Case No: 2411202/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr K Farrell

Respondent: Liverpool University Hospitals NHS Foundation Trust

Heard at: Liverpool **On:** 16 January 2020

Before Employment Judge Wardle

Representation
Claimant: Mr E Carey - Lead Legal Officer (IDU)
Respondent: Mr P Loftus - Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaints in respect of a breach of his contract and of an unauthorised deduction from his wages are well founded and that the respondent is ordered to restore to him the value of the 13 days' contractual annual leave carried over by him from the 2018/19 leave year, which was withheld from him in his final salary payment upon retirement.

REASONS

1. By his claim form the claimant claims that his contract of employment was breached by the respondent by virtue of an unauthorised change in his annual leave entitlement for 2018/19 from 33 days to 20 days and that by its failure to pay him his accrued holiday for this year of 19 days and instead paying only 6 days he has suffered an unlawful deduction from pay in contravention of section 13 of the Employment Rights Act 1996 (ERA).

2. The respondent by its response denies that it had subjected the claimant to a breach of his contract and/or an unlawful deduction of wages.

3. The Tribunal heard evidence from the claimant and from Mrs Carla Marshall, Head of Business Human Resources, on behalf of the respondent, whose evidence was given by written statements as supplemented by answers to questions posed. It also had before it a bundle of documents running to 208 pages, which it marked as "R!".

4. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

5. The claimant was employed as a Chargehand Porter by the respondent at Broadgreen Hospital from 8 May 1979 until his early retirement on 31 May 2019.

6. He was employed under a contract of service governed by nationally negotiated terms and conditions, known as 'Agenda for Change' contracts.

7. National terms and conditions for employees of NHS Trusts are set out in the NHS's Agenda for Change Handbook. These nationally negotiated terms and conditions governed the claimant's contractual annual leave entitlement and in accordance with section 13 at pages 78-9 of the bundle dealing with Annual Leave and general public holidays he was entitled over his annual leave year running from 1 April to 31 March to 33 days leave and 8 days in respect of general public holidays.

8. The Handbook (Amendment number 40) also provides at section 19 at page 80 of the bundle that other terms and conditions not covered in it will be determined locally following consultation with staff representatives with a view to reaching agreement on such terms and conditions or any changes to them and refers the reader to Annex 15, to be found at page 81 of the bundle. This states, inter alia, that for the purposes of section 19 other terms and conditions will include arrangements for carry over of annual leave and that existing arrangements (as provided by GWC section 1) will continue to apply, unless or until new arrangements are agreed. In this context GWC refers to the Whitley Councils for the Health Services Conditions of Service. Section 1 of these General Council Conditions of Service deals with Annual Leave Entitlement and provides at paragraph 5 to be found at page 119v of the bundle under the heading of 'Year of Finally Leaving the Service' that 'Employees leaving the service..... be entitled in the leave year of cessation to annual leave proportionate to the number of completed months of service during that year'. Relevantly paragraph 7 then provides that 'Employees to whom paragraph 5 applies, shall where they are unable because of sickness to take any balance of leave to which they are entitled on the proportionate basis, receive payment in lieu of uneaten annual leave, always excepting cases where the employment is terminated on disciplinary grounds'.

9. Following the introduction of Agenda for Change and a new NHS pay system based on a matching/evaluation process the claimant was written to on 25 November 2005 with a new contract of employment. Such contract at pages 37-8 was in two parts. The first part had seven clauses and the second, which the respondent was unable to produce, is stated to have a further 21 clauses numbered 8 to 28. He was further written to on 1 June 2009 following his assimilation to a new pay band with another contract of employment at 41-42, which was in the same format as the earlier one and again with no second part able to be produced.

10. During 2017 the respondent reviewed its Managing Sickness Absence at Work Policy. In this connection there was a leaflet at pages 119a - 119f of the bundle announcing that the policy had recently been reviewed and that there were changes effective from 1 April 2017 and giving guidance on the key

changes and amendments. These made no mention of any changes to carry over of leave generally or in circumstances of an employee being unable to take leave because of sickness. In point of fact, however, the reviewed policy was not published until 14 November 2017. The document in question at pages 120 - 192 recites that it was agreed by the Joint Negotiation & Consultative Group (JNCG) meeting on 8 November 2017. The minutes of this meeting are to be found at pages 44A - 44H. There was a range of matters discussed, included amongst which was 'Managing Sickness Absence' at page 44E, where it is recorded that NJ (Nick Jones - HR Manager) stated that the sickness policy had been brought to the group to be agreed subject to approval, adding that HR had undertaken a two month consultation process with the staff side and had taken on board suggestions made. This prompted Su Edwards (Unison Representative) to raise some discussion points before stating that the staff side did not agree the policy which was implemented by management and that the response had not been satisfactory and that going forward there needed to be a robust formal process in place. There then followed an exchange between Elaine Butchard (Assistant Director of HR & OD) and Ms Edwards regarding requests to Occupational Health for advice and an appeal process for staff before Debbie Herring (Director of Workforce) who was chairing the meeting asked the group to confirm if the policy was agreed, which question was responded to affirmatively.

