EMPLOYMENT TRIBUNALS

Claimant: Mrs A Mohammed

Respondent: Guy's and St Thomas' NHS Foundation Trust

Heard at: London South Employment Tribunal (by CVP)
On: 3 November 2021

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: in person (attending only for the purposes of seeking a postponement)
Respondent: Mr Nathaniel Caiden, barrister, instructed by DAC Beachcroft LLP

JUDGMENT

The claim for unlawful deductions from wages is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Mrs Aminata Mohammed, is employed by the Respondent, Guy's and St Thomas' NHS Foundation Trust, as (at the time the claim was brought) a Clinical Research Sister (Band 7). Since 9 April 2018 she has been absent from work by reason of ill-health.

2. The Claimant brought a claim for unlawful deductions from her wages, on the basis that she received no pay in September 2018 and an underpayment in October 2018, in each case in breach of section 13 of the Employment Rights Act 1996. The Respondent denies the Claimant's claim, contending that in fact the Claimant was overpaid in the period April to August 2018, and adjustments made in September and October 2018 were calculated to recover (in part) that overpayment.

3. The case came before me for Final Hearing on 3 November 2021. The hearing was held fully remote through the Cloud Video Platform. A face-to-

face hearing was not held because it was not reasonably necessary, and all issues could be determined in a remote hearing. The Claimant appeared in person; the Respondent was represented by Counsel, Mr Nathaniel Caiden. Also present were the Respondent's witness, Mr Weir, and HR officer, Ms Tolladay.

The Claimant's request for a postponement

4. By a letter received by the Tribunal at 23:57 on 2 November 2021 and read by me shortly before the hearing was due to commence at 10am the following morning, the Claimant sought a postponement of the hearing. The Claimant confirmed at the beginning of the hearing that she pursued this application.

5. The Claimant's application has to be viewed in the following context:

   (1) By an order dated 8 November 2019, Employment Judge Tsamados refused a request made by the Claimant for disclosure of documents, including most particularly an Amended Contract of Employment alleged by the Claimant to have been agreed in 2011.

   (2) EJ Tsamados refused an application for reconsideration of that decision, as notified to the parties by letter dated 11 May 2020.

   (3) The Claimant pursued an appeal of EJ Tsamados' decision to the Employment Appeal Tribunal. His Honour Judge Auerbach ordered an appellant-only preliminary hearing of the appeal, which was scheduled for 27 January 2021.

   (4) In the meantime, the final hearing in the case had been listed for 1 December 2020. In view of the closeness in time between the final hearing date and the EAT preliminary hearing, the Claimant sought a postponement of the final hearing. The Respondent did not resist that application, and a postponement was duly granted. The final hearing was relisted for 26 April 2021.

   (5) The EAT preliminary hearing took place before Mrs Justice Ellenbogen on 27 January 2021, with judgment deferred to 29 January 2021. The Honourable Judge concluded that no reasonably arguable ground of appeal had been advanced by the Claimant that could proceed to a full hearing, and that there was no other compelling reason why the appeal should be heard. A transcript of judgment was provided to the parties on 23 February 2021 and includes considerable detail as to the disclosure application and the parties' submissions in the appeal – I will not unnecessarily lengthen this judgment by repeating that material, but confirm that I read and took account of the judgment when considering the present application.

   (6) The final ET hearing was again postponed, this time due to a lack of judicial resources, and relisted for 3 November 2021.

(7) By a letter dated 9 August 2021, the Claimant applied for a further postponement of the final hearing, essentially on the basis that she was pursuing an appeal of the EAT's decision to the Court of Appeal. The Respondent resisted this application, for reasons set out in an email dated 24 August 2021.

(8) The application was considered and refused by EJ Balogun "*for the reason[s] set out in the Respondent's correspondence of 24 August 2021 objecting to [the] application*" (see the Tribunal's letter of 7 September 2021). The Claimant has not sought to appeal this case management decision.

