



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Moss

**Respondent:** Dr Jian and Dr Subramanian

**Heard at:** Manchester via CVP

**On:** 11 January 2021

**Before:** Employment Judge Ainscough

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr B Hendley (advocate)

# JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unlawful deduction from wages, contrary to section 13 of the Employment Rights Act 1996 is successful. The respondent is ordered to pay the claimant £992.00
2. The claim for unpaid holiday pay contrary to regulation 14 of the Working Time Regulations 1998 is successful. The respondent is ordered to pay the claimant £796.96

# REASONS

## Introduction

1. The claimant worked as a Practice Nurse for the respondents at their General Practitioner practice from 6 March 2018 until 13 June 2019. The claimant has brought claims for unlawful deduction from wages and failure to pay holiday pay.
2. The respondent, having been allowed to extend time to submit the response, submitted a response denying the claims and contending that the claimant had benefited from an overpayment of wages. There was a case management hearing before my colleague, Employment Judge McDonald, on 12 November 2020 during which he clarified the legal issues.

## The Issues

3. The issues to be determined were as follows:
- (1) Whether the claimant was allowed to carry over 21 hours of holiday from the year 2018 into 2019?
  - (2) The claimant's holiday pay entitlement on termination of her employment, in accordance with regulation 14 of the Working Time Regulations 1998;
  - (3) The duration of the claimant's notice period for the purposes of section 87 of the Employment Rights Act 1996;
  - (4) The amount of pay to which the claimant was entitled during that notice period, namely, whether the claimant should have received full sick pay or statutory sick pay?
  - (5) Whether there has been an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996? The respondents concede the claimant is owed 45 hours. The claimant contends she is owed 50 hours.
  - (6) Whether the claimant has been overpaid by 37.5 hours?
  - (7) The amount already paid to the claimant: is this £496.23 or £359.63?

## Evidence

4. The parties agreed a 46 page bundle. I heard evidence from the claimant and both respondents.

## Relevant Legal Principles

### Rights during notice period

5. Section 86(1) of the Employment Rights Act 1996 provides the minimum notice period to be given by an employer to terminate the contract of a person continuously employed for one month or more as:

- “(a) not less than one week's notice if his period of continuous employment is less than two years,
- (b) not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
- (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.”

6. Section 86(2) of the Employment Rights Act 1996 provides that an employee who has been continuously employed for one month or more must give not less than one week's notice to terminate the contract of employment.

7. Section 87(4) of the Employment Rights Act 1996 excludes the rights provided by the Employment Rights Act 1996 to an employee during the notice period if the contractual notice period is at least one week more than required under section 86(1).

Unlawful Deduction from Wages

8. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

- “(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker’s contract; or**
- (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.”**

9. A relevant provision in the worker’s contract is defined by section 13(2) as:

- “(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**
- (b) In one or more terms of the contract, (whether express or implied) and, if express, whether oral or in writing, the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion.”**

10. A deduction is defined by section 13(3) as follows:

- “(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.”**

11. Section 27 defines wages, which includes:

- “(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.**
- (b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992.”**

12. Section 24 provides that:

**“Where any complaint under section 23 is well-founded the Tribunal can make an order that the employer pay to the worker the amount of any deduction in contravention of section 13.”**

13. However, section 25 determines that:

- “(3) An employer shall not under section 24 be ordered by a Tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, insofar as it appears to the Tribunal that he has already paid or repaid any such amount to the worker.”**

### Holiday Pay

14. Regulation 14 of the Working Time Regulations 1998 provides:

“(1) this regulation applies where –

- (a) a worker’s employment is terminated during the course of this leave year, and
- (b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) where the proportion of the 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 of leave in accordance with paragraph (3).”

### **Relevant Findings of Fact**

15. The claimant worked as a Practice Nurse for the respondents’ General Practitioner practice from 6 March 2018 until 13 June 2019.

16. The claimant worked 22.5 hours per week on a Tuesday, Wednesday and Thursday each week.

17. Each month the claimant received £1560 gross pay. The gross pay was calculated using the formula: 52 weeks x 22.5 hours/12 months. This equated to 97.5 hours each month at a rate of £16 per hour.

18. The respondents holiday year ran from 1 January – 31 December each year. The claimant was entitled to 33 days or 6.6 weeks leave per year. The claimant’s contract of employment states that an employee will be paid “normal basic remuneration during such holidays”.

19. The contract of employment provided that the claimant was entitled to 4 weeks’ notice in the first five years of continuous employment.

20. The claimant resigned from her role on 16 May 2019 and gave four weeks’ notice.

21. The claimant was absent from work as a result of sickness from 21 May 2019 until 11 June 2019.

### **Discussion and Conclusions**

#### Calculation of Claimant’s wage

22. It is clear from the payslip provided in the bundle that the claimant’s monthly pay was calculated in accordance with a standardised month. The calculation was based on 97.5 hours each month rather than 90 hours, to take account of the fact that not every month is four weeks long: there are some months that are longer than four weeks and there are some months that are shorter than four weeks. The respondents decided that the fairest way to deal with this issue was to make a standardised payment of 97.5 hours each month at £16 per hour.