11. Contained within the above-mentioned Managing Sickness Absence Policy at paragraph 4.18 is a section entitled 'Miscellaneous Provisions' at page 144 of the bundle. Within this section there is a sub-heading entitled 'Sickness and Annual Leave or Bank Holidays', the relevant part of which for these proceedings is the final paragraph that provides as follows 'In accordance with current legal requirements an employee on sick leave who has taken less than 4 weeks' statutory annual leave entitlement (i.e. 20 days or pro rata 4 weeks equivalent for part timers) and who had been unable or unwilling to take this, is entitled to the balance when they return to work even if this means it needs to be taken in the next leave year. Any annual leave already taken within the current leave year should be deducted from this amount'.

12. Following the publication of this policy the claimant suffered a serious cardiac event on 22 August 2018 requiring hospitalisation and urgent surgery, which saw him being off sick continuously from this date until his retirement on 31 May 2019. Before this period of sickness the claimant had taken 105 hours of holiday.

13. He was reviewed by Occupational Health on 1 February 2019 in relation to his cardiac problems, musculoskeletal problems and anxiety. In the opinion given by the physician dated 7 February 2019 at page 57 of the bundle the claimant was thought to be in a position to make a phased return to work commencing with shorter shifts in approximately 8 weeks time and mention was made of his possibly wishing to use some of his accrued annual leave to lengthen his phased return if required.

14. Whilst a return to work appeared to be in the contemplation of the claimant at the time of this review he subsequently wrote to Mrs Marshall, using her maiden name of Rogers, on 5 March 2019 to inform her of his intention to retire from his position as Chargehand Porter on 31 May 2019, notification of which had already been given by his union representative Liz Frayne of the Independent Democratic Union (IDU). In his letter at page 61 he asked if he could use his remaining annual leave entitlement prior to his returning to work. At this date he remained certificated as not fit for work because of Perculaneous transluminal ablation of

accessory pathway with his fit note covering his absence until 31 March 2019, following which it was further extended to 31 May 2019. In terms of this entitlement he advised that he had 165 outstanding hours from which 30 hours for 4 Bank Holidays needed to be deducted leaving 135 hours to take. By a response dated 8 March 2019 at pages 62-3 Mrs Marshall advised that the Trust could make arrangements for him to take any annual leave entitlement prior to his retirement but that in accordance with its Annual Leave and Managing Sickness Absence at Work Policy were he not to return to work before the end of the leave year any carryover of annual leave is recalculated in line with the Working Time Regulations 1998 and that his leave had therefore been recalculated as shown in an attached breakdown, which effectively substituted in respect of the 2018/2019 leave year the statutory basic annual entitlement of 20 days for his contractual entitlement of 33 days and subtracted the 14 days leave already taken giving a carryover of 6 days into the 2019/20 leave year.

15. Ms Frayne subsequently wrote to Mrs Marshall on 14 March 2019 disputing the Trust's calculation of his outstanding leave stating that his leave entitlement had contractual force and was dictated by Agenda for Change NHS terms and conditions of service and that the Trust was not empowered to enforce the statutory minimum holiday entitlement in cases of absence due to ill health where this is less than the contractual entitlement and that to have done so amounted to a contractual breach. She further advised that as the claimant was still not fully fit he would prefer to deal with the grievance via written submissions, which she would draft and forward for consideration by the investigating manager.

16. Mrs Marshall responded on 15 March 2019 confirming that the calculation was correct and advising that the Trust had implemented guidance issued nationally by NHS Employers with regard to the payment of statutory annual leave; that the changes within the Sickness Absence Policy were agreed in partnership with the recognised trade unions through their collective bargaining framework; that the policy was agreed by the Trust Board and that all changes were communicated to staff as part of the consultation process. In terms of the guidance from NHS Employers Mrs Marshall in a subsequent email dated 18 March 2019 to Ms Frayne referred to an answer given by them on their website to the question how much holidays will workers accrue per year whilst off sick, which stated that 'For each full annual leave year from 1 April 2009 onwards, workers will accrue 5.6 weeks of annual leave. The decisions referred to throughout this guidance only relate to WTR annual leave, not the contractual leave provided for under the national agreements. However, following the Healy case, in the absence of a relevant agreement, whereby the additional 1.6 weeks shall carry over, accrued holiday for previous years may be limited to 20 days (including public holidays) under regulation 13 of the WTR. We recommend that annual leave and sick leave policies make clear that only statutory holiday accrues during periods of sickness'.

17. On 19 March 2019 Ms Frayne wrote further to Mrs Marshall at page 84 attaching a paper to be found at pages 65-6 setting out what she contended was the correct position for NHS Trusts in respect of annual leave and in respect of the claimant's particular case, where she submitted that even though case law gives employers the right to cap carry-over leave at 20 days, if NHS Trusts are to rely on this, they are still required to make clear this position in leave policies and also ensure all staff are explicitly made aware of it otherwise they risk being required to pay the full amount of carry over leave, which may be as much as 33 days and that in reference to the claimant unless there has been a lawful

contractual change implemented and communicated via express national agreement, he accrues holiday whilst off sick at the contractual rate as laid down by the AfC terms and conditions meaning that he is entitled to 247.5 hours for 2018/19, of which he has taken 105 and that he is hence due 142.5 hours of carry-over leave equating to 19 days, which is within the 20 day cap laid down by case law.

18. Further correspondence ensued between Mrs Marshall and Ms Frayne, which failed to resolve this dispute and on 15 April 2019 Ms Frayne indicated that a formal grievance would have to be lodged.

19. The claimant was separately pursuing a grievance in respect of treatment by his line manager, Jeff Woods, on the day he fell sick at work in August 2018 and the way in which he had been managed through the Trust's sickness procedures since this time, which had been lodged on 7 February 2019. This was heard in his absence on 3 April 2019 - an agreement having been reached that it would be dealt with by written submission - by Tracey Rawlings (General Manager - Theatres and Critical Care) and Victoria Sennett (Assistant Director of HR and OD). It was not upheld, of which outcome he was advised in writing on 16 April 2019, although seemingly at first by an incorrect letter.

20. On 13 May 2019 Ms Frayne lodged an appeal against the outcome and separately raised a formal grievance in respect of the claimant's accrual of annual leave in 2018/19 and the Trust's position that this was accrued at the statutory rate.

21. Following the claimant's retirement on 31 May 2019 Ms Frayne was informed by Claire Ellison (HR Advisor) on 7 June 2019 that as this second grievance was connected with the ongoing grievance appeal it had been decided to deal with it as part of the appeal hearing. This hearing subsequently took place on 3 July 2019 again by agreement in the absence of the claimant and conducted by a panel comprising Cathy Chadwick (Director of Operations/Deputy COO) as chair, Amanda Penketh (Deputy Director of Information & Patient Access Services) and Elaine Butchard (Deputy Director of Workforce). In a letter dated 19 July 2019 from Ms Chadwick the claimant was informed that neither his appeal nor his second grievance was upheld and that there was no further internal provision for escalation.

22. In advance of this the claimant made an Early Conciliation notification to Acas on 14 June 2019, which failed to promote a settlement and an Early Conciliation certificate was issued by email on 14 July 2019 following which he presented his claim on 29 August 2019, which saw the respondent file its response in resistance on 16 October 2019.

Law

23. In regard to the claimant's breach of contract claim jurisdiction is given to employment tribunals to hear certain types of contractual claims by virtue of the Employment Tribunals Act 1996 (ETA) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Under section 3(2) ETA and Article 3 of the Order it is provided that for a tribunal to be able to hear a contractual claim brought by an employee that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following: (i) damages for breach of a contract of employment or any other

contract connected with employment (ii) the recovery of a sum due under such a contract (iii) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

24. In regard to his unlawful deduction complaint section 13 of the Employment Rights Act 1996 (ERA) gives workers the right not to suffer unauthorised deductions from their wages. It provides at sub-section 1 that 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. Pursuant to section 13(2) 'relevant provision' means a provision of the contract comprised - (a) in one or more written terms of the contact 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. It further provides at sub-section 3 that 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.

25. Section 23 permits workers to present a complaint to an employment tribunal in the circumstances of a contravention of section 13.

26. Section 27(1) defines 'wages' in relation to a worker as meaning 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.

Conclusions

27. Applying the law to the facts as found the Tribunal reached the following conclusions. In relation to the contractual position it is common ground that national terms and conditions of service for NHS employees such as the claimant are set out in the NHS Terms and Conditions of Service Handbook, extracts from which are at pages 68-81. Section 13 of this establishes the claimant's annual leave and general public holidays entitlement based on his length of service as being 33 days + 8 days. Section 19 states that other terms and conditions, not covered in this handbook, will be determined locally following consultation with staff representatives, with a view to reaching agreement on such terms and conditions or any changes to them. One such example of terms and conditions being determined locally as established by Annex 15 of the Handbook is that of the arrangements for the carry over of annual leave, which states that existing arrangements (as provided by GWC section 1) will continue to apply, unless or until new arrangements are agreed. The provision made in the GWC Conditions of Service at paragraphs 5 and 7 of section 1 is that employees are entitled in the leave year of cessation to annual leave proportionate to the number of completed months of service during that year and that employees who are unable because of sickness to take any balance of leave to which they are entitled on the proportionate basis shall receive payment in lieu of uneaten annual leave.

