



EMPLOYMENT TRIBUNALS

Claimant: Miss L Netherton

Respondent: Jhoots Pharmacy Limited

On: 20 April 2022
21 April 2022
16 May 2022 (in Chambers)

Before: Employment Judge McAvoy News

Heard at: Leeds Employment Tribunal

Appearances:

For the Claimant: In person

For the Respondent: Mr B Hendley, Consultant

RESERVED JUDGMENT

1. The Claimant's claim for unauthorised deductions from wages in respect to the:
 - a. 'RX compliance deductions' **succeeds**, following the Respondent's concession; and
 - b. shortfall in her wages **succeeds**, following the Respondent's concession.
2. The Respondent is ordered to pay the Claimant the sum of **£1,145.36**. This is a gross sum and the Claimant is required to account for any income tax and/or national insurance contributions which may be due on it.
3. The Claimant's claim for unauthorised deductions from wages in respect to the annual leave allegedly taken on 25 and 26 December 2018 and 12 and 13 September 2019 is not well founded and is **dismissed**.

REASONS

Issues

1. The Respondent conceded the Claimant's claim for unauthorised deductions from wages in respect to the 'RX compliance deductions' and the shortfall in her wages between July 2018 and January 2020. Consequently, the issues that I had to determine were limited to the following:
 - a. Are the Claimant's claims in time? If not, should discretion be exercised to extend time?;
 - b. Did the Claimant take annual leave on 25 and 26 December 2018 and 12 and 13 September 2019?;
 - c. If so, was the Claimant paid her holiday pay?; and
 - d. If not, what holiday pay is due to her?

Evidence

2. The Claimant had not prepared and exchanged a witness statement. Consequently, it was agreed between the parties and me that the contents of her claim forms and her schedule of loss would comprise her evidence. The Respondent adduced evidence from Mr Jhooty. Both the Claimant and Mr Jhooty were cross examined on their evidence. I was provided with a lengthy bundle of documents including approximately 30 pages of additional documents provided by the Claimant during the course of the hearing.

Findings of fact

3. On 25 January 2019, the Claimant started the ACAS early conciliation process for the first time. That process concluded and the certificate was provided on 25 February 2019.
4. On 30 October 2019, the Claimant then lodged her first claim in the Tribunal. This claim was for unauthorised deductions from wages relating to:
 - a. deductions referred to in these proceedings as 'RX compliance deductions'. It was alleged that these deductions had been made since January 2019 on a monthly basis;
 - b. other unparticularised deductions from her wages which I have referred to in these Reasons as the claim regarding the shortfall in her wages; and
 - c. unpaid holiday pay.

5. On 23 October 2020, the Claimant started the ACAS early conciliation process for the second time. This process concluded on 23 November 2020 and the certificate was provided on that date.
6. On 23 December 2020, the Claimant lodged a further claim in the Tribunal. This stated: *"The Claimants have been paid incorrectly since July 2019 until the date they were dismissed. The amount the Claimants have received in wages does not correspond with the hours the Claimants have actually worked"* [111].
7. In her schedule of loss, the Claimant claimed £136.94 in respect to the claim concerning the RX compliance deductions. The Claimant agreed during the course of the evidence that she has received all outstanding payments from the Respondent regarding the RX compliance deductions, save as for the sum of £34.52. The Respondent conceded that this was owed to the Claimant.
8. In respect to the other unparticularised deductions from her wages, she claimed £1,110.84 regarding deductions from 14 July 2018 to 15 January 2020. This claim was conceded by the Respondent.
9. In respect to her holiday pay claim, this was originally for 28 hours that she was not permitted to take in 2018 [53]. She said that this ought to have been paid on or around 15 January 2019. Then, in her schedule of loss, she stated: *"At the time of her dismissal the Claimant was owed 4 days unpaid holidays. The Claimant worked 7 hours a day at the rate of £8.21"* [537]. It was acknowledged at the outset of the hearing that this claim was wholly unclear.
10. During the course of the hearing, it was clarified that the Claimant was claiming holiday pay as follows:
 - a. 7 hours on 25 December 2018;
 - b. 7 hours on 26 December 2018;
 - c. 7 hours on 12 September 2019; and
 - d. 7 hours on 13 September 2019.
11. The Respondent had no objection to me considering this claim however the Respondent did not concede them.
12. The Claimant's pay slip of 10 January 2019 stated that no payment for annual leave was given to the Claimant. However the parties accepted that the Claimant was on annual leave on 25 and 26 December 2018, as these were bank holidays. The parties also accepted that, if annual leave was due for these dates, it would be recorded on this particular pay slip.
13. The Claimant's pay slip of 15 October 2019 stated that the Claimant was paid for 7 hours of annual leave. This was for annual leave which she said she took on 3 September 2019. However, the Claimant's evidence was that she was on holiday

for two other days, on 12 and 13 September 2019, and therefore she ought to have received a payment for 21 hours of annual leave, rather than seven.

14. The Claimant provided her attendance register record for September 2019. This noted at the bottom that the Claimant had “2 days holiday 12+13”. The attendance register record did not show the Claimant being in work on these dates. However, it did show her being in work on 3 September 2019, a day on which she was allegedly on holiday. The Claimant accepted that she had no other evidence of her being on holiday on 12 and 13 September 2019 or these holiday dates being authorised.
15. The Claimant’s final pay slip, dated 15 August 2020, stated that two separate annual leave payments were being made to her. One was for £620.86 representing 71.20 hours of work. The other was for £99.28 representing 12.68 hours of work.
16. In evidence Mr Jhooty said that the £620.86 representing 71.20 hours of work was for the Claimant’s annual leave which accrued but was not taken prior to the Claimant’s dismissal in the 2020 holiday year. He said that the £99.28 representing 12.68 hours of work was for holiday pay from 2018 which had not been paid to the Claimant. It was however unclear from the evidence how this was calculated and which dates this payment represented.

The Law

17. Pursuant to section 13(1) of the Employment Rights Act 1996 (the “ERA”):

“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.”

18. Section 23(2) of the ERA states that, subject to subsection (4), a Tribunal shall not consider a claim for unlawful deduction from wages:

“unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made”

19. Section 23(3) of the ERA states:

“Where a complaint is brought under this section in respect of --- a series of deductions or payments... the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series...”

20. Section 23(4) of the ERA states:

“Where the Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable”.

21. In ***Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221***, EAT, it was held that whether there is a ‘series’ of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. However, a gap of more than three months between any two deductions will break the ‘series’ of deductions.

22. In ***Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors 2019 NICA 32, NICA*** — a decision that is not binding in Great Britain — the NICA declined to follow the ruling of the EAT in ***Bear Scotland*** as to the meaning of a series of deductions. Thus, in the NICA’s decision, a series of deductions was not broken by a gap of three months or more. This case has been appealed to the Supreme Court.

23. The Court of Appeal in ***Smith v Pimlico Plumbers Ltd 2022 IRLR 347***, expressed the ‘strong provisional view’ that the NICA’s decision in Agnew is correct. In the Court of Appeal’s view, there was nothing in S.23(3) ERA to support the Bear Scotland interpretation of a ‘series of deductions’.

24. Following ***Porter v Bainbridge 1978 ICR 943***, the Claimant has to satisfy the Tribunal not only that he did not know of his rights throughout the period preceding the complaint and there was no reason why he should know, but also that there was no reason why he should make enquiries. In this regard, the burden of proof is on the Claimant.

25. Following ***Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372***, the term ‘reasonably practicable’ means something like ‘reasonably feasible’.

26. Lady Smith in ***Asda Stores Ltd v Kauser EAT 0165/07*** explained: ‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.

Submissions

27. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

28. In respect to the holiday pay claim, the Claimant submitted that a payment for all four days was due. The Respondent conceded that the Claimant *may* be entitled to

holiday pay for 25 and 26 December 2018 but disputed any entitlement to the other days claimed.

Conclusions

Unauthorised deductions from wages – RX compliance deductions

29. As found above, in her schedule of loss, the Claimant claimed £136.94 in respect to the claim concerning the RX compliance deductions. The Claimant agreed during the course of the evidence that she has received all outstanding payments from the Respondent regarding the RX compliance deductions, save as for the sum of £34.52. The Respondent accepted that the Claimant was owed this sum. Consequently, this claim is upheld in respect to the outstanding sum of £34.52.

Unauthorised deductions from wages – shortfall in wages

30. Following the Respondent's concession, this claim is upheld. The Respondent should pay the Claimant the sum of £1,110.84.

Unauthorised deductions from wages – holiday pay

31. The Claimant expected to receive her holiday pay for the holidays that she took on 25 and 26 December 2018 on or around 10 January 2019.

32. The Claimant started the ACAS process on 25 January 2019 which concluded on 25 February 2019. However, she did not lodge her claim until 30 October 2019. In doing so, she brought this claim for unauthorised deductions from wages significantly outside the time limits mentioned earlier.

33. The Claimant expected to receive her holiday pay for the holidays that she said she took on 12 and 13 September 2019 on or around 15 October 2019. As she lodged her claim on 30 October 2019, her claim regarding these deductions is in time.

34. I have had to consider whether the deductions on 10 January 2019 and 15 October 2019 form part of a series of deductions. Pending the Supreme Court's decision in **Agnew**, I am bound by the EAT's decision in **Bear Scotland Ltd**. As there was a gap of greater than three months between these two alleged deductions, they do not qualify as a series and therefore the claim regarding the 10 January 2019 deduction has been presented outside of the normal time limits.

35. I heard no evidence from the Claimant about the reason for any delay on her part in bringing this claim. I note that the Claimant was legally represented at the time of lodging it. Consequently, I find it was reasonably practicable for her to present this claim in time. I do not exercise my discretion to extend time and therefore the claim regarding the 10 January 2019 alleged deduction is dismissed.

36. The only evidence before me suggesting that the Claimant was on holiday on 12 and 13 September 2019 is the earlier mentioned attendance register record for September 2019. However, this shows the Claimant to be in work on 3 September

2019, a day which the Claimant said she took as annual leave. Consequently, I do not consider the evidence contained in this record to be reliable.

37. For this claim to succeed, it is for the Claimant to persuade me, on the balance of probabilities, that she was on holiday on 12 and 13 September 2019. She has not provided me with any persuasive evidence confirming that she was. Therefore, she has not done so. Consequently, this claim is dismissed.

Employment Judge McAvoy News

17 May 2022