



EMPLOYMENT TRIBUNALS

Claimant: Ms A Okeke

Respondent: Livingstone Health Care Ltd

Heard at: East London Hearing Centre **On:** 2 March 2021

Before: Employment Judge Lewis

Representation

Claimant: In person

Respondent: Mr Collyer - Advocate

JUDGMENT

The Claimant's claims against the Respondent for failure to pay

- 1. Arrears of pay;**
- 2. holiday pay;**
- 3. mileage expenses; and**
- 4. additional payments in respect of client care fail and are dismissed**

REASONS

References in square brackets are to page numbers in the bundle.

1. By a claim form issued on 11 April 20 following a period of early conciliation from 5 to 25th of March 2020 the Claimant brought claims of unlawful deductions from wages, holiday pay and other payments namely, mileage claims and pay for extra care service to the company's client
2. I was provided with a hearing bundle prepared by the Respondent and a number of additional documents by the Claimant. I heard evidence from the Claimant and Ms Richards on her behalf and from Mr Agyare and Ms Dombo for the Respondent.

Findings of fact

3. The Claimant was employed by the Respondent as a Quality Monitoring

Officer from 17 June 2019 until 2 February 2020. The Respondent provides domiciliary home care services to service users in the London area. The Claimant's contract [pages 29 to 33 of the hearing bundle] was for 16 hours a week, consisting of two eight-hour shifts but with the possibility of additional shifts being agreed. During late 2019 the Claimant's shifts increased to 3 and then 4 days per week, they then reduced again in January 2020 to the original 16 hours. The Claimant was required to fill in time sheets and payment by the Respondent was based on the hours entered on those time sheets.

4. On 2 February 2020 the Claimant told her manager that she was resigning and would not be returning to work, later that day she provided a resignation letter [36 to 37] in which she told the Respondent that she was resigning with a heavy heart and that the seven months employment had been a wonderful and memorable experience. She had accepted an offer of employment at another organisation and her last day at work would be 28 January 2020.

Deduction from wages

5. Following the Claimant's resignation Mr Agyare informed her that she had claimed more holidays than her entitlement and this overpayment would be deducted from her final pay. The Respondent also deducted a further amount from her final pay in respect of overpayment of wages. The total deductions in the payment made on 2 March 2020 amounted to £650.00 which meant that the Claimant was only paid £263.68 net.
6. According to Mr Agyare the Claimant had been overpaid by 80 hours, i.e. £800.00 in December 2019. This came about after the Claimant had a conversation with Mr Agyare on Christmas Eve, just before the staff Christmas party, in which she queried her payments up to December. He told the tribunal that at the time of that conversation he had accepted the Claimant's calculations and agreed to pay her what she told him was the shortfall, as it was staff party he was not able to check the amounts, he told the Claimant that he would review the amounts when he returned to work after Christmas. When he reviewed the time sheets and payments he concluded that in fact the Claimant had been overpaid by 80 hours. As a result of the Claimant's resignation without notice he was unable to recover the overpayments by gradually adjusting her pay and told the Claimant that he would deduct the overpayment from her final pay..
7. The Respondent made the following deductions to the Claimant's final pay on 2 March 2020: 36 hours in respect of overpaid wages amounting to £360; and 29 hours in respect of overpaid holiday pay, amounting to £290; leaving the gross sum of £361.00.
8. The Claimant queried the payments and the Respondent reviewed and recalculated the hours the Claimant worked in January 2020; the Respondent accepted that the Claimant worked 96 hours in total in January 2020 and paid her for an additional 5.5 hours (the gross sum of £55) on 16 March 2020. On reviewing the signing in sheets in November 2020, in the course of preparing for these proceedings, the Respondent paid an additional sum of £80 in respect of an 8 hour shift on 16 January 2020. The

Respondent denied that the Claimant was owed any further wages, rather Mr Agyare told the tribunal that the Claimant still owes the Respondent the balance of the overpayment being the sum of £520.00.

9. The Claimant clarified that her claim for unpaid wages was in respect of a further day that she says she worked on 15th January, but which did not appear on the Respondent's time sheet. The Claimant suggested that she was due to work four days per week up to 20 January 2020. The Respondent could find no record of her having worked on the 15th January and maintained that her hours were reduced back down to 16 hours per week from 13 January following a meeting on 6 January 2020 [page 35].
10. The Claimant did not produce any evidence to support her claim that she had worked on 15th January 2020.
11. The Claimant denied that her hours had been reduced in January and suggested that the Respondent was manipulating the evidence to suggest that they had been. She disputed that the Respondent's records in the timesheets were accurate. However I find that the reduction in hours is also referred to by the Claimant in contemporaneous emails. [43].
12. The Claimant's witness, Ms Richards, told the Tribunal that she was present at the office in January 2020 when the Claimant was called in to a meeting by Mr Agyare and was told that her hours would be reduced back down to 16 hours.

Holiday pay

13. It was not disputed that the Respondent's holiday year runs from April to March. The contract makes no provision for the payment of sick pay.
14. The Claimant told me that she had based her claim for holiday on accruing 2.5 days holiday per month. She got this figure from the government website. She conceded that this reflected a 5 day working week and that she did not work 5 days per week at any point during her employment with the Respondent.
15. The Respondent based its holiday pay calculation on the Claimant working an average of 4 days per week. The Respondent suggested, and I accept, that this was a generous estimation over the course of the Claimant's employment and worked to her benefit. That calculation produced the figure of 14 days paid holiday entitlement in the relevant period.
16. The Claimant accepted that she was on holiday from 28 August to 3 September and was paid for three working days in that period. She maintained that those were the only dates she took as actual holiday.
17. The Respondent put in evidence the Claimant's signed holiday request forms and copies of the signed approval of holiday requests. It had recorded nine days paid holiday as follows: 14th, 15 August, two days; 2nd to 3rd of September, two days; 18th and 21st November, two days; 31st of December, one day; first and second January 2 days; bringing a total of nine

days, leaving five days untaken at the effective date of termination, or the equivalent of 40 hours. However, having carefully checked its records in the course of these proceedings it believed that the claimant was in fact paid for 13 days holiday, including 9 days approved annual leave, plus the bank holidays falling within the relevant period, for which she was paid and not required to work. The 9 days approved holiday included days the Claimant phoned in sick or otherwise unable to come to work due to family emergency/childcare reasons but asked to be paid and which Mrs Dombo treated as holiday requests.

18. Mrs Dombo gave evidence that on 14 August 2019, 2 October 2019, 18 November 2019 and 21 November 2019 the Claimant was off work due to family emergencies. She recalled that on those occasions either the Claimant's husband was unwell and unable to look after their children or that their childcare arrangements had somehow broken down. The Claimant asked her if she could get paid for those days as holiday. The Claimant was off sick from 31 December 2019 and returned to work on 6 January 2020 and had also asked if she could be paid for those days. Mrs Dombo asked her to complete holiday request forms so she could be paid. The Claimant did not tell her she did not want those days treated as holiday, although she did subsequently complete a sickness absence self-certification on her return certifying 2 days absences as sick leave [91]. Mrs Dombo completed the holiday request form for 31 December 2019 to 6 January 2020 on behalf of the Claimant so that she would get paid for three days although she was absent.
19. I accept the Respondent's evidence that the office was closed on bank holidays and the Claimant was not required to come into work. The Claimant was paid holiday pay for the bank holidays on 1 January 2020 [p74] Christmas Day and Boxing Day 2019 [p73] and the bank holiday on 26 August 2019.
20. The holiday request forms contained in the bundle which were signed by the Claimant and approved by the Respondent were in respect of the following dates: 14-15 August [p82]; 2 to 3 September 2019 [84], 2 October 2019 [86]; 18 to 19 November 2019 [88]. The holiday request form for 21 to 25 November 2019, [90] is not signed by the Claimant although the request at the top of the form [and at page 89] appears to be in her handwriting.
21. The Claimant completed a sickness absence form for absence from 31 December returning to work on 6 January 2020 which stated that she was absent for 2 working days [92].
22. The Claimant did not accept that she was not entitled to sick pay, however she accepted that there was no contractual provision that provided for sick pay to be paid. The Claimant asserted that she was entitled to be paid for those days of absence when she phoned in sick or otherwise unable to attend work, and that those dates should not have been treated as holiday. She denied that it had been agreed with Mrs Dombo that in order to be paid she would take the days as holiday. The Claimant accused the Respondent of altering the holiday request documents although the last two forms were not signed by the Claimant and it was accepted that Ms Dombo completed

the form at page 91 herself.

