



EMPLOYMENT TRIBUNALS

Claimant: Mr John Joseph
Respondent: Care Advocates Limited
Heard at: London South Employment Tribunal (by CVP)
On: 05 September 2022
Before: Employment Judge T Perry

Representation
Claimant: In person
Respondent: Mr L Khaka (Managing Director)

JUDGMENT

1. The judgment of the Tribunal is that:

- 1.1. The Respondent made unauthorised deductions from wages by failing to pay the Claimant the full amount of wages due for March 2021 and **is Ordered to pay to the Claimant the sum of £ 1,192.10 being the total gross sum deducted.**
- 1.2. The Respondent made an unauthorised deduction from wages by failing to pay the Claimant in lieu of accrued but untaken annual leave on termination of employment **and is Ordered to pay to the Claimant the sum of £1,344 being the gross sum due.**

REASONS

Claim and issues

2. By ET1 dated 31 March 2021 the Claimant brings a claim for unlawful deduction from wages in respect of notice pay, holiday pay, arrears of pay and other payments. The Claimant confirmed at the start of the hearing that claims in respect of commission are not pursued.
3. The issues for the Tribunal to decide are as set out in the record of Preliminary Hearing

before Employment Judge Beckett held on 17 June 2022. These are:

- 3.1. Notice pay – what was the Claimant's notice period?
 - 3.2. Was the Claimant paid for that notice period?
 - 3.3. Holiday pay – what was the Claimant's leave year?
 - 3.4. How much of the leave year had passed when the Claimant's employment ended?
 - 3.5. How much leave have accrued for the year by that date?
 - 3.6. How much paid leave had the Claimant taken in the year?
 - 3.7. Were any days carried over from previous holiday year?
 - 3.8. How many days remain unpaid?
 - 3.9. What is the relevant daily rate of pay?
4. A number of these issues were not strictly necessary when considering that the Claimant only worked for one year.

Evidence

5. The Claimant gave evidence on his own behalf from a witness statement.
6. For the Respondent, the Managing Director Mr Lewis Khaka and Operations Director Mr Dominic Loyal gave evidence from witness statements.
7. The Tribunal had before it a bundle of documents provided in 12 separate PDF files. References to documents in the format (B1) are to the numbering in this bundle. The Respondent provided a further payslip for December 2021, which the Claimant was able to comment on by email.

Findings of fact

8. The Respondent is a provider of care and support for adults with learning disabilities and mental health challenges. At the relevant time, it had two service users living together in a 3-bed house located in Sanderstead Area of Croydon. The service users were supported by 4 members of staff including the Claimant working on a rota pattern of 13 hours shift including sleep ins, i.e. one staff working 3 full days a week including sleep in.
9. The Claimant was employed by the Respondent as Registered manager from 6 April

2020 until 25 March 2021. The Claimant's salary was £30,000, rising to £32,000 on achieving CQC registration. Under the terms of the contract the Claimant was not paid on an hourly rate although the contract provided for normal working hours (40 hours and overtime above those hours). The Claimant's contract states he was entitled to 22 days' holiday including bank holidays. The holiday year ran from 4 April. It is agreed that the Claimant worked three days' a week. The amount of notice required to be given by the Claimant was one calendar month.

10. In fact, for much of his employment, the Claimant was paid less than the agreed monthly salary. Before the Respondent achieved CQC registration on 6 March 2021, the Claimant did work as a carer and was paid based on hours worked. There is no claim before the Tribunal in respect of any such deductions.
11. Mr Khaka alleged in evidence that the Claimant took two weeks' holiday in October 2020. The Claimant denied this. The Tribunal was provided with a payslip showing 88 hours' holiday taken in December 2020. The Claimant in his comments did not dispute the accuracy of this payslip. The Tribunal finds that the Claimant took two weeks' paid holiday in December 2020. As the Claimant was working three days a week, this equated to six days' holiday.
12. On 7 January 2021, Mr Khaka, informed the Claimant of a complaint by a service user.
13. On 11 February 2021, Mr Khaka told the Claimant to return his work phone as he would be given a new one when it arrived (B3).
14. On 15 February 2021, Mr Lewis Khaka informed the Claimant of four other complaints by a service user. The Claimant sought to resign by email that day but Mr Khaka discussed with the Claimant and they agreed that he would not resign. Mr Khaka told the Claimant to enjoy a peaceful break before returning to the business (B1).
15. The Claimant was on annual leave on 17-19 February 2021. Thereafter, the Claimant says Mr Khaka told the Claimant that he was now based in head office and not to go to the home. The Claimant says he worked remotely and continued to do assessments, medication audits, read staff notes and continued his normal duties.
16. On 24 February 2021 the Claimant was sent heads of terms for new employment with Kulkous Healthcare. This provided for a start date of 1 April 2021 but also provided that interim work setting up the office might be done before then and would be remunerated at a separate rate. The Claimant had forwarded receipt of purchase for an item from Curry's on 24 February 2021 (E6). The Claimant says he did no such work before 1 April 2021 but email correspondence shows that his new employer was

holding him out as an employee from at least 18 February 2021.