23. Therefore, the calculation of the claimant's wages on termination of employment should not deviate from this calculation.

#### Carry over of leave

24. The claimant's contract of employment was silent on the issue of carry over of annual leave from one leave year to the next.

25. The rules of annual leave were supplemented by a Staff Handbook. I was not provided with a copy of the handbook. The respondents did make reference to the content of the Handbook during evidence but were unable to quote any part that contradicted the claimant's position that her line manager had authorised the carry over of annual leave from 2018 to 2019.

26. Within the bundle are letters from Mr Smith, who was the Practice Manager and claimant's line manager from 2018 – 2019. In one letter dated 3 April 2020, Mr Smith asserts that in October 2018 he agreed with the respondents that the claimant would be allowed to carry over leave of 21 hours to the 2019 leave year to assist with a compliance task.

27. Mr Smith did not attend at the hearing to give evidence and therefore the content of his letters could not be challenged. However, the respondents did not dispute what Mr Smith had agreed with the claimant, but rather that they had been unaware of this agreement.

28. It is my finding that the claimant was authorised to carry over leave of 21 hours.

#### Holiday pay on termination

29. On termination of employment, regulation 14 of the Working Time Regulations 1998 provides that any accrued leave entitlement will be paid.

30. The amount of holiday pay owed is calculated in accordance with regulation 14(3) by establishing the period of leave to which the worker was entitled over the course of the leave year. It was agreed that the claimant was entitled to 33 or 6.6 weeks leave per year.

31. As the claimant's contract provided that the claimant was to work 22.5 hours each week, it is necessary to convert the claimant's holiday entitlement from days and weeks to hours. The claimant was entitled to 6.6 weeks of leave each year. In order to convert this entitlement from weeks to hours it is necessary to multiply the 6.6 weeks leave by 22.5 (weekly number of hours). In so doing I have established that the claimant was entitled to 148.5 hours holiday per year.

32. It is then necessary to establish the proportion of the worker's leave year which has expired before the termination date in order to calculate how much leave a worker has accrued on the date of termination. This is expressed as a percentage. On the date of the claimant's termination of employment, 46% of the leave year had expired and she had accrued 68.31 hours of leave.

33. Finally, it is necessary to establish the period of leave taken by the worker up to the termination date. In this case the claimant had taken 39.5 hours.

34. This left the claimant with an entitlement of 28.81 hours plus the 21 hours that were carried over from 2018. As the claimant was paid at the rate of £16 per hour, she was entitled to a holiday payment on termination of employment of £796.96.

#### Notice Period

35. The claimant's contract of employment provides for 4 weeks' notice in the first 5 years of continuous employment. This notice period is at least one week more than notice period required by section 86 of the Employment Rights Act 1996 and therefore section 87 of the Employment Rights Act 1996 does not apply. The parties are reliant on the contractual position.

#### Sick Pay

36. The claimant's contract is silent on sickness absence and the rate of sick pay. It was the claimant's case that she was entitled to receive full pay whilst off sick from 21 May 2019 – 11 June 2019. The claimant relied on the letter from Mr Smith dated 10 December 2019.

37. In this letter Mr Smith says "all staff.....were paid for time off when they were sick". However, Mr Smith does not confirm whether this was full pay or statutory sick pay. I have not seen any evidence to suggest that the claimant was entitled to full pay whilst off sick.

38. It is the respondent's case that the claimant was only entitled to statutory sick pay.

39. The claimant admitted in evidence that she did not know, with any certainty, whether she was entitled to full pay. The claimant relies upon what she has been told by colleagues. I have not seen any evidence from the claimant's colleagues, other than Mr Smith.

40. I accept the respondents' evidence that the claimant was entitled to statutory sick pay.

#### Payment of wages on termination

41. The claimant returned to work on 11 June 2019 and worked 22.5 hours before the termination date on 13 June 2019. At the rate of £16 per hour this equates to £360. The claimant was paid £208. There was an unlawful deduction of £152. The claimant received a tax credit of £136.60. The respondent was not entitled to use this credit in the calculation of the claimant's gross salary on termination of employment.

#### Month in Hand

42. The respondents conceded that they owed the claimant one month's wages on termination of employment. This amount was owed as a result of a historical practice of accounting. As a result of the standardised month calculation the claimant was entitled to an additional payment of 97.5 hours.

43. The payslip from May 2019 reveals that the claimant was paid 45 hours purporting to be two weeks' pay. However, as the claimant was paid for 97.5 hours

each month she is in fact owed, 52.5 hours at a rate of £16 per hour which equates to £840.

Alleged overpayment

44. I do not find that the claimant was subject to an overpayment. The respondent sought to calculate the claimant's pay on termination in accordance with the weekly hours worked rather than the standardised month calculation that had been used throughout her employment. The claimant was not overpaid by 37.5 hours and therefore does not owe any money to the respondent.

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Employment Judge Ainscough

Date: 5 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 March 2021

FOR THE TRIBUNAL OFFICE

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## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2413466/2019**

Name of case: **Mrs P Moss** v **Dr Jain & Dr Subramanian**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **9 March 2021**

"the calculation day" is: **10 March 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals