Case No: 2305868/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss V Okine

Respondent: Lewisham and Greenwich NHS Trust

Heard at: London South Employment Tribunal
On: **4 October 2022 (by CVP) and 6 December 2022(hybrid - in person and by CVP)**

Before: **Tribunal Judge Milivojevic acting as an Employment Judge**

Representation
Claimant: In person, (not present on 6 December 2022)
Respondent: Mr Nicholls – Counsel

JUDGMENT having been delivered orally on 6 December 2022 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

The Claims

1. The claimant commenced employment with the respondent on 20 May 2019, as a mobile receptionist.

2. The claimant entered into early conciliation on 2 November 2021. ACAS issued a certificate 17 November 2021. By way of an ET1 received on 15 December 2021, the claimant complained of two separate unlawful deductions from wages. These were:

a) an alleged refusal by the claimant's managers to allow her to go on a "work placement" in the Finance Department, and
b) a period where the claimant did not attend work, expressed in her ET1 as being from "August 2021 to November 2021".

3. The respondent filed an ET3 on 1 February 2022 The claims were resisted in full. The respondent said that the work placement was organised independently by the claimant and was not connected with her role as a mobile receptionist. The respondent said that they could not release the claimant from her duties due to service demands, but that the claimant could use her annual leave entitlement to carry out the placement.

4. In respect of the period where the claimant did not attend work, the respondent's position was that the claimant had been absent from work from 1 July 2021 when she informed her manager that she was sick, and that the claimant was absent without leave from 8 July 2021 to 8 September 2021, and then from 24 September to 20 December 2021. The respondent's position was the claimant had been paid all monies due to her under her contract of employment.

Issues, procedure and evidence heard

5. The final hearing of this case commenced on 4 October 2022 by CVP video hearing. The claimant had applied for an adjournment prior to the hearing. The claimant said that she had difficulties with her knee and left ankle, and felt that she would be unable to sit for the length of time required for the hearing. The request for postponement was refused by Acting Regional Employment Judge Balogun.

6. At the start of the CVP hearing I discussed the claimant's difficulties with her, making it clear that she could ask for breaks if necessary and that she could get up and move around during the hearing. I outlined the broad timings of the day, and the claimant said that these would be compatible with her need for breaks and that she would not require further adjustments to these times.

7. The respondent had provided a draft list of issues in respect of the claims for unlawful deductions from wages. The claimant asserted that she wished to pursue the claim in respect of her work placement as a discrimination claim.

8. I explained to the claimant that in her ET1 she had not ticked the box to indicate that she wished to bring a discrimination claim, or on the basis of which protected characteristics. Instead she had ticked to indicate that she wished to bring a claim that she was owed "arrears of pay" and "other payments" and that she wished to make "another type of claim". The claimant's ET1 stated that she had taken advice from a solicitor regarding her unpaid wages and that she had been advised to categorise this under Section 13 of the Employment Rights Act 1996.

9. Although the claimant's witness statement in respect of her work placement made one reference to "discrimination" neither the claimant's pleadings nor her witness statement set out of the details required for a discrimination claim, such as the protected characteristic this was based upon. I explained that as I understood it the claimant had not made an application to amend her claim.

10. The claimant did not make an amendment application and the claim proceeded on the basis of unlawful deductions from wages.

11. The legal issues to be determined by the Tribunal in relation to both the work placement claim and the period from August to November 2021 were the same:

> a) what payments were properly payable to the claimant?
> b) were any deductions made from the amounts which should have been paid to the claimant?
> c) if so were those deductions permitted or required under the terms of the claimant's contract of employment or under statute, or had the claimant previously given her written consent to the deduction?
> d) what, if any compensation is due as a result?

12. The Tribunal received two witness statements from the claimant and two explanatory notes to her witness statements. The respondent provided a bundle of statements from Ms Ackland, Ms Ganz and Ms Smith. There was also a bundle of documents. The claimant's evidence began on the morning of 4 October 2022. Unfortunately, shortly after the lunch adjournment, the claimant lost her CVP connection with the hearing. The Tribunal clerk sought to contact the claimant by telephone on a number of occasions. The clerk provided the claimant with details to dial into the Tribunal hearing so that a discussion could at least take place about how to proceed. Despite this, and waiting until almost 4pm, the claimant did not rejoin the hearing either by telephone or by video. As a result, the case was re-listed to commence in person on 6 December 2022. I directed that a letter should be sent to the parties, particularly as the claimant had not re-joined the hearing, confirming that the case would be re-listed, that the claimant remained on oath, and that the parties should be prepared to complete both evidence and closing submissions at the re-listed hearing. Prior to the re-listed hearing, I allowed the respondent's application that Mr Ganz give evidence remotely by video.

