EMPLOYMENT TRIBUNALS

Claimant: **Stewart Harper**

Respondent: **North West Anglia NHS Foundation Trust**

Heard at: **Cambridge (by CVP)** **On:** **9 February 2021**

Before: **EJ Shastri-Hurst**

Representation
Claimant: Ms Freeman (HR professional, lay representative)
Respondent: Ms Motraghi (counsel)

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction of wages is not well founded and fails.

REASONS

INTRODUCTION

1. This is a claim brought by the Claimant, by ET1 dated 16 May 2019, the Claimant having gone through the ACAS EC process from 1 March 2019 to 15 April 2019. The Claimant makes a claim of unlawful deduction of wages pursuant to s13 **Employment Rights Act 1996**, stating that he was paid for 20 hours a week rather than 37.5 hours a week from 1 May 2018 to the time of the termination of his contract on 21 June 2019.

2. The Respondent denies that there have been any unlawful deductions, in fact arguing that the Claimant was, for the period claimed, paid over and above his contractual entitlement.

3. In order to assist me in my decision, I have a paginated bundle of 101 pages. I also have a witness statement from Katy Everitt, HR Business Partner for the Respondent, and a statement from the Claimant in support of his case. I have

heard from Ms Everitt and the Claimant who both attended to give oral evidence. I also had the benefit of oral submissions from both Ms Freeman and Ms Motraghi.

4. As a preliminary point, the Claimant set out in his ET1 that his claim was a few days out of time (p14). My view on this, that I canvassed with the parties, is as follows. The Claimant's ET1 refers to claiming for deductions made up to May 2019. Under s23(2)(a) and s23(3)(a) of the **Employment Rights Act 1996**, when there is a series of deductions, a claim must be entered within 3 months of the date of the last payment from which there is said to have been a deduction. At the time of the ET1, the Claimant had received his April payslip; that April payslip has a pay date of 25.04.19 (p66). The Claimant's ET1 was therefore presented within three months of the last deduction claimed within the ET1 under s23(2)(a) and 23(3)(a) ERA.

5. I therefore considered that the claim is in time. Both Ms Freeman and Ms Motraghi agreed with this analysis.

ISSUES

6. At the commencement of the hearing, I went through the issues as I understood them to be with both representatives. They agreed that I had summarised the relevant issues accurately. Those issues are as follows:

   6.1. It is common ground that the Claimant was a worker during the relevant period and that the deductions he claims took place fall within the definition of "wages" in s27 **Employment Rights Act 1996**.
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   6.2. Has the Respondent made a deduction under s13(3) **Employment Rights Act 1996**? This question requires consideration of the following matters:

      6.2.1. What wages were properly payable to the Claimant between the period of 1 May 2018 to the date of termination of his contract on 21 June 2019? In short, the Claimant claims he was paid 20 hours a week when he should have been paid 37.5 hours a week.

      6.2.2. What were the terms of the Claimant's contract?

      6.2.3. Was there any variation to the terms of the Claimant's contract at any time around or after May 2018?

      6.2.4. What was the Claimant entitled to be paid under his contract of employment for the relevant period of the claim?

   6.3. If there was a deduction, was it authorised?

   6.4. If there was a deduction, was it an exempt deduction?

LAW

7. S27(1) **Employment Rights Act 1996** defines wages as:

> "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

8. The Claimant's claim relates to his salary, which falls squarely within this section, and is not an excluded payment under s27(2) **Employment Rights Act 1996**.

9. S13(3) **Employment Rights Act 1996** provides as follows:

> "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. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This is an issue to be decided in line with the approach of the civil courts in contractual actions – **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT**.

11. In other words, the Tribunal must decide, on ordinary contractual and common law principles, the total amount of wages that was properly payable to the worker at the relevant time.

12. In determining the terms of the contract in question, it is necessary to take into account all the relevant terms of the contract, including implied terms – **Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA**.

FINDINGS OF FACT

13. I have restricted my findings to that that are relevant to my consideration of the above listed issues in this matter.

14. The Claimant started working for the Respondent on 4 October 2010 as an Operational Support Manager at Peterborough City Hospital. The Claimant's signed contract of employment is within the bundle at p57, and records that his contracted hours were 37.5 hours a week. I note also that, at clause 6 of his contract (p57B), it is stated:

> "Any changes to your contract of employment will only be made by agreement with you individually or by collective agreements with the JNCC or the NHS Staff Council".

15. In 2016, the Claimant suffered a stroke and was on sick leave until July 2016. He then had another period of sick leave from 27 April 2017, due to work related stress (p58). He did not return to work following this date.

