



EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Jones

Respondent: Lloyds Pharmacy Clinical Homecare Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 7 October 2021
13 October 2021 (in chambers)

Before: Employment Judge J Shulman

Representation:

For the Claimant: In person

For the Respondent: Ms G Rezaie (Counsel)

RESERVED JUDGMENT

The Claimant's claim of unauthorised deduction of wages is dismissed.

REASONS

1 Introduction

1.1 The issue in this case relates to whether the Claimant was entitled to be paid the sum £23,100 for a 25 hourly week and whether with effect on 1 December 2020 the Respondent was entitled to reduce the Claimant's annual salary from £23,100 to £16,666 per annum.

1.2 Was the Respondent contractually entitled so to deduct?

1.3 Or in making that deduction had the Respondent made a mistake in overpaying the Claimant with effect from 1 October 2019?

1.4 Was the making of that mistake relevant to the outcome?

The Law

2 The Tribunal has to have regard to the following provisions of the law:

2.1 Section 13(1)(a) Employment Rights Act 1996 - 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.

2.2 The Tribunal were referred by Ms Rezaie to the case of *Smith v Hughes [1871] LR 6QB 597*. In that case Blackburne J stated that where there is a mistake, intention is to be inferred objectively. If a reasonable man would believe from A’s conduct that he agreed to B’s terms A is bound by them regardless of his true intention. This case will only apply if the question of mistake is a determining factor.

Facts

3 The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

3.1 The Claimant’s contract, which was dated 1 May 2018, sets out an annual salary of £18,500 for 37.5 hours per week. As such the Claimant was employed as a complaints and incidents investigation officer from 1 January 2017, so says the Claimant, or on 9 October 2017, so says the Respondent, but at the time of the hearing the Claimant’s employment was continuing. The Respondent is an organisation with 22,000 staff in the business of Clinical Homecare Services for vulnerable people.

3.2 Whilst on maternity leave on 17 June 2019 the Claimant made a flexible working request to reduce her hours from 37.5 hours a week to 25 hours per week, a reduction in hours of a third.

3.3 On 28 August 2019 a salary was approved by the Respondent for 25 hours per week of £23,100 pro rated.

3.4 On 1 September 2019 the Claimant’s manager, Suzannah King, completed a form entitled “returning from maternity leave – confirmation of hours role and rate of pay” (page 60 in the bundle) confirming the annual salary at £23,100 *FTE (it is my emphasis meaning Full Time Equivalent)*. In document 60 Ms King confirmed the contracted hours as 25 a week.

3.5 On the other hand the Claimant says that they had a meeting on 1 August 2021, whilst she was still on maternity leave, and Ms King verbally gave the Claimant one possible salary amount. This was for when she returned to work. The Claimant could not remember how much this possible salary was. The Claimant then said at a later unspecified date that Ms King gave the Claimant a further

amount of salary. Again she could not remember the amount. Then at a team dinner where the atmosphere was described of a non-business nature, at the Harlow Beefeater, Ms King was alleged to have said that the salary was to be £23,100. In her statement the Claimant does not actually state whether the sum was said to be pro rated or not. In cross-examination of the Claimant the Claimant agreed that at no stage did Ms King say to the Claimant that if the Claimant were to reduce her hours her salary would remain the same as if she were working 37.5 hours. When the Claimant was shown page 60 of the bundle she said that everything in there was correct except she insisted that she was told her salary would be £23,100. However the Claimant said that it was possible that she had misinterpreted what Ms King said to her.

3.6 On 29 August 2019 Ms King wrote to confirm what the Respondent intended, namely, 25 hours per week at £23,100 FTE. This letter was actually signed by Ms King, not for or on her behalf. The Claimant told us that she never received this letter, (page 75 of the bundle) although she accepted it was sent to her correct postal address. For some reason on 10 October 2019 another letter was sent to the Claimant but signed for and on behalf of Suzannah King, purporting to confirm the arrangement. This referred to “a salary increase to £23,100” (page 80 in the bundle) There was no reference to pro rating or FTE, but it did confirm the existing terms and conditions. The Tribunal examined internal paperwork of the Respondent which clearly showed that the sum of £23,100 was FTE or pro rated. See, for example, pages 69 – 71 in the bundle.

3.7 Notwithstanding the Respondent’s intention that the Claimant should receive £23,100 pro rated from 1 October 2019 the Claimant actually received remuneration on the basis that her salary for 25 hours per week was £23,100 and not pro rated. The Respondent said this was a mistake. The Claimant conceded before us that there was a misunderstanding between Human Resources and Ms King, Human Resources believing that the payment was FTE.

3.8 The Claimant was, therefore, paid from 1 October 2019 until the alleged deduction at the 25 hour a week rate of £23,100 FTE. The discrepancy was uncovered by Ms King’s successor, Sophie Wahlich. The Claimant has since 1 October 2019 been paid the equivalent of an annual salary of £35,000, nearly double her previous salary of £18,500. The Claimant told us she had a reasonable expectation to be paid more for doing less. She said that she felt she was earning more because she had asked for a pay rise.

3.9 The Respondent identified the overpayment as a processing error. The result was as far as the Respondent was concerned an overpayment from October 2020 of £7,700. The Respondent decided to write the overpayment off and not seek to recover it from the Claimant. The Claimant was in fact overpaid for 14 months in the sum of £9,163. The Claimant did not appear to know that she was receiving during this period nearly double her previous salary and she did not apparently know she was receiving £23,100 for a 25 hour week instead of £23,100 pro rated.

3.10 With effect from 1 December 2020 the Claimant’s salary was increased in any event from £23,100 to £25,000 and a letter was sent to the Claimant on 11 December 2020 (page 184 of the bundle) confirming her new salary at £16,666,

which is £25,000 FTE, with effect from 1 December 2020. It is that letter, so far as the Claimant is concerned, that gives rise to the claim for the deduction in her salary from £23,100 to £16,666. The Claimant did not put in a grievance because of this alleged deduction. The Claimant is also alleged to have said to Sophie Wahlich that she understood that the Respondent was a business and that the error needed rectifying, requesting that this be done sooner rather than later, as she did not want it hanging over her head (bundle page 117). It is certainly clear that the Claimant engaged in the salary/overpayment process (see bundle page 180).

Determination of the issues

4 (After listening to the factual and legal submissions made by and on behalf of the respective parties):

4.1 The Claimant's existing contract of employment specified an annual salary at £18,500 for a 37.5 hour week.

4.2 This was varied as a result of the post-maternity leave salary. The Claimant was extremely vague about the three discussions that she had with Ms King about her new salary. She was unable to remember the first two figures she was given. Further the Tribunal finds that it is unlikely that the third figure was given to her at a social team outing. On the other hand Ms King was quite clear at document 60 that the annual salary was expressed to be £23,100 FTE and this should be measured against the Claimant's evidence that it was possible that she misinterpreted what Ms King said to her. Why should Ms King say one thing to the Claimant and then another as part of information on rate of pay? Furthermore it seems strange that the Claimant should not get document 75, which was properly addressed as at document 80. There is much internal paperwork in this that as far as the Tribunal is concerned to make the Respondent's intention clear.

4.3 Then we have the mistake of the overpayment which is not strictly part of the claim, but issues of credibility arise in relation to it. How was it possible for the Claimant not to notice that she was receiving for 14 months nearly twice her previous salary? It seems to the Tribunal that she was extremely fortunate that the Respondent did not embark on a route of recovery.

4.4 As for the alleged deduction itself, the Claimant benefitted from an increase in salary FTE from £23,100 to £25,000, making the pro rated payment £16,666.

4.5 If there was a mistake bearing in mind the contract for 25 hours per week one would to apply the *Smith v Hughes* test. The question is whether a reasonable man would believe from the Claimant's conduct to claim that the Claimant agreed to the Respondent's terms as a result of which she would be bound by them regardless of her intention.

4.6 We therefore have to look at reasonableness and the conduct as follows:

- Our findings with regard to the conversations between the claimant and Ms King.
- The possibility that there was a misunderstanding in those conversations.
- The fact that Ms King got it right in documents 60 and 75. She did not sign document 80. It was signed on her behalf.
- The Respondent's internal paperwork which clearly showed an intention that the Claimant was paid £23,100 FTE or pro rated.
- The fact that the Claimant at £23,100 for a 25 hour week grossed up FTE would be earning nearly twice her original salary.
- The fact that the Claimant received such equivalent for 14 months without apparently questioning it.
- The reasonableness exercise is a good one to undertake in any event but the Tribunal finds that in relation to the new salary of £23,100 FTE that there was no mistake. The Tribunal finds that the intended salary was £23,100 FTE and that it was never anything else. The only mistake was the overpayment from 1 October 2019 to 30 November 2020.

5 In all the circumstances there was no deduction from salary on 1 December 2020. The Respondent was merely putting right what was obviously wrong and what they were obviously contractually able to do so and in putting it right they also gave the Claimant a salary increase from £23,100 FTE to £25,000 FTE without also trying to recover £9,163.

6 In all the circumstances the Claimant's claim for unauthorised deduction of wages is hereby dismissed.

**Employment Judge Shulman
Date: 3 November 2021**