13. On the eve of the relisted hearing, the claimant sent a number of emails to the Tribunal stating that she was unwell and would not be able to attend the hearing. The claimant said that she had suffered a number of bouts of flu and could not be vaccinated as a result. She said that she was following advice on the Tribunal's correspondence not to attend if she had flu symptoms. The claimant did not provide any medical evidence. She provided written closing submissions which she said were in compliance with the Tribunal's letter re-listing the hearing. In response to that correspondence the Tribunal Clerk emailed the claimant with the link to join the video hearing in the same manner as Mr Ganz.

14. The claimant did not attend either the Tribunal building or the CVP hearing. Mr Nicholls submitted that the Tribunal should determine the case in the claimant's absence, on the basis of the evidence before the Tribunal. I adjourned the hearing for 30 minutes, to allow time for the Tribunal clerk to telephone the claimant and to email her (using the same email address which she had contacted the Tribunal with the evening before), in the following terms:

> *"Judge Milivojevic has requested that you attend the hearing today by CVP or telephone by 10.45am. In particular to provide further information in relation to your health, and what you are asking the Tribunal to do in respect of today's hearing. If you have any medical evidence relating to why you are not able to attend the Tribunal today you should email it to the Tribunal as soon as possible."*

15. It was not possible to contact the claimant by telephone and she did not join the hearing.

16. The respondent highlighted that this was the third request from the claimant to adjourn the final hearing of this case. The case had originally been listed for hearing on 18 August 2022. The claimant emailed the Tribunal on 17 August 2022 stating that she was unwell and would not be attending on 18 August. Ultimately that hearing was postponed due to a lack of judicial resources.

17. As set out above, the claimant had sought to postpone the hearing on 4 October 2022, on the basis of difficulties with her knee and left ankle, and that had been refused. The respondent also suggested that the claimant had deliberately

disconnected from the hearing on 4 October, and/or had not re-joined when able to do so.

18. The claimant had also objected to a request from the respondent to move the re-listed hearing date, stating:

> *"I have already worked tightly around this date of 6/12/2022 and will not be able to do any dates before that date or after that date in December 2022"*

19. Mr Nicholls outlined that he had concluded the majority of his cross examination of the claimant, and that he estimated that he would have taken a further 30 minutes to complete this. He outlined that the claimant had provided closing submissions (which he had not read prior to the evidence concluding). Mr Nicholls submitted that the respondent had prepared for the hearing, and that its witnesses were prepared to give evidence, and that in all of the circumstances it was proportionate to determine the case.

20. In my judgment it was appropriate to determine the case in the claimant's absence. The respondent was not inviting me to strike out the claimant's case, but instead to hear the respondent's evidence and to take into account both parties closing submissions. This was appropriate in terms of balancing the interests of the parties, but also other tribunal users who were waiting to have their cases listed and heard in the future.

21. The claimant had made three requests to adjourn each hearing, all on the eve of those hearings, and without any medical evidence as to the basis of the request or why the claimant was not able to participate by CVP. The claimant had been able to email the Tribunal a number of times the night before the hearing and to provide her written closing submissions prior to that. The claimant did not attend the hearing on 6 December 2022 remotely, even for a short period, to explain the situation further or to set out when she considered that the case might be heard. The claimant had already made it clear in a previous email that she would not be available for the remainder of December.

22. I accepted the respondent's submission that there was a pattern of adjournment requests from the claimant very shortly before a hearing, and that there was a very real risk that any re-listed hearing would be subject to another similar request. If the hearing were to be adjourned, the respondent would incur further costs, and the memories of witnesses could fade further, given the age of some of the issues in the claim.

23. Having decided to proceed in the claimant's absence, on 6 December, the Tribunal heard evidence from Ms Smith, and Ms Ackland, who were in the claimant's line management chain, and Mr Ganz, from the payroll department. Mr Ganz provided an additional document and spreadsheet which sought to explain the comments in his statement. Mr Nicholls submitted that these were seeking to set out information already in Mr Ganz's statement in a clearer form, which I accepted.

24. In the absence of the claimant I asked questions of these witnesses addressing the issues which I considered to be relevant to the matters set out in the claimant's ET1. During these questions it became clear that there were one or two areas where, had he been able to conclude cross examining the claimant,

Mr Nicholls would have directed the Tribunal to specific documents in the bundle. In order to avoid unfairness to the respondent's witnesses as a result of the claimant's non attendance, I permitted Mr Nicholls to direct me to those documents and to briefly outline the questions which he would have asked the claimant. When weighing those points in evidence, I balanced this against the fact that the claimant had not had the opportunity to provide answers on those points.

25. The claimant had provided written closing submissions. Mr Nicholls provided written submissions which he supplemented orally. In the absence of the claimant Mr Nicholls also sought to address points which he considered that the claimant would have made if she were present.

The Facts

26. The Clamant was employed by the respondent as a mobile receptionist from 20 May 2019. In practice the claimant worked mainly as a receptionist mainly in the respondent's Foot Clinic.

27. In October 2019, the claimant emailed Mr Knevett, the respondent's Deputy Director of Finance, enquiring whether there were any apprenticeship roles or vacancies available. The response was that there was one role, which was due to be advertised shortly. There were further emails but no mention of a job being offered. This culminated in an email on 3 December 2019, which informed the claimant that a band five assistant income accountant role was to be advertised on NHS jobs.

28. In January 2020 the claimant emailed Mr Knevett. The claimant had applied for the band five role but did not pass the assessment. The claimant says that this was because she did not have her glasses with her, or a piece of paper upon which to make notes whilst assessing a spreadsheet. The claimant asked for Mr Knevett to keep her in mind if he had any roles.

29. The next contact was on 1 July 2020 when the claimant emailed Mr Knevett again. In summary, the claimant explained that she had not made further contact due to the pandemic and was now asking if Mr Knevett had any vacancies/apprenticeships coming up in finance or management accounting which the claimant could be considered for. Mr Knevett responded that his team could look into a work placement for the claimant, which could be part of her PDR (personal development review), if her line manager agreed. In further emails, Mr Knevett outlined that "*it would depend on your line manager balancing the needs of their current service and your personal development*".

30. At this stage, the claimant had already raised the possibility of being allowed to do the placement as part of her PDR. Ms Day, the claimant's line manager at that point, asked how long the placement would be, but stated that normally they did not offer placements to staff members in a full-time role, and that a placement in finance would not support her current role as a receptionist. In addition Ms Day stated that all training had been halted due to covid unless it was online.

31. On 28 July 2020 the claimant emailed Ms Day to state that she did not accept her answer, and that she had been in contact with the recruitment department who said that the claimant should ask her line manager again, and escalate this to Ms Day's manager if she was not content with the answer. The claimant said in that

email that "*I do not intend to stop asking to be released to do the placement in the Finance Department*". Ms Day's response was to ask for the details of the person in the recruitment team so that she could consult with them, and also the person in the finance department who the claimant had been consulting with. Ms Day also asked if this was a secondment or an apprenticeship, and the process which the claimant had followed to be offered this opportunity.

32. There was further correspondence from the claimant, with Ms Day and Mr Knevett respectively. On 18 August 2020 Ms Day explained to the claimant that it was not simply a matter of "*not agreeing*" to the request for a placement, but that she would require further details, even if the claimant were to use her annual leave to attend a placement one day per week. This was because annual leave could not always be granted, and it would result in the service being one person short, for one day per week. Ms Day also asked for some further details about the placement, as she was not sure of the process being followed.

33. In subsequent emails, the claimant said that she had given Ms Day and Mr Knevett each other's telephone numbers but it did not appear that a discussion had taken place. On 16 November 2020 Ms Day asked the claimant to ask Mr Knevett to send an email setting out further details of the placement, how it would be supported whilst working in another department and whether any HR paperwork had been completed. Ms Day said that she required an audit trail to be in place, before this could be signed off by Ms Carter, the supporting manager.

