EMPLOYMENT TRIBUNALS

Claimant: **X**

First Respondent (1R): **Y**
Second Respondent (2R): **Cardiff Council**

Heard at: **Cardiff, by video** **On:** **22 June 2023**

Before: **Employment Judge R Harfield**

Representation
Claimant: Mr Adkins (Trade Union representative)
Respondents: Mr Howells (Counsel)

JUDGMENT

At the date this claim was presented the sums claimed by the claimant were not properly payable to her. The Tribunal therefore does not have jurisdiction to hear the claimant's pleaded claim.

REASONS

Introduction/background

1. This is a dispute about entitlement to enhanced sick pay. The claimant is a schoolteacher working at 1R school. 2R is the local authority employer. Anonymity orders and restricted reporting orders are in place in relation to the identity of 1R and 2R and the medical records of the claimant.

2. The claimant form was presented on 14 October 2021. At section 8.1 the boxes were ticked for arrears of pay and "other payments" identified as enhanced contractual sick pay.

3. These are not findings of fact because what exactly happened is very much in dispute between the parties and it is not necessary for me to adjudicate upon those disputes for the purposes of my decision making. But in short form, and based on the claimant's case, she says:

    3.1 She raised a number of issues with R1 on an informal basis in relation to workload and unfair treatment;

3.2 Between December 2018 and March 2019 R1 placed her on monitoring under the capability procedure and the claimant felt that managers had not applied this procedure consistently;

3.3 On 27 November 2019 the claimant was called to a meeting and told to stop her communications with another employee with whom she was having a professional disagreement with. She was advised if she did not the other employee could take out a grievance against her for harassment. The claimant felt this was deeply unjust and the Acting Headteacher and Assistant Headteacher were unfairly taking the side of the other staff member. The claimant was also asked to complete a piece of work by the following day. The claimant said she was unable to do so due to other work commitments but could do it in the next few days. She says she was told if she could not make the deadline she would be put on capability procedures and if she was refusing to do the work she would be subject to disciplinary procedures. The claimant was considerably distressed by this as she felt it went against occupational health advice and she was being unfairly singled out;

3.4 The claimant says that she became so distraught she asked those present to leave. When the Acting Head returned to check on her the claimant told him she felt suicidal. She went home and has been on sick leave since 28 November 2019. She has been at times acutely unwell. The claimant's case is that on 27 November 2019 she suffered a psychiatric injury entitling her to enhanced sick pay.

The burgundy book

4. The claimant's terms and conditions regarding sick leave are set out in section 4 of the Conditions of Service for School Teachers in England and Wales (2000), known as "the Burgundy Book."

5. Section 4 paragraph 2.1 says:

> "Provided the appropriate conditions are met, a teacher absent from duty because of illness (which includes injury or other disability) shall be entitled to receive in any one year sick pay as follows:- …
>
> During fourth and subsequent years full pay for 100 working days and half pay for 100 working days."

6. Under paragraph 2.3 "working days" means teaching and non teaching days within "directed time."

7. Section 9 is concerned with absences arising from accidents, injury or assault at work. It says:

> "9.1 In the case of absence due to accident, injury or assault attested by an approved medical practitioner to have arisen out of and in the course of the teacher's employment, including attendance for instruction at physical training or other classes organised or approved by the employer or participation in any extra curricular or voluntary activity connected with the

school, full pay shall in all cases be allowed, such pay being treated as sick pay for the purposes of paragraphs 3 to 7.5 above, subject to the production of self certificates and/or doctors' statements from the day of the accident, injury or assault up to the date of recovery, but not exceeding six calendar months.

9.2 Where a teacher is still absent due to accident, injury or assault after the initial six months' period, the question of any extension of payment under paragraph 9.1 shall be considered. In the event of no extension of leave being granted under paragraph 9.1, the teacher shall be entitled to normal sick leave and pay under the terms of paragraph 2.1 according to his/her length of service as prescribed by that paragraph.

9.3 Absence resulting from accidents, injuries or assaults referred to in sub-paragraph 9.1 shall not be reckoned against the teacher's entitlements under paragraph 2 above, though such absences are reckonable for entitlement to Statutory Sick Pay.

9.4 For the purpose of sub-paragraph 9.1 "absence" shall include more than one period of absence arising out of a single accident, injury or assault."

8. Section 2, paragraph 3 of the Burgundy Book defines an Approved Medical Practitioner as "any registered medical officer nominated or approved by the employer."

The history of the proceedings

9. On the claimant's analysis of these provisions she would be entitled to (if she qualifies) up to 6 months' full sick pay under paragraph 9.1, followed by a further 100 working days full sick pay and then 100 working days half sick pay under paragraph 2.1.

10. The claimant's ET1 says that her ordinary full pay sick pay ended in May 2020 and her ordinary half pay sick pay in December 2020. On 15 December 2020 her trade union representative wrote asking for approval extended sick pay. The claimant's case is that paragraph 9.1 sick pay should have been paid from 28 November 2019 to 27 May 2020 followed by paragraph 2.1 sick pay which would have continued to May 2021. It is said: "*Accordingly it is the Claimant's position that the employer has made a continuing unlawful deduction of her wages under Section 13, Employment Rights Act 1996, between May 2020 and May 2021."*

11. The ET1 says that when referring the claimant to occupational health (OH) 1R did not request an attestation required under Paragraph 9.1 and did not, after the trade union representative's request in December 2020, refer the matter to a medical practitioner for an attestation. The ET1 says that the trade union raised it again on 16 August 2021 and on 6 September 2021 lodged a pay appeal/grievance. It is stated that on 12 October 2021 1R said that following legal advice they would not make a paragraph 9.1 payment as they considered the claimant had been given high levels of support and due regard to her health. The claimant does not agree with this but asserts in their ET1 that in any event negligence or malice is not required as paragraph 9.1 only requires an injury to have occurred in the course of employment.

12. I pause here to emphasise that as at the date the tribunal claim was lodged there had been no attestation by an Approved Medical Practitioner (or indeed any referral by the respondents to one). I also

note the claim was identified as one of unauthorised deduction from wages.

13. The respondents filed an ET3. The grounds of resistance are lengthy and raised various factual and legal lines of dispute. These included:

13.1 That the claimant did not suffer an "injury";

13.2 Any "injury" did not arise "out of and in the course of the teacher's employment." The respondents asserts it is implicit in the reading of paragraph 9.1 that culpability is required and that at the time in question the respondents were merely legitimately managing a member of staff. The say the claimant was well supported and treated appropriately and empathetically. It is said the claimant's "injury" arose due to her own conduct and constitution;

13.3 That the claim is out of time as the last date of payment of the disputed payment is 27 May 2020 but Acas early conciliation did not commence until 5 August 2021.

14. In advance of a case management hearing the claimant's representative proposed that the parties agree wording for a referral to OH, asserting that the claim would stand or fall on the basis of an attestation of an employer approved medical practitioner. They said this had been done by consent in other cases. The respondents' representative said they were agreeable in principle for further medical evidence to be obtained if the claimant's full set of medical records were available to the reporting expert and the questions are agreed with the Tribunal. They also said they did not agree that the matter turned entirely on medical evidence to be resolved by an OH expert. They pointed out that the question of whether the matter arose during the course of employment was a point they had also taken. They pointed out their limitation arguments.

15. At a case management hearing on 25 February 2022. EJ P Davies directed the parties to send skeleton arguments (including any reported cases) relating to the issue of jurisdiction. He directed the parties to agree a set of questions to be sent to an appropriate OH physician nominated by the respondents. Other standard case management orders were made and the case listed for hearing.

16. Things did not proceed smoothly. There were delays with, and a dispute then arose about, disclosure of the claimant's medical records. I need not get into the detail, but it led to the postponement of the final hearing and case management hearings taking place on 16 November, 23 November and 21 December 2022. A further case management hearing was listed for 3 April 2023 but the parties indicated it was no longer required.

17. The respondents skeleton argument on jurisdiction (March 2022) argued:

17.1 Paragraph 9.1 does not apply because it was not an injury attested by an approved medical practitioner as the respondents had,

at that stage, neither nominated nor approved any registered medical officer. Unless all the criteria in paragraph 9.1 were met, it cannot apply;

17.2 The claimant did not assert her absence arose from an injury until 15 December 2020; paragraph 9.1 is intended to be paid prior to paragraph 2.1 sick pay and should not be applied retrospectively or so far out of time;

17.3 The expression "full pay shall in all cases be **allowed** does not suggest an obligation on the part of the respondents to pay it; it is permissive wording. A contrast is drawn with other paragraphs in the Burgundy Book that use the expression "shall";

17.4 On the claimant's claim there is no link between the period the claimant says she did not receive paragraph 9.1 pay (28 November 2019 to 27 May 2020) and the claimed period of unlawful deductions between 28 May 2020 and May 2021. It is said: "Therefore the Claimant's claim does not even include the period in respect of which she claims to have suffered unlawful deductions from wages. Accordingly this cannot properly constitute a series of unlawful deductions because it does not include the disputed period";

17.5 Any deductions made pursuant to paragraph 2.1 were lawful as opposed to unlawful;

17.6 The claimant's claim only challenges the paragraph 9.1 payment meaning Acas conciliation should have commenced by 26 August 2020; the claim was out of time.

18. The claimant's submissions on jurisdiction (9 March 2022) asserted that the claimant was entitled to paragraph 9.1 pay from 28 November 2019 to 28 May 2020, followed by, under paragraph 2, 100 working days pay to December 2020 and 100 working days half pay to around 6 June 2021. It was said the unlawful deductions would first occur in the May 2020 pay slip and continued every month until June 2021 payslip. It was said that Acas conciliation started on 6 August 2021 and the claim was presented in time. The claimant argued that paragraph 9.1 does not set a contractual deadline to raise a claim and most teachers do not claim until they have been on sick leave for an extended period because they are often not aware of the provision and they start sick leave in the hope and expectation they will return to work before the need arises.

19. The claimant has provided a schedule of loss totalling £28,096.22.

20 The agreed joint expert's report from Dr Mansouri is in the bundle at page [181] (PDF numbering) onwards. He said: "[X] was not managing that well before she stopped worked in November 2019. It appears that her work-related difficulties started having negative impact on her psychological state in 2018. Prior to this, her work had a positive effect on stabilising her mental health condition… The difficulties in work which started in 2018 seem to have peaked following the work-related meeting on the 27th November 2019…

- In my opinion, her long standing history of mental health problems and work-related issues since 2018 had increased [X]'s vulnerability to stress. Having considered her likely mental health state at that time, in my opinion the meeting on the 27th November 2019 and its outcome, significantly affected [X]'s confidence and self-esteem, exacerbating her mental health condition. She developed anxiety related symptoms such as breathing problems and felt low and upset during the meeting.

- On balance, in my opinion, her pre-existing psychiatric illness was exacerbated as a result of the psychological injury due to the meeting on the 27th of November 2019 and its outcome.

- It is evident that she began to struggle with her mental health problems shortly after the meeting on the 27th November 2019, which resulted in sickness absence certified by her family doctor…"

21. The respondents raised further questions of Dr Mansouri. In his answers he said: "From a medical perspective psychological injury itself is not a medical condition with defined diagnostic criteria. It, however, covers a wide range of psychiatric disorders, such as depression and anxiety, resulting from a traumatic event or events." He also said: "My opinion is based on the medical evidenced provided, including the temporal relationship between the meeting on the 27th November 2019 and the subsequent deterioration in her mental health evidenced in her health records. I have also explored the possibility of alternative factors and concluded that on the balance of probabilities her mental health episode would not have arisen in the absence of her difficulties in work and the meeting in question."

The hearing before me

22. Before the start of the hearing before me I was given a hearing bundle extending to 471 pages, a witness statement bundle, an opening note from the respondents' counsel and written submissions from the claimant's representative. At the start of the hearing I sought to clarify the issues in dispute that needed to be decided. I was concerned about the size of the bundle, the number of witnesses, and the potential number of complex legal issues and whether that could realistically all be done within one day. I also wanted to understand what the parties' view was as to the jurisdiction of the Tribunal over the matters in dispute given paragraph 9.1 on the face of the wording refers to an attestation by an approved medical practitioner. I also wanted to understand what issues actually required the calling of witnesses to give evidence.

