to comply with the requirements of section 1(3)(c).

83. I note that section 210 states as follows:

"**210 Introductory.**

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter."

84. I note that section 1(3)(c) is a provision of the same act which refers to "continuous employment" and that there is no express statement contrary to effect of section 210.

85. I find that the claimant's current particulars of employment relating to her period of continuous employment are incorrect. The correct date of for her commencement of continuous employment is the 29th February 2016.

86. By reason of the above, and under the authority of section 12 (2)(b), I determine that the claimant's particulars of employment are amended to show that the date on which she commenced continuous employment with the respondent was the 29th February 2016.

The claim for an unlawful deduction from wages

87. The respondent's sickness absence pay policy is documented on page 141 of the bundle; a single page from a larger document. It is identified in an email [140] as an extract from the "Green Book"; the NJC terms.

88. The extract shows that the duration of full pay during sickness absence was calculated by the length of the employee's service:

    During the second year of service; two months at full pay and two months at half pay

    During the third year of service: three months at full pay and two months at half pay.

    During the fourth year of service: four months at full pay and four months at half pay.

89. There is no dispute between the parties that the policy is contractual in nature.

90. The claimant was absent from work during the period between the 7th of January 2019 and the 12th April 2019. A little over three months.

91. Based on the respondent's records, the claimant's employment commenced on the 23rd January 2017 and so the" first year of her service" ran from the 23rd January 2017 until the 22nd January 2018.

92. Any sickness absence which occurred between the 23rd January 2018 and the 22nd January 2019 would occur "during" her second year of service.

93. Any Sickness absence which occurred after the 23rd January 2019 would occur "during her third year of service".

94. On the claimant's account of her continuous service (from the 29th February 2016) the claimant was "in her third year of service" from the 1st March 2018 until the 28th February 2019.

95. During that third year of service her contractual sickness absence pay entitlement had increased to three months full pay and three months half pay. After the 1st March 2019 the balance of her sickness absence occurred during her fourth year of service".[5]

96. If, as the claimant asserts, the sickness absence payment was to be calculated by reference to the statutory method of calculating her continuous employment, then the respondent has failed to pay her sick pay in accordance with her "during the third year of service" entitlement.

97. However, the respondent's case is that the contractual terms do not encompass the statutory provisions of sections 210 to 217 of the Employment Rights Act 1996 rather, the calculation is based on the start date of the current contract alone.

98. In these circumstances, the respondent asserts it has paid the claimant all that is lawfully due and that, through an administrative oversight, there had been an overpayment of sickness absence pay which the claimant's contract allowed, as a lawful deduction from her salary, the respondent to recoup.

99. The balance of the respondent's case on this issue is a mixed question of fact and law; did the terms of the sickness absence payment scheme include any consideration of the claimant's "statutory" period of continuous employment?

100. There is no suggestion of a variation of the claimant's contract of employment following her employment on the 23rd January 2017. Nor is there a suggestion that a term should be implied. Thus, the arguments before me are concerned with the express terms of the particulars of employment and those terms which were incorporated into the contractual agreement.

101. As noted in paragraph 19 above, clause 2 of the particulars of employment expressly incorporate the National Joint Council terms; commonly referred to the as the Green Book.

102. They also state "Along with such other employment legislation which will apply from time to time".

103. The heading of the particulars of employment includes an express reference to the Employment Rights Act 1996 (as well as its predecessor).

[5] Neither the claimant nor the respondent have referred to (nor pleaded) the point that the claimant's length of service, on the respondent's case) moved into her "third" year of service on the 23rd of January 2019 and, at that point, her contractual entitlement to sickness absence pay increased to three months full pay and three months half pay for the balance of her sickness absence. As the issue was neither pleaded nor argued I have not expressed any view upon it.

104. The above might infer that any aspect of the Employment Rights Act 1996, unless expressly stated in the written particulars or incorporated from the NJC, is incorporated into the claimant's contract of employment.

105. I was initially reticent of that approach. However, I note that during the grievance process (relating to the method by which the claimant's sick pay should be calculated) respondent's, set out with some care, the matters it had taken into account. The respondent did not state that the date recorded on the 23rd January 2017 contract was the sole consideration. On the contrary, it concluded that there had been a break in the claimant's employment which was longer than one week and it was for that reason it concluded that, in its judgment, the claimant's continuous employment did commence on the 29th February 2016. Indeed, the Grievance Outcome letter [182] went so far as to state:

> **The determination of a break in Service as per the Employment Rights Act 1996 applies in this instance, this relates to the period during which you were not employed by MAWWFRS between 1/01/17 and 23/01/17 which constitutes 22 days.**
>
> **Considering the reasons outlined above and within the attached Grievance Investigation report, I find that your grievance is not upheld.**

106. I note the respondent considered the claimant's references to the Holt case. It did not reject that as an irrelevance; it took it into account. That logic reflects, in lay terms, an analysis of statutory provisions of the Employment Rights Act 1996 concerning continuity of employment and finds that statute was a relevant consideration in determining the claimant's entitlement to sick pay.

107. Counter to that, the respondent argues that, where the is a reference to a statutory provision (again as mentioned in clause 3)[6] it is wholly irrelevant to the claimant's argument and by implication the absence of a reference to aspects of the Employment Rights Act 1996 is a clear indication that it had no part to play in the terms of the claimant's contract.

108. Similarly, the same clause acknowledges that prior service may be relevant to the calculation of some benefits, including sick pay and holiday pay.[7] But it guides the reader to documents which make an express reference to holiday pay calculation but not to any reference to sickness absence payments.

109. I note that, with respect to the above matters, each refers to previous employment with a different employer, not a break in service with the same employer. But for the purposes of this decision, I am content to accept that the same approach was intended to former employment with the respondent.

Conclusions

110. The claimant' bears the burden of proof in this matter.

[6] See paragraph 17 above and the quotation from clause 3.
[7] Ibid.

111. I find that it is more likely than not the express reference to the incorporation of applicable employment law legislation included aspects of the Employment Rights Act 1996 which will apply from time to time ". That approach is corroborated by the respondent's approach to determining the claimant's assertion of continuous employment in her 2019 grievance and the absence of an assertion that the recorded commencement date was the only material consideration.

112. For these reasons I am satisfied that the respondent's contractual terms considered the effect of sections 210 to 218 and allowed for an employee's service to be continuous where a relevant break in employment fell within the statutory exemptions.

113. It follows from the above conclusion that the claimant's entitlement to sickness absence payment was, at the material time, three months full pay and three months half pay.

114. As the respondent's defence to this claim depended upon a finding that the sum lawfully payable to the claimant was full pay for a two-month period, if follows that I find that the failure to pay the claimant full pay for three months amounted to an unlawful deduction from the claimant's wages and her claim is well founded.

Remedy

115. I accept the calculation set out in the claimant's schedule of loss and find that the quantum of the unlawful deduction amounted to £363.61.

Employment Judge R F Powell

Dated: 31st December 2020

REASONS SENT TO THE PARTIES ON 8 January 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS