



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103311/2022

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Held via Cloud Video Platform (CVP) in Glasgow on 14 November 2022

Employment Judge McCluskey

10 **Miss S Gemmell**

**Claimant
Represented by:
Ms D Smith -
Friend**

15 **Palmaris Services Limited**

**First Respondent
Represented by:
Ms Z Kerr - Trainee
Solicitor**

20 **Patersons Quarries Limited**

**Second Respondent
Represented by:
Ms Z Kerr - Trainee
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Tribunal is that:

1. the claim of unlawful deduction from wages against both the first respondent and the second respondent is not well founded and is dismissed; and
 2. the claim of sex discrimination against both the first respondent and the second respondent is dismissed having been withdrawn as the case management hearing on 12 August 2022.
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REASONS

Introduction

1. The claimant brings a claim of unlawful deduction of wages. She alleges that she has not been paid her contractual sick pay entitlement during a period of sickness absence. ACAS Early Conciliation commenced on 16 May 2022 and ended on the same date. She lodged her ET1 claim form with the Tribunal on 15 June 2022. The first respondent Palmaris Services Limited is wholly owned by the second respondent Paterson Quarries Limited.
2. The claimant gave evidence on her on behalf. The respondents led evidence from Ms Lorna Gall, Director of the second respondent and Mr Joseph McEwan, Management Accountant.
3. The respondents prepared a joint bundle of documents. The Tribunal told parties that only documents to which the Tribunal were referred, during the course of evidence from witnesses, would be read by the Tribunal.

15 Issues

4. Does the claimant have an entitlement to contractual sick pay? If so, what are the terms? Were the wages paid to the claimant less than those properly payable to her?

Findings in fact

5. The claimant is employed as a sales ledger administrator and credit controller by the first respondent. The claimant continues to be employed by the first respondent. The claimant is paid each month by the first respondent.
6. The first respondent provides facilities management services to clients across Scotland. They provide their services to a variety of industries, including shopping centres and offices.
7. The first respondent Palmaris Services Limited is a wholly owned subsidiary of the second respondent Paterson Quarries Limited. Ms Lorna Gall, Director of the second respondent and Mr Joseph McEwan, Management

Accountant, carry out management functions for the first respondent. Ms Gall has responsibility for HR for the first respondent. Mr McEwan was the claimant's line manager from 2001 until 2014.

8. The claimant commenced employment in or around 1990 with Custom Group. Custom Group was also known as Whyte Group.
9. In 2001 the claimant's employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) from Custom Group to Palmaris Capital Plc.
10. At the time of the transfer the claimant did not have a written contract of employment with Custom Group or Whyte Group or with any other transferor legal entity.
11. At the time of the transfer Mr William Paterson was a director of Palmaris Capital Plc. Mr Paterson was the father of Ms Gall. At the time of the transfer Ms Gall worked for the Palmaris group of companies.
12. Around the time of the transfer Mr Paterson told Ms Gall that Custom Group did not have good paperwork and that there were no contracts of employment for transferring staff.
13. Around the time of the transfer Ms Gall heard Mr Paterson and Mr Jim Richardson, another director of Palmaris Capital Plc, talking about the transfer. She heard them saying that there were no employment contracts for transferring staff and no payroll records.
14. In around May 2005 the claimant's employment contract transferred under TUPE from Palmaris Capital Plc to the first respondent. The lawyers asked Mr Richardson about employment contracts for transferring staff. The sale documentation showed that there were no contracts.
15. Mr McEwan was the claimant's line manager from 2001 to 2014. On 14 February 2011 the claimant returned to work after a one-day absence. Mr McEwan met with the claimant on that date and conducted a return-to-work meeting with her. Mr Andy Robertson, Commercial Director also attended the meeting. The claimant had had 22 days of sickness absence in the previous

12 months. There was a discussion about the need to reduce her sickness absence in the next 12 months.

16. After the return-to-work interview Mr McEwan completed a return-to-work interview form. The form recorded that there had been a discussion about the level of her sickness absence and the need to reduce this. Mr McEwan gave the form to the claimant together with a written contract of employment (the 2011 contract). The contract was dated 14 February 2011. He asked her to sign both.
17. The 2011 contract contained a clause which *stated "The amount of Company Sick Pay that you are entitled to varies according to length of service. Employees are entitled to one week's full pay for each year of service up to a maximum of five weeks' pay for five or more years' service. An employee's Company Sick pay entitlement will be calculated in accordance with their length of service on the first day of absence and any Company Sick Pay paid in the twelve months' prior to the first day of absence will also be taken into account."*
18. The claimant did not sign the return-to-work interview form. A few days later she said she would not be signing the 2011 contract as there were a few things which were not correct and she was taking legal advice. She disputed the start date of 1994 and said that she had started in 1990. Mr McEwan did not know what other things she said were not correct. The claimant said she had an original employment contract and would be sticking to that. Mr McEwan asked to see the original contract and asked her to put something in writing to him with her concerns. The claimant did not provide him with a copy of the original contract or put any concerns in writing to him. The claimant did not sign the 2011 contract.
19. In the years following the issue of the 2011 contract the claimant had various short periods of sickness absence. The claimant received full pay for these absences. She was not absent on sick leave for more than five weeks in a twelve-month period. On occasion the claimant would take holidays to cover a period of sickness absence.