23. Within the bundle are various other medical reports/letters from treating practitioners and from OH. Mr Adkins confirmed on behalf of the claimant that the claimant is **not** arguing any of those amounted to an attestation by an approved medical practitioner.

24. Mr Howells told me:

24.1 The respondent's main argument was that the attestation by Dr Mansouri was not relevant as it was not an attestation that happened in the period of the claim from May 2020 to May 2021. He said that was required for there to be an obligation to pay and therefore for wages to be properly payable. I posed the hypothetical scenario of a request being made but a school ignoring it/refusing it until it fell outside the window. Mr Howells said a teacher would be able to obtain evidence themselves and put it forward for approval in the window and which, if ignored, could give rise to implied acceptance. Mr Howells said other lines of defence were also pursued, namely;

24.2 The argument that paragraph 9.1 sick pay proceeds paragraph 2.1 sick pay which had two effects:

24.2.1 Limitation would run from the end of the 6 month period in May 2020 (when the claimed breach of contract to pay paragraph 9.1 sick pay would end) such that Acas were contacted out of time;

24.2.2 in the 6 month of the period for the claimed breach of contract, November 2019 to May 2020, the claimant had received 100% pay so there could be no deduction in that period;

24.3 Paragraph 9.1 requires the employer to determine, after attestation, if there has been an accident or injury in the course of employment. It is an objective test by the employer. There is an extra layer in 9.1 beyond the attestation (a step not yet taken by the respondents);

24.4 Paragraph 9.1 retains an element of discretion to the employer whether to pay or not by used of the expression "allowed" (a step not yet taken by the respondents);

24.5 Paragraph 9.1 incorporates a test of culpability (or it should form part of the employer's discretion);

25. I raised the question of whether a way forward might be for me to determine some issues due to be heard at that final hearing as preliminary issues. There was some discussion about this and in particular whether it would help to focus initially on whether there had been a relevant attestation (and leaving to one side the question of whether the respondents retained a residual discretion). Here Mr Howells suggested the preliminary issue concentrate on the sums properly payable to the claimant in the period May 2020 to May 2021. He identified the claimant was saying the claim was made good if there was an attestation now to satisfy paragraph 9.1. Whereas the respondents' argument was that even if there was such an attestation now, it did not give the claimant a valid claim under section 13 Employment Rights Act 1996 ("ERA") because at the time in the period of the claim the claimant had received the sums properly payable to her. I.e. he was suggesting the focus in the preliminary issue be on whether the claimant's case satisfied section 13 ERA not on whether it satisfied Paragraph 9.1.

26. We took a break to see if the parties could agree the wording of a preliminary issue. Some progress was made and after further discussion and a further break the preliminary issue was identified as:

> *"**Taking the Claimant's case at its highest (see below), what wages were properly payable to the Claimant during the period of her claim, namely from 28 May 2020 to 27 May 2021? Was that amount less than the total amount of wages properly payable to the Claimant during that same period?"***
>
> ***"The Claimant's case at its highest reflects the following points:***
>
> ***1.The attestation from Dr Mansouri dated December 2022, which is relied upon to establish the entitlement under section 4, paragraph 9.1 of the Burgundy Book;***
> ***2. The absence of any earlier attestation;***
> ***3. The additional points raised by the Respondents in their joint defence are deemed not to be made out."***

27. In light of that agreement it was also agreed that no witness evidence was needed and a decision could be made on the basis of submissions. I heard those submissions. I have taken both parties' oral and written submissions into account in my decision making.

Unauthorised deduction from wages - Section 13 Employment Rights Act

28. The material provisions of ERA are as follows:

"13. Right not to suffer unauthorised deductions
(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 to the making of the deduction
…
(*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*…

27. Meaning of 'wages' etc
(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including –
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise….

23 (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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
…

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-
(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
(3) Where a complaint is brought under this section in respect of-
(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the reference in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
(*4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

29. In New Century Cleaning Co. Ltd v. Church [2000] IRLR 27, the Court of Appeal held that the words " properly payable" in section 13(3) mean sums to which the employee has some legal, but not necessarily contractual, entitlement.

Discussion and conclusions

30. For there to be a deduction from wages (Section 13(3) ERA) the amount of wages paid on any occasion by an employer to the employee must be less than the total amount of wages properly payable by the employer to the worker on that occasion.

31. The respondents say that in the period May 2020 to May 2021 the claimant was paid monthly and there were roughly 12 occasions on which the claimant claims she received less than was properly payable to her (because entitlement to paragraph 9.1 sick pay would have a knock on effect on the claimant's entitlement to paragraph 2.1 sick pay in that time period).

32. The respondents' argument is that in that time frame and when those payments were actually made on each occasion there was no attestation in force. Therefore, on each occasion payment was made to the claimant at the actual time in the period May 2020 to May 2021 the claimant was paid what she was properly entitled to at that time (which was what she was paid by way of sick pay in that period under paragraph 2.1). It is said without an attestation the entitlement to paragraph 9.1 sick pay had not been triggered.

33. The respondents argue that even if you look instead at the date the claim form was presented, the entitlement still had not been triggered because there was at that point in time still no attestation and therefore no obligation on the respondents to make a paragraph 9.1 payment.

34. The respondents submit that it is not possible, in an unauthorised deduction from wages claim, to go back in time and retrospectively argue there has been an unauthorised deduction from wages. The attestation of Dr Mansouri

was not available to the respondents at the time they were making the payments to the claimant.

35. Mr Howells acknowledged, with the benefit of hindsight, that maybe the respondents should have challenged the approach to obtaining Dr Mansouri's report by saying that it would still not result in the claimant establishing that the wages paid at the time were less than those properly payable. He says it may have been better to have pushed for a hearing on a preliminary issue or a strike out hearing at that time.

36. Mr Adkins submitted there are no limitations on when the attestation could be obtained. He pointed out the claimant's entitlement under paragraph 2.1 was to 100 working days full pay and 100 working days half pay extending the calendar period in question. He said at the time the claim form was presented they were at an impasse which was only broken by the tribunal's directions. He said it could not be right if an employer could avoid payment by not meaningfully addressing an application. He took me through the process of trying to get a paragraph 9.1 referral in this case which he described as being either negligent or malicious[1] in terms of, for example, not telling the claimant to provide her own evidence to be referred to OH and not making a referral to an approved medical practitioner. He submitted that an attestation can apply retrospectively. He said it was sufficient for a request to be made in the period of the claim. The claimant's position remains that there was a series of deductions and the claim was presented in time.

37. The preliminary issue for me is predicated on a presumption that in December 2022 Dr Mansouri made a qualifying attestation for the purposes of Paragraph 9.1 Burgundy Book (and for present purposes I ignore the other arguments made by the respondents such as a residual discretion to disagree with Dr Mansouri etc).

38. The pay occasions in dispute for the purposes of the claim are clearly set out in the ET1 as covering the period May 2020 through to May 2021. The claimant's schedule of loss does not break down the sums claims into month by month. But the claimant's skeleton argument on jurisdiction submits that the May 2020 pay slip was the first monthly pay slip the respondents reduced the claimant's pay as a result of her sick leave absence and that the deductions continued every month thereafter until June 2021 (albeit the pleaded claim is until May 2021). So the complaint brought is that there were 12 (or 13) payslip occasions on which the claimant received less than she was properly due.

39. Section 13 ERA directs me to look at whether the wages paid "on any occasion" is less than the amount of wages properly payable to the worker on that occasion. The language is focused on looking at a specific occasion (for example the May 2020 payslip). It is of course then possible to look at other specific occasions too.

40. Under section 23(1) a worker can present a complaint to the tribunal that his employer "has made a deduction from his wages in contravention of section 13." The language used therefore envisages that the deduction from wages has happened before the claim form was presented. Likewise, the time limit

[1] This is denied by the respondents

provisions in section 23(2)(a) focus on a particular occasion, saying the time limit runs (subject to any extension granted) from "the date of the payment of the wages from which the deduction was made."

