EMPLOYMENT TRIBUNALS

Claimant	Mr S Ibrahim
Represented by	in person
Respondents	Maidstone and Tunbridge Wells NHS Trust
Represented by	Dr G Burke (counsel)
Before:	**Employment Judge Cheetham QC**

Remedies Hearing held on 28 March 2022 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Respondent will pay the Claimant the sum of £2,177.50.

2. The judgment of the Tribunal made at a hearing on 22 August 2020, whereby the Claimant was held to be entitled to receive "full pay" throughout the period of his suspension, is revoked by the Tribunal on its own initiative under Rule 70.

REASONS

1. At a hearing on 22 August 2020, the Claimant was held to be entitled to receive "full pay" throughout the period of his suspension. The Respondent subsequently applied for reconsideration of that decision, but that application was refused on 29 January 2021. At that stage, the Respondent indicated that it had applied for permission to appeal, but I was advised at this hearing that the appeal was subsequently withdrawn.

Agbeze v Barnet NHS Trust

2. At the start of the hearing, I drew the parties' attention to a very recent decision of the Employment Appeal Tribunal, ***Agbeze v Barnet NHS Trust [2002] IRLR 115***. I gave the parties – who were not familiar with the decision – sufficient time to read it and to consider how it affected the matters to be considered at this hearing.

3. ***Agbeze*** was decided after the reconsideration application. It is directly relevant and there is even reference to the first instance decision in this claim in the EAT's decision (although no consideration of it). Therefore, it was plainly correct to raise it with the parties.

4. In ***Agbeze***, where the facts were very similar to this case, HHJ Auerbach explained that the source of an employee's entitlement to be paid during a period of suspension must be contractual. If there is no express term to that effect, then such a term would have to be implied and – as he concluded – there is no basis to imply such a term.

5. At paragraphs 50 to 53, there is a passage that considers the contractual terms:

> *50. This was a claim for unlawful deduction from wages pursuant to Part II* ***Employment Rights 1996****. It could only succeed on the basis that average wages were "properly payable" to the claimant, during the period in question, within the meaning of section 13(3), that is, that he had a legal entitlement to be paid such wages. See* ***New Century Cleaning Co Ltd v Church [2000] IRLR 27****. In this case, as usually, what was relied upon was a contractual entitlement.*
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> *51. The source of such an entitlement could only be an express term of the contract or an implied term. As the authorities have from time to time explored, in some cases where there is an umbrella contract, this does more than just supply a reference point for the terms that apply during assignments, but also itself gives rise to some mutual obligations throughout the duration of the umbrella contract itself, including between assignments. In this case there were two expressly designated clauses of that type, relating to data protection and declaration of interest on joining the bank, but they were rightly not argued to be relevant here.*
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> *52. Ms Chan submitted that the express terms of the contract in this case were simply silent on the question of whether a period of suspension was paid or unpaid, as clause 13 did not address this. Mr Kennedy's position was that to imply a right to be paid during such a period would go contrary to the natural meaning of the express provisions of this bank contract.*
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> *53. As to that, the express terms of the contract included that: (a) save for the clauses that I have mentioned, its terms did not apply outside*

> *periods when the claimant was providing bank services (clause 1); (b) there was no obligation on the respondent to offer any work nor on the claimant to accept any offer of work (clause 1); (c) there were no regular hours, these being as required, and agreed (clause 3); and (d) remuneration would be based on Agenda for Change pay scales "according to the duties you are offered whilst providing bank services" (clause 6). Taken together the effect is clearly that the availability of work, and the willingness of the claimant to do it, are not sufficient to trigger an entitlement to wages. That only arises if the respondent chooses to offer an assignment, and the claimant chooses to accept it.*

6. After a detailed consideration of the authorities (including those considered at the original hearing in this claim), HHJ Auerbach held as follows:

> *77. It seems to me that the creation of an implied term, as contended for in this case, would go significantly beyond that which could be rationalised as a necessary incident of all worker relationships, or even a reasonably necessary one, and hence it cannot be supported by the principles of implication that I take from authorities such as **Irwin** and **Geys**. It would be of a materially different kind from implied terms, such as the duty of trust and confidence, which reflect features that are inherent in all working relationships, or the term implied in a case such as **Geys**, which reflects the practically necessary incidents of a notice of termination of employment in every case. Nor do I think that common law principles support the implication of such a term into all worker contracts of the zero-hours or bank types. The introduction of such a term would materially alter the nature of contractual relationships of this type.*

7. Applying that guidance to this present case, the correct question is therefore whether the express terms of the Claimant's contract entitled him to be paid during the period of his suspension, given that no term to that effect can be implied.