23. I accept Mrs Dombo's evidence that the Claimant asked that she be paid for the days she was not able to come to work and Mrs Dombo agreed to treat those days as holiday. I found Mrs Dombo 's account to be consistent with the documents and I find on the balance of probabilities that it is more likely than not that the Claimant asked to be paid for the days on which she was absent and that Mrs Dombo told her that those days would be treated as holiday in order for the Claimant to be paid.
24. I find that the Claimant worked an average of 3.5 days per week over the duration of her employment with the Respondent and accrued an entitlement to 12.14 days, (rounded up to 13 days). She was paid for 13 days holiday.
25. I am satisfied on the evidence before me that the Claimant was absent from work on the dates recorded in the holiday request sheets and was paid for those days. On two of the days she was recorded as being absent for holiday and wa paid holiday pay she was in fact unfit for work.
26. I accept Ms Dombo's evidence that the Claimant asked that she be paid for the days she was not able to come to work and Mrs Dombo agreed to treat those days as holiday and that she understood the Claimant agreed to this. I am satisfied on the balance of probabilities that the Claimant had agreed to this arrangement at the time.
27. I do not find that the Respondent has manufactured or deliberately falsified any evidence. The Claimant has made a number of unfounded allegations in respect of fabrication of documents as well as assertions in respect of her entitlement to pay generally for which there is no contractual or evidential basis. I am unable to prefer her evidence to that of Mrs Dombo.
28. The Claimant has not established she worked on any days for which she has not been paid.

Mileage claim

29. The contract did not contain any provision in respect of claiming, or the calculation of, any mileage claims.
30. The Respondent accepted that it was its practice to pay staff mileage if they used their own cars for work purposes but that staff were requested to submit mileage sheets together with receipts for any fuel at the end of each month. The Respondent disputed that the Claimant was expected or required to use her own car regularly. The Respondent maintained that from August 2019 onwards it made a car available for staff which the Claimant used on a regular basis. Mr Agyare accepted that on 5, 9 and 27th of July 2019 the Claimant used her own car for work. She was asked to submit a mileage sheet after completing visits to clients but did not do so and instead complained that the sheet was too complicated and suggested that she would produce a simpler claim form for mileage. This was never received by the Respondents.

31. On 31 July 2019 Mr Agyare paid the Claimant £20 for each of those days. This was more than the amount she would have been paid had she claimed the actual mileage.
32. On 2 September Mr Agyare told the Claimant to use an app when visiting client's homes which would then record her mileage. Having checked the Respondent's computer system Mr Agyare found that none of her visits were recorded. In response to the Claimant's claim for £450 in respect of mileage Mr Agyare checked the Respondent's records and was able to provide the information set out at paragraph 15a-h of his witness statement. He described the Claimant's claim for £450 as appearing to be an "inflated guess".
33. The Claimant told the tribunal that she regularly used her car for work and that she would submit mileage sheets on a regular basis but these were ignored. The only evidence the Claimant was able to provide in support of her claim for mileage was a number of parking vouchers which she says show that she had parked near to where service users lived on a number of different occasions. She maintained that in order to have these in her possession they must have been in her car and this showed she had used her own car and not the Respondent's car.
34. The Claimant had not provided any evidence in respect of the number or length of any journeys, or any proper basis to calculate or estimate the amount of miles for which she was claiming. She told the Tribunal that she had printed off the details from the AA website or from Waze and gave that to her manager to show her mileage and had not kept any copies.
35. The Claimant did not suggest there was any agreement for mileage rates per mile or fuel usage. She estimated that on each day that she used her car for work she would drive 7 miles on average. The Claimant is claiming the sum of £450 for mileage; of that sum £250 was for petrol. The Claimant accepted it was a rough calculation and she did not have any documents or proof to establish what if anything was the agreed rate for mileage; that she had submitted the claims for mileage to the Respondent; or that she had in fact incurred the mileage for which she was claiming.
36. The Claimant's former colleague, Ms Richards, gave evidence on her behalf. Ms Richards was employed by the Respondent from 25th of November 2019. She initially told the tribunal that she had witnessed the Claimant submitting mileage documents at the end of every month. She qualified this statement and confirmed that it must have been on only two occasions; probably November and December 2019. She was not able to say whether or how much the Claimant used the company car before November 2019 (when her own employment started). She confirmed that when she started work she was told she had to use the company car and there was no agreed mileage rate. She also confirmed that no new forms were introduced for mileage claims and that she did not witness the Claimant providing completed copies of the Respondent's mileage sheets to the Respondent.

