



EMPLOYMENT TRIBUNALS

Claimant: Mr. R. Diaz

Respondent: Grosvenor Services (UK) Limited

Heard at: London Central

On: 27 May 2021

Before: Employment Judge M Joyce (sitting alone)

Representation

Claimant: Ms. L Zapata (Consultant)

Respondent: Ms. N KhunKhuna (HR manager)

JUDGMENT having been sent to the parties on **11 June 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant has brought a claim for unlawful deduction of wages. The issues agreed at the start of the hearing were:(1) were the wages paid to the claimant less than they should have been? (2) was any deduction from the claimant's wages authorized by the written terms of the contract? (3) was any deduction from the claimant's wages authorized by virtue of the claimant not being ready, willing and able to work?; and (iv) what sums were owed to the claimant?

Hearing: Procedure, documents and evidence heard

2. The Tribunal heard evidence from the claimant, and Ms. KhunKhuna on behalf of the respondent. In addition, there was a bundle containing 33 documents. Oral closing submissions were made by the representatives for both parties.

Facts

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3. The respondent is a company that provides cleaning services. The claimant commenced employment as a night cleaner with the respondent on 12 March 2018.
4. From 14 to 29 February 2020, the claimant was on sick leave due to back pain. Annual leave was approved for the claimant from 1-16 March 2020. The claimant returned to his home country of Peru, but decided to stay in Peru beyond that date. In fact he remained there until 28 July 2020.
5. By letter dated 20 April 2020, the claimant was placed on furlough and on 21 April the claimant returned a signed copy of the letter to the respondent.
6. By email on 16 July 2020, Ms. Khunkhuna, HR manager, informed the claimant that he was required to return to work on 19 July 2020. It was clear to him that he was required to return to work on 19 July 2020.
7. On 19 July 2020, the claimant sent an email to Mr. Rhener Furtado, Administrator with the respondent, asking for an explanation relating to the email sent to him by Ms. Khunkhuna requiring him to return to work. This email was followed up by a phone call between the claimant and Mr. Furtado.
8. On 20 July 2020, the claimant sent an email to Ms. Khunkhuna and Mr. Furtado in which he stated that he had a plane ticket for the 28 July 2020 and that he would "be in action for the first of August". On the same day, the claimant sent to Mr. Stoil Grozdanov, Administrator with the respondent, a copy of the email by WhatsApp message.
9. By WhatsApp message of the same date to Mr. Grozdanov, the claimant stated that he would be required to quarantine for a period of 14 days upon his return to the UK. The claimant also sent WhatsApp messages to Mr. Grozdanov, attaching his plane tickets and stating that he was not refusing to return to work.
10. On 28 July 2020, the claimant returned to the UK from Peru. It does not appear that there was any further material contact between the claimant and the respondent until 11 September 2020. During this time C was apparently in quarantine and unable to work.
11. On 11 September 2020, the claimant sent an email to Ms. Khunkhuna enquiring why his salary had not been paid. On the same date, Ms. Khunkhuna sent an email to the claimant informing him that he was on unpaid leave as he had been asked to return to work in July but had not done so. Ms. Khunkhuna also asked the claimant when he planned to return to work.
12. On 14 September 2020, the claimant had a meeting with Mr. Furtado. The claimant mentioned that he would be getting private treatment from a chiropractor for his back. He stated that he was ready, willing and able to resume full duties at work from 16 September 2020. On the same day, Mr. Furtado sent an email to Ms. Khunkhuna stating that he had met with the claimant who had said he would be available for work from 1 October.

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13. On the same day, Mr. Furtado emailed the claimant stating that he had held a meeting with Human Resources who advised him that the claimant had been placed on leave without pay because the claimant had not returned to work. The email further requested that the claimant provide a fitness to return to work note in light of his reference to needing treatment for his back.
14. Following various failed attempts to obtain a fitness to return to work note from the doctor, on 3 November 2020 the claimant provided a self - certification of his fitness to return to work in the form of a signed handwritten note.
15. On 17 November 2020, the claimant filed a formal grievance in relation to non-payment of his wages. On 26 November 2020, a grievance meeting was held. On 8 December 2020 the claimant's grievance was dismissed.
16. The respondent did not receive any furlough payments for the claimant from June 2020 onwards. The respondent did not pay the claimant wages from 19 July 2020 to 3 November 2020.

