



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Miss J Rodriquez

London Borough of Hammersmith & Fulham

Heard at: London Central Employment Tribunal (by video CVP)

On: 9 December 2020

Before: Employment Judge Adkin
Ms H Craik
Mr D Shaw

Representations

For the Claimant: Claimant
For the Respondent: Mr R O'Dair, Counsel

JUDGMENT

- (1) The Respondent is to pay the Claimant for the claim for unlawful deduction of wages as follows:
- a. Claim for sick pay 17 April-24 April 2019 **£95.68**.
 - b. Claim for unpaid employer contributions during the period 17 – 24 April 2019 under the Local Government Pension Scheme the sum of **£126.66**.
- (2) Under rule 70 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, the Tribunal has reconsidered its earlier judgment against the Respondent in respect of unpaid employer contributions during employment by Mitie Property Management Limited for the period December 2018 – 16 April 2019. That judgment is revoked.

REASONS

Background to sick pay claim

1. The unlawful deductions claim was dealt with in our written reasons on liability dated 5 October 2020, specifically paragraph 119-126 and 135-136. In essence, summarising, although a small pay claim like this would normally be dealt with at the conclusion of the hearing, we considered it would be just to allow a second opportunity for evidence to be obtained on the question of the Claimant's pay entitlement
2. The principal dispute between the parties is whether the Claimant is entitled to full pay on a contractual basis for sickness absence or alternatively on the statutory basis. The Claimant's contract provides for 20 days full pay on the basis of a rolling 12 month period under clause 13 of her contract of employment ("contractual sick pay"). Thereafter she receives statutory sick pay.
3. As was noted in our previous reasons, it appeared that we had direct evidence on whether or not a Claimant had exhausted the 20 day full pay sick pay entitlement, in particular no sick record. The Respondent's position is that the Claimant needed to prove that she had not taken these days so as to establish entitlement. We considered it might be argued on the Claimant's behalf that the argument about sick pay entitlement being exhausted is effectively a "defence" to the claim for sick pay and on that basis the burden should fall on the Respondent. The Claimant makes the point that the Respondent should have obtained the sick pay documents from Mitie as part of the transfer, and there was an onus on them to produce the documents. The Respondent's position is that they do not have these documents.
4. Following that hearing the Claimant requested from her former employers Mitie and Mears Group PLC details of her pension payments made to Scottish Widows and annual leave record in letters dated 12th October 2020 and 21/26 October 2020. Apparently having had no reply she made an application to Employment Tribunal on 3 November 2020 asking for an order under rule 31 of Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, in view of no response to 4 letters. The letters chasing details of annual leave and holiday pay were attached. Unfortunately this application was not referred to me nor any other judge. I received a copy of the application notice (using the County Court form) on the afternoon of 8 December 2020 with the Claimant's other documents. The covering email application we only saw during the course of the hearing. This is plainly unsatisfactory, and I can only apologise to the Claimant on behalf of our administrative function.
5. Jasmine Hudson, Group HR Director, of Mitie did however respond to correspondence from the Respondent. By a letter dated 20 November 2020, she provided details of pension payments made to Scottish Widows up to the transfer date of 17 April 2019. She also confirmed that there were no annual

leave holiday records for the Claimant. This letter provided the information that the Claimant was seeking in correspondence and was the information referred to in the application for a rule 31 order.

6. Belatedly, it seems, the Claimant realised that she had not requested Her sick record, which was the “loose end” in relation to her claim for contractual sick pay. Accordingly she requested this in a letter dated (Saturday) 28 November 2020. She had received no reply however by 9 December.
7. For reasons given orally at the outset of the hearing when dealing with preliminary matters, the tribunal refused the Claimant’s application to adjourn the hearing for there to be third attempt to consider this pay claim. Our decision was that we needed to decide this claim based on the evidence that we have.
8. It has been suggested by the Respondent that the Claimant could have obtained GP records to demonstrate that she was not sick during this period. In our assessment the Claimant acted reasonably by pursuing Mitie, since they would be reasonably expected hold her sick record.
9. It is unfortunate that Mitie did not respond to the Claimant’s initial correspondence and unfortunate that the Tribunal administration did not refer the Claimant’s application for a rule 31 order. Given however that Ms Hudson has provided the information sought by the Claimant in her application, she has not been disadvantaged by the latter.
10. As to the Claimant’s late request for her sick record, if this was sent by post on a Saturday, it may not have been received by Mitie until 1 or 2 December, i.e. a week before the remedy hearing. The absence of this documentation was identified at the hearing in September and the absence of the sick record highlighted in the Tribunal’s reasons dated 5 October 2020. To leave it so late to request these documents ran the real risk of no evidence being obtained.
11. The Claimant was invited to produce a witness statement confirming what sick leave she took in the event that she was not able to obtain documentary evidence [paragraph 135.3 of the written reasons]. Unfortunately she did not do this. It falls to the Tribunal to make an assessment of sick pay entitlement based on the evidence we have.

Assessment of quantum of sick pay claim

12. It is common ground between the two parties that the Claimant was signed off sick in the period 5 – 24 April 2019, and that the employment transferred from Mitie to the Respondent on 17 April 2019 by operation of TUPE.
13. It is also common ground that the Claimant is entitled to be paid sick pay for the period 17-24 April 2019. The point of dispute is whether the Claimant should recover contractual or statutory sick pay.

14. If there was a total absence of evidence about sick pay, we consider that we would have had to resolve the conflicting arguments about which party bore the burden of proof set out above. There is however one piece of evidence. The Claimant received a payslip from her previous employer Mitie dated 26 April 2019, which covered the period up to her transfer to the Respondent under TUPE on 17 April 2019.
15. The payslip contains two items of relevance:
 - 15.1. SSP Amount £75.40 [statutory sick pay];
 - 15.2. Payable OSP £1,064.75 [occupational sick pay i.e. contractual sick pay].
16. We have calculated, roughly, that the SSP paid represents 5.5 days' pay, whereas the OSP payment paid represents 6.5 days. The two total 12 days' sick pay, which corresponds to the 12 day sick absence 5-17 April 2018.
17. The previous payslip was dated 27 March 2019 for a pay period 201812. This payslip was dated 26 April 2019 for a pay period 201901. The payslip described above relates to the month of April, being the first month of the financial year.
18. We do not consider that this payslip is conclusive proof of whether the Claimant had or had not exhausted her sick pay entitlement for the rolling 12 month period up to 24 April 2019, the date of termination. We have had to approach this on the balance of probabilities and what is most likely in the circumstances.
19. Drawing on the Tribunal's industrial experience, we find it more likely than not that Mitie, which is a large organisation, has a payroll system which automatically switches to statutory sick pay when contractual sick is exhausted. Our finding, on the balance of probabilities, is that the Claimant exhausted her available contractual sick pay during the period 5-17 April 2019, which is why she began to receive SSP.
20. Most likely, we find is that the Claimant had the benefit of 6.5 OSP (contractual sick pay) first before switching to SSP on the basis that in the preceding rolling 12 month period she had received 20 days' contractual sick pay. There is a possibility that she had already exhausted her 20 days' as at 5 April 2019, but absences in the period 5-17 April 2018 fell off her rolling 12 month sick record, leading to an entitlement to OSP. Even if this is the case, the new OSP payments would take her back to 20 days' sick pay in the rolling 12 month period.
21. The only basis on which the Claimant would be entitled to OSP (contractual) sick pay in period 17-24 April 2019 would be paid contractual sick pay the previous year for the period 17-24 April 2018, which would mean that the number of paid sick days received in the preceding rolling 12 months period would fall below 20 days.

22. While it is a possibility that the Claimant's record of contractual sick payments for the previous year exactly lined up with the material week in 17-24 April 2019, dealing with what is probable, on the balance of probabilities we consider that this is unlikely. We find that it is more likely than not on the balance of probabilities that, throughout the period 17-24 April 2019 contractual sick pay was exhausted for the preceding rolling 12 months.
23. It follows that on transfer on 17 April 2019 the Claimant was entitled to be paid SSP until 24 April 2019. We assess her entitlement accordingly as **£95.98**.

Pension

Unpaid employer contributions during the period 17 – 24 April 2019 under the Local Government Pension Scheme

24. The Respondent admits that this sum is unpaid. The calculation is 15% of normal salary (£857.70), making **£126.66**.

Claim for pension December 2018 – 16 April 2019.

25. We have received evidence a letter dated 20 November 2020 from Jasmine Hudson, Group HR Director, in which she sets out a schedule of payments made to Scottish Widows from May 2018 to a leading date of 17 April 2019. This we accept at face value as showing that Mitie has made payments to the Claimant's pension.
26. By contrast the evidence relied upon by the Claimant as suggesting that Scottish Widows has not received these payments is somewhat inconclusive. We have been shown something that looks like a screen shot. It is unclear why the Claimant understands from this document that her SW pension account has not received payments since December 2018. It seems that the Claimant has had a telephone conversation with someone at Scottish Widows. We infer that this was a conversation with someone in a call centre who was not able to investigate the matter in any depth. We are reasonably confident that if the letter from Ms Hudson dated 20 November is provided to Scottish Widows it will be possible for Scottish Widows confirm that the payments are all up-to-date.
27. In order to give the Claimant some piece of mind, given that this claim is still "live" for the purposes of the Respondent's costs application, I have raised the possibility that a rule 31 order could be made by the Tribunal in the event that either Scottish Widows fails to cooperate with confirming that the payments received by Scottish Widows into the Claimant's pension take account of payments made up to 17 April 2019. This is not an opportunity to resurrect the sick pay claim which we have now dealt with. (Given the administrative difficulties experienced previously, I suggest that the Claimant copy my email address in any such application. Any such application or an application for a witness order against a named witness must be made at the latest by 27 January 2021, i.e. at least four weeks before the hearing.)

28. Before I would consider making an order, I would need to see evidence that the Claimant has written to Scottish Widows, attaching the letter from Ms Hudson and a copy of this judgment, and asking them, within a reasonable timeframe, i.e. at least 14 days, to confirm the position. The Claimant would be well advised to send this letter in December 2020.

Employment Judge Adkin

Date: 16 December 2020

WRITTEN REASONS SENT TO THE PARTIES ON
16/12/2020.

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FOR THE TRIBUNAL OFFICE

Notes

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