41. For time limit purposes under section 23(3) it is possible to bring a complaint about a series of deductions and, if so, time will run from the last deduction in the series. But nonetheless there still need to be individual occasions where there has been a deduction which are then linked together to form a series for the purpose of tribunal time limits.

42. So what was properly payable to the claimant on the occasion of the May 2020 payslip (or the 11 or 12 payslips after that?). Was it the sums that she actually received at the time under paragraph 2.1? Or does Dr Mansouri's subsequent attestation under paragraph 9.1 recast it as being the higher sum that would be due if paragraph 9.1 pay was due for the period November 2019 to May 2020, thus pushing forward a more generous sum due to the claimant under paragraph 2.1 in May 2020?

43. Continuing to take May 2020 as an example, I am drawn to the conclusion that the amount properly payable to the claimant at the time of the May 2020 payslip was the sum she was actually paid at that time under paragraph 2.1 (without any adjustment for a paragraph 9.1 payment). This was the sum she was contractually entitled to at the time under paragraph 2.1. There had, at that time, been no attestation by an approved medical practitioner. The claimant, as at May 2020, had no contractual entitlement to a higher rate of pay caused by the knock on effects of an earlier entitlement to paragraph 9.1 pay because she had no entitlement to paragraph 9.1 pay at the time without there being an attestation in force. The claimant at the time she was paid her May 2020 payslip was not paid less than the amount of wages properly payable to her on that occasion. She was paid her contractual entitlement that existed at the time. The same analysis applies to each monthly pay period after that through to May 2021.

44. I do not consider that an attestation obtained after the pay occasion in question can turn, under section 13 ERA, what was a sum originally properly due as the contractual entitlement at the time into instead becoming a deficiency (and therefore a deduction) by virtue of the attestation giving an improved contractual pay entitlement after the event. I do not consider that reflects the language and construct of section 13 ERA.

45. A section 13 unauthorised deduction from wages claim is not a breach of contract claim, albeit they are often founded in contractual entitlements. A section 13 claim is not simply a complaint that an employer owes wages/sick pay to an employee under the contract. A section 13 complaint is specifically that the employer has unlawfully deducted a sum from the wages owed. It is looking at the particular occasion in question; whether on that occasion a particular wage deficiency has taken place. In my judgement, for there to have been an unlawful deduction on a particular occasion the legal indebtedness must existed at the time of the pay occasion.

46. I consider this approach accords with what was said by the Court of Appeal in Delaney v. Staples [1991] IRLR 112 (dealing with the precursor to section 13; section 8(3) Wages Act 1986:

"*The subsection makes repeated references to an 'occasion'. The subsection is concerned with a comparison between the amount paid on an occasion with the amount which ought to have been paid on that occasion. I do not think this presents any problem. If on his 'pay day', when an employee is due to be paid, a worker receives less wages than he should have done, the deficiency is to be regarded as a deduction for the purposes of the Act. Likewise if he receives nothing. If, come his 'pay day', a worker is in law entitled to a particular amount as wages and he receives nothing then, whatever be the reason for non-payment (excepting only errors of computation), that amount is to be treated as a deduction made from his wages on that occasion. Section 8(3) applies, because the total amount paid on that occasion when he ought to have been paid was nil. The s.5(2) time limit for making a complaint will run from the date on which the wages payment ought to have been made."*

47. The references to, on a "pay day", a worker being in law entitled to a particular amount of wages, and then receiving less wages than he should have done, accords, I believe, with my approach. It concentrates on what the legal entitlement actually was at the time of the pay day.

48. It was said in Group 4 Night Speed Limited v. Gilbert [1997] IRLR 398: "*It is only when an employer fails to pay a sum due by way of remuneration at the appropriate time, i.e. at the contractual time for payment that a claim for unlawful deduction can arise.*" As at May 2020 or the months thereafter in the time period in question the contractual time for payment had not arisen because no contractual entitlement was in existence. The respondents therefore at that time had not failed to pay a sum that was due. There was no failure to pay at the time to give standing for a deduction from wages claim to be brought.