Reconsideration under Rule 70

8. In drawing ***Agbeze*** to the parties' attention, I shared my concern that, had that guidance been before me previously, I would have adopted a different approach in analysing the claim and would most likely have reached a different conclusion. I suggested, therefore, that Rule 70 applied and the Tribunal on its own initiative would reconsider that original decision, as it was necessary in the interests of justice to do so.

9. Having had time to read and digest the decision and to take instructions, Dr Burke for the Respondent submitted that when one applied the decision in ***Agbeze*** to the facts of this case, it was plain that the Tribunal was previously in error in its approach and in concluding that the Claimant was entitled to be paid during the period of his suspension.

10. Very properly, Dr Burke set out the arguments that could be made by the Claimant. He pointed out that, whereas in ***Agbeze*** the disciplinary policy was not contractual, in this case the policy was at least referenced in the contract. The policy stated at (at para. 5.5.4) that suspension would "normally be on full pay".

11. However, that was as far as it went and it was clear that in all other major respects, this case shared the features of ***Agbeze***. The source of the entitlement to be paid during a period of suspension must be contractual and the contract did not contain that express provision. The reference to "normally" meant that it may or may not be paid (which was similar to ***Agbeze***). At the time of the original decision, there was no clear authority on this issue, but now there was and the Tribunal could not ignore it.

12. Quite understandably, Mr Ibrahim was concerned by this development. He referred me to various matters, all of which I had addressed in my first judgment, but he was unable to meet the point that there was no express term requiring payment during suspension.

13. I therefore concluded that I had been in error in reaching my original decision. Contrary to the guidance now provided in ***Agbeze***, I had reached my decision by effectively implying a term in the Claimant's favour and that approach was no longer permissible. It is correct that there was no clear guidance one way or the other at the time, but as that guidance has now been provided, the Tribunal cannot ignore it.

14. Applying Rule 70, the Tribunal has therefore on its own initiative revoked that original decision, because it is necessary in the interests of justice to do so. I should add that, although disappointed, Mr Ibrahim was accepting of the fact that this case had to be considered and was very polite and understanding.

Unauthorised deductions

15. There remained the residual claim for unauthorised deductions. First, there was a claim for loss of pay between 18 and 24 March 2019 in the (agreed) sum of £2,177.50 and which the Respondent accepts it should pay to the Claimant.

16. Secondly, the Claimant was also claiming for hours that he said that he had worked, but for which he had not been paid. This was based upon his contention that he should be paid from the time he first entered the Respondent's car park. So, for example, on 2 March 2018, he drove in at 07:58 and drove out at 16:53. He was paid for the hours he worked and so the claim is for the additional time he was on site (on this day, he says, a further 25 minutes).

17. Dr Burke submitted that this cannot be correct. Apart from the fact that it is not the contractual basis upon which the Claimant was paid, the Respondent had no control over when the Claimant arrived in the car park.

What if he chose to arrive an hour early and sit in his car making phone calls? Whereas the time he left the site could be an indicator of – for example – finishing early, it would not be feasible for an employer to pay staff in this way.

18. The Respondent is plainly correct on this second point. One need look no further than the contract, which makes clear that pay is in relation to working, rather than being present on site. However, as a matter of common sense, the Respondent could not pay the Claimant according to when he chose to arrive in the car park. This second claim for unauthorised deduction is therefore dismissed.

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Employment Judge S Cheetham QC
Dated **20 April 2022**

sent on **19 May 2022**

by

for the Tribunal Office