



EMPLOYMENT TRIBUNALS

Claimant: Mr T Akwasi

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 6 July 2022

Before: Employment Judge M Brewer

Representation

Claimant: Mr K Antwi-Boasiako, lay representative

Respondent: Ms J Smeaton, Counsel

JUDGMENT

1. The claimant's claim for unauthorised deductions from wages fails and is dismissed.
2. The claimant's claim for breach of contract fails and is dismissed.

REASONS

Introduction

1. This claim was brought by the claimant against the respondent 4 what the claimant says is unpaid wages and unpaid holiday pay. The claimant was represented by Mr Antwi-Boassiako, and the respondent by Ms Smeaton.
2. There was an agreed bundle of documents running to 136 pages, I had witness statements and heard oral evidence from the claimant and, on behalf of the respondent from Carl Jones, Service Manager, Stephanie Gawn, Temporary Staff and E-rostering Manager, and Rachel Towler, Operational Manager. Ms

Smeaton provided a written skeleton argument and also a copy of the case of **Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust** EA-2020-000413.

3. The evidence in the case was short and I was prepared to deliver a simple oral judgment, but the claimant expressed a wish to have written reasons. However, given the amount of time left in the hearing I said that as well as providing written reasons I would nevertheless tell the parties the outcome so that they did not have to wait but for this written judgment.

Issues

4. The issues in this case all fairly straightforward and are as follows.
5. In relation to the unauthorized deductions claim:
 - a. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?
6. In relation to the holiday pay claim:
 - a. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
7. In relation to Breach of contract:
 - a. Did this claim arise or was it outstanding when the claimant's employment ended?
 - b. Did the respondent do the following:
 - i. Fail to pay the claimant wages for the period January to November 2021?
 - ii. Fail to pay the claimant accrued untaken statutory holiday pay at the date of termination of his employment?
 - c. Was that a breach of contract?
 - d. How much should the claimant be awarded as damages?

Law

8. The claimant puts the case as either one of unauthorised deductions from wages or in the alternative breach of contract. The issues are as follows.

Unauthorised deductions from wages

9. 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.'

10. 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)).

11. 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.

12. Section 27(1) ERA defines 'wages' as:

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

13. 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'.

14. 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.

15. 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.

Breach of contract

16. The claimant has the burden of proof in showing that the respondent was in fact in breach of an express or implied term of his contract.

Findings of fact

17. The claimant was employed by the respondent as a healthcare assistant at band 2 from June 2018. The claimant also held a bank contract. I will discuss further below what a bank contract is.
18. For personal reasons the claimant resigned from his employment on 9 November 2018.
19. On 14 January 2019 the claimant re-joined the respondent as a worker under a bank registration contract which can be seen from pages 41 to 51 of the bundle.
20. Under the claimant's bank registration contract the following terms are material to this case:

"Introduction

The purpose of this document is to place you on a register of individuals who may make themselves available to work on an ad hoc basis to meet a temporary need...

- 1.1 the Trust is under no obligation to offer you any work and the Trust reserves the right to offer such work through other individuals registered as it may elect in cases where the work is suitable for more than one individual. The Trust shall incur no liability to you should it fail to offer you any work.*
- 1.2 you are under no obligation to accept any work that is offered to you under the Bank. Any work offered to you on the Bank is temporary work only and there will be periods when no work is offered.*
- 1.3 In registering on the Bank you are not and not to be treated or to hold yourself out as an employee of the Trust...*
- 4.1 You will be paid at £8.92 per hour.*
- 5.1 As a flexible worker, you have no normal working hours.*
- 6.1 As a worker, you will be entitled to statutory annual leave under the Working Time Regulations..."*

21. In early February 2021 the claimant was alleged to have used verbal and physical aggression against a young person and to have used an intimidating demeanour during the incident. The respondent determined to investigate that matter and as part of that, and given the serious nature of the allegation, a decision was taken that the claimant would not be allocated any shifts under his Bank registration contract unless and until the investigation was complete. In taking that decision the respondent had discussed the matter with the Local Authority Designated Officer who has responsibility for safeguarding matters.

22. The claimant was advised on 10 November 2021 that there would be no action taken following the completion of the investigation into the incident and that he was therefore allowed to work again on the Bank.
23. For the period between January and November 2021 therefore the claimant was not offered any shifts on the Bank and he considers that his loss of earnings in that period amounts to either unlawful deductions from wages or a breach of contract and he also says that in some way he has lost holiday pay.
24. The claimant commenced early conciliation on 4 February 2022 and he received his early conciliation certificate on 7 February 2022.
25. The claimant presented his claim on 8 February 2022.
26. Those then are the, of necessity, brief findings of fact.

