EMPLOYMENT TRIBUNALS

Claimant: Miss A Martin-Harris

Respondent: West Midlands Ambulance Service University NHS Foundation Trust

FINAL HEARING

Heard at: Midlands (West) (in public; by video) **On:** 17 September 2024

Before: Employment Judge Camp

Appearances
For the Claimant: in person
For the Respondent: Mr C Crow, counsel

REASONS

1. The Tribunal's Judgment was that:

> *Section 14(1)(a) of the Employment Rights Act 1996 applies to the deduction the Respondent made from the Claimant's wages to which these proceedings relate.*
>
> *Accordingly, the Claimant's claim fails and is dismissed.*

2. The written version of the Judgment was sent to the parties on 3 October 2024.

3. Reasons for the Judgment were given orally at the hearing. These are the written reasons, asked for by an email from the Respondent's solicitors of 4 October 2024.

4. The Claimant was employed by the Respondent, latterly as a paramedic, from 14 December 2015 until 5 June 2023. She went through early conciliation between 18 May and 29 June 2023 and she presented her claim form on 12 July 2023. Her claim is for unauthorised deductions from wages, in a sum of £3,000-odd.

5. After the claim was issued, it was listed for what was intended to be a final hearing. This is the standard thing that happens in relation to cases of this kind. The hearing took place on 28 November 2023 before Employment Judge Kight. She decided to turn it from a final hearing into a preliminary hearing. In the claim form, the Claimant had ticked various boxes in addition to the box for deductions from wages, but at that hearing, it was clarified that (to quote from the written record of it): "*the Claimant's claim relates to the deduction from her final salary with the*

entirety of the sum payable to her as set out in her final payslip which the Respondent says was made to recoup overpayment of wages."

6. We are therefore in the unusual situation where a claim for a few thousand pounds, that in the County Court would be a small claim and would probably be allocated an hour or an hour-and-a-half of Court time, has had two Tribunal hearings, including a three-hour hearing today. That is not meant as a criticism of anyone, it is simply what has happened.

7. What is significant from a procedural point of view is the fact that up until very recently, this final hearing was proceeding on the basis that it would be a hearing where I would consider all legal issues that arise in relation to whether the Respondent was entitled make this deduction, in principle and in practice. However, in the run up to this hearing, the Respondent's legal team realised they had overlooked relevant legal authorities which limited the Employment Tribunal's powers.

8. What we are looking at here is a deduction which was made, or which purports to have been made, pursuant to section 14(1)(a) of the Employment Rights Act 1996 ("ERA"). This states: "*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 an overpayment of wages*". ERA section 13 is the section that sets out the right not to suffer unauthorised deductions from wages. Section 14(1)(a) is therefore to the effect that a worker has no right under the ERA not to have deductions made from their pay if the employer shows that "*the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages*."

9. That provision has been interpreted as meaning that all the Tribunal has to ask is: why, in its own mind, did the employer make the deduction; and was it genuinely to recover wages it had previously overpaid? See **Sunderland Polytechnic v Evans** [1993] IRLR 196 and **SIP (Industrial Products) Ltd v Swinn** [1994] IRLR 323 and the section from *Harveys on Industrial Relations and Employment Law* that is appended to Respondent's counsel's skeleton argument. If the answer to that question is yes, then that is the end of the Tribunal's enquiry: there is simply no right under ERA section 13; and questions such as "was the amount of the deduction correct?" and "was there a contractual right to make this deduction?" do not arise. If the Claimant wanted to pose those questions, she would have to bring a contractual claim in the County Court.

10. What that means in the present case is that I have to decide: first, whether there was an overpayment of wages[1] – the amount of which is not relevant; and,

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[1] Respondent's counsel's submission, which during the hearing I was attracted to, seemed to be that this was not a question I had to ask myself. However, as is stated at the start of the extract from *Harveys* that counsel provided, "*It is for the party claiming the section 14 exemption to show it applies. It is therefore not enough for the employer merely to assert that one of the section 14 grounds applies. In order to determine whether the tribunal's jurisdiction is ousted by ERA 1996 s 14 (or by s 16), the tribunal must first make findings of fact to determine whether, for example, there has been an overpayment of wages or expenses or whether the worker actually took part in a strike or other industrial action*".

secondly, if there was, was the reason the Respondent made the deduction to recover what it believed to be the amount of the overpayment?

11. The second issue is definitely not a 'live' one. It is not in dispute that the purpose of this deduction – the reason the Respondent made it – was to get back an overpayment of wages it believed it had made. The issue wasn't disputed in the Claimant's witness statement; it wasn't raised during cross-examination of the Respondent's witnesses; and in cross-examination of the Claimant, the Claimant was specifically asked whether she was disputing it, and she said she wasn't. Moreover, there is nothing in the documentary evidence on which I could base a finding that that was not the purpose of the deduction. In fairness to the Claimant, she has never suggested otherwise.

12. Whatever the position is in theory, I don't think the first issue is in reality disputed either. As was noted by Employment Judge Kight at the preliminary hearing, the Claimant accepts that during her employment, she was paid for more hours than she worked. In those circumstances, it would be very difficult to sustain an argument that there has been no overpayment of wages at all, in so far as the Claimant is arguing this. The case she has put forward at this hearing has been to the effect that she worked the hours she was asked to work and therefore that it was not her fault that she did not work enough hours; and that it was in those circumstances unfair to make the deduction from her wages. She has also disputed the Respondent's calculations, pointing out, amongst other things, that she has been given different figures at different times as to how many unworked hours she was allegedly paid for. She has not, in other words, put forward a reasoned challenge to the Respondent's main point: that under her contract, she was not entitled to be paid the same amount however many hours she worked.

13. What that means is that the Respondent wins. It really is as simple as that. I could, then, end this decision now. However, it seems to me that it would be quite unsatisfactory for me to do that, given the amount of time and energy that has been devoted to this case and given the possibility of the Claimant going to the County Court. What I am about to say is primarily for the Claimant's, Ms Martin-Harris's, benefit. I can't stop her from going to the County Court, and nothing that I say from this point onwards is intended to be binding on the County Court. But I am afraid my view is that it would be a further waste of her time and energies, and – because there are fees and expenses in the County Court, even in small claims and because, potentially, she still owes the Respondent some money (see below) and the Respondent can counterclaim in the County Court – a waste of her money for her to pursue a County Court claim.

14. For reasons which are explained in considerable detail in the Respondent's witness evidence, in particular the evidence of Senior Operations Manager Mr Barratt in paragraphs 6 to 12 of his first witness statement, not substantially challenged in cross-examination, paramedics' wages are worked out by annualising an hourly rate of pay for a nominal 37½ hour working week. However, because of various things, including shift patterns, they don't work 37½ hours each week in practice – they may in any given week work more or fewer hours than that. What this means is that they may be overpaid or underpaid in any given week, or month, or year, in the sense that they may have worked on average more or less than 37½ hrs per week during that period.

15. When looking back at a given year, a paramedic may well find that with hindsight they have been overpaid by even more than would be accounted for simply by their working hours, because of the way annual leave is factored into rotas. This is so even if they take no more annual leave than they are contractually entitled to. The reason for this is that:

    15.1 up to 10 years' service, the longer a worker has worked for the Respondent, the more annual leave they are entitled to under their contracts;

    15.2 rotas are devised as if everyone has 10 years' service and has the maximum annual leave entitlement that would come with it, i.e. (as I understand it) the rota assumes that everyone works 37½ hours each week and takes in full the annual leave that someone with 10 years' service would be entitled to;

    15.3 if, like the Claimant, you have less than 10 years' service (and are not entitled to as much annual leave as someone with 10 years' service) and you simply work in accordance with the rota, you will therefore, inevitably, do fewer days of work than you need to do in order to have averaged 37 ½ hours per week during the periods when you were not contractually entitled to be on annual leave.

16. The impression I have been given is that most paramedics who work for the Respondent for less than 10 years are in deficit in terms of their working hours. This is not through any particular fault of their own: they have not been 'slacking', or failing to turn up for work, or knowingly over-taking annual leave, or working different shifts from those assigned to them. This is an unsatisfactory state of affairs. It is true that they have access to information about whether or not they are in deficit, and that if they seek that information out and find they are in deficit they can address this by, for example, working extra shifts or taking less annual leave. But they shouldn't have to do that. It should not be beyond the whit of someone to devise a system whereby a paramedic who works the shifts she is directed to work by management is not automatically overpaid; a system whereby, over the course of a year, she actually get paid what she is entitled to be paid, not more or less than that.

17. There may be good reasons for the Respondent persisting with the system it has, but if so I do not know what they are. It must generate a lot of ill-will amongst ex-employees like the Claimant and word gets around, which surely exacerbates whatever recruitment difficulties the Respondent already has.

18. At the very least, workers should be warned about the issue in the clearest of terms before they start work; and they should be written to regularly telling them whether they have a working hours deficit or surplus and reminding them (again in clear terms) of what will happen if their employment comes to an end at a time when they are in deficit.

19. Be that as it may, the Respondent's system is not an unlawful one and how fair it is objectively is not relevant to whether the Respondent was entitled as a matter of contract law to deduct the sums it deducted.

20. So far as concerns the amount that was deducted, the Respondent's calculations are set out most clearly in Trainee Payroll and Pensions Manager Stephanie

Aitchison's (again substantially unchallenged) evidence. I cannot fault those calculations, which are supported by the documentary evidence. What the Respondent does when a worker's employment comes to an end, and did in the case of the Claimant, is to look at hours worked and annual leave taken for each year (1 April to 31 March) of their employment versus how much they needed to work and were entitled to take to earn the amount they were paid, taking into account factors such as unsociable hours and time off in lieu. In the Claimant's case, she was 'in credit' for some years but 'in deficit' for others, and finished her employment with a deficit of around 210 hours, equivalent to £3,415.53. Subject to a time limits point, which it is unnecessary for me to go into, she still owes the Respondent £59.64.

21. The Claimant previously being given different, higher figures for the amount she owed the Respondent is explained by the fact that the Respondent has double- and triple-checked the information it has, just as it normally does. The fact that those double- and triple-checks have resulted in adjustments in the Claimant's favour means there is little cause for suspicion and cynicism around this than there might otherwise be.

22. The only reasonable basis I can see for challenging the Respondent's calculations relates to the hourly rate used. The Respondent did not simply apply the hourly rate paid to the Claimant when her employment ended to 210 hours. Instead, it did its calculations for each year using the hourly rate payable at the end of that working year, i.e. on 31 March. The Claimant says that that is not right, and that the actual hourly rate payable at each relevant time should be used. There is an obvious objection to that on grounds of practicability: it would likely take a disproportionate amount of time to do any such calculation. But if that is what the law required to be done then it would have to be done, regardless of proportionality.

23. However, I don't think it is what the law requires. As already explained, what the Claimant had to do was work a particular number of hours per year, the number of hours being based on a nominal 37½ hour working week. She did not have to work 37½ hours each week; it didn't matter how many hours she worked each week or each month, so long as she worked a particular number of hours in the year to 31 March. It would therefore be wrong in principle to look at any particular week or month and say that she underworked or overworked a particular number of hours and do a calculation on that basis. The only time when the calculation can be done is retrospectively, at the end of the year. Consistent with that, there is a logic to doing what the Respondent does and using the hourly rate payable at the end of the year. On balance, I think a better approach in principle would be to use the average hourly rate payable during the year. But in the Claimant's case, the Respondent has done a calculation and it turns out that if it had adopted that approach, it would mean she owed the Respondent more than the Respondent says she does.

24. I appreciate that the Claimant is not happy with the figures and wants more information and data. But the Respondent has already made strenuous efforts to explain things to her. For example, it provided a supplementary statement from Mr Barratt addressing specific queries she had about unsociable hours calculations, amongst other things, something it did not need to do. If she thinks making a County Court claim would be a way of forcing the Respondent to provide

more than it has already provided, I fear she is mistaken. Far more time and trouble has been spent on these Employment Tribunal proceedings than the County Court would deem reasonable and proportionate, given the value of her claim.

25. In summary and conclusion, as a matter of employment law, this is a straightforward claim which the claimant loses on the basis that the Employment Tribunal has no power to look into the issues that are really in dispute. The County Court does have that power, but I would like to make clear, for the Claimant's own benefit, that I think she would be on a hiding to nothing if she brought a claim there.

Employment Judge Camp

30/10/2024