34. Further emails took place between Ms Day and Ms Ackland in November 2020 where concerns were expressed by Ms Ackland that the service was already short staffed. In that email chain Ms Day said that she was not willing to allow anything until it had been confirmed through the official channels and then even then if it was not appropriate she would not allow it. Ms Day also confirmed in that email that the claimant had wanted her to chase the Mr Knevett but that she did not think it was for her to do so. In response Ms Ackland raised the question of what would happen if this placement were allowed and then other team members wished to do something.

35. On 30 November 2020, Mr Knevett emailed the claimant to say that the placement would have to be put on hold as his department were only coming into the office for a couple of days per week, and were practising social distancing when they did, as a result of the covid pandemic. This meant that it would not be possible to offer any placements or training during this period. Mr Knevett said that if it was possible, he would pick this issue up again in the new year with the claimant's managers but that he was not comfortable with the claimant being required to take annual leave to undertake the work.

36. The claimant did not hear from Mr Knevett again, and the claimant's next email to him appeared to be 18 June 2021. In cross examination the claimant accepted that she did not contact her managers about a potential placement after this date.

37. In her witness statement the claimant said that she had stopped seeking finance opportunities outside her organisation from from July 2020 as she had secured one in her own organisation. In cross examination the claimant repeatedly stated that she was a part-qualified accountant, and not a school leaver, and that she would not simply do a placement to gain experience. She said that the purpose of the placement would be to get used to the respondent's finance

practices and systems and that she was doing the placement in the expectation of being employed in a band 7 role in the finance team in a short period. The basis of the Claimant's claim in relation to the placement was the loss of earnings from a band 7 role.

38. The Tribunal found as a fact that the claimant's email exchanges with Mr Knevett were in relation to the possibility of a work placement. Mr Knevett suggested that this be completed as part of the claimant's PDR in her substantive role. There emails did not contain any discussions about rates of pay for completing the placement. There was no evidence of the offer of a job in the finance team for the claimant if she completed her placement. It was clear in Mr Knevett's emails that this was an opportunity to gain experience, not the offer of a firm job, and as expressed by Ms Day in her emails, there was no evidence of a formal recruitment process having taken place.

39. There was no suggestion that at any time when the placement was being discussed, the claimant did not receive the salary due to her for her role as a mobile receptionist.

40. In June 2021 the respondent received a complaint from a service user regarding the claimant's conduct on 7 May 2021. On 29 June 2021 one of the respondent's managers spoke to the claimant about this incident. In a subsequent email to the line management chain, the manager described that call "*very challenging*". Ms Ackland then emailed the claimant asking her to set out her version of events. The claimant's evidence was that she provided her response but having sent it, deleted it from her mailbox. The claimant did not provide any explanation for this. Ms Ackland said that she did not have a record of the claimant having sent an email to her at this time.

41. On 1 July 2021 the claimant emailed the respondent stating that she was unwell. The claimant did not give any details of her illness or when she expected to return to work. Ms Ackland sought to arrange a meeting to discuss the complaint with the claimant, but these were cancelled due to the claimant's illness. In summary, the claimant did not return to work from 1 July 2021 to 18 December 2021 when a return to work meeting was held. Ultimately, the claimant was paid for two periods of sickness absence. These were 1 July to 7 July where the claimant was deemed to be complying with the self certification regime, and 9 September to 23 September 2021, where the claimant retrospectively submitted a Med 3 certificate for this period.

42. On 5 July 2021 the claimant emailed Ms Ackland to state that she was still not well so would not be coming into work. The claimant said:

> *"I will book a doctor's appointment today so he can prescribe something to help you. I will email you in the next few days when I hope I will feel better to come in to work.*
>
> *As you once told me not to just come in after being unwell without telling you first, I wont just come in without emailing you about it."*

43. After the 7 July 2021 the claimant was no longer able to self-certify as being unfit for work. However the claimant did not provide a Med 3 certificate. Neither

did she provide any update on whether she had spoken to a doctor, and if so, the outcome.

