



EMPLOYMENT TRIBUNALS

Claimant: Miss K Johnson

Respondent: Thornton Homecare Ltd

UPON a reconsideration of the judgment dated 15 November 2021 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

The Judgment dated 15 November 2021 is varied in so far as it dismissed the Claimant's complaints in relation to the Respondent's failure to pay pension contributions into the NEST Pension Scheme on her behalf.

REASONS

1. At the Final Hearing of this matter on 8 November 2021, the Claimant's complaint of an unauthorised deduction from her wages for February 2021 was held to be well-founded. As set out in the subsequent Judgment dated 15 November 2021, the Respondent was thus ordered to pay to the Claimant the sum of £1,440.88 (gross).
2. The Claimant also brought two complaints in relation to non-payment of pension contributions. The first was that the Respondent had deducted sums from her pay since the commencement of her employment, but had not paid them into the NEST Pension Scheme on her behalf. The second was that the Respondent had agreed to pay its own contributions into the Scheme on her behalf but, again, had failed to do so since the commencement of her employment. The Claimant notified me of one exception, in that a small payment was made into the Scheme on 4 August 2020.
3. The Respondent did not attend the Hearing on 8 November, and indeed has played no part in these proceedings at all. I nevertheless concluded that the Tribunal did not have jurisdiction to hear the Claimant's complaints regarding the pension contributions. This was principally on the basis of a concern on my part

as to whether the arrangements effected by the NEST scheme arose from the Claimant's contract of employment such as to found a complaint of breach of contract within the Tribunal's jurisdiction under the Employment Tribunals Extension of Jurisdiction Order (England and Wales) 1994 ("the Jurisdiction Order"). In the short time available to me to consider the matter (the Hearing was listed for two hours), it seemed to me that this was a matter for the Pensions Regulator rather than the Tribunal.

4. In so far as relevant, rules 70 to 73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows:

70. A Tribunal may ... on its own initiative ... reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

[Rule 71 sets out how a party should make an application for reconsideration].

72. (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked ... the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

5. In the correspondence sent to the parties indicating that I was proposing to reconsider the Judgment in relation to the complaints regarding pension contributions pursuant to rule 73, I indicated my provisional view that in fact the Tribunal does have jurisdiction to consider them, and set out my reasons. The parties have been given two opportunities to comment on the matter and have not done so. Neither has suggested that there should be a hearing and I am in any event satisfied that it would have been disproportionate to convene a hearing to deal with this matter which can perfectly properly be dealt with on the papers. I have therefore reconsidered the matter as set out below.

6. I am satisfied on re-reading Part II of the Employment Rights Act 1996 (“the Act”) that where the Respondent has deducted from the Claimant’s pay, ostensibly for pension purposes but without ever paying those contributions into any pension scheme on her behalf, those are unauthorised deductions from wages. They are amounts which the Respondent has simply retained and no such deduction can be said to have been authorised by any statutory or contractual provision. They are not excluded by section 14 of the Act, nor by the definition of wages under section 27 of the Act. The latter excludes “any payment by way of pension” but that is not what is in issue here. It is not that the Respondent was paying the Claimant a pension and making deductions from that; rather, it was paying her wages and making deductions from those wages but not paying them into a pension scheme. Alternatively, the Respondent was in breach of contract, by agreeing to pay pension contributions deducted from the Claimant’s pay into the pension scheme and failing to do so – see further below.
7. As for employer pension contributions, they are clearly not deductions from an employee’s wages and so do not fall within Part II of the Act. I am satisfied that they would however fall within the Tribunal’s jurisdiction as a result of the Jurisdiction Order. In accordance with article 3 of the Jurisdiction Order, on the face of it what the Claimant was seeking to pursue was a claim for damages for breach of her employment contract, or at the least breach of a contract connected with her employment (see section 3(2)(a) of the Employment Tribunals Act 1996), in either case on the basis that the Respondent entered into a contractual agreement with her to make contributions to the NEST Scheme for her benefit. I was satisfied based on her evidence that this was the case. It is also a claim that a court in England and Wales would have jurisdiction to determine, it is not excluded by article 5 of the Jurisdiction Order, and it is a claim that was outstanding on termination of the Claimant’s employment, in that the contributions all remained unpaid. The deductions from the Claimant’s pay that were supposed to be made in order to make employee contributions to the Scheme could, in my judgment, be analysed in the same way.
8. The loss the Claimant has suffered as a result of the failure to pay both sets of contributions into the NEST Scheme on her behalf is not easy to quantify. I have considered whether that means the Tribunal should not have jurisdiction to deal with these matters, specifically under the terms of the Jurisdiction Order. In fact, however, the Claimant seeks only the value of those contributions as compensation, so that the Respondent would not be prejudiced by the Tribunal making a simple calculation of damages on that basis, rather than a more complex calculation of the Claimant’s actual loss, which would in all likelihood lead to a higher figure than the amount of the contributions.
9. The amounts in question were shown on the Claimant’s pay-slips, except for employer contributions from October 2020 onwards. According to the Claimant, the amounts paid on 4 August 2020 were £63.77 of employee’s contributions and £47.83 of employer contributions. I am bound to exclude from the employee contributions any amount which was to be paid out of the February 2021 pay because as a matter of fact no such deduction was made

(no time limit issues arise from that), though I am entitled to take into account the employer contributions for that month as in breach of contract they were not paid over to the Scheme. It appears that very roughly, the Respondent was paying around 2.5% of the Claimant's monthly earnings (not including mileage) into the Scheme and so regardless of whether that is what the Scheme requires, which would require further evidence that was not before me, I will use that as the basis for calculating the employer pension contributions that were due but not paid for October 2020 onwards for which I have no actual figure.

10. That means that the total employee contributions deducted from the Claimant's pay and not paid into the Scheme, thus unlawfully deducted or deducted in breach of contract, were £1,008.35 minus £63.77, namely £944.58. The total amount of employer contributions, including those from October 2020 onwards calculated on the basis set out above, and in breach of contract not paid into the Scheme on the Claimant's behalf, were £758.85 minus £47.83, namely £711.02.

11. I have varied the Judgment dated 15 November 2021 accordingly.

Employment Judge Faulkner
Date: 2 December 2021