



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101568/2022

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Final Hearing held by Cloud Video Platform in Glasgow on 2 August 2022

Employment Judge M Robison

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Miss P Crossan

**Claimant
Represented by
Mr S Muir -
Union Representative**

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CAT 1 Property Limited

**Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant's claim for unpaid wages succeeds and the respondent shall pay to the claimant the sum of **FOUR THOUSAND SEVEN HUNDRED AND FIFTY SEVEN POUNDS AND SEVENTY FIVE PENCE (£4,757.75)**. The claim for holiday pay is withdrawn.

REASONS

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1. The claimant lodged a claim in the employment tribunal on 17 March 2022. At this hearing, held remotely by video, the claimant was represented by her union representative, Mr S Muir, who initially pursued claims of unlawful deduction from wages in respect of contractual sick pay and outstanding holiday pay. During submissions, Mr Muir recognised that as the claimant's employment has not yet terminated, the claimant is not entitled to claim payment in lieu of untaken leave (regulations 14 and 30 of the Working Time Regulations 1998). The Tribunal therefore treats that claim as withdrawn.

2. Mr Muir had lodged a volume of productions which he relied on during the course of the hearing, when the Tribunal heard evidence from the claimant only.
3. Although the respondent had lodged an ET3 defence, and forwarded a copy of the contract of employment upon which they rely (both of which were taken into account by the Tribunal), the respondent was not represented at this hearing.
4. A hearing had been due to take place on 22 June 2022 but was discharged because of the absence of the respondent's representative, Mr Akhtar, for reasons of ill health. At that hearing, the respondent was ordered to provide to the Tribunal medical evidence to support their position that their representative was unable to attend due to ill health. No medical evidence was received. The respondent was also advised that the hearing would be rescheduled to take place on 2 and 3 August 2022.
5. Given that background, the Tribunal decided to proceed in the respondent's representative's absence.

Findings in fact

6. The Tribunal finds the following facts proved, admitted or agreed based on the evidence heard and the documents referred to.
7. The claimant commenced employment at 10 Highpark Avenue, New Cumnock on or around 29 June 1986 as a shop assistant. At that time her employer was The Co-operative Society. The Co-op sold the shop to McColl's Retail Group in April 2017. The shop was again sold in June 2020 to the respondent.
8. In respect of her employment by the Co-operative Society, the claimant was issued with a statement of terms and conditions of employment on 9 November 2012, which she signed on 16 November 2012 (document 4). This stated that her period of continuous employment began on 9 March 1987. It included terms and conditions in relation to holiday entitlement.
9. It also included the following terms under the heading "sickness absence":

“If absence due to sickness occurs, you must observe the Society’s absence policy and procedures in the Employee Handbook..... If you have completed 12 months or more continuous service, subject to the Society’s absolute discretion, which shall not be unreasonably withheld, and your compliance with all procedures you may receive Society Sick Pay up to the maximum, as detailed below. When the Society makes payment in times of illness or injury, this includes any entitlement to Statutory Sick Pay. The entitlements relate to any rolling 12-month period”.

10. For service of 10 years or more, the terms and conditions state that the maximum sickness which may be paid in any rolling 12-month period is 30 weeks.

11. According to the terms and conditions issued by the Co-operative Group (document 4) the claimant then worked 39 hours per week, however this reduced at some point to 30 hours per week. When the claimant’s employment was transferred to McColl’s in April 2017 she was working 30 hours per week.

12. In regard to her employment with McColls, the claimant was issued with a statement of terms and conditions of employment referencing a commencement date of 10 April 2017 with the start of her continuous employment stated to be 9 March 1987. The claimant did not sign this statement. The claimant understood that her terms and conditions with the Co-op had transferred to her employment with McColls.

13. In the McColls statement of terms and conditions, under hours of work, that statement states as follows:

“Your normal hours of work are 30 per week (excluding meal and refreshment breaks). Your hours will be worked in accordance with business needs as directed by Management. You may be required to work additional hours from time to time as deemed by Management. The signed acceptance of this Agreement shall be considered to include an opting in notice as defined by schedule 4 of the Sunday Trading Act....”.

14. Terms and conditions relating to holidays are set out under “annual holidays”.

15. Under “sick pay”, it is stated that “there is no company sick pay scheme applicable to your employment. Further details of conditions relating to absence through sickness or injury and statutory sick pay are contained within the colleague handbook”.
- 5 16. On 30 June 2017, the claimant advised her manager of her availability, which represented the hours which she had worked prior to the take over by McColls (document 8). This states that she was not available on Mondays, available 6 am to 10 pm on Tuesdays and from Wednesday to Sunday 6 am to 2 pm. This availability related to the fact that the claimant has a second job caring for a
10 vulnerable adult. The claimant worked a backshift on a Tuesday (2 pm to 9.30 pm) and three day shifts (from 6.30 to 2.30) on a rota basis.
17. While working with McColls the claimant was paid holidays on the basis of the Co-op terms, and not those of McColls. This was reflected in her pay slips (see for example document 16/1 which is a payslip dated 30 May 2018 with an entry
15 “Coop Hol Hrs”).
18. The claimant was also paid sick pay on the basis of the Co-op terms while working for McColls. For example, when she was on sick leave relating to a knee operation in August 2019, she was paid “Co-Sick Pay” (see pay slip document 16/2).
- 20 19. The claimant understood that she would retain her Co-op terms and conditions when her employment was transferred to the respondent under the Transfer of Undertakings Regulations in June 2020.
20. In or around February 2021, the claimant understood (from watching the Martin Lewis consumer programme) that those who are carers of vulnerable people
25 as a second job were entitled to be placed on Furlough.
21. The claimant raised this with respondent, and the claimant was put on furlough initially for six weeks but that was to be extended to October 2021.
22. The claimant received a letter (undated) around June 2021 from Mr Akthar, manager of the respondent (document 10). In that letter, reference was made
30 to an “informal talk” (although no informal meeting took place) and “concerns

about your employment contract”. Reference was made to the need for the claimant “to adhere to the rota that is situated in the store room”.

23. Attached to that letter was a contract of employment which was stated to be dated 10 July 2021 and stated to set out the main terms of the claimant’s contract. It stated, “Your contract of employment with the Company commenced on 1 July 2021. No previous employment counts toward your period of continuous employment with the company”. Under position, it is stated that the claimant’s job title was sales assistant, and that “the Company may amend your duties either on a temporary or permanent basis. You will be notified of any permanent change in writing....”.
24. This contract also contains provisions about holiday entitlement and statutory sick pay. In particular it states that “you will be entitled to Statutory Sick Pay for any period of absence due to sickness or injury subject to meeting the required qualifying conditions”.
25. Under the heading “grievance procedure”, it is stated that “the company encourages employees to settle grievances informally with their manager. If however you have a grievance relating to any aspect of your employment which you would like to be resolved formally, you must set out the nature of the grievance in writing and submit it to a manager”.
26. By letter dated 21 July 2021, (document 9/1), the claimant took issue with the proposed terms of the contract and advised that she relied on the contract issued by the Co-op in 2012 in regard to the terms and conditions of her employment with the respondent.
27. Following a discussion with Ms C Nicoll, the shop manager, on 7 August, and a meeting with Mr Akhtar on 9 August to discuss a return to work and the end of furlough, the claimant wrote to the respondent by letter dated 11 August 2021 (document 11) advising that she was prepared to go back to work. She expressed concern however that she had not yet received a reply to her letter relating to the proposed changes to her terms and conditions; and with regard to the proposed rota that her “contracted hours and shift pattern have been a

contractual agreement of my employment since November 2012 due to work commitments and health reasons”.

28. By letter dated 29 August 2021 (document 12) the claimant advised that she was “raising a grievance regarding the lack of consultations on previous correspondence regarding my TUPE contract and lack of correspondence regarding my letter sent on Thursday 22 July relating to this issue”. She asked to be represented by her USDAW rep.
29. On 3 September 2021 the claimant went on sick leave with work related stress.
30. By letter dated 13 September 2021, the claimant’s trade union representative, Mr Stephen Muir wrote to the respondent regarding the failure to respond to her letters of 21 July, 11 August and 25 August, asking them to deal with the grievance and referencing the need, under the ACAS code of practice, to deal with such in a timely manner.
31. Mr Muir subsequently spoke to Mr Akthar on 17 September 2021, and followed that up in writing (document 14) requesting a meeting to deal with the grievance, and requesting sick pay.
32. By letter dated 2 November 2021, Mr Muir requested a formal meeting, given that the date initially proposed for a meeting on 8 October had been unsuitable and no further correspondence had been received (document 15). No meeting took place.
33. The claimant remains absent on sick leave. She has been in receipt of statutory sick pay paid since September 2021 at a rate of £385.40 (gross) each week, which is £304.34 net (document 16/3).
34. The claimant contacted ACAS on 21 January 2022, and lodged a claim in the Employment Tribunal on 17 March 2022.

Relevant law

35. Section 13 of the Employment Rights Act 1996 states that an employer shall not make a deduction from wages of a worker employed by him unless the

deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

5 36. Section 23(1) states that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of Section 13.

37. Under regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, when a new employer takes over following a relevant transfer, the new employer (transferee) assumes all the rights powers, duties and liabilities which the old employer (transferor) had under the contracts and is bound by their terms and conditions as if he were the original employer.

