



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr B Arthur

ISS Mediclean Ltd  
t/a ISS Facility Services Healthcare

## REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 9 DECEMBER 2022

### *Introduction*

1 These reasons are given in writing pursuant to a timely written request by the Claimant. I regret the delay in supplying them, which is attributable in part to my absence on annual leave and in part to general pressure of work.

2 The Respondent is a substantial company which provides facilities management and associated services to many bodies and organisations operating in the healthcare sector. The Claimant has been a part-time member of its workforce since April 2004, mainly working at weekends. He currently holds the position of Service Manager, based at the Royal Marsden Hospital.

3 Unfortunately, the Claimant has a chronic medical condition which has made it necessary for him to take a significant amount of sick leave over the years.

4 By a claim form presented on 30 May 2022 the Claimant complained of unauthorised deductions from wages, which were said to have taken the form of underpayments in respect of periods of sickness absence. The claim was resisted on the basis that he had always received his full entitlement to wages.

5 The case was listed for final hearing by video before Employment Judge Emily Gordon Walker on 4 October. She adjourned the matter to 8 December 2022 because, owing to a technical problem, the Claimant was unable to attend the hearing by video, and gave simple case management directions. Helpfully, she also took the opportunity to clarify the dispute in her document sent to the parties the following day, in these terms:

24. This case is about the claimant's entitlement to contractual sick pay. The claimant's normal working hours are on the weekend. The claimant is paid an enhanced basic rate of pay as he works antisocial hours. The claimant says that his contractual sick pay should be based on this enhanced pay. The claimant has sickle cell anaemia. The claimant was absent with sickness from 1 January 2022 to 11 June 2022. His claim is for £2,655.12 which is the difference between the sick pay he

received for this period (which was paid in [the] period 13 January 2022 to 11 June 2022), as compared with the sick pay he would have received if this had been calculated based on his enhanced pay.

25. The respondent says that the claimant, like all their employees at the Royal Marsden Hospital, was never contractually entitled to enhanced weekend sick pay. The respondent says that employees in some other hospitals were contractually entitled to enhanced weekend sick pay, but that this was removed in 2014 as it was financially unsustainable. The respondent agrees that, if the claimant had been paid enhanced sick pay for his period of absence from January to June 2022, he would have been paid an extra £2,655.12.
26. The claimant may be confused by the respondent's explanation because, in the outcome to his grievance about this issue, the respondent erroneously stated that the reason why the claimant was not paid enhanced weekend sick pay was because this had been removed in 2014. The claimant feels this is unfair as he was not consulted about that change to his contractual terms, and he has produced witness statements from four colleagues who corroborate the fact that there was no such consultation. In fact, the respondent agrees that the claimant was not consulted about the removal of enhanced weekend sick pay, because, they say, this was not actually removed, as the claimant was never contractually entitled to this.

6 The matter came before me in the form of a 'face-to-face' hearing on 8 December, with one day allocated. The Claimant represented himself and Ms I Egan appeared for the Respondent. I am grateful to both for their careful and courteous advocacy.

7 I heard oral evidence from the Claimant and, on behalf of the Respondent, Mr Chris Feeney, Head of Employee Relations. I also read statements tendered by the Claimant in the names of his supporting witnesses, Asante Fosu, Peter Kumi, Rose Owusu-Atakorah and Nana Yinkah.

8 I also read the documents to which I was referred in the bundle running to more than 300 pages.

#### *The facts*

9 The Claimant's express terms included, from the start, provision for sick pay commencing on day four of any period of sickness absence. This took (and takes) the form of a 'credit-based' system. The credit accrues at the rate of a day's pay for each month in which the individual has not been absent from work on sickness or other grounds. It is not in dispute that the Claimant has always received sick pay in accordance with this system.

10 The Claimant's claim is for *enhanced* sick pay based on *Agenda for Change* ('AfC') terms. It is agreed that if AfC enhanced terms were applicable to him, he would be entitled to recover the £2,655.12 which he claims.

