EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107186/2020

Held via Cloud Video Platform (CVP) on 10 February 2023

Employment Judge W A Meiklejohn

Mr J Perrins	**Claimant** **Represented by:** **Mr R Clarke - Solicitor**
Prestwick Aircraft Maintenance Ltd	**Respondent** **Represented by:** **Mr K McGuire - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Employment Tribunal is that the respondent is ordered to pay to the claimant the gross sum of **TWO THOUSAND TWO HUNDRED AND TWO POUNDS AND FIFTY-FOUR PENCE (£2202.54)** in respect of unauthorised deductions of wages.

REASONS

1. This case came before me for a remedy hearing, conducted remotely by means of the Cloud Video Platform. Mr Clarke represented the claimant and Mr McGuire represented the respondent, assisted by Ms D Dickson, Solicitor.

Liability Judgment

2. Following a hearing on 22 June 2021, I issued a Judgment (the "Liability Judgment") dated 6 July 2021 and sent to parties on 19 July 2021 in which I found that the claimant had suffered an unlawful deduction of wages by the respondent. The main points of the Liability Judgment are summarised in the following paragraphs.

3. The claimant was one of eight employees of the respondent who brought claims which arose in similar circumstances. No Order had been made under Rule 36 of the Employment Tribunal Rules of Procedure 2013 specifying his claim as a lead case, and the related cases had not been sisted. It had been anticipated that my decision in the claimant's case should allow the parties to resolve the other seven cases.

4. As a consequence of the impact of the coronavirus pandemic on the aviation industry, and specifically Ryanair for whom the respondent carried out aircraft maintenance, the respondent sought and secured the agreement of the majority of its staff to a 50% pay cut in April and May 2020. The claimant (and his seven co-claimants) objected. The respondent imposed the pay cut on them and they raised proceedings alleging an unlawful deduction of wages.

5. I found that the terms of neither the old form of contract (under which the claimant and one of his colleagues were employed) nor the new form of contract (under which the other six claimants were employed) authorised the respondent to reduce pay in the way they did. The pay cut was therefore an unlawful deduction.

6. The respondent contended that the claimant had been overpaid in respect of *"slip days"* and for a 13th week of summer shutdown in 2020, in circumstances which were explained in the Liability Judgment. The overpayments were said by the respondent to amount to pay for 8 days and 6 days respectively. I decided that I could not determine this as a hypothetical question. In other words, if the respondent believed there had been an overpayment, it would need to make a corresponding deduction from the claimant's wages. That deduction could then be challenged if the claimant did not accept that the respondent was entitled to make it.

Evidence

7. The parties had not been able to resolve matters and so the case came back to me for a hearing on remedy. I heard oral evidence from the claimant. I had a bundle of documents provided by the claimant. I also had the joint bundle of documents from the Liability Hearing.

Findings in fact

8. The claimant confirmed the amounts of pay he had received from the respondent in April and May 2020. I had already made findings in fact about these in the Liability Judgment (at paragraph 28) in relation to gross pay, and the claimant's evidence simply confirmed the amounts set out there. The claimant confirmed that his pay for May 2020 had included elements of furlough pay (£645.16) and company top-up (£120.96) which reflected the respondent's participation in the Coronavirus Job Retention Scheme from on or about 23 May 2020.

9. In relation to slip days, the claimant said that he had worked all of the slip days assigned to him. He did not accept that he had been paid for 8 slip days which he had not worked. He did however accept that he had been paid as if all of his slip days had been worked. He accepted that, if he was short of slip days, the respondent could *"claim them back'* or roster him for extra days.

10. In relation to the summer shutdown, the claimant accepted that the respondent's Annualised Hours Policy ("AHP") referred to *"12 weeks"* of *"Summer shut down"* and that the summer shutdown period in 2020 was actually 13 weeks. However, he said that *"There's always really a 13 week shutdown - it's 3 calendar months".* He said that he had always been paid for those 3 months. He agreed that the duration of the summer shutdown depended on how the August bank holiday dates fell and how the calendar worked in any particular year - it could be 12 or 13 weeks, and this had never been a problem.