Law

17. Section 13 of the Employment Rights Act 1996 provides in relevant parts:
13 Right not to suffer unauthorised deductions.
(1) An employer shall not make a deduction from 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.
18. From the authority of *Camden Primary Care Trust v Atchoe* 2007 EWCA Civ 714, CA, I deduced the principle that in order to determine what wages are properly payable, one must consider all relevant terms of the contract, including any implied terms. An implied term in that case included the employee being ready, willing and able to work.
19. I also took account of the case of *Northwest Anglia NHS Foundation Trust and Dr. Andrew Gregg* [2019] EWCA Civ 387 which provided that if an employee does not work, he or she has to show that they were ready, willing and able to perform work if they wish to avoid a deduction to their pay. The case further provided that when assessing whether an employee was ready willing and able to work, one should consider whether any inability to work was due to an "unavoidable impediment" or was "involuntary". In cases where an inability to work was deemed to be unavoidable or involuntary, the deduction of pay may be unlawful.

Conclusions

20. The claimant's claim, can be broadly divided into two separate parts. Part A relates to the non-payment of wages from 19 July 2020 to 15 September 2020, during which period the claimant sought furlough payments,

amounting to 80% of his regular wages. Part B of the claim relates to non-payment of wages from 16 September 2020 to 3 November 2020.

21. Neither party disputed that there was a deduction from the claimant's wages. Neither party maintained that there was a written term of the contract that authorized the respondent to make deductions from the claimant's wages. The key issue to emerge at the hearing was whether the deductions were authorized by virtue of the claimant not being ready, willing and able to work.
22. As to part A of the claim, I found that the deduction of wages was authorized in that the claimant was not ready, willing and able to work. The claimant had leave authorized from 1 to 16 March 2020, but decided to stay in Peru beyond that date. As such, he had voluntarily absented himself from the workplace. On receipt of the email from Ms. Khunkhuna of 16 July 2020, it was clear to him that he was required to return to work on 19 July 2020.
23. While the claimant maintained during the hearing that it was not clear to him that he would have to return to work, due to a separate conversation with Mr. Rhener, I find that the email from Ms. Khunkhuna was clear and unambiguous in requiring him to return to work. That he knew this to be the case is further underlined by his email of 20 July 2020 in which he stated that he would be "ready for action" (presumed to mean, ready for work) on 1 August 2020. Yet, this email was also contradicted by a separate WhatsApp message to Mr. Grozdanov in which the claimant stated he would need to quarantine for 14 days upon his return to the UK.
24. In light of the above, it was entirely unclear when the claimant would be ready, willing and able to return to work. I conclude that as he had voluntarily absented himself from the UK, it was incumbent upon him to communicate with Human Resources upon his return from Peru and to inform them when he was ready, willing and able to return to work. He did not do so. I find that he was not ready, willing and able to return to work between 19 July until 15 September 2020. As such, the deduction of his wages during this period by the respondent was authorized.
25. I have taken account of the covid pandemic, which restricted the claimant's ability to return to the UK, but even so, the claimant had returned by 28 July 2020 and had not communicated this unambiguously to his employer such that they knew he was ready, willing and able to work. Furthermore, the claimant sought furlough payments from 9 July 2020 to 15 September 2020, when he was not on furlough during this period, having been informed that he was to return to work from the 19 July. As noted above, the respondent did not receive any such furlough payments for the claimant during that period. Consequently, this part of the claimant's claim is dismissed.
26. As to part B of the claim, it was not disputed that there was a deduction from the claimant's wages. At the in-person meeting on 14 September 2019 with Mr. Rhener, the claimant informed him that he was ready, willing and able to return to work from 16 September onwards. While he mentioned that he had a private treatment scheduled with a chiropractor, he also made it clear that he was able to return to work to assume his full duties. No evidence was provided by the respondent as to Mr. Rhener's knowledge of the

conversation he held at the meeting with the claimant. I accept that there was an email from Mr. Furtado to Ms. Khunhuna referring to a proposed return to work date of 1 October 2020, but there was no reference in that email to any issue with the claimant's back.

27. At the respondent's insistence, the claimant sought to obtain a doctor's note declaring him fit to return to work. He was unable to do so due to the covid pandemic. Finally, the respondent accepted a handwritten note from the claimant himself as self-certification of his fitness to return to work. If the note was sufficient as of 3 November 2020, then in my view it would also have been sufficient as of 16 September 2020, namely the date on which the claimant made it clear to the respondent that he was ready, willing and able to return to work. Therefore, the deduction of the claimant's wages from 16 September 2020 to 3 November 2020 was unauthorized and this part of the claim succeeds.

Remedies

28. At the conclusion of the hearing, the parties were invited to agree the figure for the unpaid wages from 16 September 2020 to 3 November 2020. By email of 1 June 2021, the parties confirmed the correct figure to be £2660.70. This figure was the same as that contained in the schedule of loss provided by the claimant, and which formed part of the bundle. I therefore made an award to the claimant for this amount.

Employment Judge **Joyce**

Date 29/06/2021

REASONS SENT TO THE PARTIES ON

29/06/2021..

FOR THE TRIBUNAL OFFICE