



EMPLOYMENT TRIBUNALS

Claimant: Mr Dragos Craciun
Respondent: Mid and South Essex NHS Foundation Trust
Heard at: East London Hearing Centre (by CVP)
On: 26 and 27 March 2024
Before: Employment Judge Illing

Representation

Claimant: Mr D Craciun (In Person)
Respondent: Ms Sophie David (Counsel)

JUDGMENT having been sent to the parties on **11 April 2024** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural history

1. The claimant initiated the Acas procedure for an alleged claim for an unlawful deduction of wages in relation to holiday pay on 19 May 2023. This process concluded on 30 June 2023.
2. The claimant issued his claim in the Employment Tribunal on 12 July 2023 and the respondent did not respond to this claim.
3. The claim was originally listed for a full merits hearing on 12 September 2023 before EJ Sugarman. The respondent did not attend but was contacted direct by the Tribunal and a solicitor representing the respondent attended. The respondent had not received the original claim and the hearing was converted to a preliminary hearing. The respondent was given an extension of time to file their response. EJ Sugarman gave case management orders, including for the claimant to consider whether he wished to bring his claim as an unlawful deduction of wages claim and / or as a claim directly under the Working Time Directive.

4. EJ Sugarman also permitted the claimant to file an amended claim to bring his claim up to date and the respondent confirmed that its response would be unchanged.
5. On 2 January 2024 there was a further preliminary hearing specifically to determine the issues in the case. EJ Peer discussed the case with the claimant and during this hearing the claimant confirmed to EJ Peer that he agreed that the claim was proceeding as an unlawful deduction of wages claim. The list of issues were drafted and discussed with the parties.
6. At the beginning of today's hearing, I discussed the list of issues as detailed in EJ Peer's case management orders of 2 January 2024. Both parties agreed that these were correct.
7. The issue of employment status was withdrawn before the start of the final hearing as the respondent accepted that the claimant was a permanent employee.
8. The issue of time limits had also been withdrawn as the respondent confirmed that the claim was issued in time.
9. It is the claimant's claim that he has been underpaid his holiday pay and that this is an unlawful deduction of wages. The claimant is paid holiday in accordance with Article 13.9 of the NHS TCS Handbook. Whilst the claimant works regular hours, he receives an enhanced payment when he works on a Saturday or Sunday as these are unsocial hours. The claimant states that this article provides that he should be paid holiday pay at the rate at which he should be paid as if he had worked, which would include being paid at the enhanced rate for Saturday and Sundays, if these are days on which he took leave, i.e. to be paid like for like.
10. It is the respondent's position that Article 13.9 provides that workers receive their basic rate of pay which is then uplifted with the average of any enhancements, such as for working unsocial hours, that they have received in the 3-months prior to the annual leave being taken.
11. The claim before me is to determine the contractual construction of Article 13.9 and to determine whether the claimant has or has not been paid in accordance with this Article.
12. The issues specifically to be addressed, are as detailed in the case management orders dated 2 January 2024 from EJ Peer, are:

The Issue - Unauthorised Deductions

- 12.1. Were the wages paid to the claimant in March, April, July, August, September, November and December 2023 in respect of leave taken in February, March, June, July, August, October and November 2023 less than the wages they should have been paid?
- 12.2. Was any deduction required or authorised by statute?
- 12.3. Was any deduction required or authorised by a written term of the contract?

- 12.4. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 12.5. Did the claimant agree in writing to the deduction before it was made?
- 12.6. How much is the claimant owed?

The hearing

13. The Parties had prepared a bundle of 348 pages.
14. Evidence was heard from the claimant and Mr Lee Brown (Director of Workforce Services & Strategic Planning) for the respondent.
15. The respondent also provided a neutral chronology.
16. In accordance with the order of EJ Peer, given the complex nature of holiday pay claims, the respondent had provided the claimant with their written submissions in advance of this final hearing.

Findings of fact

17. The Respondent is an NHS Trust.
18. The Claimant is, and remains employed by the respondent, as a security officer. He has fulfilled this role since November 2022.

Documents

19. The claimant works a regular shift pattern. From July 2022 it is clear that he regularly worked 37.5 hours per week, with occasional additional hours.
20. From May 2023, the claimant's shift pattern changed to a 2-week rota of 33-hours then 44-hours alternating. This gives a weekly average of 38.5-hours per week.
21. The claimant is paid a basic rate for all of the hours he works.
22. If the claimant works a Saturday, his basic rate is uplifted by 41%. i.e he receives a Supplementary payment. (A Supplementary Payment) (my definition)
23. If the claimant works a Sunday, his basic rate is uplifted by 83%. Again, a supplementary payment. (A Supplementary Payment).
24. An Agenda for Change Handbook (AfC) was introduced to all NHS workers except medical staff and senior managers in February 2023. This Handbook was prepared in consultation with the NHS Staff Council and Trade Unions.
25. Whilst no evidence was produced, both the claimant and respondent gave evidence that the terms within AfC would affect a significant proportion of NHS employees. Given the size of the organisation, this would be circa 10,000 people.
26. The AfC was prepared in response to the changes to case law surrounding holiday pay, specifically *Flowers v East of England Ambulance Service NHS Trust*[2019]EWCA Civ 947. This is explained in the AfC Frequently Asked

Questions, which explains that the AfC Average Pay is an average payment of duties worked for overtime / additional hours, unsocial hours and on-call hours made during periods of annual leave.

27. Section 13 provides the terms for Annual leave and general public holidays.

28. The claimant is entitled to 27 days holiday plus 8 bank holidays.

29. Section 13.9 of AfC provides as follows:

13.9 Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work.

- *For staff who have regular hours the reference period should be based on the previous three months at work or any other reference period that may be locally agreed.*
- *With effect from 06 April 2020, for staff who have irregular hours the reference period should be based on the last 52 weeks. When calculating the 52 full weeks of pay, employers are limited to referencing the previous 104 weeks from the date the leave begins.*

30. The claimant accepted that he works regular hours with his pay varying according to when he works.

31. When the claimant took a day of leave, he received his basic pay plus an average of any Supplementary Payments paid to him in the 3-months preceding the annual leave. (an Average Uplift – again my definition). The Average Uplift was calculated and then applied to every hour of annual leave that was taken.

32. The holiday pay calculations in the witness statement of Mr Brown were not disputed. I accept that any errors within those calculations were due to human error on inputting data and that the respondent has made up any shortfall prior to the date of this hearing.

33. The claimant accepted that the respondent did calculate holiday pay in this way using the Average Uplift. He further accepted that when he was paid holiday pay, the Average Uplift was paid to him irrespective of the day on which he took annual leave.

34. I find that on days where the claimant was not due a Supplemental Payment (Monday – Friday), he would be paid more whilst on leave than his expected earnings had he worked that day.

35. I find that on days where the claimant was due a Supplemental Payment (Saturday's and Sunday's), he would be paid less whilst on leave than his expected earnings had he worked that day.

The law

36. Before I can address the issues in this case as to whether the claimant has suffered an unlawful deduction of wages, I must first ask:
- 36.1. What is the interpretation of Article 13.9 of AfC?
37. In the construction of a contract there are a number of factors to take into account. In summary, these include:
- 37.1. Considering the intention of the parties, from the position of a reasonable person with the relevant background knowledge (*Lord Neuberger, Supreme Court, Arnold v Britton [2015] AC 1619*) which should take into consideration the documentary, factual and commercial context.
- 37.2. A clause must be construed in context, i.e. as a whole (*Cosmos Holidays plc v Dhanjal Investments Ltd [2009] EWCA Civ 316 CA pg 17* also *Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR*). This should also be reflected back to the facts and / or the circumstances surrounding the clause.
- 37.3. Furthermore, that common sense should prevail. (*Anderson and ors v London Fire and Emergency Planning Authority [2013] IRLR 459 CA at paras 22, 24, 25*)
38. S.13 ERA 1996 is the legal basis with regard to the Right not to suffer Unlawful Deductions. This provides 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.

(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.

Submissions

39. Both the claimant and the respondent's representative provided closing submissions.

Conclusions

Interpretation of Article 13.9 AfC

40. Turning first to the construction of the term at 13.9 of AfC. From the documents provided, the changes to the calculation of holiday pay were made by the respondent in response to the changing case law including Lock v British Gas Trading Ltd [2014] IRLR 648, Bear Scotland Ltd v Fulton Hertel (UK) Ltd v Woods [2015] I.C.R. 221 EAT, Dudley Metropolitan Borough Council v Willetts [2018] I.C.R 31 and Flowers.
41. The terms of the holiday pay calculation were agreed with the NHS Works Council and the relevant Trade Unions before they were applied to all relevant employees.
42. The respondent states that the changes to AfC were introduced following developments in EU Case law, which provides that intrinsically linked regular payments must be included in holiday pay.
43. It was the respondent's intention to comply with the obligations under the changing holiday pay landscape and to balance this with the scale of the impact of increasing holiday pay.
44. It is the claimant's position that he should be paid on a like for like basis, in that if he were to take days off where a Supplementary Payment would not normally be paid, then he should be paid at that lower rate, i.e. Monday - Friday. In the same way, if he took annual leave on days that the Supplementary Payment should be made, then he should be paid that enhanced payment in full i.e. Saturday and Sunday.
45. It is the respondent's position that to pay someone more on certain days e.g. Saturday and Sunday, would incentivise them to take those days as a holiday in priority to other days. The supplements are paid to cover overtime and unsocial hours, so to incentivise workers to take this time off would impact the respondent in its ability to fulfil its purpose.
46. This is not about whether a Supplementary Payment should or should not be included in the calculation for holiday pay, as was the case in Flowers, because the Supplemental Payment is within the holiday pay calculation by way of the Average Uplift.
47. The legislation and case law permit the calculation of average supplemental payments over a reference period. Dudley.
48. The question for the Tribunal, is initially one of contract and is regarding the interpretation of the Article at 13.9 AfC.
49. I find that the construction of Article 13.9 is that pay during annual leave does include the Supplementary Payment that is paid when the claimant has worked Saturday's and Sunday's.

50. Considering Article 13.9 and the Implementation of Agenda for Change Average Pay for Annual Leave documents, I find that it is the intention of the respondent to incorporate the Supplemental Payments into holiday pay by calculating the average of regularly paid supplements from the previous 3-months at work. This average is then applied to every hour of annual leave that is taken, whether or not a Supplementary Payment would apply to that time if the worker was actually at work.

51. Turning to the issue in this case, which is limited to unauthorised deductions:

Were the wages paid to the claimant in March, April, July, August, September, November and December 2023 in respect of leave taken in February, March, June, July, August, October and November 2023 less than the wages they should have been paid?

51.1. To answer this question, I ask myself, has the respondent complied with Article 13.9 AfC in conducting its calculation of the claimant's holiday pay?

51.2. I have found that holiday pay includes the payment for Supplementary Payments for working Saturday's and Sundays by way of an Average Uplift.

51.3. I have found that the calculations for the claimant's holiday pay within the respondent's evidence to be consistent with this interpretation of the Article 13.9 AfC.

51.4. I conclude that the claimant has received the holiday pay that he is entitled to under the contract with the respondent.

51.5. I therefore conclude that there has not been an unlawful deduction from the claimant's wages.

Judgment

52. The complaint of unauthorised deduction of wages is not well-founded. The claimant's claim is dismissed.

**Employment Judge Illing
Dated: 23 April 2024**