Submissions for claimant

11. Mr Clarke submitted that there was no jurisdiction for the Tribunal to consider the alleged overpayment in respect of slip days in these proceedings. The point had been addressed in the Liability Judgment and was *res judicata.* There was also no jurisdiction to consider any counterclaim - that could only be done in a breach of contract claim.

12. Mr Clarke referred to *Ridge v HM Land Registry* UKEAT/0485/12. He accepted that this case dealt with the availability of set-off only in the context of a breach of contract claim but argued *expressio unius est exclusio alterius.* He contended that the jurisdiction question should not be revisited.

13. If I disagreed with that, Mr Clarke submitted that it was for the respondent to prove their case. They had presented no evidence that the claimant was short of 8 slip days. Further and in any event, if the respondent believed there had been an overpayment, they could deduct the purported overpayment from the claimant's wages and the claimant could then bring a fresh claim to challenge this.

14. The claimant's position was that there had been no overpayment. The AHP referred to the claimant working *"all the slip days/hours assigned to you during the working yeah',* and he had done this. It was a live argument and there should be no account taken of any alleged overpayment.

15. Mr Clarke referred to the amounts in the claimant's May 2020 payslip for furlough pay and company top-up, and accepted that credit should be given for these. He cited *Walters t/a Rosewood v Barik* UKEAT/0053/16 as confirming that the award should be the gross amount of wages, leaving the employer to calculate and account to HM Revenue and Customs for the appropriate amounts of income tax and employee's National Insurance contributions.

16. Mr Clarke then, in anticipation of what was foreshadowed in Mr McGuire's Note of Arguments, referred to section 25(3) of the Employment Rights Act 1996 ("ERA"). That section reads as follows -

An employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the Tribunal that he has already paid any such amount to the worker.

17. Mr Clarke contended that section 25(3) could apply only to a subsequent payment made by the respondent which partially addressed the earlier

unlawful deduction. The respondent had made no such payment. Any separate payment (i.e., the alleged overpayment) was a separate issue.

Submissions for respondent

18. Mr McGuire disagreed that the issue of whether I could take account of the sums said by the respondent to be overpayments to the claimant was *res judicata.* He referred to Macphail's Sheriff Court Practice, paragraphs 2.128 - 2.133. There had to be a final interlocutor and then a further and separate action.

19. Mr McGuire said that *Ridge* was of no assistance. It did not deal with set-off in a statutory claim, as here. He referred to Harvey on Industrial Relations and Employment Law, Volume 1, paragraphs 381.01 - 381.03. At paragraph 381.01 - *"There is simply no statutory provision, either in the Extension of Jurisdiction Order or elsewhere, giving the tribunal jurisdiction to hear a counterclaim in these circumstances".*

20. Mr McGuire referred to paragraph 381.03 and to the case of *Asif v Key People Ltd* UKEAT/0264/07 cited there. In that case the Employment Appeal Tribunal held that Part II ERA did not allow an employer to set off claims for damages against wages otherwise due to the worker. Harvey comments *"It seems anomalous that an Employment Tribunal can apply the doctrine in contractual claims but not in unlawful deduction claims."*

21. Mr McGuire submitted that set off was a defence, not a cause of action. Section 25(3) ERA should be applied. In effect Mr McGuire was arguing that by paying him for slip days to which he was not entitled and for the 13th week of summer shutdown, the respondent had made an overpayment or overpayments to the claimant and these should be treated as sums *"already paid".*

22. Mr McGuire did not accept that the overpayment(s) could only relate specifically to the unlawful deduction. The reference in section 25(3) was to section 24 ERA (Determination of complaints) and not to section 23 ERA (Complaints to Employment Tribunals). It was a matter of remedy. He

stressed the phrase *"in so far as it appears to the Tribunal"* in section 25(3). That supported a wider interpretation of *"any such amount".* If the employer could point to any payment to which the worker was not entitled, it could be taken into account.

