



EMPLOYMENT TRIBUNALS

Claimant: Mr M Waterhouse

Respondent: Reads Court Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 18 November 2024

Before: Employment Judge M Butler

Representation

Claimant: Ms Sharratt (of Counsel)

Respondent: Mr Hulks (Litigation Consultant)

JUDGMENT

1. The respondent made unlawful deductions from the claimant's wage, in the agreed sum of £582.50.

REASONS

INTRODUCTION

1. The claimant presented a claim form on 15 December 2023, and this was following ACAS early conciliation which took place between 25 and 27 October 2023.
2. The claimant initially brought complaints of age discrimination, being owed holiday pay and arrears of pay. However, the claims of age discrimination and holiday pay were dismissed on withdrawal. A judgment to this effect was made on 13 February 2024. The only outstanding claim before this tribunal was that of unauthorized deduction from wages.
3. The tribunal was assisted with a bundle of documents that ran to some 242 pages. And heard evidence from both the claimant and from Mr Stuart King.

LIST OF ISSUES

4. The only issue in this case is whether there was an unauthorised deduction from the claimant's wages in respect of a period between 26 October 2023 and 20 November 2023.
5. What were the claimant's working hours?
6. Was the claimant's pay during this period subject to the sick pay provisions or the suspension provisions?
7. Has there been an unauthorised deduction from the claimant's wages, and if so, how much?

THE LEGAL FRAMEWORK

Unlawful deduction from wages

8. Section 27 (1) Employment Rights Act 1996 defines "wages" as any sums payable to the worker in connection with his employment.
9. The provisions of section 13 of the Employment Rights Act 1996 state:
 - (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.
10. Section 23 (1) Employment Rights Act 1996 provides that a worker may present a complaint to an employment tribunal that their employer has made a deduction from their wages in contravention of section 13. Under s. 23 (2) the Tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made.

11. Ms Sharratt relied on several cases in respect, in submitting that the claimant should be paid at the suspension pay level rather than at sick pay level. Namely, *Simmonds v Croydon London Borough Council* (Unreported, 2300719/2022, ET) ('Simmonds'), *Heatherwood & Wrexham Park Hospitals Trust v Beer* (Unreported UKEAT/0087/06) ('Heatherwood') and *Wright v Weed Control Limite* (Unreported, UKEAT/0492/07) ('Wright').
12. Ms Sharratt took the following principles from those cases:
 - a. the starting point is the contract of employment, including the incorporated disciplinary procedures (*Simmonds* at [17]);
 - b. a letter from the employer or its representatives cannot vary the contract – that can only be achieved via agreement between the parties (*Simmonds* at [21]);
 - c. if there is no express requirement within the contract that a suspended employee must be fit to work in order to receive pay whilst suspended, then it is not to be implied into the contract. It is 'settled law that for a term to be implied "the touchstone is always necessity and not merely reasonableness" (*Liverpool City Council v Irwin* [1977] AC 239, 266 cited in *Heatherwood* at [52]);
 - d. similarly, in *Wright* the EAT found that where 'there is no provision expressly stating that an employee must remain ready and willing to work (whilst suspended) ... we see no reason to qualify the clear language of the contractual term in that way' (*Wright* at [27]);
 - e. if a suspension is not lifted and an employee is not free to return to work, the contractual provisions as to suspension pay should apply (*Heatherwood* at [56]); and
 - f. The lesson to be drawn from the EAT authorities is 'that it is the employer who needs to specify in clear language that the right to pay during suspension is subject to the sick pay arrangements rather than the other way round' (*Simmonds* at [24]).
13. The above, as presented by Ms Sharratt, is an accurate reflection of the legal principles in this area.

CLOSING SUBMISSIONS

14. Submissions were made on behalf of both the claimant and the respondent.
15. Mr Hulks made the following submissions on behalf of the respondent:
 - a. The claimant was only entitled to statutory sick pay as he was unfit to work. He was paid what he would have been entitled to had he not been suspended.
 - b. The *Wright* case differs from this case, as in *Wright* the claimant became ill during a suspension. In this case the claimant became ill before suspension.
 - c. *Simmonds* also differs in that that case the suspension appears to have been the cause of the illness.

- d. In terms of working hours, there are no time sheets or evidence supporting that he worked far more than his contractual hours. If working that amount, then the claimant needed evidence.
- e. Tribunal is invited that statutory sick pay was the correct rate of pay and there is nothing in terms of arrears of pay. And if the tribunal is against me, then the number of hours should be based on contractual hours, that being 16 hours per week.