Discussion and conclusion

27. The claimant agreed that work done under his bank contract was not work done as an employee but as a worker. The claimants accepted that it was entirely his choice not to be an employee because he wanted the flexibility of bank work in other words, he wanted the ability to pick and choose when and if he worked. It is noted that there were periods when he chose not to work.
28. That flexibility is not, of course, afforded to employees because the basic contractual arrangement for an employee is that they must be available to work, and indeed work if required, and for that commitment they receive pay. An employee receives pay even if the employer does not provide work.
29. In the case of the claimant, it was a case of 'no work no pay' which is in accordance with clause 1.1 of the bank contract.
30. As I have indicated above, wages are defined in the employment rights act as any sums payable to the worker in connection with his employment.
31. In order to determine a claim for unauthorised deductions is necessary to establish what was properly payable on any given occasion. I should use ordinary common law principles to establish what was payable to the claimant under his contract by way of wages during the period he says there were unauthorised deductions.
32. I have no hesitation in finding that he was not entitled to receive any pay during the period January to November 2021.
33. It seems to me that this conclusion is inevitable given the 'no work no pay' nature of the Bank contract.
34. The terms of clause 1.1 of the contract is that there is no obligation to provide work and by virtue of clause 1.2 there is no obligation on the claimant to accept any work which is offered.
35. It is clear from clause 4.2 that in order to be paid, work has to be done and moreover that work has to be authorised by an authorised signatory on a

timesheet which has to then be submitted and received by the payroll department before a given cut-off date each month. The contract states that it is the worker's responsibility to ensure that this is done.

36. Self-evidently, during the period January to November 2021 the claimant did no work for the respondent, there were no time sheets and therefore no pay was payable to the claimant.
37. To put the matter more succinctly, on no occasion during the period January to November 2021 no pay was 'properly payable' to the claimant because he did no work.
38. To some degree I can understand the claimant's confusion and his reason for bringing this case. He feels that because he was suspended from the bank by the respondent and, had he not been so suspended, he would have worked, he has lost out on a significant amount of pay. But as I pointed out to him during the hearing, it was not part of my role to consider the rights and wrongs of the suspension because there is no basis to import a test of reasonableness into a case which is to be determined by contractual principles, by reference only to the common law.
39. There are of course cases where courts had been prepared to imply terms into a contract but there has to be a legal and factual basis for so doing and in that context, I agree with Ms Smeaton that the case of **Agbeze** is binding authority for the proposition that there is a clear distinction between the rights of an employee to pay when they are suspended and the rights of a worker who is 'suspended' in circumstances where the worker has a contract which does not afford them pay unless they provide work. The matter is summed up perfectly well in the case report headnote which is as follows:

“The effect of the express terms of the contract was clearly that the availability of work, and the willingness of the claimant to do it, were not sufficient to trigger an entitlement to wages. That only arose if the trust chose to offer an assignment, and the claimant chose to accept it.

There was a fundamental difference between a contract the basic architecture of which was of that sort, and a conventional employment contract, which itself provided for guaranteed pay and required work and hours, and correspondingly guaranteed and required pay, so long as the employee was ready, willing, and able to work.

Corresponding to that distinction was an important distinction between the legal implications of action taken by the employer, which might, nevertheless, in both types of case, be described as suspension. The term suspension was commonly used to describe a situation in which a conventional employee was told, in respect of a period during which they would normally be required by their contract to work or be available for work, and would

normally be entitled to be paid accordingly, that they were not only not required to work, but were positively required not to work and/or attend at the workplace.

In such a case the starting point was that such a management direction would not, without more, deprive them of their underlying contractual right nevertheless to continue to be paid in respect of that period, unless the contract expressly so provided.

Importantly, in such cases, the underlying right to be paid derived automatically from the contract itself, and so the employer's fiat could not unilaterally take it away.

But the particular provision within the claimant's contract referred to suspension in a different sense. The substantive step being contemplated was that he might be treated as not eligible to be offered work during the period of that suspension. But the underlying contract itself would not have automatically conferred on him the right to be paid wages during some or all of that period. That would only have arisen had the trust elected to offer him such work (which the contract did not oblige it to do), and he had taken up the offer"

40. In the **Agbeze** case the claimant contended for an implied term that he received average pay during the period in which he was not to be given the work under the bank contract. But the tribunal and the EAT firmly rejected that on the basis that the implication of such a term would go significantly beyond that which could have been rationalised as they necessary incident of all worker relationships or even a reasonably necessary one. The EAT also said that common law principles did not support the implication of such a term as it would materially have altered the nature of the contractual relationship.
41. That is essentially the position the claimant finds himself in here. His suspension, that is to say the period during which he was not to be offered work, is catered for in the contract itself because the contract says that there is an absolute right on the respondent to not offer work and the reason for the not offering work is therefore not relevant, on common law principles, either to the decision not to offer the work or to whether the claimant should be paid during the relevant period. That is determined solely by looking at the terms of the contract and the terms of the contract, as I have found, are clear, 'no work no pay'.
42. For those reasons I find that there were no unauthorised deductions from wages during the period January to November 2021, because no wages were payable during the period January to November 2021. I also find that the respondent was not in breach of contract in both their decision to 'suspend' him and in not paying the claimant during that period of 'suspension' because the contract is clear that the claimant is only paid when he works and, in that period, he did no work. I stress again so that the claimant is entirely clear, that

the reason he was not provided with work is wholly irrelevant to my judgement. He may wish that that was not the case, but the law and precedent is firmly against him.

43. it also follows that the respondent does not owe the claimant any pay for holiday accrued during the period January to November 2021 which was untaken at the termination of his employment because the claimant did not accrue holiday during the period January to November 2021 and thus there was no unpaid holiday pay.
44. For all those reasons the claimant's claims fail and are dismissed.

Employment Judge M Brewer

Date: 6 July 2022

JUDGMENT SENT TO THE PARTIES ON

23 July 2022

FOR THE TRIBUNAL OFFICE

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