16. Within the bundle, I have two version of the Respondent's Sickness Absence and Attendance Policy. Both versions set out that employees with more than five years' service with the NHS are entitled to be paid six months' full pay and six months' half pay when absent from work due to sickness (pp36I and 36AG). This is also reflected in the Claimant's contract of employment at p57E, clause 19.2.

17. In August 2017, the Claimant's position became redundant. Unusually however, he was not served with notice of redundancy until 26 April 2019. The

reasons and fairness of that process and the Claimant's dismissal, are I understand the subject of another live claim, and are not relevant to the issues I have to decide.

18. The Claimant's pay went down to half pay on 27 October 2017.

19. At some point in spring 2018, the Claimant submitted a grievance. The detail and outcome are not relevant to the issues I have to decide, I simply record its existence within the chronology of events. I note that Caroline Walker (Deputy CEO/Finance Director) recorded in a letter of 3 April 2018 in relation to the ongoing grievance process that she was not able to extend the Claimant's half-pay sick pay, but his outstanding annual leave would be paid to him (p81). That letter also records the Respondent's position that, as at 3 April 2018, there were no suitable alternative roles available for the Claimant, in light of his position being made redundant: the search was to continue.

20. The Respondent referred the Claimant to its Occupational Health Physician ("OHP") to consider the effects of his stroke as well as his work-related stress: the assessment date was 23 April 2018. At that stage, the OHP reported that the Claimant was still not fit to return to work, and that, even when he was fit, he would require an extended phased return. In fact, "a 20-hour contract configured appropriately … or thereabouts" was suggested by the OHP to be appropriate: I refer to the OHP's report at p84.

21. Shortly after the OHP assessment, the Claimant's entitlement to half pay was exhausted, and so from 28 April 2018 he received zero pay.

22. On 1 May 2018, the Claimant received a fit note that marked him as fit to return to work with some restrictions, namely a phased return and workplace adaptations (p62).

23. A meeting took place on 4 May 2018 between the Claimant, Ms Everitt and Ms Walker to discuss both the Claimant's grievance and the OHP's report.

24. Following 4 May 2018, I have seen some communication back and forth between the parties regarding possible suitable alternative employment, that would allow the Claimant to do 20 hours a week (p85).

25. A letter dated 25 May 2018 was sent to the Claimant to record a summary of the 4 May 2018 meeting in which it was mentioned that there may be a potentially suitable role available in the HR Department (p86). It also recorded that the Claimant had agreed at the 4 May 2018 meeting that he agreed with the content of the OHP report.

26. I note at this stage that the Claimant accepted in his evidence to me that, following the OHP report and the fit note of 1 May 2018, no further medical evidence was provided to the Respondent which stated that the Claimant was fit and able to work more than 20 hours a week.

27. The possible HR role was further explained in a letter of 8 June 2018 (p88), in which Ms Everitt, in relation to this role, wrote:

> "Because Occupational Health have confirmed that it is unrealistic for you to attempt to return to a full time post given your ongoing symptoms (particularly the undue fatigue) and

> that a 20-hour contract would be appropriate, the Trust will take steps to ensure that this adjustment is made to your contractual hours going forwards and we can discuss this when we meet. This means that your contractual hours of work will reduce to 20, and your pay will be amended accordingly."

28. Much was made of this statement in cross-examination of Ms Everitt, however it is both parties' case that this statement did not alter or vary the Claimant's contract. When read in the wider context of the full letter, it is clear that this statement from Ms Everitt relates to the possible HR role that she had identified for the Claimant. Again, it appears to be both parties' cases that, if the option of this role had been agreeable to the Claimant, there would have been further meetings and discussions with the Claimant in order to iron out the contractual terms of that new HR position. In the event, the Claimant did not consider this role suitable, and so no such further discussions took place. I therefore take the same view as the parties, that nothing in the 8 June 2018 letter varies (or even attempts to vary) the Claimant's terms of employment.

29. Ms Freeman pointed out that the HR role at p88 was a supernumerary role, and questioned therefore why a role could not have been created, not within the HR department, but within an area that was compatible with the Claimant's skills and expertise. Again, I remind myself that the issue before me is one of contractual interpretation and wages. Issues of what steps the Respondent took to find suitable alternative employment for the Claimant during the period from 27 April 2017 up to his dismissal are issues relevant to the Claimant's other live claim. I therefore make no findings as to the reasonableness or otherwise regarding the ability of the Respondent to create supernumerary roles.

30. The Claimant submitted a further grievance to the Chairman of the Board of Governors of the Respondent in November 2018 (p89A).

31. By letter of 12 February 2019, from the Chairman of the Respondent, Mr Rob Hughes, the Claimant was informed that:

> "…pending the resolution of matters relating to your return to work/redeployment, the Trust will resume paying you a salary equivalent to 20 hours per week and this payment of salary will be backdated to 1 May 2018".

32. The Claimant responded by letter of 4 March 2019 in which, *inter alia*, he sought full reinstatement of his full pay (at the 37.5 hours a week rate) from 27 October 2017

> "because [he] was fit to return to work at this time subject to Occupational Health assessing the suitability of genuinely vacant roles…" – p95.

33. The Claimant was served with notice of redundancy and his employment with the Respondent terminated on 21 June 2019. At the point of his redundancy, he received a redundancy payment based on his annual salary calculated at the rate of 37.5 hours a week (p101).

CONCLUSIONS

34. I will take the issues I have set out above in turn.

What were the terms of the Claimants contract applicable at the relevant time?

35. The contract terms that governed the Claimant's pay generally were as follows:

    35.1. The claimant was on a full-time contract of 37.5 hours a week, and would be paid for those hours when at work.

    35.2. When on prolonged sick leave, the Claimant was entitled to full pay for six months and half pay for six months.

Was there a variation to those contract terms?

36. I conclude that the Claimant's contractual terms relating to pay were not varied, whether unilaterally or by agreement from those I have set out above.

37. As above, the contractual terms can only be altered by agreement: I have seen no evidence of any such agreement, and indeed neither party avers that there was any such agreement to vary the Claimant's terms of employment.

38. The only documentation that the Claimant points me to in order to demonstrate that the Respondent sought to unilaterally change his pay terms is the letter of 8 June 2018, and I have dealt with my findings on that above. In short, that letter does not constitute a variation of the Claimant's terms of pay. I also accept Ms Everitt's evidence that it was not intended to constitute a unilateral change: there is no evidence to contradict her oral and written evidence that this was not her intention, and I found her evidence on this point credible, particularly given the context of the letter being in relation to a potential role, rather than a definite role for the Claimant.

39. The Claimant's contractual terms therefore remained unchanged during the relevant chronology of this case.

What was the Claimant entitled to be paid under his contract of employment for the relevant period of the claim?

40. Given the Claimant's sickness absence started on 27 April 2017, he was entitled to be paid at his full-time rate (37.5 hours a week) up to 27 October 2017. He was then entitled to be paid at half that rate up to 27 April 2018. His contractual right to occupational sick pay was exhausted from that point onwards and he was entitled to be paid nothing.

41. Ms Freeman argues on the Claimant's behalf that, from the point of receipt of the GP's fit note of 1 May 2018, the Claimant was no longer on sickness absence, but was kept from returning to work as the Respondent could not accommodate the requirements of a phased return with adjustments. Ms Freeman therefore argues that the Claimant should have been on full pay.

42. I do not accept this argument. As I have set out, the Claimant's contract as found at p57 remained unaltered. He was therefore contracted to provide 37.5 hours of service to the Respondent every week. He was not fit to perform his role for those number of hours. He therefore cannot be deemed as fit to return to his contractual role, and I therefore find that he was correctly categorised as remaining on sick leave after 1 May 2018.

43. Ms Freeman also averred that the fact that the Respondent used the Claimant's full-time salary to calculate his redundancy payment demonstrates that his correct rate of pay throughout the course of his employment was 37.5 hours a week.

44. I reject this argument. The Respondent's Agenda for Change terms regarding redundancy are at p42 of the bundle. Within those terms, at clause 16.8, it is recorded that:

> "The lump sum will be calculated on the basis of one month's pay for each complete year of reckonable service, …"

45. Further, I also have sight of the Respondent's redundancy FAQs at p45, which states that:

> "payment should be calculated on the basis of the employee's "normal working hours"…".

46. This must be correct when considering the statutory framework for redundancy payments, set out (in part) at s162 **Employment Rights Act 1996**, and the intention behind a redundancy payment to compensate an employee for their length of service with an employer. It would make a mockery of redundancy payments if employers could legitimately argue that redundancy payments should be calculated on the pay that an employee happens to be receiving at the point that the redundancy takes effect. To take an extreme example, this logic would mean that an employee, employed for decades, who happened to have exhausted their entitlement to sick pay at the point of redundancy, would be entitled to a redundancy payment of zero.

47. I therefore conclude that the method of calculation of the Claimant's redundancy pay has no bearing on the Claimant's entitlement to pay between 1 May 2018 and 21 June 2019 as I have set out above.

What sums were properly payable?

48. Given my findings and conclusions above, it follows that, for the period the Claimant claims, he was entitled to zero pay. Therefore, the salary properly payable between 1 May 2018 and 21 June 2019 was zero.

49. As the Claimant received pay equating to 20 hours a week for that period, he has received over and above the figure to which he was contractually entitled. I therefore find that there have been no deductions from wages in this matter.

Employment Judge Shastri-Hurst

3/3/21

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS