EMPLOYMENT TRIBUNALS

Claimant: Dr Muntasir Abo Al Hayja

Respondent: Liverpool University Hospitals NHS Trust

HELD AT: Manchester (by Cloud Video Platform) **ON:** 4 and 5 March 2024

BEFORE: Employment Judge Ficklin

REPRESENTATION:
Claimant: In person
Respondent: Mr McCardle, Legal Executive

REASONS

PREAMBLE

1. In an oral judgment delivered on 5 March 2024, I dismissed the claimant's claim for unpaid wages as not well-founded. I was asked for written reasons.

BACKGROUND

2. The respondent is a National Health Service (NHS) Trust that employs more than 14,000 people, including about 6200 on the same site as the claimant. The claimant is employed as a Cardiology Consultant with the respondent. His offer letter dated 3 June 2019 specified a salary range of £77,913 -£105,042 per annum. He negotiated his starting salary as £89,856 and started his role on 6 January 2020.

3. In a claim form received on 30 January 2023 following ACAS Early Conciliation on 29 January 2023, the claimant brought complaints of unpaid wages (unauthorised deduction).

HEARING

4. There is an agreed bundle of 576 pages. I heard evidence from the claimant on his own behalf. I also heard from Dr Khaled Albouaini, a consultant cardiologist who works with the claimant and took part in his assessment when he started.

5. For the respondent I heard from Dr Jason Pyatt, a consultant cardiologist who sat on the claimant's interview panel, and Dr Mark Lawton, the Divisional Medical Director.

LAW

6. Section 13 of the Employment Rights Act 1996 (ERA 1996) provides that a worker has the right not to suffer unauthorised deductions from wages. A deduction from wages cannot be made without the worker's written consent unless the employer is authorised by a statutory provision or by a relevant provision in the worker's contract.

7. Section 13 of the Employment Rights Act 1996 materially states:

> (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.
>
> …

8. By virtue of section 23(1) of the Employment Rights Act 1996, "a worker may present a complaint to an employment tribunal…that his employer has made a deduction from his wages in contravention of section 13."

9. By reason of sections 23(2), 23(4) and 23(4A) of the Employment Rights Act 1996, as amended by the Deduction from Wages (Limitation) Regulations 2014, a complaint of unauthorised deduction from wages may be considered up to two years after the first deduction if:

> (a) The claim is brought within three months of the last alleged deduction, and;
>
> (b) the deductions are less than three months apart, or;
>
> (c) The deductions are linked to the same error.

10. I also bear in mind the Supreme Court cases *Cavendish Square Holding BV v Makdessi; Parking Eye Ltd v Beavis (Consumers' Association intervening)* [2015]

UKSC 67. Those cases are about the penalty rule, which does not arise in this case. But the court made the relevant statement that:

> "Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. …"

AGREED ISSUES

11. The issues were agreed between the parties, as set out in the agreed bundle:

Unauthorised deductions/Unpaid wages

11.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

11.2 To answer this question the Tribunal must consider whether the respondent paid the claimant less than the sums "properly payable" under the claimant's contract of employment at the date he presented his claim. The Tribunal will have regard to any express or implied terms of the contract.

11.3 The Tribunal must make clear findings of fact as to the claimant's contractual entitlement to payments payable, with reference to the claimant's contract of employment, any other contemporaneous evidence and other relevant documentation. The Tribunal may have to have regard to the construction of the contract (see *Agarwal v Cardiff University & Another* [2019] ICR 433).

11.4 If the claimant is successful, how much is the unlawful deduction? Even if the claimant can succeed in his claim the respondent says the two-year backstop operates because of the Deduction from Wages (Limitation) Regulations 2014.

EVIDENCE AND FINDINGS

12. Having considered the oral and written evidence and submissions presented by the parties, I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities. I will not rehearse all the evidence but incorporate the points made by the parties within the body of these reasons.

13. The claimant argues that he was entitled to higher pay at the start of his employment and has been underpaid to date. The claimant says he is receiving the wrong salary because he is not being paid in accordance with the correct position on the consultant's salary scale. He says that his 11 years' service in Sweden has not been properly taken into account, or in the alternative that he has not been paid properly because his contract says on its face that he has 11 years' experience.

14. In the first place, the claimant's wages claim is limited by statute to the two years before the date of his claim, and so would not include the first year of his employment. I accept that the relevant time period is two years before his claim, and not the normal three months, because the payments in question were paid monthly and are linked to the same claimed error.

15. The letter conditionally offering the claimant the position is dated 3 June 2019. It offers employment as a consultant cardiologist subject to various pre-employment checks. It states:

> "As discussed a period of retraining will be required to enable you to safely practice clinical cardiology given that you have been employed in Sweden

predominantly as an imaging specialist without much patient care for the last 5 years. This will mainly take the form of 'shadowing' the cardiologists already working here with evidence of getting yourself up to date in all aspects of clinical cardiology."

16. The pay scale at the time he was hired ranged £77,913 -£105,042 per annum and has increased since then. When the claimant was hired, it is not in dispute that the standard NHS policy was to offer a position at the lowest point of the pay scale unless there was justification for a higher pay point on that scale.

17. The respondent's policy is found in the Terms and Conditions for Consultants (England) 2003 (Version 10, 01.04.2018). It states at Schedule 14 that the salary "will be the first of the thresholds" which means the lowest point of each threshold in the payscale, subject to "any approved consultant-level experience that a consultant has gained." It states at Schedule 1, "NHS organisations should take into account ... any equivalent experience in another EEA Member State." I accept that the payscale is contractual in the sense that if an applicant is assessed as having experience that falls on a particular point on the pay scale, the employee must be paid that amount.

18. During the hiring process, the claimant asked for a salary of £89,000 for financial reasons and because he said in an email that he had been working as a cardiologist since 2008. The claimant did not investigate the salary scale or inquire how his experience would be taken into account at that time.

19. The respondent considered the claimant's experience and pay in Sweden and reached the conclusion that he had six years' equivalent experience as a consultant because five years of his experience had been in medical imaging "without much patient care" as per the conditional offer letter. The respondent accepted the claimant's request for a salary at that pay point, ie £89,856. The pay from 4-8 years' experience as a consultant was the same ie £89,856. The respondent's internal communications at the time the claimant was hired show that his experience was discussed. There is reference to him having 11 years' experience as a consultant, but that is before any assessment of the experience takes place.

20. The claimant rejects the word "retraining" and says that it is not correct that his role in Sweden had lacked patient care. He said in evidence that he had accepted a period of shadowing to get used to the NHS systems, but it was not that his skills or experience were lacking. But I find that those terms and descriptions had been used in his conditional offer letter without contest.

21. The language is lifted directly from an internal email from Dr Pyatt on 3 June 2019 regarding the employment offer. It also states that this was discussed with the claimant on the day of his interview panel. The claimant accepted the employment offer and undertook the shadowing with Dr Albouaini. I accept Dr Albouaini's evidence that the claimant was and is a competent and experienced consultant. I note that Dr Pyatt also confirmed this in his evidence and accepted that "retraining" was not meant

formally but referred to mentorship. As I set out below, I find that the claimant's competence does not impact on the assessment of his experience in Sweden.

22. Only after starting the job the claimant investigated the NHS pay scales. He took advice from the British Medical Association and reached the view that he was underpaid and that his experience in Sweden had not been calculated correctly. The claimant raised a grievance about his pay in April 2022 which was considered but not accepted. The claimant refused to provide further specified evidence to show how the uncounted five years was at least equivalent to NHS service, which was described as job plans, job descriptions and contracts for his previous roles The claimant says that the systems in Sweden are different, and the evidence of specific work undertaken was not equivalent to the NHS versions. But he eventually accepted that it may have been possible for him to obtain the evidence of his experience in the NHS-requested format, but he did not feel that he should have to do this.

23. The NHS is clearly entitled to have a system for measuring experience in other countries to determine where someone falls on the pay scales, which the claimant accepted in principle. The claimant's position is that he should not have to provide the requested evidence, because it is not standard practice where he worked in Sweden and getting evidence in the appropriate format is difficult. He argued that his CV and references should be adequate. But that is not up to him. It is entirely reasonable for the NHS to require specified evidence of foreign experience. That it is difficult to obtain from Sweden is not a valid reason to drop the requirement.

24. After the claimant's grievance was rejected, he sought ACAS reconciliation and then issued his claim on 30 January 2023.

25. Whether intentionally or not, the claimant has put his case in two distinct ways; the first is that his experience was not taken into account properly and he should have been on a higher salary at the start of his employment that recognised his years as a consultant; the other way he has put his case is to argue that his contract states on its face that he had 11 years' seniority and so he has not been paid in accordance with his contract.

26. I address the claim that he should have been on a higher salary when he started. I find as a fact that the claimant passed his necessary qualifications in 2006, but became a consultant in 2008. On that basis the claimant argues that his contract should have recognised 11 years of equivalent experience instead of the six that the respondent accepted. This would have resulted in higher pay.

27. I find that evidence from Dr Albouaini and Dr Pyatt about the claimant's skill level and work performance are not relevant to this consideration. I accept that his skill level as a consultant cardiologist is a question for his managers, and is a separate consideration from his equivalent experience level and pay scale, which is a human resources issue. It seems to me that the period of shadowing, also referred to as retraining, is not a central issue in this case, because that related to the physicians'

views about the claimant's skills and adaptation to a UK hospital and has nothing to do with his calculated experience level for the purposes of pay scales.

28. I also find that the claimant's argument that one year of experience in a particular setting might equal to a greater or lesser period in another setting is misconceived, because that is a reference to skills, not to the human resources function of determining where someone falls on a pay scale.

29. The claimant argues that the NHS is wrong to have treated him as having six years instead of 11 years' experience at the time he was hired, and his contract should have been something different than it was. But that does not fall under the jurisdiction of a pay claim. A pay claim only determines whether an employee has not been paid some part of his pay to which he is entitled under his contract as it stands.

30. The caveat to this is, as referred to in *Caveat Square Holding* case, is in cases of "fraud, duress or undue influence". The only relevant issue here could be fraud, on the basis that the respondent intentionally and fraudulently convinced the claimant to accept pay lower than his entitlement under the pay scale. There is no evidence of that at all.

31. The claimant also argued that his 11 years from 2008-2019 was stated on the face of his contract and he has not been paid accordingly. This is also misconceived, because the contract is more than just what is written on the front. Dr Lawton said, and I accept, that the reference to 11 years' seniority is not determinative of the NHS process for considering equivalent service. As I say, the NHS is entitled to have a system to determine equivalent service, which the claimant was invited to engage with. The fact that the claimant disagrees with the evidence required or finds it difficult to obtain and thinks he should not have to provide it, is nothing to the point.

32. The respondent informed the Tribunal in the evening of the first hearing day that it may be that the claimant had been assessed at four years' experience and not six, as had been argued. While the starting salary for 4-8 years' experience was the same, the difference impacted on incremental pay rises as the employment went on. The Respondent stated that investigation would follow and that if that was correct will pay him the arrears. The claimant had not put his case this way, and there was no calculation before me of what the arrears may be. I cannot determine an unquantified claim, and in any case it was too late and not in the interest of justice to amend the claimant's claim at that point. I record it in the reasons so that the parties may consider the issue.

CONCLUSION

33. I find that the respondent did not make unauthorised deductions from the claimant's wages within the meaning of the Employment Rights Act 1996. The claimant received the sums that were properly payable under the terms of his contract at all times. I accept that the consultant pay scales are part of the contractual agreement, but so is the Terms and Conditions for Consultants that requires an evidential basis for accepting non-NHS experience.

34. The claimant's claims are not well-founded and are dismissed.

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Employment Judge Ficklin

21 June 2024

REASONS SENT TO THE PARTIES ON
2 July 2024

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FOR THE SECRETARY OF THE TRIBUNALS