44. Ms Ackland emailed the claimant on 28 July 2021, checking whether the claimant was ok, seeking clarification of whether the claimant was still on sick leave, and reminding her of the need for medical certificates if so. Ms Ackland wrote to the claimant on 29 July 2021 by recorded delivery. The claimant was asked to contact Ms Ackland by 1500hrs on 30 July, and to provide medical certificates, backdated to 8 July, by 4 August 2021. This letter contained a warning that if medical certificates were not provided by this deadline, then her pay would be stopped with effect from 8 July, resulting in an overpayment owing to the respondent.

45. The claimant was also sent letters on 10 August and 19 August 2021 seeking clarification as to her status and advising her that she had been placed on unpaid leave in accordance with the respondent's Attendance Policy. Given what the Claimant had said in her email of 5 July, at this stage, the Respondent's understanding was that that Claimant was still not fit for work but had not complied with the requirement to submit Med 3 certificates.

46. The claimant did not contact the respondent until 23 August 2021 when she wrote to HR. The claimant said in that letter that prior to being absence from work she had experienced "attack emails" from one of her managers, which had caused a flash or spark to be flashed out of the computer, and then some names flashed up. She said that she considered these emails to be sources of demonic activities. In conclusion, the claimant said that she felt much better, and would have liked to have returned to work but did not want to be taunted or bullied. She said that she did not want to be pressurised into coming back to work and doing things that would cause further illness.

47. On 17 September 2021 the claimant emailed the respondent's HR team attaching a Med 3 certificate dated 9 September 2021, for the period 9 September 2021 to 23 September 2021 which stated that the claimant was not fit for work on the basis of *"Recurrence of Knee Pain – O*A". The claimant's covering email stated:

> *"I had a flu cold over 2 weeks ago and self isolated for 2 weeks. I am now able to get about and go to the library where I email you as my internet mobile phone is spoilt and I can't afford to buy a new one yet. As I am using funds I have to look after myself at the moment.*
>
> *At the end of last week, my knee got inflamed again so I went to the doctors who prescribed some stronger medication and said I should rest it. I attach a sick note he gave me to give to my workplace. I have started taking the medication and its improved. He has also asked that I go and do an X'ray on the knee at an NHS hospital, which I went and it was shut but I will go again to have it done asap as he wants to see what's wrong with my knee again and the better medication he can provide.*
>
> *I also asked if you could put me in touch with a trade union rep. I am now able to contact people again after the flu."*

48. The claimant wrote to the respondent on 29 October 2021. As part of that email she said:

"*My legal advisor has spoken to me yesterday and said I should be going back to work during the resolving of the complaint. I am also now more confident having spoken to you and communicated with Ms Jenkins about my complaint and that I hope I will not be troubled at work now/ during the investigation and that I can work normally like everyone should be allowed to do in work.*

If I am not allowed back to work, I should be paid my full pay before and up to completion of investigation and which she will file papers on in court, if I am not allowed to go back to work since I made the complaint. It seems a bit of a mouthful but I am trying to recollect and quote what she said yesterday."

49. The claimant's managers did not respond to this email. Instead, they sought HR advice and a decision was made to refer the claimant to occupational health before carrying out a return to work meeting. There were further internal discussions about who, in the line management chain should make the occupational health referral in the absence of the claimant's line manager, who was on long term sick. As a result the occupational health referral was delayed until 11 November 2021.

50 . On 16 November the respondent's HR department emailed the claimant with a letter dated 9 November in which Ms Smith responded to the claimants complaint (i.e. the claimant's email of 23 August). It also referred to the fact that an OH referral had been made.

51. The claimant responded to Ms Smith that evening. The claimant said that although her solicitors had advised her to return to work (as expressed in her email of 29 October), she had not returned as she was waiting for a response from either Ms Smith or HR before doing so. The claimant said that was ready to return to work on 18 November. The claimant made a number of comments in relation to her complaint and the patient comment, and stated:

"Then the call came relating issues to the matter I had already dealt with- the threatening call came from someone, I think the man you mentioned about an issue relating to her, a patient, and me which had been resolved well before she went off sick. It was when I also felt unsafe to stay in the office as I also felt ill with the 'influences' being exerted even over the phone and causing my head to feel bloated or warmish."

"One can sense these things of psychic influences (as well as the other issue of the 'spark' from a previous email which I had also mentioned in the Complaint - all causing me some concerns) and I have to protect myself from these things."

52. The following day, Ms Smith informed the claimant that she would ask for a return to work meeting to take place, and the claimant agreed to await contact from Ms Balkaran who was covering the sickness absence of the claimant's line manager.

53. Ms Ackland suggested to HR that rather than a return to work meeting there should be a meeting with HR present to discuss the claimant's previous absence

and why she had not followed procedures for reporting her absence. Ms Ackland emailed the claimant asking her to contact the respondent to arrange a convenient time and date for this meeting. The claimant did not respond to this meeting request. Similarly the claimant did not make contact with occupational health to arrange the OH assessment. Ms Ackland wrote to the claimant again on 30 November 2021 asking the claimant to make contact to arrange a meeting, and to contact OH. It was then agreed that Ms Smith would conduct the return to work meeting, and Ms Smith contacted the claimant on 30 November and 7 December asking her to do so.

54. On 30 November the claimant attended one of her places of work, and stated that she was ready to work and wished to say hello to her colleagues. As Ms Balkaran was on leave, the receptionist contacted Ms Ackland. Ms Ackland was clear in her witness statement that she had said that the claimant needed to let the respondent know that she was coming back to work. This was because a return to work interview would need to be conducted, as the respondent's understanding at that point was that the claimant had been absent due to (uncertified) sick leave. In addition, as the claimant had not contacted the respondent to arrange the return to work meeting, the claimant was still being treated as being on sick leave, and therefore was not rostered to work on that day, either at that site, or elsewhere.

55. There was a further email exchange between the claimant and Ms Smith, on 7 December. The claimant took issue with not being allowed to be in an NHS building on 30 November and accused Ms Ackland of trying to delay her return to work. Ms Smith responded on the same day setting out that she was actively trying to facilitate the claimant's return to work, that once a date was set then a return to work meeting can take place, and then the claimant can work according to a rota. Ms Smith stated that she was also willing to discus the concerns in the claimant's email about her interaction with Ms Ackland.

56. Ms Ackland's evidence was that the claimant had not contacted OH to arrange an assessment, but that ultimately a return to work interview was conducted on 18 December.

57. The Tribunal found large parts of the claimant's oral evidence to be unreliable. During cross examination, the claimant's answers often diverged from the contemporaneous documents. On a number of occasions, despite reminders, the claimant sought to criticise the actions of others more widely, rather than address the questions being put to her where her account diverged from the documents.

58. During cross examination the claimant was expressly asked whether her position was that she was sick during the periods of absence (that essentially she was ill but had not provided a Med 3 certificate) or if it was due to something else. The claimant's response was that she was not sick apart from the periods covered by her period of self certification in July 2021, and her Med 3 certificate in September 2021. The claimant was asked about the references in her emails to demonic activities and psychic attacks. The claimant said that something abnormal in June 2021 had caused her to be unwell early in July 2021, and that whilst she was not sick, she was not willing to return to work as that would either cause her to be unwell again, or the fear of this happening again. When asked about the period after the September Med 3 certificate, the claimant said that she was not willing to go to work due to the bullying which she considers that she had suffered, and that she had written to the respondent in August 2021 seeking

assurances. It was at this point in the cross examination that the claimant lost contact with the CVP hearing.

59. The claimant's answers in cross examination contradicted the claimant's email of 5 July, where she said that she was still unwell and would contact her doctor, and that she would let the respondent know when she was well enough to return to work. Similarly there appears to be some conflict with the claimant's email of 17 September, as during cross examination the claimant did not mention her period of flu as being a reason for her absence. Instead she said that had she received assurances in relation to her allegations of bullying, she would have returned to work.

60. Given the contradictions in the claimant's evidence, where it was necessary to do so, and unless expressly stated, the Tribunal preferred the evidence of the respondent's witnesses, particularly as this was corroborated by the contemporaneous documents.

61. Mr Ganz gave evidence as to the actual payments made to the claimant and to why these were applied retrospectively. In summary, this was due to the relevant payroll dates, and the payroll team not being informed in a timely manner of some of the changes. For example the claimant's Med 3 certificate for September was dated 9 September 2021, but the claimant did not email this to the respondent (and then to a contact in HR rather than to her line manager as required) until 17 September 2021. I was satisfied by Mr Ganz's evidence that despite a number of retrospective adjustments being made, the claimant received her usual salary for 1 July to 7 July, and 9 September to 23 September, but did not receive any other pay in respect of the period from 8 July to 17 December.

