IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4103805/2022 Heard Remotely at Edinburgh on the Cloud Based Video Platform, on 22nd September 2022 at 11 am

Employment Judge J G d'Inverno

Ms H Mackintosh	**Claimant** **Represented by:** **Mr R Bertram** **per Citizens Advice Scotland**
National Schizophrenia Fellowship	**Respondent** **Represented by:** **Ms K Moss of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim is dismissed.

REASONS

1. This case called for Final Hearing at Edinburgh on the 22nd of September 2022. The Hearing was conducted remotely on the Cloud Based Video Platform.

2. Each party enjoyed the benefit of representation, for the claimant Mr Bertram of Citizens Advice Scotland, and for the respondent Ms Moss of Counsel.

3. The claim presented was one for compensation (payment) for 44.5 hours of Time Off In Lieu of Payment (TOIL), accrued but untaken by the claimant as at the Effective Date of Termination of her employment.

4. The claimant who was in attendance gave oral evidence on affirmation and answered questions put in cross examination and questions put by the Tribunal. Parties' representatives thereafter each addressed the Tribunal in submission.

5. The essential facts were not in dispute between the parties and were either the subject of agreement or concession by the respondent.

Findings in Fact

6. The claimant was employed by the respondent as a "Carer Support Worker" from 5th February 2018 until 1st March 2022, on which latter date she was summarily dismissed (without notice) following a disciplinary process.

7. The claimant's employment was regulated by a written contract, produced at page 44 of the Hearing Bundle signed by the claimant and for and on behalf of the respondent, respectively on the 13th and 20th of February and which specified a commencement date of 5th February, all 2018.

8. The claimant was initially contracted to work 17.5 hours per week. In June of 2020 the claimant's conditions were subject to a consensual variation in terms of which the respondents requested and the claimant agreed to, and did work, increased hours of 21 hours per week.

9. The claimant was paid for her contracted hours worked at the agreed rate of £11.92 per hour gross.

10. On page First of the claimant's written contract under the clause headed "Hours" the following is provided and agreed between the parties:-

> *u The employee shall work 17% hours per week* (increased by agreement to 21 hours from June 2020). *Some of these may be unsocial and, if so, they shall not attract any additional remuneration unless otherwise agreed. Overtime is not paid and extra hours worked must be taken, in consultation with the Line Manager, as time off in lieu of extra hours worked"*

11. The claimant who regularly worked extra hours operated that clause, exercising her rights under it, throughout the period of her employment up to and including the Effective Date of its Termination, 1st March 2022. The claimant regularly recorded and submitted her extra hours worked, and on an ongoing basis sought agreement to take and did take time off in lieu of extra worked, in succeeding months.

12. There was no agreement between the parties to vary the terms of that clause. In particular there was no agreement between the parties that any of the extra hours worked by the claimant would attract additional remuneration.

13. The applicability of that clause was not impacted by the consensual variation to increase the weekly hours worked from 17% hours to 21 hours per week.

14. As at the point of her dismissal on 1st March 2022 the claimant had accrued but had not yet taken an agreed total of 45.5 hours of TOIL.

15. But for her dismissal, which was summary and occurred without notice, it would have been the claimant's intention to continue to take that accrued TOIL progressively over the succeeding months.

16. As a result of her dismissal the claimant was unable to exercise her right under the contract to take the accrued time off in lieu.

17. The summary nature of the claimant's dismissal (that is a dismissal without notice) is not a matter which was challenged by the claimant nor was it a matter before the Tribunal for consideration at the hearing of the claim.

Findings in Fact and in Law

18. As at the Effective Date of Termination of her employment, and upon such termination, the claimant had no right in contract to be remunerated for the untaken TOIL.

19. As at the Effective Date of Termination of her employment the claimant had no other entitlement in law (that is other than in contract) to receive remuneration in respect of the untaken TOIL.

Reasons

20. Although not expressly pled in one form or the other, a claim of this nature has the potential to engage either the Tribunal's contractual jurisdiction awakened upon termination of a Contract of Employment and or that conferred upon it in terms of section 13 of the Employment Rights Act 1996 which protects workers from the making, by their employers, of unauthorised deductions from their wages.

21. The written Contract which regulated the claimant's employment expressly provides that employees have no entitlement to remuneration for additional hours worked but rather must take these as TOIL (as reflected in the Tribunal's Findings in Fact). That clause was never challenged by the claimant in the course of her employment. Rather, the clause was operated by the claimant and by the respondents, to their mutual benefit, up to the point at which the claimant's Contract was terminated. Its efficaciousness was in no way impacted upon by the consensual variation to the claimant's hours which occurred in 2020. Both parties to the Contract exercised and performed their rights and obligations under the clause prior to the variation

and continued to do so following upon the variation. The clause is unambiguous in its terms.