11 AfC was implemented within the NHS in 2004, replacing the Whitley Council pay and grading system. NHS employees became entitled to benefit from its terms from then on. But it did not extend to private sector organisations and their staff.

12 On 6 October 2005 a joint statement was issued by the Department of Health, NHS Employers (a representative body), the CBI and Business Services

Association, and interested trade unions advocating the “good practice” measures to extend the reach of AfC to independent organisations within the healthcare sector. It was envisaged that this would happen by using Government funding paid to NHS Trusts but since the monies were not ring-fenced, some Trusts chose to apply it for other purposes. Accordingly, the ambitions of the joint statement were not realized – at least not fully.

13 On 20 September 2007 an agreement was reached between three major trade unions and the Respondent for the implementation of AfC across its workforce, but subject to this important qualification:

**It is recognised that Mediclean will need and be obliged to negotiate with each of its Hospital Trust clients in relation to obtaining the funding and agreement to terms and conditions before local contract implementation of AfC can commence.**

14 In January 2009 the Respondent entered into an agreement with the Royal Marsden NHS Foundation Trust under which, in return for a specified payment, it agreed to increase staff pay and benefits in line with AfC terms. These increases extended to (among other things) rates in respect of unsocial hours (including weekends) worked. But the agreement expressly excluded from its scope all terms relating to “sickness leave and payment entitlement” (clause 2.1.1.6).

15 As a result of the 2005 and 2007 agreements, enhanced sick pay terms fully matching those under AfC (including terms reflecting unsocial hours working patterns) were applied at some NHS establishments. But no such terms have ever been implemented at the Royal Marsden.

16 In 2014, following negotiations with the trade unions, the Respondent ceased to pay enhanced unsocial hours sickness pay at those sites where the relevant Trust had provided the necessary funding. This change did not affect the Claimant because, as I have stated, there was never a right to such pay at the Royal Marsden.

17 In 2016 and/or 2017 the Respondent offered those of its employees who worked weekends the option to surrender their right to enhanced pay for unsocial hours in return for payment of a sum of money. This approach was concerned only with pay for hours *actually worked*. Self-evidently, it could not concern a proposed surrender of enhanced sick pay rights since (a) no such rights existed anywhere after 2014 and (b) for good measure, in the cases of the Claimant and many others (at Royal Marsden and many other sites) no such rights had ever existed. The Claimant, as he was quite entitled to do, declined the buy-out offer.

18 In line with the 2009 agreement, the Claimant has received enhanced (AfC) rates of pay for his weekend working. He has throughout received sick pay in accordance with his original terms of employment.

19 In February 2022 the Claimant raised a grievance, complaining that he had been denied sick pay at an enhanced rate reflecting his weekend working pattern. It seems that this was the first such complaint. The complaint was not dealt with as it should have been in that an erroneous explanation was given (see Judge Gordon Walker’s document, para 26, cited above).

*Conclusions*

20 The claim depends on the Claimant showing that the wages paid to him were less than those “properly payable” under his contract of employment (Employment Rights Act 1996, s13(3) read with s27(1)(a)).

21 The Claimant’s case is unsustainable given my factual findings. It is very clear to me on the evidence presented that he never received enhanced sick pay and never acquired a contractual right to do so. The documents speak for themselves and I fully accept Mr Feeney’s comprehensive and well-informed evidence. The mistake in responding to his grievance was unfortunate but does not call into question the correctness of the Respondent’s case. I accept that the Claimant’s sense of grievance is sincere and I was very sorry to hear of the many difficulties which his medical condition has caused him. But the legal merits of this dispute are not on his side.

EMPLOYMENT JUDGE – Snelson  
30<sup>th</sup> Jan 2023

**Reasons entered in the Register and copies sent to the parties on: 30/01/2023**

**anastasia.vakulenko@uk.issworld.com ..... for Office of the  
Tribunals**