The Law

62. Section 13 Employment Rights Act 1996 sets out the appropriate test in a case of unlawful deductions from wages:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) 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
>
> (b)the worker has previously signified in writing his agreement or consent
>
> (2) In this section"*relevant provision"*, in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as

a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

63. The respondent's primary submission was that the sum's claimed were not "properly payable". *Agarwal v Cardiff University [2018] EWCA Civ 2084* confirms that the Tribunal has the jurisdiction to determine the terms of the contract when considering a claim for unlawful deductions, in order to ascertain what is properly payable under that contract.

64. Mr Nicholls written skeleton contained extensive references to authorities supporting his submissions that the contractual position is that wages are not due if an employee has not provided consideration, and that the courts have distinguished this into two types of bargain. Those are a) pay in return for work (ie piece workers and hourly paid employees with no guaranteed hours), and b) pay in return for service.

65. The written skeleton outlined previous cases which drew a distinction between voluntary and involuntary non-performance of work by the employee. The most recent case cited by the respondent in that line of authority was *Miles v Wakefield Metropolitan District Council [1987] IRLR 193 (HL).* In that case the House of Lords approved the line of authority cited by Mr Nicholls and stated at 49:

"But where the employee declines to work at all for a particular period – and I have already said that, in my judgment, this case has to be approached on the basis that the plaintiff was simply withholding his services on Saturdays – then, subject to the question of whether the wages or salary payable are apportionable on a periodic basis, I see no ground upon which the employee who declines to perform that condition upon which payment depends can successfully sue for the remuneration which is dependent upon its performance."

66. In my judgment the correct analysis of what is properly payable therefore requires the Tribunal to consider whether the claimant was performing her contract of employment at the material time, and if not, whether this was a result of the claimant "simply withholding" her services, or something else.

Conclusions

67. The claimant's written closing submissions again referred to "discrimination at work" in respect of the placement in the finance team. However, even at that stage, and following the discussion at the hearing on 4 October 2022, the claimant had not applied to amend her claim, nor did she provide any details in relation to the basis for her discrimination claim. In the absence of a formal application to amend her claim, the Tribunal continued to determine the claimant's claims as claims for unlawful deductions from wages, and on the basis of the law set out above.

The finance placement

68. I found as a fact that although the claimant had taken a number of steps to arrange a possible placement in the finance team, she did not have a contractual right to undertake the placement. There was no evidence before the Tribunal that carrying out a placement in the finance team would have entitled the claimant to a higher salary whilst conducting the placement itself. Indeed this did not appear to be the claimant's case.

69. The claimant's case was that having completed the placement she would have obtained a job in a finance role, paying band 7 rates. The evidence before the Tribunal was that the placement was something which the claimant could potentially carry out as part of her PDR, subject to her line manager approval. There was no evidence that completion of the placement would have provided the claimant with a contractual right to a band 7 role in the finance team (which was the continuing loss which the claimant sought to claim).

70. The claimant accepted that save for the period between July and December 2021, she was paid the salary due to her under her contract of employment as a mobile receptionist. In the Tribunal's judgment, these sums were the sums which were "properly payable" to the claimant. She was not entitled to be paid any additional sums, either by way of completing a placement, or otherwise.

71. As a result, the claimant had not suffered a deduction from wages, and therefore her claim for unauthorised deductions from wages in respect of the proposed placement in the finance team is not well founded.

<u>Absence from work</u>

72. The claimant accepted in cross examination that she had been paid sick pay for the periods 1 July to 7 July 2021 (self certification) and 9 September to 23 September 2021 (Med 3 certificate). The remaining issue was therefore the periods from 8 July 2021 to 8 September 2021 and 24 September 2021 to what the claimant had pleaded in her claim as "November" but which covered a period of absence extending to 17 December 2021.