(9) By a letter dated 1 November 2021, the Claimant again applied for a postponement of the final hearing. Again, the central basis of the application was the pending appeal to the Court of Appeal. Reference was also made to "*health complications that I suffered due to covid-19*", though no explanation was given of why they meant the Claimant could not participate in a final hearing. The Respondent resisted this application for reasons set out in an email dated 2 November 2021, those being essentially that the new application added nothing materially to the application already refused by EJ Balogun.

(10) The application was considered and refused by Regional Employment Judge Freer "*for the reasons set out in the Respondent[']s email dated 2nd November 2021*" (see the Tribunal's email of 2 November 2021).

(11) The Claimant also applied to the Court of Appeal for an order that the present proceedings be stayed. That application was considered on the papers by Lord Justice Bean and was refused in a reasoned order dated 2 November 2021. In material part, Lord Justice Bean's reasons state that "*Now, on the eve of the date fixed for the ET hearing, [the Claimant] seeks an order of this court postponing it. Even if the application to this court for permission to appeal had any merit, which I very much doubt, it is much too late for such an application to be made. The ET case should proceed tomorrow.*"

(12) By an email sent at 20:55 on 2 November 2021, the Claimant applied to the Court of Appeal to set aside Lord Justice Bean's order. That application had not been determined by the time the case came before me at 10:00 the following morning.

6. The Claimant's basis for applying for a postponement, as set out in her letter of 2 November 2021 and expanded upon orally, can be summarised as follows:

(1) The Claimant is pursuing an appeal of EJ Tsamados' refusal to order disclosure.

(2) EJ Balogun's decision to refuse a postponement should not be characterised as an unassailable case management decision.

(3) At the time the Claimant was informed of EJ Balogun's decision, she anticipated that the appeal would have been resolved prior to today, but this has not turned out to be the case.

(4) The Civil Appeals Office had confirmed in an email of 1 November 2021 that applying to the ET for an adjournment was the correct manner in which to proceed.

(5) There are various cases in which cases have been stayed pending appeals (e.g. *Chief Constable of Strathclyde Police v Lavery* EAT 0098/04; *GFI Holdings Ltd v Camm* EAT 0321/08).

(6) The ET has thus far provided no particular reason for refusing to postpone other than endorsing the Respondent's position.

(7) The 2011 Amended Contract is a vital component of the claim and it is important that the issue regarding its content is addressed. In order for the Claimant to present her case she needs that document.

(8) The Claimant disagrees with the Order of Lord Justice Bean and is seeking reconsideration.

7. The Respondent directed me to the history, pointing out that essentially the same request had been made on multiple occasions to the ET and had repeatedly been refused. Following *Serco v Wells* [2016] ICR 768, a decision to refuse a postponement is a case management order that is only subject to variation or change in limited circumstances. There is nothing to warrant the decision being considered again. Moreover, the Claimant had made the same request to the Court of Appeal, and it had again been refused.

8. I considered the Claimant's submissions and her various letters regarding postponement (i.e. the letters of 9 August 2021 (and the letter of 25 March 2021 referred to therein), 1 November 2021 and 2 November 2021) and the materials provided with those letters. I gave a short oral judgment refusing the application. My reasons were as follows:

(1) I accepted the Respondent's submission that the application to postpone is made on essentially the same grounds as the applications made on 9 August 2021 and 1 November 2021 to the Employment Tribunal. In both cases the applications were refused, by EJ Balogun and REJ Freer respectively.

(2) As Mr Caiden, counsel for the Respondent, explained in his submissions, a decision to refuse a postponement is a case management order that is only subject to variation or change in limited circumstances such as a material change of circumstances since the original order was made.

(3) Here, the only true change of circumstances that can be pointed to is that Lord Justice Bean has refused an application that the Claimant made to the Court of Appeal for a stay of these proceedings, by an

order sent to the parties yesterday. Plainly this does not favour the Claimant. Whilst I recognise that the Claimant is seeking to have that decision set aside, that does not materially change the position.

(4) Accordingly, for the same reasons given by the Tribunal on 7 September and 2 November 2021 (there having been no material change of circumstances that would favour the grant of a postponement since these decisions were made), and consistent with the direction of Lord Justice Bean of 2 November 2021, the request for postponement would be refused.

9. After I delivered by oral judgment, the Claimant sought again to persuade me that I should grant a postponement, and indicated that she would not be able to participate should the hearing proceed. In doing so, the Claimant mentioned her dyslexia (a topic that was addressed also in EJ Tsamados' order of 8 November 2019).

10. I indicated that I has already ruled and had taken full account of everything the Claimant had said, and emphasised that in considering the overriding objective to deal with the case fairly and justly, I must also take account of fairness and justice to the Respondent. I must also consider the issue of delay, bearing in mind that this case has been delayed on several occasions already. The cases relied upon by the Claimant in support of her position each turn on their own facts. In the circumstances (and taking account of the context in which the application was made), in my judgement the interests of justice fell firmly in favour of proceeding.

11. Regarding the Claimant's dyslexia, Mr Caiden (as he had done at the hearing before EJ Tsamados) explained that he was content not to cross-examine the Claimant, and I explained to the Claimant that the Tribunal would be able to make any reasonable adjustments to facilitate the Claimant's participation should she wish to.

12. Notwithstanding this, the Claimant made clear that she was not prepared to proceed today, and confirmed that her decision was based on the perceived unfairness to her of not being able to rely upon the 2011 Amended Contract, rather than on any inability to participate as a result of disability. Once I confirmed that we would be proceeding with the final hearing today, the Claimant left the hearing at 10:56.

13. I add for completeness that the Claimant showed no material signs of distress or nervousness during the time that she was present in the hearing, by contrast to how she presented before EJ Tsamados in November 2019. I have no doubt that the Claimant was fit to participate, and she did so competently in the part of the hearing that she was present for.

<u>Proceeding in the absence of the Claimant</u>

14. Rule 47 of the Employment Tribunal Rules provides that:

> If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any

enquiries that may be practicable, about the reasons for the party's absence.

15. The reasons for the Claimant's absence were known to me, as set out above.

16. After taking a short break to allow Mr Caiden to take instructions (10:58 to 11:21), the Respondent confirmed it was content to proceed with the hearing on the basis of the materials in writing. I also considered that this this was the appropriate course. I have a skeleton argument from Mr Caiden, and a full witness statement from Mr Weir (which, in the absence of cross-examination, now stands unchallenged), plus the material in the bundle.

17. Before ending the hearing, I sought two clarifications from Mr Caiden:

    (1) Whether the Claimant is still in the employment of the Respondent. Mr Caiden confirmed that she is.

    (2) Whether any explanation could be provided for the discrepancy in the amount of the alleged overpayment identified by Ellenbogen J. in paragraph 17 of her judgment. Mr Caiden confirmed that no explanation could be provided, but that as far as the Respondent was concerned, it was limiting the amount of overpayment it argued was outstanding to £3,000, and therefore the small discrepancy between the two higher figures canvassed in the correspondence / evidence was no longer of any relevance.

18. I ended the hearing at 11:25 and proceeded to decide the case based on the written materials.

Issue for determination

19. The sole issue which falls to be determined is whether the Respondent made unauthorised deductions from the Claimant's wages and, if so, how much was deducted.

Findings of fact

20. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read, but that does not mean such documents were not considered if referred to in the evidence.

21. The Claimant is employed by the Respondent as a Clinical Research Sister (Band 7) working within the Acute Medical Directorate in Research & Development. Her employment commenced in 2006 [29-33].

22. Section 12 of the Claimant's original contract of employment [30-31] provides (insofar as relevant) for the following in respect of sick pay:

(i) You are entitled to Statutory Sick Pay. The qualifying days for SSP will be Sunday to Saturday.