20. The claimant had a period of sickness absence from 13 December 2021 until 23 May 2022. During this absence she was paid full pay for five weeks in accordance with the 2011 contract. She received statutory sick pay thereafter.
21. On 7 February 2022 the claimant raised a formal grievance against the first respondent. She alleged unlawful deduction from wages concerning her contractual sick pay entitlement.
22. A grievance meeting took place on 3 March 2022. The grievance was heard by Ms Gall. At the grievance meeting the claimant alleged that she was entitled to full pay when off sick, without limit of time. She alleged that she had a written contract of employment which pre-dated the TUPE transfer in 2001. She alleged that this contract provided for full pay for all sickness absences. She was unable to provide a copy of this contract to Ms Gall. She alleged that she had not received the 2011 contract.
23. Following the grievance meeting Ms Gall instructed a search of the respondents' archives and computer systems to look for a contract of employment for the claimant, which pre-dated the TUPE transfer in 2001. No contract of employment was found. She asked Mr Paterson and Mr Richardson if they had any recollection of a contract of employment for the claimant which pre-dated the 2001 transfer. They had no such recollection. They told Ms Gall that there had been no contracts of employment for any transferring staff which had been given to Palmaris Capital Plc at the time of the transfer in 2001.

Relevant law

24. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.
25. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

Submissions

26. Both parties made submissions which the Tribunal considered carefully. For the sake of brevity, they are not repeated in full here.

27. The first respondent submitted that no contract of employment had ever existed prior to the 2001 transfer. The claimant had not proven on a balance of probabilities either that such a contract existed or that she had an entitlement to contractual sick pay on the terms she alleged. The claimant had changed her evidence about the terms of any such entitlement to sick pay, from full pay without limit of time to six months full pay and six months half pay. This called into question the reliability of the claimant's evidence. She had no entitlement to full pay when sick without limit of time nor any entitlement to six months full pay and six months half pay. The first respondent had honoured its contractual commitment by paying five weeks full pay followed by statutory sick pay during the claimant's sickness absence. There had been no unlawful deduction from wages.

28. The claimant submitted that in 2001, at the time of the TUPE transfer, the transferee should have provided all transferring employees with a summary of their expectations of employees following the transfer. This did not happen. The claimant assumed that the transferee company had a copy of her contract of employment which she had been given by Custom Group / Whyte Group. It was not the responsibility of the claimant to provide her new employer with a copy of her contract of employment. If the first respondent had given her a written contract in 2011, which it said she did not sign, why had the first respondent not followed up in writing requiring a response. The first respondent has not followed employment legislation in relation to TUPE processes which has led to a "he says, she says" situation. The claimant has an entitlement to full pay for six months and half pay for six months when she is off sick. She did not receive this entitlement during her recent sickness absence. There has been an unlawful deduction from her wages.

Discussions and decision

29. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.
- 5 30. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence (or non-occurrence) of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred (or did not occur) as the case may be.
- 10 31. The Tribunal found the respondents' witnesses to be credible and reliable. After Ms Gall heard the claimant's grievance in March 2022, she instructed a search of the respondents' paper archives and computer systems to try to locate a contract of employment for the claimant which predated the TUPE transfer in 2001. She asked Mr Paterson and Mr Richardson, who had been directors of Palmaris Captial Plc in 2001, if they had any recollection of a contract of employment for the claimant and the terms of any such contract. 15 They told her that there were no contracts of employment for any transferring employees in 2001.
- 20 32. The Tribunal accepted the evidence of Ms Gall. The Tribunal accepted that she had made genuine attempts to locate an employment contract for the claimant which contained the term about contractual sick pay upon which the claimant sought to rely. The Tribunal accepted that she also made genuine attempts to find out if those who had been present in the business in 2001 had information to support the claimant's position. The Tribunal accepted that, having done so, Ms Gall was unable to find any documentation or information 25 which supported the claimant's position. The Tribunal accepted that Ms Gall was entitled to rely on the information provided to her by Mr Paterson and Mr Richardson who had been directors at the time of the 2001 transfer together with the outcome of the search of the paper archives and the computer systems.
- 30 33. The claimant was unable to provide the first respondent with a copy of the contract of employment which she said she had been given and which

predated the 2001 transfer. The recollection of the directors in 2001 was that employees did not have contracts of employment. At the time of the subsequent transfer in 2005 the sale documentation showed that that there were no contracts. For these reasons the Tribunal preferred the evidence of the first respondent and determines that there was no such contract of employment.

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34. The Tribunal found there to be inconsistencies in the claimant's evidence about the terms of any entitlement to contractual sick pay. The claimant alleged in her ET1 claim form that her contractual terms on transfer in 2001 included "full pay for any and all absence due to illness". The claimant made the same allegation in her grievance meeting on 3 March 2022. The claimant maintained this allegation at the outset of her evidence in chief. When cross examined, the claimant alleged that her entitlement to contractual sick pay on transfer in 2001 was "six months full pay and six months half pay". The Tribunal found this to be a significant change in the evidence of the claimant. The claimant sought to explain that she had made a mistake in her evidence in chief. The Tribunal noted that the claimant had made the same allegation about full pay for sickness absence without limit of time in her formal grievance and in her ET1 claim form. It appeared to the Tribunal that this was more than a mistake made only in evidence in chief. For these reasons the Tribunal found the claimant's evidence about the terms of any entitlement to contractual sick pay, as alleged by her, to be unreliable. The Tribunal preferred the evidence of the first respondent and determines that the claimant did not have an entitlement to sick pay without limit of time or sick pay for six months full pay and six months half pay.

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35. The Tribunal noted that the claimant had, on occasion, taken holidays to cover a period of sickness absence. The Tribunal determines that this action was inconsistent with the allegation that the claimant had an entitlement to contractual sick pay for all absences without limit of time. This was also inconsistent with the claimant's alternative allegation that she had a sick pay entitlement to six months full pay and six months half pay. The Tribunal noted that the claimant's periods of sickness absence prior 13 December 2021 had

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been short term and would have been covered by any entitlement to six months full pay and six months half pay.

5 36. There was a dispute between the claimant and Mr McEwan about whether the claimant had received the 2011 contract on 14 February 2011 after her meeting with him on that date. The claimant said she had not received that document. The Tribunal preferred the evidence of Mr McEwan that he had given her the 2011 contract on 14 February 2011. This is consistent with the claimant having no written contract of employment prior to that. This is consistent with the concern of the first respondent in 2011 about the level of the claimant's absences and the need to address these as documented in the completed return-to-work interview form, which the claimant accepts that she received.

10 37. The Tribunal accepted Mr McEwan's evidence that the claimant said to him that she had an original employment contract and would be sticking to that. This is consistent with the allegation advanced by the claimant in this claim, namely that she had contractual terms which were more favourable to her than that which the first respondent understood to be the case. The Tribunal accepted that Mr McEwan asked to see the original contract and asked her to put something in writing to him with her concerns but the claimant did not do so. In submissions the claimant said that the first respondent did not follow up with the claimant about the 2011 contract which evidenced that it had not been given to her.

15 38. The Tribunal agrees that it would have been helpful if there had been follow up with the claimant about the 2011 contract and the comments she had made about an original contract. But the lack of follow up did not mean that the 2011 contract was not given to her. There was a catalyst for giving her the contract in 2011 given the lack of contracts and concerns about her absences which the first respondent wished to resolve. On balance the Tribunal was satisfied that this contract had been given to her.

20 39. For completeness, it was not disputed by the first respondent that there had been a TUPE transfer of the claimant's employment to Palmaris Capital Plc in 2001. It was not disputed that on a transfer of her employment under TUPE in 2001, the claimant's existing terms and conditions of employment, including

any term about contractual sick pay, would have transferred. There was then a subsequent transfer of the claimant's employment under TUPE in 2005 and she transferred to the first respondent. It was not disputed that on a transfer of her employment under TUPE in 2005, the claimant's terms and conditions of employment at that time would have transferred.

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40. For the reasons given above, on the balance of probabilities the Tribunal determined that the claimant did not have a written contract of employment which predated the 2001 transfer. On the balance of probabilities, the Tribunal determined that the claimant had no contractual entitlement to full sick pay for absences, without limit of time, which predated the 2001 transfer and which would have transferred under TUPE. Nor did she have any contractual entitlement to full pay for six months and half pay for six months which predated the 2001 transfer and which would have transferred under TUPE. The claimant did not allege any other contractual entitlement to company sick pay for which she had not been paid, as an alternative to being paid without limit of time or for six months full pay and six months half pay. The Tribunal determined that there was no unlawful deduction of wages by the first respondent or the second respondent. The claims against both respondents are dismissed.

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Employment Judge: Jacqueline McCluskey
Date of Judgment: 15 December 2022
Entered in register: 16 December 2022
and copied to parties

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