23. Mr McGuire referred to page 167 of the original hearing bundle. This showed the value of the 8 slip days paid to the claimant (and his co-claimants) expressed in net wage terms. The value of the slip days in both gross and net terms was shown at page 168. Mr McGuire argued that I should reflect this in any award in favour of the claimant.

24. Mr McGuire noted that the equivalent gross and net figures for the 6 days representing the 13th week of summer shutdown were also shown on page 168. However, he acknowledged that there was what he described as *"mixed evidence"* about whether the summer shutdown period was 12 or 13 weeks. He said that he would accordingly restrict his argument to the 8 slip days.

Applicable law

25. I set out parts of sections 13 and 14 ERA in the Liability Judgment so I will not repeat these here. In relation to remedy, sections 23, 24 and 25 ERA are engaged. These provide, so far as relevant, as follows -

23 ***(Complaints to Employment Tribunals)***

(1) A worker may present a complaint to an employment tribunal -

(a) that his employer has made a deduction from his wages in contravention of section 13....

24 ***(Determination of complaints)***

(1) Where a Tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer-

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13….

26. The relevant part of section 25 is subsection (3) which I have already set out at paragraph 16 above.

Discussion

27. I considered that I should deal first with the *res judicata* point. At paragraph 2.128, Macphail describes the operation of the principle of res *judicata* (as it arises in this case) as "a *plea of bar to prevent a litigation which mirrors an earlier one whose merits have already been determined'.* Macphail then expands on this as follows -

"The rule may be stated thus: when a matter has been the subject of judicial determination pronounced in foro contentioso *by a competent Tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, on the same grounds. "*

28. This meant that my decision in the Liability Judgment that the claimant suffered an unlawful deduction of wages by the respondent could not be revisited in this litigation. However, the matter Mr McGuire sought to have revisited was not that decision, but what I said at paragraph 80 of the Liability Judgment -

"*So far as the amounts in respect of slip days and the 13th week are concerned, I came to the view that these were not matters which I could properly decide. If the respondent believes that these were overpayments it could, at any time since the payments were made, have deducted the alleged overpayments from wages otherwise due to the claimant. It had not done this, but arguably could still do so. Until that happens, the question of whether these amounts can lawfully be deducted is hypothetical, and the Tribunal cannot determine this as a hypothetical question. It can only determine whether the deductions are unauthorised after these have actually been made."*

29. Mr Clarke urged me to find that this made the issue *res judicata.* I did not agree. What I was saying at paragraph 80 was that I could not determine whether a deduction was unlawful before that deduction had been made. What Mr McGuire was asking me to do was different. He was asking me to decide whether section 25(3) ERA required that a subsequent payment made by the respondent to the claimant, which was in excess of the amount to which the claimant was entitled when that subsequent payment was made, had to be taken into account (to the extent of that excess) when making an order under section 24 in relation to an unauthorised deduction.

30. Having decided that I could deal with what I will refer to as *"the section 25(3) point'* I now do so. The general scheme of section 25 ERA is to limit the amount recoverable by a worker as an unauthorised deduction of wages in certain circumstances. This can be seen from the terms of subsection (1) which provides -

> *Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied.*

31. I pause to observe that this reference to *"section 24(a)"* appears to be a drafting error-there is no such provision and it should read *"section 24(1)(a)".* Fortunately this has no impact in the present case.

32. Turning to the language of the relevant provision, I considered that the key phrase in relation to the section 25(3) point was *"any such amount'.* Did this mean -

    a. The amount of the unauthorised deduction or such part thereof as the employer has already paid to the worker, but not some other separate amount which the employer has paid to the worker for a different reason?

b. Any amount which the employer has paid to the worker subsequent to the unauthorised deduction, to which the worker was not entitled?

33. I decided that meaning (a) was to be preferred. I came to this view based on the language of subsection 25(3). Where this states *"any such amount',* I considered that this was a reference back to the phrase *"any amount in respect of a deduction or payment'* where it appears earlier in the provision. In other words, the *"such amount'* was the same *"amount'* as the section 24(1) order related to.

34. I was fortified in this view by Harvey at paragraph 379.01 -

"ERA 1996 s25(3) provides that the tribunal shall not order an employer to pay or repay to a worker an amount in respect of a deduction or payment in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker. This clearly means that if, after making an unlawful deduction, the employer pays the worker all or part of the sum in question before the hearing then the tribunal cannot award the amount that has been repaid when making an award under section 24(1)..."

35. An employer who makes an overpayment of wages to a worker is able to recover that overpayment by deduction from any subsequent payment of wages otherwise due to the worker. Such a deduction, if properly made for the purpose of reimbursement of the employer, cannot be challenged as an unauthorised deduction - see section 14(1)(a) ERA. I say *"properly made"* because there must in fact have been an overpayment.

36. I was mindful that there was a dispute between the parties as to whether there had in fact been an overpayment by the respondent to the claimant in relation to slip days in June/July/August 2020. The claimant's evidence was that he had worked all of the slip days that had been *"assigned'* to him. It might be that the respondent could have assigned further days to be worked as slip days during the summer shutdown period in 2020 although arguably their right to do so was now lost (see paragraph 18 of the Liability Judgment - *"you may be rostered for duties over this period at the company's discretion").* I had no evidence as to the respondent's position on this.

37. Moving on to what I might describe as Mr McGuire's wider argument based on set off, I considered that the EAT's decision in *Asif.* Underhill J said this at paragraph 21 of his Judgment -

"...however strong the Respondent's cross-claim might be, Part II of the 1996 Act does not allow an employer to set off cross-claims for damages against the worker against wages otherwise due."

38. I did not believe that the respondent's assertion that the amount by which they claimed to have overpaid the claimant in respect of slip days was a *"cross-claim for damages".* It was the assertion of a right of set off. I did not understand Mr McGuire to be arguing anything other than that I should interpret section 25(3) ERA to give effect to that right. I did not agree that the section bore any interpretation other than the one I have given it. It did not allow any payment other than one made in part satisfaction of the original underpayment to be brought into account.

Decision

39. I therefore found that the difference between (i) the amounts the claimant should have been paid in April and May 2020 and (ii) the amounts he was actually paid required to be treated as unauthorised deductions of wages.

40. On the basis of my findings in the Liability Judgment I was able to determine as follows -

    a. The amount of the gross pay due to the claimant in April 2020 was £2968.33.

    b. The amount of gross pay actually paid to the claimant in April 2020 was £1484.00.

    c. The shortfall in April 2020 was £1484.33.

    d. The amount of the gross pay due to the claimant in May 2020 was £2968.33.

e. The amount of gross pay actually paid to the claimant in May 2020 (Including furlough pay and company top up) was £2250.12.

f. The shortfall in May 2020 was £718.21.

g. The total shortfall in April/May 2020 was £2202.54.

41. The total amount of the unauthorised deductions made by the respondent from the claimant's wages was accordingly £2202.54, and I determined that the respondent should be ordered to pay this sum to the claimant. This is expressed in gross terms. It will be subject to the deduction of income tax and employee's National Insurance contributions (and any other lawful deductions which the respondent is required to make, eg employee's pension contributions). The respondent will satisfy this Judgment by paying to the claimant the net sum remaining after deducting from the gross award the amount of such deductions, provided it properly accounts to HM Revenue and Customs and any other relevant party for the said deductions.

Further procedure

42. At the end of the hearing I discussed with the parties' representatives how matters might now proceed. It was apparent that there would be some issues if I found that the respondent could exercise a right of set off. As I have not so found, these issues should not arise, or at least not in these proceedings.

43. I would hope that the parties will be able to agree that the consequence of the Liability Judgment and this Judgment is that there have been unauthorised deductions in the cases of the other seven claimants. It will then be for the respondent to take such steps as it may be advised to recover the alleged overpayments.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 17 February 2023
Entered in register: 24 February 2023
and copied to parties