16. Ms Sharratt made the following submissions on behalf of the claimant:

- a. The starting position is the contractual position. This is dealt with in paragraph 9 of my skeleton argument.
- b. The company handbook, in respect of suspension, is incorporated into the contract. This gives respondent absolute discretion to suspend on full pay in order to undertake investigations. The contractual entitlement is to full pay during suspension.
- c. There is no material difference in whether illness or suspension comes first. The EAT authorities all support that suspension pay trumps in such circumstances.
- d. The principle is the contract. The respondent is seeking to imply into a contract that the claimant must be able to work during the suspension period, explicitly rejected in *Heatherwood*.
- e. If respondent wanted to make suspension subject to sick pay then it should have done so. Here, it has not.
- f. In terms of level of pay, this should reflect what would have been earned during the period, as suspension is not punitive.
- g. On contract, that would be 16 hours per week. However, this was a minimum worked.
- h. The claimant has produced what evidence he could in respect of working hours. The respondent had the opportunity to produce evidence but did not. The tribunal should resolve this issue in favour of the claimant.

FINDINGS OF FACT

The following findings of fact were made based on the balance of probability from the evidence read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted the tribunal in making its findings of fact this is not indicative that no other evidence has been considered. All findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why the tribunal made the findings that it did.

This tribunal does not make findings in relation to all matters in dispute but only on matters that it considered relevant to deciding on the issues currently before it.

- 17. The claimant commenced employment with the respondent from 01 September 2023.
- 18. The claimant received a document which was a statement of the claimant's main terms of employment. This document contained the agreed contractual terms of

the claimant's employment with the respondent (pp.67-71).

19. In respect of hours of work, the following was contained in the statement of main terms and applied to the claimant:

"Your normal hours of work are 16 hours per week and are variable in accordance with the rota, which will be notified to you on a weekly basis."

"In addition to these hours, you will be required to work a reasonable amount of additional hours when necessary. You are entitled to payment for additional hours at your normal rate of pay."

20. In respect of sick pay, the following was contained in the statement of main terms and applied to the claimant:

"Payments for periods of absence due to sickness will be made in accordance with the current Statutory Sick Pay (SSP) scheme where applicable."

21. In respect of disciplinary rules and procedure, the statement of main terms directed the claimant to the Employee Handbook for details of the rules and procedure that applied to him.

22. The Employee/Staff handbook that applied to the claimant was at pp.219-230:

- a. With respect overtime it explained the following (see p.222):

"Overtime is defined as any time worked over and above your contractual working hours. If, according to your contract of employment, you are entitled to receive payment for working overtime, all such overtime must be agreed and authorised in advance with your Head of Department. Overtime payments are in accordance with your contract of employment. Overtime is not payable when employees have not completed their contractual hours."

- b. With respect timesheets and records it explained the following (see p.222):

"All members of staff (unless informed that they are exempt) are required to record the number of hours worked and absences in the manner required by either Operations Department, who, each week, will check and approve the record before submission to the HR Office. Each staff member is responsible for submitting a timesheet at the end of each seven-day recording period in a timely manner. You should ensure that your working hours are documented accurately. Falsification of time sheets is treated as gross misconduct."

- c. With respect sick pay it explained the following (see p.224):

"The Company does not operate a Company Sick Pay Scheme. Sick pay is paid on the Statutory Sick Pay rate governed by the Government and details of which can be found on the Governments website."

- d. With respect suspension pay (under the title 'Precautionary paid suspension') it explained the following (see p.229):

"The Company may, in its absolute discretion, suspend you on full pay in order to investigate any claim or allegation that it considers could constitute serious misconduct, where relationships have broken down, where the

Company has any grounds to consider that its property or responsibilities to other parties are at risk, or where the Company considers that your continued presence in Company premises could hinder an investigation.

Any such suspension is without prejudice to the Company's right subsequently to terminate your employment on the same or any other ground and will last no longer than is necessary to carry out any inquiry or investigation into the circumstances and to hold any appropriate disciplinary hearings.

During any period of suspension, the employee may be refused access to Company premises without prior consent and may be subject to conditions."

23. The claimant was responsible for producing the necessary paperwork/spreadsheet for payroll based on time sheets. Mr King would approve pay based on the spreadsheet produced by the claimant. The claimant, despite not being informed that he was exempt from producing time sheets, at no point completed any time sheets to record the hours that he worked. Nor did he seek agreement or authorization for overtime from any Head of Department.
24. There was no express oral or written agreement to increase the contractual working hours from 16 hours per week.
25. The claimant did regularly work more than 16 hours per week during the short period he worked for the respondent, and was paid for those extra hours accordingly.
26. During September 2023, the claimant worked 110 hours. The large increase in hours was primarily due to the claimant undertaking an induction process and being introduced to the respondent's systems of work.
27. The parties were in dispute over what hours the claimant worked in October 2023, however, Mr King paid the claimant the 35.5 hours he says he was owed. This was despite Mr King not accepting that the claimant had worked the hours he was claiming. The claimant at no point sent any proof of the hours that he says he worked during October, other than a breakdown of the hours he said he did work (see p.238, email of 19 October 2023).
28. The claimant had a period of sick leave that ran from 12 October 2023 until 17 November 2023 (see p.98). The claimant received a statement of fitness for work on 16 October 2023, which covered the period 14 October 2023 until 17 November 2023 (see p.101).
29. On 26 October 2023, the respondent sent a letter to the claimant suspending him (see p.117). This explained that the claimant had been 'suspended on contractual pay to allow an investigation to take place...' However, the letter continued and explained the following:

'As you were previously informed, in accordance with the ACAS Code of Practice the decision to suspend you was subject to ongoing reviews. In the circumstances, we have decided to lift your suspension. As a result, whilst you remain unfit to work you will be paid Statutory sick pay in accordance with the Company's rules and procedures.'

Whilst the investigation is ongoing, and whilst you are signed off sick, we would ask that you do not enter Company premises nor should you make contact with any member of the Company's staff regarding the outstanding

investigation, or contact any customers, clients or agents without permission from myself or a more senior manager. Failure to comply with this instruction will be regarded as an act of Gross Misconduct and may result in disciplinary action. However, if there is anyone you feel could provide a witness statement which would help in investigating the allegations against you, please contact me and I will arrange for them to be interviewed.'

'It is important to keep us fully informed in respect of your progress and to notify us when you are no longer sick, at which point the investigation hearing could be rescheduled, and you will revert to suspension on contractual pay.'

30. During the period of 26 October 2023 and 20 November 2023 the claimant was suspended. At the hearing, there appeared to be some dispute over whether the claimant was suspended during this period, or whether there had been a suspension followed by an immediate lifting of the suspension. However, the claimant's case is that he was suspended. The respondent's pleaded case (see para 16 of the Grounds of resistance) is that that claimant was suspended with effect from 26 October 2023, and there was no application made to amend the grounds of resistance. And this is further confirmed by Mr King at para 29 of his witness statement, when he stated that the issue at hand was whether the claimant should be paid at their contractual rate during the period of suspension, which was taken as the respondent having suspended the claimant for this period.
31. The claimant received contractual pay for attendance at the disciplinary hearing on 17 November 2023.

CONCLUSIONS

32. The tribunal agrees with Ms Sharratt's analysis of the case law in the area relating to the interaction of sick pay and suspension pay.
33. It is clear within the contractual documents, and the incorporated staff handbook that the claimant was contractually entitled to full pay whilst suspended. And that there was no additional requirement imposed by the contractual documents that the claimant must be fit to work, or ready and willing work, during the period of suspension to qualify for full pay.
34. The authorities the tribunal were referred to support that the tribunal should not be implying a term into the contract that the claimant should be fit to work, or ready and willing to work in order to qualify for full pay. If the respondent wanted to make suspension pay subject to such a restriction, then it could and should have included this in the contract. It chose not to.
35. In those circumstances, the claimant was thus entitled to receive full pay during the period of suspension, that being 26 October 2023 to 20 November 2023.
36. Turning to the issues of what was full pay. This is not a straightforward matter.
37. The contractual position is important in respect the correct level of pay. The contractual agreement was for 16 hours per week, subject to additional hours when that was required. And that is a matter not in dispute between the parties. And this did lead, at least during September 2023, when the claimant was undertaking induction and learning his new role, to the claimant working hours in excess of his contractual hours.

38. It is not entirely clear how the claimant is pursuing that there had been an agreement to vary his contract in these circumstances. There was certainly no express agreement to increase the contractual hours. And the evidence before the tribunal does not support that the contract had been varied by custom and practice (which requires the term to be reasonable, notorious and certain). And there is no evidence of a varied term being agreed that reaches the level of certainty and specificity such as to vary the written contractual position.
39. Rather the additional hours, even if the claimant is correct and he worked 35.5 hours across the first 2 weeks of October 2023, is simply the current contract being applied. A 16-hour per week, with overtime hours when required. And that is the decision of this tribunal. The claimant had a contractual entitlement to 16 hours per week. And any additional hours worked during September and/or October 2023 were overtime hours provided for by the contract and paid in accordance with it.
40. There was no amendment to the contract by express agreement, by custom or practice or through conduct. There is correspondence in the evidence file concerning additional hours, but these do not reach the level of being a variation to the initial contract.
41. In terms of remedy, the parties reached an agreement. There was an unlawful deduction from the claimant's wages in the agreed sum of £582.50.

Employment Judge **M Butler**

Date_13 January 2025_____

JUDGMENT SENT TO THE PARTIES ON
24 January 2025

FOR THE TRIBUNAL OFFICE

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