(ii) Any entitlement in excess of this will be governed by the terms of the NHS Occupational Sick Pay scheme as follow:-

… after completing five years of continuous NHS service – six months' full pay and six months' half pay.

23. The Claimant's terms of employment incorporate the NHS "Agenda for Change" Terms and Conditions of Service Handbook (see section 20 at [32]). As regards sick pay, section 14.2 of that Handbook [34a] provides that:

Employees absent from work owing to illness will be entitled, subject to the conditions of this agreement, to receive sick pay in accordance with the scale below … after completing five years of service – six months' full pay and six months' half pay.

24. The same is provided for in the Respondent's Sickness Absence Policy & Procedure at section 7 [35].

25. Sick pay is paid for aggregated episodes of paid sickness absence across a 12 month period preceding the current period of sickness absence [34b], [35].

26. As of April 2018, the Claimant's salary in payment (including Inner London weighting) was £3,687.16 gross. In July 2018, as a result of the NHS National Agenda Pay Deal, her salary was increased to £3,790.00 gross, with this to be backdated to April 2018. From October 2018, by virtue of progression through the pay scale, the Claimant's basic salary was to be further increased.

27. The Claimant was absent from work sick from 3 April 2017 to 31 August 2017 inclusive, and again from 22 January 2018 to 2 February 2018 inclusive [42]. She went off sick again on 9 April 2018 and had not returned by the date of this claim.

28. Notwithstanding that, in accordance with the sick pay policy, as at the start of her latest sickness absence on 9 April 2018 the Claimant had already exhausted a very large portion of the six months' full sick pay to which she was entitled in the preceding 12 months, and that the remainder would be exhausted by May 2018, the Respondent continued to pay the Claimant her full salary until August 2018.

29. In September 2018, Mr Weir noticed the above and took steps to notify payroll who, in turn, asked him to write to the Claimant to notify her of this overpayment and to let her know that the payroll team would be in contact to discuss a repayment plan. Mr Weir did write to the Claimant on 18 September 2018 [44].

30. Deductions were then made from the Claimant's salary with the purpose of recovering the overpayment such that, in September 2018, the Claimant received zero pay, and less than full (or no) salary was paid in the months

that followed.

31. In the October 2018 salary payment the Respondent erroneously failed to include pay due for the previous month. This error was identified and corrected in March 2019. The October 2018 salary payment also reduced the salary payable for that month to half pay.

32. Further correspondence ensued in which the Claimant sought information as to the alleged overpayment, which the Respondent provided. It is not necessary to pick through the correspondence in this judgment. It suffices to say that the Claimant did not accept the Respondent's position and ultimately she commenced this claim arguing in the ET1 that the deductions made in her salary payments in September and October 2018 were unlawful.

33. The ET1 does not assert that any unlawful deductions were made in the salary payments prior to September 2018. Mr Weir has given unchallenged evidence to that effect. I therefore find that there were no unlawful deductions in those earlier months.

34. Based on the payslips provided [62-73] the Claimant received the following gross salary payments in the period from April 2018.

Date	Gross Salary Received (£)
April 2018	3,687.16
May 2018	3,687.16
June 2018	3,300.74
July 2018	4,145.45
August 2018	3,932.39
September 2018	00.00
October 2018	2,245.56
November 2018	128.66
December 2018	00.00
January 2019	00.00
February 2019	00.00
March 2019	2,269.79
Total	£21,127.12

Relevant law

35. Section 13 of the Employment Rights Act 1996 (***ERA***) provides, insofar as is relevant:

> (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.
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> (2) In this section "relevant provision", in relation to a worker's contract, means a

provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy 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 to the worker in writing on such an occasion.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

36. Section 14 ERA provides exceptions to section 13, including insofar as is relevant:

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,made (for any reason) by the employer to the worker.