10 38. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which applies to all jurisdictions listed in schedule A2, where it appears to the employment tribunal that the claim concerns a matter to which a relevant code of practice applies, and the employer has failed to comply with that code in relation to that matter and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

15 39. Schedule A2 applies to section 23 of the Employment Rights Act 1996 (claims relating to unauthorised deductions and payments).

Tribunal deliberations and decision

20 40. The claimant in this case claims only contractual sick pay. Given that she had lodged a grievance (to which the ACAS Code of Practice on disciplinary and grievance procedures applies), she seeks an uplift for the failure to comply with the code.

Holiday pay claim withdrawn

25 41. The claimant also claimed unpaid holiday pay, but Mr Muir accepted that since the claimant's employment had not yet terminated the claimant was not entitled to claim unpaid holiday pay at this stage. That claim is therefore treated as withdrawn.

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Entitlement to contractual sick pay

42. With regard to the claim for contractual sick pay, the claimant relies on the terms and conditions of her contract with the Co-op, which she argues were transferred to McColls, who honoured those terms, and which she argues were then subsequently transferred on the take over by the respondent.
43. Although the respondent's representative was not present at the hearing, the respondent did lodge an ET3 in which it was stated as follows; "no new contract signed yet by Miss Crossan. Miss Crossan wants full pay on sick not SSP (old contract say SSP). Not willing to work with need/hours of business – want rigid days....payment for SSP outstanding since last payment Jan/Feb due to dispute". The respondent enclosed the McColls contract (document 6). It is clear the respondent relies on its terms in respect not only of the clause relating to flexibility on hours, but also in regard to sick pay, which states that only SSP will be paid.
44. It would appear however that the respondent may not have appreciated that since the claimant has been transferred not once but twice during her employment, that she relies on the original terms of her employment with the Co-op.
45. I accept that the claimant is entitled to rely on the terms and conditions confirmed as at 2012 when she was employed by the Co-op. As noted above, on transfer an employee's contract of employment, and terms and conditions, are transferred to the new employer and require to be implemented by them until they may be changed (usually by agreement) for reasons which do not relate to the TUPE transfer.
46. It is clear from the documentary evidence that those terms and conditions were honoured by McColls and there was no attempt to change them post-transfer. The respondent therefore inherits the contract of employment of the claimant based on the Co-op terms and not those of McColls. Although the respondent has attempted to change the terms and conditions by issuing a new contract, he accepts that this has not been signed by the claimant. Further it is clear from the documentary evidence, as well as the claimant's

evidence, that the claimant has not accepted any change to her terms and conditions of employment.

47. Given that the claimant can rely on the terms and conditions of her employment with the Co-op, the claimant is entitled to contractual sick pay. It is clear from that contract that sick pay is paid at the basic rate, on a sliding scale, with employees who have been employed for more than 10 years as the claimant has being entitled to a total of 30 weeks in any rolling 12 month period.

Sums due for unpaid contractual sick pay

48. For this reason, Mr Muir claims contractual sick pay for 30 weeks. He claims sick pay using the claimant's gross hourly rate of £8.91 per hour. However, the claimant is only entitled to net pay which is noted to be £803.14 per month. That equates to £185.34 per week, which multiplied by 30 would give a total net award for unpaid wages of £5,560.20.

49. However, as Mr Muir is aware, from that requires to be deducted, in line with the terms of the contract, SSP which was paid to the claimant.

50. Mr Muir took the claimant in evidence to his letter to the Tribunal dated 4 May 2022 (document 20) and she confirmed that she had received £1,754 in sick pay (which I assumed to be the net figure). Deducting that £1,754 from the sum of £5,560.20, the balance due is therefore £3,806.20.

Uplift for failure to comply with ACAS code

51. Mr Muir advised that he is also claiming an uplift in regard to the failure to comply with the ACAS code. This relates in particular to the fact that the claimant lodged a grievance and there was a complete failure on the part of the respondent to deal with that grievance.

52. I note that a claim for unlawful deductions from wages is one of the jurisdictions to which the uplift may apply. I accept that in this case the claimant has raised a grievance and that the ACAS code of practice on discipline and grievances is therefore relevant. I accept the claimant's evidence that there having been no meetings to discuss or resolve the

grievance, that there has been a complete failure to follow the terms of the Code, which are relevant even for the smallest employers. I find therefore that the employer has failed to comply with that code in relation to that matter and that failure was unreasonable. In all the circumstances, I consider it just and equitable to increase the award made by the maximum of 25%.

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53. An uplift of 25% equates to £951.55, giving a total award of £4,757.75. The Tribunal orders the respondent to pay that sum to the claimant.

10 **Employment Judge: M Robison**
Date of Judgment: 3 August 2022
Entered in register: 11 August 2022
and copied to parties

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