73. Despite what the claimant said in her emails to the respondent at the time, that claimant's answers in cross examination were not that she was not unfit for work, but rather she was unwilling to return to work, because she did not wish to be subjected to what she considered would be further bullying, including psychic and other forces, that she required assurances from the respondent, and that her complaint should be resolved before she would return to work.

74. Mr Nicholls made clear submissions that this was not an individual who was saying that she not fit for work but who had not provided sick certificates, but someone who was voluntarily refusing to work.

75. In the absence of the claimant I asked Mr Nicholls whether the position was different for the period from 29 October 2021 to 11 November 2021. This was on the basis that the claimant had emailed on 29 October stating that she was fit to return to work, but that the respondent had not arranged an OH referral until 11 November. I queried whether this was a case where the claimant was fit for work, and essentially the respondent was seeking to place the claimant on medical suspension, in accordance with their absence management policy.

76. Mr Nicholls made two submissions in response. His first was that where the claimant's email of 16 November stated that she was awaiting a response, this meant a response to the claimant's complaint on 23 August and therefore the claimant was not willing to return until that complaint had been resolved. In my judgment, the correct reading of the email of 16 November was that the claimant's position was that she was had been awaiting a response to the email of 29 October, where the claimant had stated that she had been advised to return to work.

77. Mr Nicholl's second submission was that when the chronology was viewed as a whole, the claimant was not actually willing to return to make herself available for work under the terms of her contract. I accepted that submission. On 1 July 2021 the claimant had self-certified as being sick in response to a request to discuss a complaint from a service user. The claimant did not respond to requests to arrange a meeting to discuss this on a future date when she was well enough to return to work. On 5 July 2021 the claimant stated that she was still unwell and would be visiting a doctor. The claimant did not update the respondent further as to whether she visited the doctor, and if so the outcome, and/or on whether she was fit to return to work. The claimant did not respond to correspondence from the respondent seeking to ascertain her wellbeing and her absence status. The claimant then submitted a complaint on 23 August 2021. Even when that complaint was resolved, the claimant did not respond to a request to attend an OH assessment. Similarly the claimant did not respond to a request to a return to work meeting with her line management chain and HR to discuss the period of unauthorised absence and why the claimant had not complied with the absence reporting procedure. Instead, the claimant presented herself, unannounced, at one of her workplaces, on 30 November 2021. The claimant had not attended an OH assessment, and only responded to requests to arrange a return to work meeting once it was agreed that it would be conducted by HR, rather than the claimant's line management chain.

78. Against that backdrop, in my judgment it cannot be said that the claimant was making herself available for work. At most, her willingness to attend work was conditional on a number of demands being met, or avoiding meetings which she did not wish to participate in. I am satisfied that considered against the test in *Miles v Wakefield Metropolitan District Council [1987] IRLR 193 (HL)* the claimant was withholding her services.

79. In those circumstances the claimant was not performing the requirements of her contract of employment. Therefore it cannot be said that her salary during the periods 8 July 2021 to 8 September 2021 and 24 September 2021 to what the claimant had pleaded in her claim as "November" but which covered a period of absence extending to 17 December 2021 (or at least until submission of her claim on 15 December 2021) was "properly payable" within the meaning of Section 13(3) Employment Rights Act 1996. Accordingly the claimant's claim of unlawful deduction from wages is not well founded.

80. In the alternative, to the extent that the payments were erroneously made to the claimant and then subsequently adjusted to reflect the fact that the respondent's payroll team were notified of some of the facts of the case after the relevant payroll deadlines, those deductions were authorised under a term of the claimant's contact specifically the section headed "Deduction from Salary". For the reasons outlined above, any payments for the period 8 July 2021 to 8 September 2021 and 24 September 2021 to what the claimant had pleaded in her

claim as "November" but which covered a period of absence extending to 17 December 2021 (or at least until submission of her claim on 15 December 2021) were not properly payable and were therefore an overpayment which could lawfully be deducted under the terms of the claimant's contract.

81. For the avoidance of doubt, although Mr Ganz's evidence outlined the payments to the claimant up to July 2022, the Tribunal only considered the period up to the date when the claimant submitted her claim, being 15 December 2021. Any later periods do not form part of that claim and therefore have not been determined by the Tribunal in this judgment.

Tribunal Judge Milivojevic acting as an Employment Judge

Date___13/01/23___________________