17. The Tribunal finds as a fact that the Claimant informed Mr Khaka of his new employment on 25 February 2021 and his intention to leave. The Tribunal finds that Mr Khaka and the Claimant agreed that the Claimant's employment with the Respondent would continue until 25 March 2021 (being the one month notice period required). The Tribunal finds that Mr Khaka's motivation for doing this was to ensure that the CQC registration was not detrimentally effected by the Claimant's departure. This agreement explains why the Respondent took no steps to contact or discipline the Claimant for absence during March 2021.
18. The Claimant submitted a timesheet on 26 February 2021 (C1). In the covering email, the Claimant said "this means holiday I have taken this month is 36 hours or 3 days holiday, and we discussed taking two weeks holiday. I would take the reminders from next week (D2).
19. Mr Khaka says the Claimant did not return to work after 25 February 2021 and that the Claimant failed to submit timesheets for this period. Mr Khaka says the Claimant was working for someone else during this period.
20. The Tribunal finds as a fact, based on the covering email of 26 February 2021 and the claim form (in which the Claimant referred to writing to Mr Khaka "after my two weeks break") that the Claimant took a two-week period of annual leave in the first two weeks of April 2021 and that he did no work for the Respondent during this period. Mr Khaka instructed Mr Loyal to take over the Claimant's duties immediately after 25 February 2021. Mr Khaka did this because he was aware that the Claimant was leaving and that he was effectively only staying for the purposes of the CQC registration and would not be undertaking the day-to-day responsibilities of the Registered Manager.
21. On 3 March 2021 the Claimant wrote a text to Mr Khaka to state that he had been informed that the CQC would require him to stay as Registered Manager for three months after registration. The Claimant offered to withdraw his application because "I start new job and would not be at Care Advocate." (B5) The Claimant said that he understood it would have an adverse effect on subsequent applications if he did not stay for the duration.
22. On 6 March 2021 the Respondent became a registered care provider with the CQC. From this date the Claimant's salary increased to £32,000. The Tribunal finds that the increase to salary applied to the whole month of March 2021.
23. On 9 March 2021 the Claimant texted Mr Khaka to say he had been locked out of his

work email. Mr Khaka sent him a new login (B5 and B4).

24. On 9 March 2021 Mr Khaka and the Claimant were due to meet. The Claimant was late at another appointment and asked to postpone the meeting. The meeting took place on 11 March 2021.
25. On 11 March 2021 the Claimant purported to resign in writing on two weeks' notice. In this letter the Claimant referred to having raised a safeguarding concern and said he would notify CQC of his notice of resignation. (B2) The letter stated that the Claimant's employment would end on 30 March 2021 but in fact it is agreed that it ended on 25th March 2021. This was a somewhat artificial letter as the Claimant had already told Mr Khaka he was leaving on 25 February 2021.
26. On 16 March 2021 Mrs Lorraine Henderson at CQC wrote to the Claimant regarding the cancellation of his registered manager application on 25 March 2021. The email mentioned that an earlier change date could be applied if needed. The Claimant forwarded this email to Mr Khaka stating "I am still here till the 25th could we touch base quickly on update about service users or alternatively if you feel this is too much, I am happy to change exit date with CQC immediately. Lorraine wanted to know if I am still heading the team and involved in the daily service." (D3) I have not seen any answer to this letter and it appears Mr Khaka did not take the Claimant up on an early termination date.
27. On 18 March 2021 the Claimant did a medicine audit, a care plan audit and induction for a new member of staff. The Tribunal finds that this was the only work done by the Claimant for the Respondent during March 2021. This was a requirement of the Registered Manager and was conducted on a monthly basis. The Claimant alleged to have had meetings with social workers but was unable to record the dates. The Tribunal finds as a fact that these meetings with social workers did not happen during March 2021.
28. On 31 March 2021 the Claimant was paid a gross sum of £1,473.90. This equated to a net salary of £538 due to a high tax code. The Claimant was paid salary for the last two weeks of employment. The Respondent offset 22 hours accrued untaken annual leave against part of the alleged absence from 25 February 2021 until 15 March 2021. A BR tax code was applied to the Claimant's earnings. This was set by HMRC (C2).
29. By email on 31 March 2021 at 04:02 the Claimant complained about his wages saying he thought it must be mistaken. Mr Khaka sent the Claimant his payslip. The Claimant sent a further email at 11:45 stating that he should be paid at a rate of £32,000 because of the CQC registration. The Claimant said he was owed a full month's salary to 25

March 2021 as this was a full month from 25 February 2021, which he said was the “cut off period”. The Claimant said too much tax had been deducted.

