



EMPLOYMENT TRIBUNALS

Claimant: Dr. A. Raithatha

Respondent: Bedfordshire Hospitals NHS Foundation Trust

Heard at Watford Employment Tribunal

On: 19 April 2024

Before: Employment Judge S. Matthews

Representation

Claimant: Miss Crawshay-Williams (Counsel)

Respondent: Miss Moss (Counsel)

RESERVED JUDGMENT

1. The complaint of unlawful deduction from wages is not well founded and is dismissed.
2. The claimant's claim that there has been a failure to provide section 1 Employment Rights Act particulars of employment is dismissed upon withdrawal by the claimant.

REASONS

Claims and Issues

1. The Claimant, a doctor, provided regular locum services to the Respondent at Luton & Dunstable University Hospital from 14 February 2022 until 12 July 2023. His employment status was that of a worker in respect of the relevant legislation, the Employment Rights Act (ERA) 1996. The Respondent is an NHS Foundation Trust, responsible for managing services at Bedford Hospital and Luton and Dunstable University Hospital.
2. The claimant brings a claim for unlawful deduction of wages under s. 23 ERA 1996. ACAS conciliation commenced on 30 June 2023 and ended on 11 August 2023. The claimant issued his claim on 11 September 2023. He

ticked boxes at section 8.1 of his ET1 form claiming 'holiday pay' and 'arrears of pay'.

3. The claim is particularised in the Schedule of Loss (40) and the claimant's witness statement (AR/58) for the 'Relevant Period', 14 February 2022 to 12 July 2023 (AR/58):

Over the entire Relevant Period, the Claimant should have been paid a total gross figure of £240,925.28 comprised of:

1. £214,942.50 for the correct basic pay which he should have received in accordance with the correct rates of pay for the entire Relevant Period; and
2. £25,943.56 to represent the figure of 12.07% of his expected basic pay to represent the correct amount of rolled up holiday pay.

£214,942.50 + £25,943.56 = £240,886.06

Over the entire Relevant Period, the Claimant was actually paid a total gross figure of £238,483.06, comprised of:

1. £223,577.92 for basic pay; and
2. A total of £14,905.14 in payments which were labelled "WTD" on his payslips, and therefore represented rolled up holiday pay.

£223,577.92 + £14,905.14 = £238,483.06'

Therefore, the Claimant claims that the total amount owed to him in respect of loss of earnings and rolled up holiday pay is £2,403.00 (£240,886.06 – £238,483.06)

4. The respondent defends the claim on the grounds that the holiday was included in the hourly rate (G of R/10). It states that the claimant has in fact been overpaid by the net sum of £10,500 (G of R/12). It accepts that the payslips do not accurately itemise the holiday pay (G of R/ 8).
5. At the beginning of the hearing, I discussed the issues to be decided with the parties' representatives. Counsel for the claimant confirmed that the claimant was bringing a claim for holiday pay through the right not to suffer unlawful deductions under s. 13 ERA 1996.
6. It was agreed that the issue I need to decide is the hourly rate which was 'properly payable'. Specifically did the rate the claimant was paid include holiday pay or should holiday pay have been paid in addition at 12.07% of the hourly rate?
7. The respondent has pleaded a claim for 'Set-off' in respect of the £10,500 which it submits was overpaid to the claimant (G of R/ 13 and 18). This was not pursued by counsel for the respondent in the context of the issues to be decided. I refer to this further in my conclusions below.

Procedure and Evidence Heard

8. I had before me a bundle of 365 pages. There was a great deal of duplication of documents within the bundle. Although the relevant period is defined as 14 February 2022 to 12 July 2023 some payslips in the bundle pre-date and post-date that period. Numbers in brackets below are references to pages in the bundle.

9. I was also sent a bundle marked 'without prejudice save as to costs' which I told the representatives that I would not read as I assume it was not relevant to my decision at this hearing.
10. I heard sworn oral evidence from the claimant and from 2 witnesses on behalf of the respondent;
Jim Machon, Deputy Director of HR (services)
Heather Taylor (Consultant)
References to paragraphs in their witness statements are set out below preceded by their initials (XY/ZZ).

Facts

11. I will set out the facts which directly relate to my conclusions. These are facts which relate to the hourly rate to which the claimant was contractually entitled.
12. The claimant moved to bank work with the respondent when his substantive post ended on 8 August 2021 (243). He moved from 'permanent surgical trainee' to locum 'bank doctor'. A document confirming the change to his terms and conditions (Change to T&C) with effect from 1 September 2021 was signed by the claimant on 8 September 2021 and counter signed by a resourcing assistant on 10 September 2021. There is a handwritten annotation to the document 'Pls pay 12.07 % as WTD' (49).
13. The claimant also signed the respondent's 'Bank Registration Document' (BRD) on 8 September 2021 (51). This is a 12-page document (50-63) which gives details of the claimant's registration with the Trust as a member of the Trust Bank. The respondent says the claimant would have been sent a copy by email (JM/6-7). The claimant's evidence is that he went to the bank office and signed the BRD. There was email correspondence during September 2021 about the forms the claimant needed to sign, but some of it post-dates the signing on 8 September 2021 and the attachments are not identified (245-246). I find that it is probable that the claimant was sent a copy of the BRD as an attachment at some point as part of the email correspondence.
14. The terms of the BRD so far as relevant to the rate of pay were (emphasis added)

RATES OF PAY

7.1. Rates of pay will be appropriate for the Bank assignment undertaken. *Rates of pay will be made available to you prior to accepting any Bank assignment.*

HOLIDAY PAY

....

8.2. Individuals registered as a member of Trust Bank who do not hold a substantive post with the Trust *are eligible for annual leave payments* as soon as they have undertaken a Bank assignment.

8.3. The annual leave year runs from 1st April to 31st March. Payment for annual leave will be processed automatically through your time sheet, whether or not you have taken annual leave. You will not have to complete any extra forms to claim payment if you are entitled to the leave.

8.4. Your holiday entitlement will depend on the number of hours that you actually work and will be pro-rated on the basis of a full-time entitlement of 28 days' holiday during each full holiday year including the usual eight public holidays in England and Wales. Bank Holidays will not be paid, unless you work an assignment on a day which is a Bank Holiday.

8.5. *Any annual leave pay you are entitled to will appear on your pay slip(s). It will show under the element code "WTD Pay" and will show the amount of pay.*

8.6. As a member of the Trust Bank Staff *payment of annual leave is made in accordance with the Working Times Regulations 1998 (as amended) and does not in any way imply a contractual relationship between yourself and the Trust. Neither does this strengthen any other service related benefit.*

8.7. Should you wish to request annual leave, you should liaise with the Bank Office (Locum Desk) or supervising clinician to whom you are assigned. You must ensure that you take a minimum of 4 weeks annual leave between 1st April/31st March every leave year. You will not be paid during any annual leave, *since you will have already received payment under the annual leave payments scheme as detailed above.* It is your responsibility to ensure that in any leave year you take a minimum of four weeks annual leave in accordance with Working Time Regulations.

15. The hourly rates referred to at clause 7.1 of the BRD were not set out on the Change to T&C document or on the BRD. The rates are set out on Rate cards for the relevant periods (64-71):

From November 2021

£55 per hour for all hours worked (64).

In the footnote it states:

'Your hourly rate includes holiday pay (rolled up) equivalent 12.07%'

From 7 November 2022

£60 per hour for core hours

£65 per hour for unsocial hours

£70 per hour for bank holidays

From 13 February 2023

£70 per hour for core hours

£75 per hour for unsocial hours

£80 per hour for bank holidays

16. The rate cards from 7 November 2022 present the information about rolled up holiday pay in a different format to the one ending 6 November 2022 ('the first rate card'). Instead of the footnote referring to rolled up holiday pay they have separate columns headed 'Rate', 'WTD' and 'Total'. By way of example, the figure in the 'Rate' column from 7 November 2022 for a worker of the claimant's grade for core hours is £53.54, the figure in the 'WTD' column is £6.46 and the figure in the 'Total' column is £60 (65).

17. 'WTD' is an acronym for Working Time Directive. The respondent uses it to refer to rolled up holiday pay which it calculates by taking 12.07% of the total rate. The claimant's evidence is that he did not know the meaning of the acronym 'WTD' and did not realise it referred to rolled up holiday pay. The BRD which he signed explains that it means holiday pay at paragraph 8.5 (see paragraph 14 above).

18. The claimant accepted in evidence that he was sent the rate cards for the period 7 November 2022 onwards. He maintains that he was not sent a

copy of the first rate card. He says he was somehow aware that the rate was £55. He thinks he recalls being told that the hourly rate was £55, possibly by the General Manager.

19. The respondent was unable to refer me to an email sending the first rate card to the claimant and I find that it was not emailed to the claimant. However, the rates were set out on the intranet (JM/11D), and I find it probable that the claimant saw the information there or in some other written form before filling in his time sheets (see paragraph 22 below). I make that finding on the basis that the claimant was unable to give cogent evidence on how he found out the rate was £55, and I find it unlikely he would have relied solely on 'word of mouth' before writing it on his timesheet. In any event the BRD states that the rates will be made available prior to the claimant accepting any assignment and if he had not received a copy for some reason, it is reasonable to expect him to ask. Having found that he saw the rate on the intranet or in some other written form I find that he would have seen the reference to rolled up holiday pay being included in the rate because I have seen no evidence that the rate was ever published without that being made apparent.
20. The respondent argues that the claimant was on the Locum Bank Rates working committee and was well aware of the composite rate. However, information he may have discovered as a result of being on this committee is not relevant to the formation of his contract and the emails which he was copied in to were much later, in February 2023 (356).
21. The acronym 'WTD' was also used on the pay slips. The respondent concedes that the pay slips did not always accurately itemise holiday pay (G of R, para 8). Indeed, it can be seen from the claimant's Schedule of Loss that the total amount of pay defined as 'WTD' on the payslips (£14905.14) was not 12.07% of the total of £223,577.92. Heather Taylor (HT), a consultant providing services to the respondent, concedes that the payslips 'in no way' reflect what the claimant earned on a month by month basis' (HT/4). Some payslips do not refer to 'WTD' at all, for example, the payslip dated 2 February 2023 (124).
22. The claimant was required to complete timesheets. Initially these were paper documents. He wrote out his hourly rate of £55 (eg.72,82). From 7 November 2022 the forms were electronic and auto populated with a clear breakdown of the hourly rate eg. £53.54 and £6.46 WTD (118).
23. The claimant was understandably concerned from the beginning of his contract that he was not being paid accurately. The payslips were unclear. It was impossible for him to keep track of his pay as it did not equate to the hours he worked each month. Eventually, having been unable to resolve his queries, he asked his union representative to assist, and the union contacted Jim Machon, Deputy Director of HR (services) on his behalf on 14 March 2023 (131).
24. A meeting to try and reconcile the figures took place on 8 August 2023. The claimant's time sheets were used to reconstruct the hours he had worked. The hours worked were agreed at 3,516 hours (39). Even on the respondent's case it transpired that the pay was incorrect. The respondent now says that the claimant was overpaid for the number of hours he worked.

Attempts to resolve the position failed, and after an ACAS conciliation period, the claimant issued these proceedings.

Law

25. The claim is brought under section 23 of the Employment Rights Act (ERA) 1996. References to section numbers below refer to sections in ERA 1996.

26. Section 13 sets out the right not to suffer unauthorised deductions:

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.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract 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.

(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.

27. Wages are defined in s. 27 and include holiday pay. The right to holiday pay is granted by the Working Time Regulations (WTR) 1998, regulations 13(1) and 13A.

28. The question of what is properly payable under s.13 (3) requires interpretation of the relevant terms of the contract and a factual analysis of the claim (Agarwal v Cardiff University and anor 2018 EWCA Civ 2084 CA). The meaning of the terms is to be construed objectively.

29. The nature of rolled up holiday pay schemes is that employers make rolled up contractual payments to their workers which expressly include an element of holiday pay. In Robinson-Steele v RD Retail Services Ltd [2006] ICR 932 ECJ the ECJ took the view that rolled up holiday pay arrangements are in breach of the WTR 1998 which provide that the minimum statutory period of annual leave may not be replaced by payment in lieu. However, the ECJ went on to state that this did not preclude employers setting off genuine holiday pay under the rolled up method against workers entitlement to payment when they actually take leave, provided such sums are paid “transparently and comprehensibly, as holiday pay”. The burden is on the employer to prove the latter.

30. From 1 April 2024, following an amendment to the WTR 1998, an employer is now lawfully able to pay holiday on a “rolled up” basis provided certain circumstances apply, but that amendment does not apply retrospectively to this claim.
31. The time limit for bringing a claim is three months beginning with the date of payment of wages from which the deduction was made (s. 23(2)(a)), unless there is a series of deductions or payments in which case the time limit runs from the last deduction in the series (s 23 (3)).

Submissions

32. I received submissions from Counsel for the respondent and the claimant. I will not set these out in full but I have taken them into account in reaching my conclusion.
33. Counsel for the respondent argued that it was for the claimant to prove his case. She submitted that the documentation is clear that the total rate was a composite rate which included holiday pay, albeit that the payslips were incorrect.
34. Counsel for the claimant referred me to Lyddon and Englefield Brickwork Ltd 2008 IRLR 198 EAT in which the EAT refer to Smith v AJ Morrisroe and Sons Ltd 2005 ICR 596 EAT on the issue of whether the payment of rolled up holiday pay has been implemented “transparently and comprehensibly”. In the case of Smith the EAT gave guidance on matters which would satisfy the test. The amount allocated should be identified in the contract and ‘preferably’ on the payslip, reasonable efforts should be made to ensure that the worker takes holidays and records of the holidays taken should be kept.
35. In Lyddon the EAT stated that the matters set out in Smith are only guidelines and they are not the only way of satisfying the test.

Conclusions

36. I construed the terms of the contract between the claimant and the respondent in so far as they relate to the ‘properly payable’ hourly rate. The respondent’s case is that the rate includes rolled up holiday pay and therefore the burden of proof is on the respondent to demonstrate that the scheme was transparent and comprehensible.
37. The first document the claimant signed on 8 September 2021, the Change to T&C document was ambiguous regarding the inclusion of holiday pay in the hourly rate. The handwritten annotation ‘Pls pay 12.07 % as WTD’ (49) could mean that 12.07% is added on top of the hourly rate or it could mean 12.07% of the hourly rate (paragraph 12 above).
38. However, on the same day the claimant signed the BRD (50-63). This document does not explain the composite nature of the rate, but it does state that hourly rates will be made available to the claimant prior to

accepting any Bank assignment at clause 7.1. The effect of this clause is to incorporate the rate cards into the contract (paragraph 14 above).

39. The rate cards clearly break down the rate of pay to show that holiday pay is rolled up within it. The latter ones use the acronym 'WTD' to refer to holiday pay, as do the wage slips. The BRD explains the meaning of 'WTD' (paragraphs 13 to 17 above).
40. I find that when the BRD and the rate cards are read together it is transparent and comprehensible that rolled up holiday pay is included within the total rate.
41. I found that the first rate card for the period ending 6 November 2022 was not emailed to the claimant. It was available on the intranet, and I found it probable the claimant would have seen the rate in writing and not relied on being told the rate verbally. Alternatively, the BRD document stated that rates of pay would be made available before an assignment, and it would be reasonable to expect the claimant to ask for a copy (paragraph 18-19 above).
42. Even if that was not the case the claimant was supplied with the rate cards from 7 November 2022. The composite nature of the rate was made clear to him from then. His claim for deductions prior to 7 November 2022 is plainly out of time as the alleged series of deductions came to an end when he received the November 2022 rate card.
43. The claimant's claim is accordingly not upheld and is dismissed.
44. The issue of set off for the alleged overpayment was not pressed by Counsel for the respondent during the hearing. It is not a live issue as I have not found in favour of the claimant. In any event the claim does not fall within the employment tribunal's jurisdiction, and I make no findings relating to it.

Employment Judge **S. Matthews**

Date 9 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
10 May 2024

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