



EMPLOYMENT TRIBUNALS

Claimant: Mrs Nia Hogarth

Respondents: Menter Celyn Ltd

Heard at: Cardiff Employment Tribunal (by video link) **On:** 18 August 2023

Before: Employment Judge E Macdonald

Representation

Claimant: Mrs Nia Hogarth (in person)

Respondent: Mrs L M McCann (Director)

REASONS

Background

1. The decision in this matter was given orally to the parties on 18 August 2023. The Respondent subsequently asked for written reasons by e-mail dated 22 August 2023. Due to administrative error that request was not placed before the Tribunal until 13 September 2023. I am grateful to the parties for their patience in waiting for these Reasons.
2. The claim was for unlawful deductions from wages and holiday pay. The Respondent resisted the claims. I found that the claim for unlawful deductions was well-founded, and that the claim for holiday pay was not well-founded.
3. These reasons explain that decision.

The hearing

4. The hearing was conducted on Cloud Video Platform with all attendees joining by video link.
5. Prior to the hearing, the Claimant had been ordered to produce, and had produced, a breakdown of the sums claimed. That breakdown itemised the claims as follows and I adopt the Claimant's numbering for the purposes of these Reasons.
6. The claim comprised the following:

1. Relating to the period December 12 – 16 2022, a claim for unlawful deductions in the sum of £576.92

2. Course fees deducted from the Claimant's January payslip in the sum of £497.50, said to be unlawful deductions from wages.
 3. Relating to the period January 5 – January 17 2023, a claim for unlawful deductions in the sum of £1,038.42
 4. A claim for 3.5 days holiday owed, in the sum of £403.83
 5. A claim for unlawful deductions relating to 5 hours pay in lieu for hours worked on 30 December helping staff in Y Lloft, in the sum of £76.90
7. The Respondent's position, in outline, was that:
1. In relation to the December claim, the Claimant did not generate work of sufficient quality, there was no real evidence of work being done, and on advice from the Respondent's accountants the Respondent chose to pay Statutory Sick Pay only.
 2. The claim in relation to course fees was agreed, and the Respondent agreed that the sum of £497.50 is due
 3. In relation to the period 5 January – 17 January 2023, the Claimant had failed to carry out the duties requested following the review meeting, so the Respondent was willing to pay up to 6 January 2023 only.
 4. In relation to the 3.5 days holiday claimed, the Respondent says that the Claimant attended a training course which occupied 3.5 days and that was to be treated as annual leave.
 5. In relation to the 5 hours pay in lieu, the Respondent says that there was a breakdown in communication, and does not accept that this sum was properly payable
8. The Respondent did not make an employer's claim for breach of contract.
9. Oral evidence was heard from Mrs Hogarth and Mrs McCann. I also had regard to a bundle of documentation provided by Mrs Hogarth running to some 65 pages, and to a further bundle provided by Mrs McCann on behalf of the Respondent running to some 30 pages. I heard submissions from both parties.

Findings of fact

10. I made the following findings of fact on the balance of probabilities.
11. It was common ground that Mrs Hogarth was employed by the Respondent from 5 October 2022. I saw and had regard to the offer letter which explained that the salary is £30,000 per annum and provides for a contractual holiday entitlement of 30 days plus public holidays.
12. On 11 December 2022 Mrs Hogarth suffered a sprained ankle. She offered to work from home. That offer was accepted by Mrs McCann to be a genuine offer. She was therefore available for work in that period and did in fact do some work during that period, although there is a dispute between the parties about the quality of the work done, with Mrs McCann characterising the work as "superficial".
13. I was shown WhatsApp evidence in which Mrs McCann says "[t]ake the time to do your report to the directors and show which of the deliverables have been achieved, the progress on all, and all additional projects. Will be a good way to plan future actions and priorities . . ." This was a management instruction from Mrs McCann directing the work which she expected Mrs Hogarth to do during the period when she said she was working from home.
14. The Respondent business was closed from 5pm 23 December 2023 through to 9am 31 December (I noted that 3 January was a Tuesday, with 2 January being a public holiday as 1 January 2023 was a Sunday).
15. On 30 December the Claimant attended the workplace following a text exchange with

a manager Anthony Denholm-Wright. I was shown the text message exchange around that point in which the Claimant said that she “could come over on Friday with the laptop to go over a few things”. I found that this was a unilateral offer to perform work.

