



EMPLOYMENT TRIBUNALS

Claimant: Ms H Leal

Respondent: Medina Connect Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 8 November 2021

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondent: Mr S Akhter, Director

JUDGMENT

The claimant's claim for unauthorised deductions from wages fails and is dismissed

REASONS

Introduction

1. This case was listed for a full hearing to consider the claimant's claim for unauthorised deductions from wages.
2. I had various documents from both parties which I have considered. I had written statements and heard oral evidence from the claimant and for the respondent from Mr S Akhter, Director and Ms Z Kollar, Payroll Administrator. I also heard and have considered the parties' submissions.

3. One preliminary issue was the respondent's name. After some discussion it was agreed that the correct name for the respondent is 'Medina Connect Limited'.
4. At the end of the hearing I reserved my decision which I set out below in detail.

Issues

5. The sole issue in this case is whether the claimant suffered unauthorised deductions from wages in relation to her sickness absence which commenced in March 2021 and is ongoing.

Law

6. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

'An employer shall not make a deduction from wages of a worker employed by him.'

7. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).
8. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):
 - a. a contract of employment (defined as a 'contract of service or apprenticeship'), or
 - b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
9. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'

10. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.
11. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of

wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

12. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Findings of fact

13. The claimant was originally employed, from 19 June 2017, by Nottingham CityCare Connect. That organization was taken over by the respondent in 2017 and the claimant, along with all of her colleagues transferred their employment to the respondent with effect from 1 September 2017 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.
14. The claimant worked under a contract of employment with her former employer, a full copy of which is amongst the documentation. Clause twelve of the contract deals with sickness and injury and although it says that details of sick pay entitlements are contained in a non-contractual sick leave policy, clause 12.2 of the contract is in the following terms:

“In case of incapacity for work due to sickness an employee will be paid occupational sick pay (OSP) after completion of the six month probationary period and up until an employee triggers under this policy i.e. upon breaching a Bradford Factor of 128 or having more than four episodes of absence in a rolling 12 month., whichever comes first.”

15. Occupational Sick Pay is full pay.
16. That contract was taken over by the respondents and the claimant continued to work under it. The respondent says that in April 2021 the claimant began working under new terms and conditions of employment. The claimant disputes this and says that she never agreed to vary her terms and conditions of employment or to accept new terms and conditions of employment, but for the reasons set out below I find that nothing turns on this and I need not decide that matter.
17. The claimant had little time off sick. The respondent's records show that the claimant was on sick leave on the following dates: 24 April 2018; 11, 12 and 13 June 2018; 11 December 2018; 15 and 16 April 2019; 17 August 2019; 26 November 2019; 6, 7, 8 and 9 March 2020. for all of those dates the claimant received full pay. However, the respondent says that following a period of four days sick leave in March 2020 her Bradford Factor score was 128 which meant that when the claimant went off sick again from 15 March 2021, she was paid only Statutory Sick Pay (SSP).

18. Other than the claimant disputing that she was off sick on 11 December 2018, the dates set out above are agreed as periods of sickness absence.

Submissions

19. The claimant submits not the correct way to read clause at 12.2 is that there is a rolling 12-month period both in relation to the Bradford factor score and the episodes of absence referred to in that clause. In other words, an employee is only disentitled to OSP if, in any 12-month rolling period The Bradford factor score is 128 or they have 4 periods of absence.
20. The respondent's submission is that the claimant's interpretation is incorrect and that clause 12.2 means what it says, which is that once an employee reaches a Bradford Factor score of 128 or has 4 periods of absence within a rolling 12 months, they become disentitled to OSP from that point forward.
21. The respondent submits in the alternative that in April 2021 the claimant agreed to work under a new contract which only provides for SSP to be paid and that therefore from that point the claimant was no longer entitled to OSP in any event.

Discussion and conclusion

22. There was some confusion caused in this case by the fact that only one of the claimants pay slips shows her being in receipt of OSP. The others covering periods when the claimant agrees she was off sick only show her receiving full pay.
23. I accept the evidence of Ms Kollar who explained that employees were confused by the reference to OSP on their pay slips given that it amounted to full pay in any event and therefore from quite an early stage after the TUPE transfer, the respondent recorded when an employee was off sick in their HR timesheets but did not show payment of OSP, they simply rolled it up into full pay. I accept this evidence because it is entirely consistent with the claimant's pay slips. The claimant agrees that she was off sick as shown on the Bradford Factor spreadsheet, save for 11 December 2018 and having looked through the relevant pay slips despite being off sick she is not shown as being in receipt of OSP although she does not make any claim that she was not in fact paid for periods when she was off sick. What the claimant in fact says is that she elected to treat being off sick as being on holiday and therefore was in receipt of holiday pay. However, none of the time sheets support that evidence. Where the claimant is shown as being in receipt of holiday pay it is far in excess of the amount of pay, she would receive in relation to the time taken off and recorded by the respondent as sick leave. I do not accept the claimant's evidence about this.
24. The contemporaneous documentation is consistent with what the respondent says which is that they simply removed references to OSP for employees in receipt of that because the employees preferred to have recorded on their pay slips the amount of total pay, they were receiving given that OSP was full pay.

25. The more difficult point is construing what clause 12.2 of the claimant's contract of employment means.

26. The wording is as follows:

"In case of incapacity for work due to sickness an employee will be paid occupational sick pay (OSP) after completion of the six month probationary period and up until an employee triggers under this policy i.e. upon breaching a Bradford Factor of 128 or having more than four episodes of absence in a rolling 12 month period, whichever comes first."

27. In my judgement the wording of this clause should be given its natural meaning. It is clear to me that the intention of the clause is that if an employee who has completed six months service has time off for sickness, they will receive occupational sick pay. However, their entitlement to receive occupational sick pay will stop when the employee hits either one of two triggers. The first trigger is reaching a Bradford Factor of 128. The second trigger is having more than four episodes of absence in a rolling 12-month period. There is no suggestion in the contract but once a trigger has been reached, OSP will be reinstated at any point thereafter and I see no need to imply that into the contract.

28. I reach this conclusion simply based on what the clause says. In short it says that OSP will no longer be paid once an employee hits one of the triggers. If the meaning contended for by the claimant was to be correct, I would expect the clause to read rather differently. It might say for example that in any rolling 12-month period in which an employee has a Bradford factor score of 128 or more they will cease to be entitled to OSP. But it does not say that. What it says quite clearly is that an employee will be entitled to receive OSP until they reached a Bradford Factor of 128, or until they have for absences within any rolling period of 12 months.

29. If I accept the evidence of Ms Kollar, which I do, the claimant hit the first trigger on 9 March 2020 which means that when she went off sick in March 2021, she was no longer entitled to OSP.

30. For those reasons the claimants claim for unauthorised deductions from wages fails.

Employment Judge Brewer
Date: 8 November 2021

JUDGMENT SENT TO THE PARTIES ON
9 November 2021

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