Claim for payments for extra care services

37. The Claimant also claimed that unlawful deductions had been made in respect of the failure to make payments to which she said she was entitled for visits to a particular service user: she valued the claim at £450.
38. The Claimant maintained that it was not within her job role to attend on service users or to provide them with personal care. It was accepted that the Claimant was asked to attend a particular service user's home on a number of occasions. The Claimant had carried out the initial service user assessment for this person in November 2019. The Claimant claimed that she was entitled to be paid an additional £10.00 per hour for the time spent attending the service user at her home. The Claimant accepted that each of the visits was within her normal working hours and that she was paid on those days her usual hourly rate of £10 per hour. She maintained that because she was also visiting the service user and this was beyond her normal responsibility, she should be paid twice, she expected to be paid £20 per hour for the duration of any visits. She acknowledged that there was no written agreement, nor had there been any oral agreement, to this effect and that the carer who was attending the service user at the same time to provide personal care in the normal course of their work would be paid less than £10 per hour.
39. The Respondent disputes that the Claimant was entitled to double pay for those visits. It also maintained that the attendance was never to provide personal care, as the Claimant attended along with a carer. The Respondent asked the Claimant to attend with the carer to avoid the possibility of complaints from the service user that the carer had not attended, or had not done their job properly. The particular service user could sometimes be 'difficult' and had previously alleged that a carer had not attended even though the carer had signed the visit sheet. The Claimant had carried out the initial assessment for this service user as part of her role as Quality Monitoring Officer and was familiar with the service user. The Respondent considered that in the circumstances asking the Claimant to attend along with the carer fell within the Claimant's role as Quality Monitoring Officer. The Claimant was not required to carry out personal care as she did not have the required qualification to do so, although the job description provided for all staff to provide care cover as necessary in an emergency.

Relevant law

40. **Employment Rights Act 1996 Section 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.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

41. The failure by an employer to pay all or any of the employee's wages on time may constitute a deduction from wages under this section: *Elizabeth Claire Care Management Ltd v Francis* [2005] IRLR 858, EAT.

42. Unpaid statutory holiday pay under the Working Time Regulations 1998 can constitute an unlawful deduction from wages under these provisions, even though the Regulations have their own means of recovery: *Revenue and Customs v Stringer* [2009] UKHL 31, [2009] IRLR 677, [2009] ICR 985, HL.

43. **Section 14, Excepted deductions**

(1) 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—

- (a) an overpayment of wages, or
- (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

Sick pay

44. In the absence of an express term, there is no general implied right to sick pay. There was no express term in the Claimant's contract of employment which would give rise to an entitlement to sick pay. There was no evidence of any agreement in respect of qualifying days in this case.

Statutory Sick pay

45. In most cases the employee has to serve three 'waiting days' before being entitled to SSP. The employee must wait not just for three days but for three *qualifying* days (Social Security Contributions and Benefits Act 1992 s 151(1)). This means that the waiting days are not necessarily the first three days of sickness, *qualifying* days will usually be the days of the week on which the employee works. However, it is open to the employer and employee to agree between them what the qualifying days in any week shall be.

46. **Working Time Regulations 1998 (SI 1998/1833) Regulation 14 Compensation related to entitlement to leave**

- (1) [Paragraphs (1) to (4) of this regulation apply where]—
- (a) a worker's employment is terminated during the course of his leave year, and
 - (b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.
- (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
- (3) The payment due under paragraph (2) shall be—
- (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
 - (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

- A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];
- B is the proportion of the worker's leave year which expired before the termination date, and
- C is the period of leave taken by the worker between the start of the leave year and the termination date.

16 Payment in respect of periods of leave

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.
- (5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Conclusions

Unlawful deduction from wages

Overpayment of wages

47. I have accepted the Respondent's evidence that the Claimant had been overpaid in December 2019. I find that the Respondent was entitled to deduct the overpayment from the Claimant's pay in accordance with s 13 of the Employment Rights Act 1996.

Mileage claim

48. The Claimant has failed to provide any evidence to establish that she is entitled to be paid for mileage or to substantiate the amount of her claim for mileage. This claim therefore falls to be dismissed.

Extra payments- attendance on service user

49. There is no contractual or statutory basis for the claim for double pay in respect of attendance on the service user. I find that claim is misconceived. This claim is also dismissed.

Holiday pay

50. I find that the Claimant has been paid for all the 13 days holiday she accrued during her employment with the Respondent. That on two of the days for which she has been paid as holiday she was in fact off sick does not avail her of the entitlement to be paid twice. The Respondent has paid the Claimant for those days, in accordance with the agreement it had with her to treat those days absence as holiday. I am satisfied that those payments have extinguished her claim for payment. in accordance with Regulations 14 and 16 of the Working Time Regulations 1998.
51. The claim for unlawful deductions in respect of holiday pay is therefore dismissed.

Apology

52. This judgment and reasons were prepared in draft on 20 April 2021. The Employment Judge apologises for the time it has taken to approve and send this judgment and reason to the parties which has been due to the overwhelming demands currently placed on judicial time.

Employment Judge Lewis

28 September 2021