30. In an emailed response on the same day at 13:19, Mr Khaka admitted owing the Claimant the increased rate because of the CQC registration but denied owing more than a minor alteration of £74.40. Mr Khaka accused the Claimant of not submitting time sheets and not working apart from a meeting on 10 March and an assessment on 18 March 2021. Mr Khaka accused the Claimant of having admitted to working elsewhere and cited their cancelled meeting on 9 March 2021 as evidence of this (D1).
31. The Claimant replied at 13:57 stating that he had turned up for work every day as expected. The Claimant referred to an email sent to staff stating that the Claimant was running the team until 25 March. The Claimant referred to a letter stating that he could still access work systems and that staffing issues should be directed to him. The parties disagree about whether such correspondence exists.
32. The Claimant both contacted ACAS and was issued with an ECC on 31 March 2021.
33. The Claimant contacted CQC on 1 April 2021 stating that after the email of 16 March 2021, he agreed with Mr Khaka to stay until 25 March 2021 (D8)
34. The Claimant started new employment on 1 April 2021.
35. The Claimant says he took out loans with pay day lenders to cover the shortfall. The Claimant says that the interest on these loans amounted to almost £300 but no documentary evidence of such loans was provided.

The Law

36. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. A worker has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.
37. Subject to an express contractual provision to the contrary, an employee or worker is entitled to be paid if they are “ready and willing to work” **Beveridge v KLM UK Ltd** [2000] IRLR 765, EAT.
38. The Working Time Regulations 1998 provide for minimum periods of annual leave and

for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum for a full-time worker. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

39. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. In accordance with a series of cases including the Court of Appeal's judgment in **British Gas Trading Ltd v Lock and anor** 2017 ICR 1, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European law but not for the additional 1.6 weeks leave which is purely domestic in origin. With effect from 6 April 2020, the reference period for a "week's pay" for the purpose of calculating holiday pay has changed from 12 to 52 weeks.
40. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay to the worker, in addition to the amount deducted, such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction per section 24(2) Employment Rights Act 1996.

Conclusions

41. The Claim was issued at a point when the alleged deductions were all well in time and the Tribunal has jurisdiction to consider them.
42. As set out above, The Tribunal finds that the agreement between Claimant and Mr Khaka reached at the end of February 2021 was that the Claimant would remain registered manager for 1 month from 25 February. There was no real expectation that the Claimant would perform his duties other than the minimum requirement of the monthly medicine audit. Mr Loyal took over the majority of the role effectively immediately. However, there was a clear benefit to the Respondent from this arrangement in that it allowed the CQC registration to be completed with apparent continuity.
43. The Tribunal finds that for the purposes of Beveridge, the Claimant remained ready

and willing to work. He was doing the little that was required of him including the audits on 18 April 2021. Accordingly, the Claimant had the right to be paid a full salary up until 25 March 2021. Whether the Claimant was also working elsewhere during this period is irrelevant. As the CQC registration had been obtained on 6 March 2021, he was entitled to be paid at the higher salary of £32,000.

44. It follows that for March salary the Claimant was entitled to and should have been paid £2,666 gross. In fact, he was paid £1,473.90 gross. The Tribunal finds that difference of £1,192.10 was an unlawful deduction.
45. The Tribunal does find that the Claimant was on holiday for the first two weeks of March 2021. This equated to six days' holiday on top of the three days' taken in February 2021 and the six days' holiday in December 2020. The Tribunal finds that this was the only holiday taken by the Claimant during holiday year from 4 April 2020. The Claimant took a total of 15 days' holiday.
46. The Claimant was not paid for any accrued but untaken holiday on termination of employment. In fact, based on the evidence before me, the Claimant was employed for the full 12 months of the holiday year and accrued 22 days' annual leave. Holiday entitlement was in days and the Tribunal does not accept the hourly calculations made by the Respondent correctly reflect the Claimant's holiday entitlement. The Claimant had only taken 15 days' annual leave at termination. Accordingly, the Claimant was due 7 days' accrued untaken holiday. The Tribunal considers £30,000 as the best approximation of the Claimant's earnings over the last 12 months. Based on a three-day working week that equates to £576 a week (£30,000/52) or £192 (£576/3) a day. For seven days, this equates to £1,344.
47. All sums are to be paid gross. The Claimant may be liable to tax on such sums.
48. The Tribunal can do nothing about the tax code operating by the Respondent at the time. The Claimant may be liable for a rebate in due course if excessive tax was deducted.
49. The Tribunal declines to make a payment for interest on pay day loans as such loans have not been evidenced.
50. There is no provision for making an award for interest. The Claimant has asked for an uplift for unreasonable failure to follow the ACAS Code, but the Tribunal finds there was no such unreasonable failure.

Employment Judge T Perry
Date 24 October 2022