Case No: 2304342/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr John Craig

Respondent: Abellio Limited

Heard at: London South **On:** 6 July 2021

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent Mr A Lord instructed by Backhouse Jones Solicitors

JUDGMENT ON RECONSIDERATION

1. The original judgment is restored save that the respondent concedes that a further payment of £278.94 is outstanding.

2. Accordingly, there was an unauthorised deduction from the claimant's wages in the sum of **£2,120.48**

REASONS

1. This is essentially an application to set aside judgment, a judgment on reconsideration made on 3 November 2020. It followed a hearing on 26 October 2020.

2. The case has had a difficult history. There was very limited time at that original hearing to deal with all issues. It concerned a claim of constructive dismissal in which Mr Craig resigned because the payment of his sick pay was not made on the date expected, and I concluded that that was not a fundamental breach of

contract. That left, among other issues, the calculation of the amount of sick pay he should have received – whether on the basis of his average pay, as he contended, or on the basis of a flat daily rate as used by the company.

3. It seemed to me clear that the relevant sick pay policy supported his approach, but there was then an application by the company for a reconsideration on the basis that they still used a daily rate approach, as agreed with the union.

4. There was no response from Mr Craig to that application, and accordingly I concluded that it was accepted on his behalf that that was the position, and the judgment was revised accordingly.

5. He then disputed that, saying that he did not receive notice of the reconsideration. No reasons were given for disputing their approach, but after further directions he has done so, and this hearing was listed.

6. I have now been re-supplied with the original bundle and heard arguments on each side. It is worth revisiting what I said in the original judgment about this:

> 17 [The previous sick pay policy from 2012] was designed for those who work a standard five-day week, not someone like Mr Craig with compressed hours. The basic intention behind it is clearly to provide for three months' full pay and three months' half pay. A week's pay usually varies from person to person and is easy to calculate in an individual case, so there is no unfairness. But here the policy provided for 13 weeks of "Normal Benefit" for those with his length of service, followed by 13 weeks of "Reduced Benefit". These were defined as a fixed amount, equal to a normal days pay of eight hours, so it operated unfairly for someone like Mr Craig working compressed hours. If he was off sick for a week he would get four standard days' pay, the same as someone working 32 hours a week.
>
> 18. That unfairness was compounded by the fact that the company's records, at least on his personnel file, appeared to show that he was employed three days a week, so he would in fact just receive three "Normal Benefits" for a week off sick.
>
> 19 The issue about these fixed benefits was resolved in the 2018 policy, which adopted the simpler approach of paying 13 weeks full and then half pay, but the issue about his weekly pattern of work continued, and these controversies bedevilled the rest of his employment.

7. The respondent's application for a reconsideration took issue with that. The first point made was that his contract of employment (page 46), stated that his entitlement was for 13 weeks at 'normal benefit', followed by 13 weeks 'reduced benefit'.

8. Further:

> "The Respondent's contractual sick pay offering in both policies is firmly based upon a set daily rate, which from 5 January 2019 was £85.26, as demonstrated by the pay

> implementation notice at page 103B of the bundle. The Respondent has not deviated from applying the prescribed set daily rates, which is supportive of the fact it has never been the Respondent's intention by policy, or by custom and practice to calculate sick pay based on an average earnings calculation."

9. These were the main arguments relied on by Mr Lord today. He argues that although the 2018 policy refers to full pay and half pay, this was "an issue of language", and that it was necessary to look behind the language to see the intention behind the policy. It was always intended to work in the same way as the previous arrangement, as shown by the negotiations with the Union.

10. It is however trite law that in construing any contract, including a contract of employment, what matters are the words used, not the intention of the party using them. Those words have to be construed in light of all the circumstances, including the history of dealings between the parties, i.e. their custom and practice, in order to work out how those words would have been understood. But again, that is not the same as what was intended.

11. The contract of employment does indeed provide for sick pay of 13 weeks 'normal benefit' followed by 13 weeks 'reduced benefit'. There is then an asterix and a comment that states "Some employees may have different sick pay contractual arrangement", which Mr Craig points to as showing that his entitlements may be different, but the asterix only relates to SSP payments for those in their first two years, and so does not apply to his case. It is a red herring.

12. The sick pay policy in force at that time (the 2012 policy) is at page 76. It also provided for 'normal benefit' and 'reduced benefit', which were given a specific value. The question though is what the parties would have understood the position to be following the introduction of the 2018 policy. The language has now changed to 'full pay' and 'half pay'. How was the contract to be interpreted then?

13. The company says, it was to be interpreted in exactly the same way as before. The change of language meant no change at all. But a week's pay is very different. It is also very easy to understand. It is the pay you receive in a week. Or if it varies, it is the pay you receive in an average week. Not only is that clear but it is also fair. It takes account of untypical working patterns. It is fair to both parties. A driver who only worked in the morning and was off sick for a week would receive sick pay for those five mornings, not five fixed payments based on a full daily rate. Equally someone in Mr Craig's position would get the benefit of a full week's pay rather than three or four such fixed payments.

14. It seems to me therefore, as a matter of interpretation that the words used in the 2018 policy do change things. The company chose not to repeat the previous references to normal and reduced benefit, as they might easily have done, and must be taken to have intended some change. The change appears obvious.

15. Against that it is said that the memo issued to confirm new pay rates, which followed pay negotiations with the union, shows that the fixed rate approach continued. The relevant rates were increased in 2019. But this was not a document provided to Mr Craig or employees generally. At best it is evidence of their intention. However it seems to me that this is more likely to have been an oversight. No doubt this is part of an annual pay round, and every year figures are increased in all categories, including these historic features. That does not seem to be any basis to override the clear terms of the published policy.

16. Objection is also taken on the basis that the calculation was done on the basis of a twelve week average, but the method of calculation is not defined in the policy. Normally this will be easy to calculate, but not so easy where pay fluctuates from week to week. That is very much a secondary consideration. The method used in the judgment is that derived from section 222 Employment Rights Act 1996, in the same way as commonly employed for holiday pay calculations, which must now reflect actual earnings not just a basic rate. No alternative mechanism is proposed, and the fact that the averaging method has to be implied does not affect the clear meaning of the policy.

17. A number of smaller points have also been raised this morning but I am not going to go into those in any detail. There has to be finality of litigation. The outcome was recorded in the original Judgment. If that is wrong there is a right of appeal. The company applied for it to be reconsidered on one point only. That was done, and now, after hearing argument on the point, it has been undone. That does not mean that all points are re-opened.

18. However, the respondent accepts that taking into account the annual pay rise in 2019 and the final payment actually made to Mr Craig, which was less than calculated at the time, a further £278.94 is owing and they invite me to include that in the Judgment. I will therefore amend the original judgment figure of 1,851.54 upwards to £2,120.48.

Employment Judge Fowell
Date **6 July 2020**

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date **7 July 2020**

FOR THE TRIBUNAL OFFICE