28. It is the respondent's position that as a result of its introducing a Managing Sickness Absence at Work Policy published on 14 November 2017 having obtained agreement to it from the Staffside at a Joint Consultation Group meeting held on 8 November 2017 that the provision made by the GWC Conditions of Service relating to the carry-over of annual leave by employees prevented from taking it because of sickness has been superseded by the provision made in its locally determined and agreed policy, which at section 4.18 under the heading of 'Miscellaneous Provisions' provides that employees on sick leave who have taken less than 4 weeks statutory annual leave entitlement and who had been unable or unwilling to take this are entitled to the balance when they return to work even if it needs to be taken in the next leave year but that any annual leave taken within the current leave year should be deducted from this amount i.e. the statutory 20 days.

29. The respondent says further that the case of Sood Enterprises Ltd v Healy UKEATS/ 0015/12/BI validates its approach in respect of its limiting of the amount of paid leave that can be carried over from one leave year to another to the basic statutory 4 weeks' leave to which workers are entitled under Regulation 13 of the Working Time Regulations 1998 on the basis that the EAT confirmed, in the absence of a relevant agreement under Regulation 13A(7) allowing for the carrying forward of additional leave, the Working Time Directive does not require carry-over of the additional 1.6 weeks' leave under Regulation 13A where a worker is prevented from taking holiday owing to long-term sickness.

30. The Healy case, however, concerned the Working Time Regulations 1998 made under Article 7 of the Working Time Directive, where the sick worker's entitlement to leave was statutorily based. In the instant case the claimant's entitlement depends on the terms of his contract. In order for the limiting provision made by the respondent's Managing Sickness Absence Policy to have contractual effect it is necessary that there is an agreement between the claimant and the Trust for incorporation into his contract of terms from other sources such as those contained in collective agreements, works rules and workplace policies etc. The difficulty here for the respondent is that it was unable to adduce any satisfactory evidence of the policy, with its limiting term in respect of the amount of untaken leave because of a sickness absence able to be carried over by the claimant, having been incorporated into his contract of employment.

31. In answer to the Tribunal's question as to how the policy had been incorporated in the absence of any statement in the Part 1 of the claimant's contract dated 1 June 2009 at pages 41-2 that certain of its terms are governed by other sources such as collective agreements Mrs Marshall admitted that she did not know. Whilst acknowledging that the claimant's contract was clearly a two part document and the Trust's current Part 2 template at pages 119G - 119O does make provision for any changes implemented following determination at the local level after consultation or negotiation with recognised trade unions to be subsumed within the contract it was noted that the current template is a different and lengthier document to the Part 2 referred to in the Claimant's 2009 contract containing clauses numbered 1-32 as compared to 8-28.

32. Nor was there any satisfactory evidence of the revision made by the policy in relation to the capping of annual leave to be carried over that was unable to be taken because of sickness to 20 days having become custom and practice since the policy's publication in November 2017 as at its highest Mrs Marshall, who only joined the Trust in January 2019 could say no more than that it was her

understanding that it had been the respondent's practice since at least 2015 for carry-over of annual leave to be limited to 20 days' statutory leave, albeit that this was not formalised until November 2017, which evidence it should be said was disputed by the claimant, whose own evidence was that the respondent did not at any time make a distinction between contractual annual leave and the Working Time Regulations' statutory minima and that employees were not at any time told that annual leave was split into statutory and contractual before stating that in circumstances where employees did not return to work after sickness absence, whether due to resignation, retirement or termination of employment by the employer, outstanding contractual leave was paid in full in the final payment, including leave not taken in the previous holiday year. As such the Tribunal was not satisfied that these circumstances were such as to merit a finding of incorporation expressly or impliedly.

33. Accordingly the Tribunal considered that the position in respect of the claimant's accrual of leave whilst off sick and what his entitlement was in respect of receipt of payment in lieu continued to be governed by the GWC Conditions of Service in the absence of any new contractually agreed arrangements and that he had accrued 33 days of annual leave by 31 March 2019, of which he had taken 14 days leaving an uneaten entitlement of 19 days, in respect of which he ought to have been paid in lieu. The respondent's actions in paying him for only 6 days therefore constituted both a breach of his contract of employment and an unlawful deduction from his wages and it is ordered to restore to him the value of the 13 days pay withheld from him.

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Employment Judge Wardle
Date: 28 January 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 February 2020

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2411202/2019**

Name of case: **Mr K Farrell** v **Liverpool University Hospitals NHS Foundation Trust**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 3 February 2020

"the calculation day" is: 4 February 2020

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.