37. The section 14(1) exception provides no limitation as to the amount or period of time for which any recovery of overpayment may be made (see *Key Recruitment UK Ltd v Lear* UKEAT/0597/07/ZT at [8]-[10]).

38. Section 25 ERA provides, insofar as is relevant, 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, in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker.

39. The section 25(3) provision can apply to amounts paid before or after the deduction (see *Autonomy Systems Ltd v Cuddington* EAT/0854/02 RN applying the decision of the Court of Appeal in *Robertson v Blackstone Franks Investment Management Ltd* [1998] IRLR 376).

Conclusions

40. I have to determine whether the Respondent was entitled to reduce the salary paid to the Claimant in September and/or October 2018 in the way that it did.

41. It is evident from the findings I have made above that, because of her periods of sickness absence in the 12 months immediately preceding the commencement of her latest period of sickness on 9 April 2018, the Claimant's entitlement to be paid her full salary would come to an end at some point in May 2018. Thereafter she would be entitled to be paid half of her salary for six months, whereupon her sick pay entitlement would be exhausted.

42. Mr Weir provided figures for the Claimant's sick pay entitlement which stand unchallenged and are consistent with the finding in the preceding paragraph. I accept those figures (and accept Mr Weir's unchallenged evidence that they properly account for applicable increments and pay increases), which are as follows:

Date	Gross Salary Entitlement (£)
April 2018	3,790.00
May 2018	2,661.67
June 2018	2,269.79
July 2018	2,282.94
August 2018	2,282.94
September 2018	2,269.79
October 2018	2,245.56
November 2018	128.66
Total	£17,931.35

43. Considering these figures as compared to the gross salary actually paid to the Claimant (paragraph 34 above), two relevant conclusions can be drawn:

    (1) In the period April-August 2018, the Claimant had been overpaid in the sum of £5,465.56 gross (=£18,752.90 paid less £13,287.34 entitlement).

    (2) Over the full period April 2018 to the presentation of the claim in March 2019, the Claimant had been overpaid in the sum of £3,195.77 (=£21,127.12 paid less £17,931.35 entitlement).

44. I note that there have been some discrepancies in the figures advanced by the Respondent in the ET3 and in the evidence of Mr Weir, for which no explanation has been provided. However, the order of magnitude of these discrepancies (e.g. Ellenbogen J. identified a discrepancy of £39.44) is such that the conclusions in the previous paragraph are not undermined. On any view, and even taking the figures that are most favourable to the Claimant, there have been significant overpayments.

45. I find that section 14(1)(a) ERA applies to the deductions made to the Claimant's salary in September 2018. These were deductions made by the Respondent where the purpose of the deduction was the reimbursement of the Respondent in respect of an overpayment of wages (*i.e.* the overpayment identified in paragraph 43(1) above), as found at paragraph 30 above. Accordingly, section 13(1) ERA does not apply to the deduction in September 2018.

46. The situation is more complicated for October 2018. In that month, as for September 2018, a deduction was made by the Respondent where the purpose of the deduction was the reimbursement of the Respondent in respect of an overpayment of wages. However, in addition, an error was made in the calculation of the salary payable (see paragraph 31 above). I am satisfied, and find, that the error was one which falls within the scope of section 13(4) ERA, being an error of computation rather than a deliberate one. I also note that the error was remedied by a payment made in March 2019. Accordingly, section 13(1) ERA does not apply to the deductions in October 2018.

47. Even if I was to be wrong about the purpose of the deductions, as I have found that the Claimant still owes the Respondent in respect of overpayment (see paragraph 43(2) above) I would still be prevented from making an order by virtue of section 25(3) ERA. However, because of the findings I have made in the preceding paragraphs, this does not arise.

Overall conclusion

48. In view of the above findings, I conclude that the claim for unlawful deductions from wages is not well-founded and is dismissed.

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Employment Judge Abbott

Date: 9 November 2021