22. Although in his submissions Mr Bertram once made reference to the phrase "custom and usage of trade", there was no evidence placed before the Tribunal which went to establish any departure from the operation of the clause, either involving the claimant or any other employee of the respondent. The claimant confirmed in evidence that she had never received payment for extra hours worked.

23. Counsel for the respondent referred the Tribunal to the decision of the Employment Appeal Tribunal, sitting in Scotland, in the case of **Vision Events UK Limited v Mr Gregor Richard Paterson** (Appeal Number UKEATS/0015/13/BI). In that case the Employment Tribunal had at first instance implied a term into an employee's contract to the effect that he was entitled, upon termination of employment, to be paid for accrued hours worked under a flexi hour scheme.

24. In reversing the decision, the Employment Appeal Tribunal found, by a majority, that the Tribunal had erred in law in so doing, it not being necessary, for business efficacy purposes, to imply such a term and, that it was not a term which both parties would have agreed to. In consequence, what was in that instance a complaint of unlawful deduction from wages failed.

25. I am likewise satisfied that no basis exists for implying such a condition into the claimant's Contract particularly so when the matter was one to which parties had already applied their minds and expressly made provision in clear terms in their written agreement. In fairness to Mr Bertram I did not understand from his submission that he was arguing that the Contract should be read as containing, by implication, any such condition.

26. Rather, my understanding, on the thrust of Mr Bertram's submission, was that the claimant having found herself in a position where post her dismissal she was unable to exercise her contractual right to take TOIL, and she having

undoubtedly performed the additional hours of work which hours of worked were to the benefit of the respondent, she should be compensated for them, by means of financial payment, upon termination of employment.

27. Counsel for the respondent had understood that to be a submission which was being made on the general grounds of "fairness" or equity and submitted that no such right to be remunerated on the grounds of "fairness" arose from the facts in this case. That is a submission which I had no difficulty in accepting.

28. However, and in fairness to Mr Bertram who provides his representative services on a voluntary and non-legally qualified basis, and lest it have been his intention to seek to invoke the doctrine of unjustified enrichment, more properly in Scots law of seeking a payment *quantum lucratus,* I address that issue for completeness sake.

29. For a worker to recover sums from an employer in terms of section 13 of the Employment Rights Act 1996 that worker must first establish that the sums deducted or withheld from their wages, including a final wage, were sums properly due to be paid to the claimant as "wages".

30. Wages for this purpose are defined by section 27 of the ERA 1996 which provides that wages mean "any sums payable to the worker in connection with his employment", and includes:

- Any fee, bonus, commission, holiday pay or other emolument referrable to the worker's employment, whether payable under their contract or otherwise *(section 27(1)(a), ERA 1996).*

- Any payment in the nature of a non-contractual bonus which is, for any reason, made to a worker by their employer. The amount of payment is treated as wages and as payable to the worker as such on the day on which the payment is made, *(section 27(3). ERA 1996.)*

31. Leaving aside, for immediate purposes, the question of whether or not a payment of the type which the claimant seeks in this action falls within the section 27 statutory definition, at first glance it would appear not to, in order to recover under section 13, a claimant must first establish some entitlement in law, whether in contract or otherwise, to the payment in question, at first instance.

32. Payments, *quantum lucratus* are payments made in "quasi contract". As such I consider that they are payments likely to fall within the Tribunal's extended contractual jurisdiction awakened on termination of contract. The obligation to make payment in recompense is one referred to within the law of unjustified enrichment. A readily understood example of the same may occur where a person, who contributes towards the purchase of a property in the mistaken belief that they own a share of the property, seeks recompense (repayment of their contribution) under the law of unjustified enrichment.

33. I do not consider that the facts in this case give rise to any such obligation incumbent on the respondent, within the law of unjustified enrichment. Had I taken a contrary view it would have been necessary to consider to what extent the claimant would have been entitled to succeed in a claim of which she had not given notice. In the circumstances however that secondary issue does not arise. In the instant case no question of mistaken belief arises. Parties agreed the mechanism whereby additional hours worked were to be recognised and the nature of the right by which they were to be compensated. That was.expressly a right to TOIL and was expressly said not to be a right to additional remuneration. The exercise of the contractually agreed right was always dependent upon a situation in which the claimant's employment continued. While not without some sympathy for the circumstance in which the claimant finds herself the fact that her employment ceased by means of summary dismissal following discipline proceedings does not operate to create any such right. The same circumstance would have occurred had the claimant resigned without notice in order to take up another work opportunity.

34. I am accordingly satisfied that the claimant has failed to establish any entitlement in law, whether in contract or otherwise, to the payment which she seeks and that her claim accordingly falls to be dismissed.

I confirm that this is my Judgment in the case of Mackintosh v National Schizophrenia Fellowship t/a Support in Mind Scotland and that I have signed the Judgment by electronic signature.

Employment Judge: J G d'Inverno
Date of Judgment: 7 October 2022
Entered in register: 27 October 2022
and copied to parties