49. I agree with Mr Howells that the claimant faces an added problem in this case. Even if I am wrong and Mr Mansouri's attestation meant that the payments made to the claimant in the period May 2010 to May 2021 retrospectively became deficient and constituted deduction from wages that was not the case when these proceedings were commenced. When the claim form was presented Mr Mansouri's attestation did not exist. When the claim form was presented there was no contractual entitlement to the paragraph 9.1 sick pay. At the point the claim form was presented there had been no failure to pay sick pay due and therefore no unlawful deduction in existence. Under section 23 the deduction needs to be in existence before the complaint to the tribunal can be brought. In Hyde v Lehman Brothers Limited UKEAT0121/04/SM the EAT confirmed that a complaint of unauthorised deduction from wages can only be brought once the unlawful deduction has occurred. They held that in that case the tribunal only had jurisdiction to determine the claimant's claim if the respondents had a contractual obligation to pay the disputed bonus before the date of the presentation of the claim form. The claim had therefore been presented prematurely. It is potentially possible to amend a premature or a defective claim; see Prakash v Wolverhampton City Council [1996] 0140 06. But I have no application to amend before me. As such for the claim as currently presented before me I do not consider that the tribunal has jurisdiction to hear it in any event.

50. I have real sympathy with Mr Adkins' point that it could leave employees in difficulties because, particularly if there is a recalcitrant employer, an attestation may well be obtained long after the event, if at all. Mr Howells observes that, as identified in Cooke v Highdown School & Sixth Form Centre and Governors UKEAT/0005/16/BA there may be ways to obtain an implied agreement to an attestation but I accept that is not a complete fix. It is not necessary for me to make findings about what the respondents did or did not do in this case, or why, and I do not do so. But the point is that identifying the potential practical problem does not lead me to consider that I can interpret section 13 in a way other than I have. There are also ultimately ways to enforce positive contractual obligations but that is not through an unauthorised deduction from wages claim.

51. I would also observe in a general sense, rather than specific to the particulars of this case, that once an attestation has been given and presupposing a contractual entitlement then crystallises (subject to all the arguments the employer would wish to make about that) then on the broad face of it there would appear to be a potentially arguable case for a claim to payment of sums owed under paragraph 9.1. Whether as a breach of contract claim in the civil courts or the tribunal[2] or potentially, if viable, as a deduction from wages complaint. But these are things for both parties to assess and take legal advice about. I cannot make a decision about a case that has not even been brought.

52. I do also acknowledge that the instruction of Dr Mansouri was done at the direction of the tribunal. It has led to the obtaining of a report that does not change the jurisdictional point I have decided. But that cannot alter the analysis I have to undertake. It was also a direction, as far as I can see, that was done with the consent of both parties. But I accept there was no commitment on the part of the respondents that Dr Mansouri's report would resolve the dispute. Certainly, in terms of the wider dispute between the parties it was a practical step.

53. To answer the preliminary issue I was posed, taking the claimant's case at its highest the wages that were properly payable to the claimant during the period of her claim, 28 May 2020 to 27 May 2021 were the sums she actually received under Paragraph 2.1. The amount was not less than the total amount of wages properly payable to the claimant during that period.

54. I also do not consider on the claim as currently presented that the Tribunal has jurisdiction to determine the claim that has been brought. It was premature.

55. To my understanding my decision disposes of this claim as currently brought. I agreed, however, with the parties that they would have chance to reflect and if either party considers there are any outstanding issues they can write in and I will arrange a case management hearing if appropriate. They should do so within 28 days. To be clear however that is not an invitation to debate the decision I have reached or its reasoning. It is a Judgment and it stands subject to the usual rights of appeal or reconsideration. The opportunity for

[2] There are limits on breach of contract claims in the employment tribunal including employment must have ceased, and the cap on compensation at £20,000. Obviously there are also different limitation periods in the different jurisdictions.

further case management is there in case either party considers there remains a live aspect of this case following this Judgment.

Employment Judge R Harfield
Date - 18 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 21 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche