



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Coffey
Respondent: Abertawe Bro Morgannwg University Local Health Board
Heard at: Cardiff **On:** 31 July 2017
Before: Employment Judge S Davies (sitting alone)

Representation

Claimant: Mr M Blitz, counsel
Respondent: Mr J Walters, counsel

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claim of unauthorised deduction from wages is dismissed.

REASONS

Claims and issues

1. The claim of unauthorised deduction from wages contrary to section 13 Employment Rights Act 1996 (ERA) gave rise to the following issues:
2. What did the parties agree in 2008 with regard to the claimant taking on the role of community practice educator (CPE); a permanent promotion to band 7 or a temporary 'acting up' position?
3. If the CPE role was a temporary acting up position had it been brought to an end?
4. Whether the correct rate of pay was paid in respect of the claimant's promotion to a band 7 role in 2012, in light of paragraph 12 of the contract of employment?
5. The claimant also invited me to consider whether the claimant's

appointment to the duty officer role in 2009 created a new contract of employment at band 7. The respondent objected to the way in which the claimant put her case in this regard suggesting that it had not been foreshadowed in the pleadings and I will return to that point in my conclusions.

Hearing

6. I heard evidence from the claimant and on behalf the respondent from Colin Reeve, retired service manager for adult mental health services, Julie Doyle, community nurse manager, Robert Goodwin, locality manager for Neath Port Talbot mental health and learning disability services and Malcolm Jones, locality manager for Swansea mental health and learning disability services.
7. The parties provided an agreed bundle of documents of approximately 300 pages. The claimant produced one additional document, marked C1, which was adduced in evidence without objection from the respondent.
8. References to page numbers in this judgment are to the bundle used by me – there appeared to be some variance on page numbering between my bundle and those used by counsel.
9. The claimant raised an issue about the veracity of part of the content of the document at page 38 (record of supervision dated 24 September 2008). As well as seeing the copy in the bundle, I was shown the original document from which the copy was taken.
10. Prior to the hearing in correspondence the parties indicated concerns that one day would not be sufficient to hear all the evidence and for judgment to be delivered. In light of the limited time available the parties were directed, by email of 25 July 2017, to timetable cross examination of witnesses and submissions so that they concluded by 3pm. The parties cooperated to adhere to the timetable, which overran by only a short period of time.
11. The claimant provided written submissions on 28 July 2017 to the tribunal. A copy of the submission was provided to the respondent at the hearing. Oral submissions were heard from both parties at the hearing.
12. There was insufficient time for oral judgment on the day; judgment was reserved and considered in chambers on 14 August 2017.

Facts

13. The claimant worked as a nurse for the respondent from 1981 until her retirement from full-time employment on 31 July 2016. The claimant was employed as a community psychiatric nurse at pay band 6, but acted up in various roles at band 7 from time to time. The bundle contains documentation of temporary acting up roles in 2005 and 2006 (pages 31 – 36).
14. In 2008 Mr Reeve approached the claimant to request that she took on the role of CPE to mentor degree level students. The new role attracted a

higher pay band (band 7), than the claimant's substantive role (band 6).

15. The claimant mentored a student during the academic year 2008 – 2009. The claimant also agreed to mentor a student the following academic year but that student did not in fact take up their position.
16. Funding for the CPE role was provided by the relevant university and paid to the claimant retrospectively. The claimant notes the delay in payment to her (paragraph 4 of her witness statement). There is a dispute as to whether the claimant was aware of this funding arrangement: the claimant asserts she did not know about the source of funding (consistent with paragraph 4 of her witness statement) whereas her line manager, Ms Doyle, asserts that she would have told the claimant.
17. Ms Doyle completed two staff notification of assignment changes forms to notify payroll of changes to the claimant's pay band:
 - a. indicating new position (band 7) effective 15 September 2008 (page 51). In additional comments: "Melanie has been practicing as a community practice educator since 15 September 2008, she has supervised a student on the community studies degree. Whilst undertaking this role the university fund for a band 7 nurse. Melanie has fulfilled this role." Ms Doyle's evidence was that the comment indicated that the role had completed; and
 - b. indicating new position (band 6) effective 1 July 2009 (page 45).
18. An email from Mr Twigg to Ms Doyle of 4 September 2009 (page 53) indicated that a staff notification of assignment changes form had been forwarded to payroll. Mr Twigg said "*FYI the attached has been forwarded to payroll. You will need to complete another form to indicate that she reverted back to a band 6 on 4 July 09 and send it to Colin for signing off (as I am on A/L). When she starts the supervision of the student again you will need to complete another form to highlight that.*"
19. Ms Doyle then emailed a form to Mr Reeve on 10 September 2009 (page 53) – it is not clear which form was attached but the email states "*here is amended form informing of finishing date for Melanie. Please could you sign off? Thanks Julie*"
20. The claimant indicated that she had not seen or consented to the staff notification of assignment changes forms. Ms Doyle's evidence was that this was normal procedure and that she would complete the form to instruct payroll without sending the form to the employee concerned.
21. From the content of the September 2009 emails combined with the content of the staff notification of assignment changes forms, I conclude that Ms Doyle communicated the conclusion of payment to the claimant at band 7 with effect from 1 July 2009 (page 45). The reference "Melanie has fulfilled this role" (page 51) together with "informing of finishing date for Melanie" (page 53), and the post-it note attached to the supervision note of 27 July 2009 (page 46) support Ms Doyle's evidence of communication of the reversion to band 6 with the completion of the CPE role.

22. The change to band 6 pay for the claimant was not actioned by payroll.
23. The claimant took up another new role from October 2009; that of duty officer. This role was viewed as onerous; no one else in the team wished to take it on but the Claimant volunteered for it. At paragraph 10 of her witness statement, the claimant asserts she was 'led to believe' the role meant she would continue to be paid at band 7 because of the additional responsibilities, 'as a result of discussions' with Mr Reeve. In cross examination, the claimant's position was that she had *assumed* she would remain at band 7. The respondent's witnesses dispute that the duty officer role entails a change to band 7 and point to the fact that no recruitment process was carried out, as would be expected for a promotional opportunity.
24. In 2012 the claimant successfully applied for a permanent band 7 role. The claimant provided details of her salary and grade (page 84) citing band 7 and salary of £38,851. In her application form the claimant stated "*I have been a specialist clinical nurse practice teacher for post-registration degree students and was consequently awarded band 7 as a result of this role*" (page 85). The claimant's unchallenged evidence is that she also informed the selection panel at her interview of her band and salary.
25. The claimant sought references from Ms Doyle and Mr Twigg to support her application for the role. Ms Doyle referred to the claimant as a 'community psychiatric nurse/deputy manager' (page 125) in her reference. Mr Twigg reference specifies the claimant's role as band 6 (page 123).
26. When the claimant started her new band 7 role in 2012, she relinquished the duty officer responsibility she had undertaken since 2009. The duty officer role was then advertised at band 6.
27. The claimant's offer of employment as 'mental health clinical nurse specialist band 7' dated 25 May 2012 is at page 95 – 96. The claimant's contract of employment starts at page 97.
28. Remuneration is dealt with at paragraph 12 (page 101):
- "You will commence on £38,851 per annum paid monthly by direct debit to your bank account/building society.
Previous NHS service at the same or a higher grade may be taken into account in determining commencement salary in accordance with the relevant Agenda for Change terms and conditions of service. Your commencement salary has been determined from the information provided by you on your application form. However, this is subject to confirmation of relevant service from your previous NHS employer. When this information has been obtained, your commencement salary will be adjusted as necessary and details will be shown on your payslip."*
29. Paragraph 15 (page 102) deals with deductions and overpayments; it provides for the withholding of salary and benefits or making deductions where there has been overpayment of salary and/or expenses.
30. Upon the claimant's appointment to the new role the respondent

discovered, what they considered to be, overpayment of salary from 2009 to 2012. Ms Doyle was asked to speak with the claimant to advise her that the respondent would make deductions from her salary to recoup overpayment. Additionally, the claimant's starting salary in her new band 7 role was adjusted downwards to the lowest increment of band 7.