16. The Claimant tendered her resignation by e-mail dated 10 January 2023 timed at 9.36pm. The resignation was evidently on notice.
17. The Claimant’s last pay followed a payslip dated 5 January 2023 which covered the previous calendar month. As at the time of the hearing, the Respondent had issued a payslip dated 7 February 2023 but had not paid across any monies for the period January 2023, on the basis that it was waiting for the Claimant to hand over a piece of work which related to a tractor decal. The Claimant said in evidence – and I accepted – that she had completed this work.
18. I found as a fact that the Claimant’s weekly gross wages were £576.92
19. The Claimant took annual leave on 9 December (1 day); 21 December (0.5 days); 28 – 30 December (3 days) and 16 January (0.5 days).

The applicable law

20. I reminded myself of the provisions of Sections 13, 14, and 23 Employment Rights Act 1996, which provide insofar as is material 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

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker’s wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

- (a) an overpayment of wages, or
 - (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
- made (for any reason) by the employer to the worker.

[. . .]

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

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [F1employment 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 references 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.

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,

[. . .]

21. I also reminded myself of the guidance in **Agarwal v Cardiff University and Anor [2018] EWCA Civ 1434** : the Tribunal has the power to construe the contract and determine the amount properly payable.

22. I also note the relevant provisions of the Working Time Regulations 1998 as follows:

Entitlement to annual leave

13.— (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(2)

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

[. . .]

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) subject to the exception in paragraphs (10) and (11) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10)

applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

Entitlement to additional annual leave

13A.—(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—
[. . .]

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

[. . .]

Compensation related to entitlement to leave

14.—(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [F2regulation 13] [F3and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

[. . .]

Payment in respect of periods of leave

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) and the exception in paragraph (3A).

[. . .]

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") (and paragraph (1) does

not confer a right under that contract)].

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Remedies

30.—(1) A worker may present a complaint to an employment tribunal that his employer—

[. . .]

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

Decision

23. The primary question in this case was the question whether wages were “properly payable” during the relevant periods.
24. In the period 12 December – 16 December 2022, I found that wages were properly payable. The Claimant was available for work and it had been agreed with the Respondent that she would in fact undertake work. The Claimant submitted, and I accepted, that her pay was not expressed to be contingent upon performance. I therefore upheld this element of the claim, in the sum of £576.92, albeit that credit was to be given for SSP received in the sum of £39, giving a total figure of £537.92
25. In relation to the deduction for course fees, I noted that this was not contested by the Respondent. In any event such a deduction would not have been lawful pursuant to ss 13 and 14 ERA 1996. The relevant sum payable is £497.50
26. In the period 5 January – 17 January 2023, I found that wages were properly payable. Again the Claimant was available for work and was in fact undertaking work. That was sufficient for performance of the Claimant’s part of the work-wage bargain. Put differently, her availability and willingness to perform work was the consideration for payment of wages and they were therefore properly payable. Those sums would have been payable in any event by March 2023 and there had therefore been a deduction from wages. That deduction related to a period of 8.5 working days. I found that the Claimant was owed the sum of £980.76 for that period (calculation: 1.7 weeks x £576.92 = £980.76)
27. In relation to the claim for unpaid holiday, I considered that the Respondent was entitled to treat the Claimant’s absence from work as annual leave. If I were wrong about that, then the Claimant’s attendance at the course would have amounted to an absence from work in respect of which wages would not have been properly payable, and that sum would therefore stand to be offset from the amount due in respect of holiday pay. An award in relation to this claim would amount to double counting in any event. I therefore dismissed the Claimant’s claim for 3.5 days holiday pay.
28. In relation to the 5 hours pay in lieu, while I accepted that the Claimant chose to perform some work-related tasks on 30 December I did not accept that she did so pursuant to a contractual obligation. I therefore did not find that any sums were “properly payable” in respect of the attendance on 30 December 2022; there had therefore been no unlawful deduction in this regard.

Employment Judge **E Macdonald**

Date: **20 September 2023**

JUDGMENT SENT TO THE PARTIES ON 21 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.