31. The claimant raised an internal grievance, and subsequent appeal, with regard to the proposed deductions, both of which were rejected by the respondent following an initial grievance determined by Mr Jones and appeal decided by Mr Goodwin. The claimant was represented by her trade union during the internal process.
32. The respondent made deductions to recoup overpayment from the claimant's final salary prior to her retirement in July 2016. The claimant has subsequently returned to employment on a part-time basis in a different part of the service.

Law

The relevant sections of ERA are:

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.

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...

23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13....

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section 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, or

...

(3)Where a complaint is brought under this section in respect of—

(a)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 or to the last of the payments so received.

33. The claimant submitted that it was necessary for me to consider the objectively communicated intention of the respondent. Mr Blitz referred me to **Smith v Hughes (1871) LR 6 QB 597** in which Blackburn J states:

*“if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in **Freeman v Cooke**. If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”*

34. Accordingly, the claimant succeeds with regard to her contractual contentions if:

- a. a reasonable person would have thought that the respondent was agreeing to a contract on the terms she asserts (i.e. band 7 permanent appointment or, in the alternative, temporarily acting up to band 7 without specified end date), and
- b. the claimant in fact believed this was the case (subjectively).

Conclusions

35. In this case the oral evidence conflicts on the key issue; the question of the permanency or otherwise of the claimant’s move to band 7 in 2008. There is a lack of direct written communication between the parties about the status of the claimant’s CPE role from 2008. The contemporaneous documents that mention the claimant’s band were not produced to confirm this point, rather they were created for a variety of other reasons and provide contextual evidence.

36. I am mindful of the fact that the parties did not appreciate the difference in their understanding on this key point until 2012, some four years after the claimant originally acted as CPE. During the internal processes, which ensued from the claimant’s grievance, both sides had to recall events which occurred many years previously. It is not surprising that differences of view and inconsistency of recall arise after the elapse of a significant period of time. In the absence of direct documentation about the status of

the band 7 CPE role, such as was created for previous temporary acting up periods, both parties had to recall events from memory and the contemporaneous documentation available.

37. I have considered the suggestion made by the claimant that the content of supervision notes signed by the claimant and her line manager may have been altered retrospectively by Ms Doyle, with the addition of the wording "student CPE 29th – 9 – 08 x 8/12". The claimant properly acknowledged the seriousness of the allegation, which is denied by Ms Doyle. I reject this suggestion and am satisfied that the entire content of the note at page 38 was contemporaneously recorded by Ms Doyle. Having viewed the original document, it was clear that all comments on the page were written in the same ink. The claimant referred to what she considered to be unusual positioning of the comment on the page but I do not consider that a sufficient basis on which to conclude the comments were added retrospectively. In any event, the comment in question is not the only one placed on the right-hand side of the page.
38. Turning to the oral evidence, the claimant accepts that no formal process of recruitment was adopted with regard to her CPE role in 2008. There was no advert, application or selection process. The respondent's witnesses assert that formal processes are adopted when recruiting to permanent roles and the fact that this process was absent in 2008 is supportive of their position that no permanent band 7 role was created for the claimant. The claimant submits that just because policies and procedures were not followed does not preclude the creation of a band 7 role in the circumstances.
39. Mr Reeve denies that he offered the claimant a substantive band 7 post. He also denies the claimant's suggestion that as a result of discussions between them he communicated that the claimant would continue to be paid at band 7 in 2009 (paragraph 10 of the claimant's witness statement).
40. In cross-examination, the claimant explained that she assumed she would continue at band 7 and in support of this, asserted that she had not been told the acting up period was temporary and was not provided with written confirmation of the temporary nature of the CPE post, as she had in the past when acting up (e.g. page 31). It appears the claimant's basis for her assumption was the absence of documentation rather than any positive statement made on behalf of the respondent.
41. The claimant also referred to the fact that she had not been shown the staff notification of assignment changes forms. I am however satisfied by Ms Doyle's evidence that her usual practice as line manager was to send the forms for action without showing them to employees.
42. Ms Doyle asserts that the claimant was informed of the temporary nature of the CPE acting up and relies upon supervision notes (page 38). Ms Doyle explained the reference to '8/12' was an approximation of the academic year that the student was due to attend mentoring with claimant. The supervision note was written prior to the student taking up mentoring with the claimant; they were due to start at the end of September.
43. The claimant submitted that there were inconsistencies in Ms Doyle's

recording of the length of time for which CPE mentoring would continue: page 38, 8/12 –a reference to 8 months in a year, page 48, Ms Doyle's aide memoir, refers to a period of one year and page 199a, an establishment data report, states "Melanie Coffey temporary band 7 from September 2008 for 45 weeks". I note that the reference to the period of time at pages 38 and 48 were recorded prior to the student starting, whereas the report at page 199a was created after the student had completed mentoring and the period could be quantified accurately. When the three references are considered in this context, I do not consider they demonstrate inconsistency so as to undermine the reliability of Ms Doyle's evidence.

44. I am satisfied from the contents of the supervision note and Ms Doyle's aide memoir that, on the balance of probabilities, Ms Doyle communicated to the claimant that her acting up band 7 CPE would only be in place whilst she mentored a student. This conclusion is supported by the contemporaneous emails of September 2009 referred to above, which indicate the notification process adopted for the claimant to be moved between bands for pay purposes, dependent on having a student. The emails show that it was thought that the claimant would have another student for the academic year 2009 – 2010 and the correspondence refers to the need for Ms Doyle to notify payroll of change between bands when the students start and finish. This is consistent with Ms Doyle giving evidence to the effect that the acting up to band 7 may continue with the possibility of a new student in the next academic year.
45. The claimant's pay band is included in records of supervision meetings with Ms Doyle (page 38 – 44). The records are signed by the claimant. In September and October 2008 she is referred to as band 6. In November, December, January 2008 (January in fact states 08 but is signed 26 February 2009 and so I conclude the reference to 08 is erroneous) the claimant is referred to as band 7. In May 2009, she is referred to as band 6, reverting back to band 7 in June 2009, band 6 in July 2009 and band 7 in August 2009. Whilst some inconsistencies in the way the band is recorded are evident, I take into account that there was some uncertainty as to whether the CPE role would continue with a new student in the next academic year and the fact that the claimant herself signed forms. Overall, I consider that these supervision records demonstrate Ms Doyle's belief that the claimant was acting up temporarily to band 7 CPE from her substantive post of band 6.
46. At page 46, the supervision note of July 2009 states "CPE – continue 2009/10". Subsequently a post-it note was placed on this supervision document noting that the student did not start and makes reference to the staff changes form being completed. Although the claimant would not have seen the post-it note when signing the form as it was added retrospectively, I do not think this affects the reliability of Ms Doyle's evidence. Nor does it particularly assist the claimant's case. It is an agreed fact that the student whom the claimant had agreed to mentor in an email of 24 August 2009 (page 47), did not in fact start. The post-it note simply reflects that fact and the internal process to be completed in consequence.
47. The claimant referred to Yvonne Griffiths Rogers by way of comparison in her witness statement, although the existence of a comparator was not

pleaded in the ET1. The claimant asserted that Ms Griffiths Rogers acted up as band 7 CPE but did not mentor students every year whilst paid at that level. No documentary evidence was provided with regard to Ms Griffiths Rogers pay band or acting up as CPE and Ms Griffiths Rogers did not give evidence. The respondent's witnesses had no knowledge of her situation and all the circumstances I place little weight on this evidence.

48. As for the way in which the acting up was funded by the university, I accept the claimant's evidence that she was not aware of this. There is no written evidence to suggest that she was told about the source of funds and this would have been a matter between the respondent and the university. Those senior to the claimant would have known of the arrangement but there would be no requirement to inform the claimant, as Mr Reeve stated in evidence.
49. In considering whether a reasonable person would have believed the appointment to CPE in 2008 was a permanent band 7 position, I conclude that they would not. In my view the absence of direct documentation is not a sufficient basis on which to reach that conclusion. That is particularly so when no formal recruitment process was applied and there were no direct words spoken by Mr Reeve to suggest the role was permanent. An assumption is not a sufficient basis for such a belief.
50. The claimant's subjective belief is not sufficient on its own. In any event I am satisfied that Ms Doyle did communicate the temporary nature of the role. This may have been misremembered by the claimant, possibly due to the elapse of time.
51. In light of my findings above, a reasonable person would not have considered the CPE acting up was a temporary measure without a fixed end date. Ms Doyle communicated that acting up would cease when the student finished.
52. I conclude that the CPE role was a temporary acting up position which only subsisted whilst the claimant mentored a student. Based on the evidence above I conclude that it came to an end following the departure of the student at the end of academic year 2008 – 2009.
53. The claimant invited me in the alternative to consider whether the claimant's appointment to the duty officer role in 2009 created a new contract of employment at band 7.
54. The respondent objected that this contention had not been foreshadowed in the pleadings. There is no reference in the pleadings and it is first raised in the claimant's witness statement, starting at paragraph 9. The importance of properly pleaded case should be well understood by represented parties in that it is the content of the ET1 claim form to which a respondent must answer not the content of a witness statement.
55. The claimant's contention could be rejected on the basis that it was not pleaded. Even if the assertion were determined, it would be rejected. It was agreed between the parties that the duty officer role was onerous and no one else wished to take it on. However, the undesirability of a role is not sufficient basis upon which to conclude there should be a new contract

of employment. The claimant's reasons for believing that she should remain at band 7 were based on assumption and the absence of documentation. For the reasons outlined above, this not a sufficient basis upon which to conclude that a new contract had been formed. It is relevant to note in reaching this conclusion that; the claimant did not identify the duty officer role as the reason for her band 7 position in the application form at page 85 (she refers only to the CPE role as the reason for being awarded band 7) and when the claimant relinquished the duty officer role it was re-advertised at band 6. For these reasons the test in **Smith v Hughes** is not satisfied.

56. I turn now to whether the correct rate of pay was paid in respect of the claimant's promotion to a band 7 role in 2012. Band 7 pay range is stated as being £30,460 to £40,157 (page 101). The contract offers pay of £38,851, the same level the claimant states in her application form. The claimant provided the correct information about what she was being paid in the application form.

57. The respondent relies upon paragraph 12 of the contract of employment:

Your commencement salary has been determined from the information provided by you on your application form. However, this is subject to confirmation of relevant service from your previous NHS employer. When this information has been obtained, your commencement salary will be adjusted as necessary and details will be shown on your payslip

58. The contract anticipates rectification of errors and mistakes. The claimant ought to have appreciated the respondent's mistake in offering pay of £38,851 in light of my findings above about what Ms Doyle communicated about the temporary nature of the CPE acting up.

59. When the respondent confirmed previous service and on the basis of that information noted overpayment, steps were taken to adjust the claimant's commencement salary accordingly. This action accords with paragraph 12: "*your commencement salary will be adjusted as necessary*". The claimant accepts that she was paid at the lowest increment of band 7 from commencement of the new role. I conclude that the correct rate of pay was paid in accordance with the contract of employment. Accordingly, there have been no unauthorised deductions from the claimant's wages and the claim is dismissed.

Employment Judge S Davies
Date 25 August 2017

JUDGMENT SENT TO THE PARTIES ON

25 August 2017

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FOR THE TRIBUNAL OFFICE