EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113171/2018

Held in Glasgow on 26 October 2018

Employment Judge: Iain F. Atack

Davin Flood	**Claimant** **Represented by:** **In Person**
Emblation Limited	**Respondents** **Represented by:** **Ms. K Beattie** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims are dismissed

REASONS

Introduction

1. In this case the claimant claims that the respondent has made an unlawful deduction from his final salary and that he has not been paid his full holiday entitlement. The respondent admits making the deduction claiming that it was authorised in terms of the claimant's contract of employment. They deny that the claimant has not been paid his full holiday entitlement.

2. The tribunal heard evidence from the claimant himself and, for the respondent, from Neil McGonigle, their engineering manager and from Gary Beale, their chief executive officer. The parties produced a joint bundle of documents extending to 167 pages. Reference to the documents will be by reference to the page number.

3. From the evidence which I heard and the documents to which I was referred I found the following material facts to be admitted or proved.

Material Facts

4. The claimant was employed as a product development engineer with the respondent from 26 June 2017 until 31st May 2018.

5. The respondent is a medical device company. It specialises in the design and manufacture of microwave medical devices for use in the treatment of cancer and other operations.

6. The claimant resigned from employment with the respondent by letter of 3rd May 2018, page 151.

7. The claimant's contract of employment is contained at pages 35- 51.

8. Paragraph 5.5 of that contract states **"The company may from time to time offer bonuses and to fund personal development training requested by the employee. In the event that the employment is terminated either by company or the employee within 6 months of receiving a bonus or personal development training requested by the employee then the employee may be required to refund all costs relating to those benefits."**

9. The contract provides at paragraph 10, that following completion of a probationary period and one year's continuous service an employee will be entitled to receive in the event of absence due to sickness four week's full pay followed by four week's half pay. Prior to completing both the probationary period and one year's continuous service employees are entitled only to statutory sick pay.

10. Paragraph 9.7 of the contract entitles the respondent to require an employee to take any unused holiday entitlement during their notice period.

11. The claimant was absent from work due to ill-health in January 2018. Whilst absent he was paid his full pay for a period of six days rather than simply statutory sick pay as stated in his contract. That was an overpayment of salary.

12. It was agreed that rather than repay the respondent the difference between the full salary he had been paid and the statutory sick pay to which he was entitled, the claimant would work extra hours to make up that difference. It was agreed the extra time he would work would be 48 hours or 6 days.

13. The claimant was only able to verify that he had worked for 4 days. The respondent did not accept he had worked for the full six days to repay the overpayment.

14. On 3rd January 2018 the claimant sent an email to Neil McGonigle, page 53, advising he had found a training course for what was known as FPGA training.

15. Neil McGonigle responded to the claimant on 4 January, page 52, stating that he was sure the training was worthwhile but would need to be fitted in with the development plans for the year and January was probably too early. He suggested the claimant discuss the matter with Gavin Cameron who was a project engineer.

16. The claimant sent a further email to Neil McGonigle on 1st February asking if he could attend the course that month, page 52.

17. The same day Neil McGonigle responded to the claimant "We **have too much going on just now and have to catch up lost time so we need to focus on demonstrating the non-FPGA performance of the health jig**…". In Mr McGonigle's position was there were too many activities occurring at that time in the respondent's business to allow the claimant to attend the training.

18. Time had been lost on the project upon which the claimant had been employed due to his absence whilst sick in January.

19. The claimant was advised by the training provider, Doulos, on 1st February that there was only one space left on the course he had enquired about. The claimant asked Doulos that a place be provisionally held for him on the course, page 67.

20. He advised Neil McGonigle that the place could be held until the end of the week. Mr McGonigle agreed that the claimant could go on the course and he spoke to Doulos regarding the obtaining of a discount for the claimant's attendance.

21. The training to be provided was not related to the project upon which the claimant was currently working.

22. The claimant attended and completed the training.

23. The cost of the training, including all related expenses, amounted to £4182.50, page 165.

24. During the course of his employment the claimant had received external training paid for by the respondent as set out at page 107. That training comprised 5 days commencing 24th July 2017, 4 days commencing 15 August 17 and one-day on 16th of February 2018.

25. The respondent regarded those training courses as being necessary for the work which the claimant was engaged to perform.

26. The respondent regards "personal development" training as being training which will benefit the person undertaking it long-term in their career. Non-personal development training is regarded by the respondent as being specific for a skill set used in the respondent's business and not necessarily conveying a career advantage to the employee.

27. The respondent will support personal development training requested by an employee and will pay for it but may seek to recover payment of the cost of such a course should an employee leave within 6 months of its completion.

28. The FPGA training which the claimant was seeking to undertake was not essential for the job he was employed to do by the respondent.

29. That training was personal development training which would benefit the claimant long term in his career.

30. The claimant requested that he be allowed to go on the FPGA training course.

31. Following receipt of the claimant's letter of resignation a meeting was held by Mr McGonigle with him on 17th May 2018. The notes of that meeting are produced at pages 86 – 94.

32. At that meeting there was discussion regarding the FPGA training which the claimant had undertaken in February. The respondent's stated position at the meeting was that the costs of that training required to be repaid to them.

33. The respondent also indicated that a bonus of £525 which had been paid to the claimant would also require to be repaid.

34. There was no requirement by the respondent to have the claimant trained on the FPGA course as they already had an employee trained in that respect, Gavin Cameron. If work was required which required the person carrying it out to have FPGA training and could not be handled by Mr Cameron the respondent was able to outsource such work. They did not require the claimant to have such training at that stage. It was not necessary for his job as a product development engineer

35. At that meeting it was decided that the claimant would not return to work but would stay off and utilise his unused holiday entitlement whilst being paid.

36. The claimant did not return to work following the meeting.

37. He sent in a fit note which covered the remainder of his period of employment with the respondent, stating he was unable to work.

38. During his absence due to illness the claimant was paid statutory sick pay in terms of his contract.

39. It was agreed between the parties that the claimant was entitled to 10 days holiday until the date of termination of his employment, page 164.

40. The respondent paid the claimant for 8 days holidays with his final salary, page 166.

41. The reason for the difference between the 10 days holiday which was agreed as being due and the 8 days which were paid was because the respondent sought to recover the 2 days shortfall in the extra hours which the claimant had agreed to work to repay the previous overpayment of salary during his period of absence in January.

42. The claimant was paid in respect of the balance of his holiday entitlement the sum of £996.16, calculated at the rate of £124.50 per day.

43. The respondent deducted from the claimant's final salary the sum of £2614.92 as a payment to account of the full costs they had incurred in respect of the claimant's attendance at the FPGA training. They intend to seek recovery of the balance in other proceedings. The full costs could not be recovered from the sums claimant had earned in his final month.

Claimant

44. It was the claimant's position that the FPGA training was not personal development training. His submission was that he had not requested the training and that it was training which should be paid for by his employer and not be deducted from his final salary.

45. It was also his position that he had not been paid his full holiday entitlement and was still due an extra 2 days.

46. He did not accept that the respondent was entitled to clawback from his holiday entitlement the 2 days in respect of which he had been overpaid. He maintained that he had worked the full 6 days to repay the overpayment.

Respondent

47. Ms Beattie for the respondent submitted that the claimant had two claims the first being a claim of unlawful deduction from wages under section 98 of the Employment Rights Act 1996 and the second being a claim under regulation 14

of the Working Time Regulations 1998. It was her position that no sums were due in respect of either claim.

48. With regard to the claim for holiday pay it was her submission that the claimant had been paid all to which he was entitled. The full entitlement it was agreed was 10 days but the claimant required to repay 2 day's pay to the respondent in respect of an overpayment of salary. The respondent was entitled to offset those 2 days.

49. With regard to the deduction in respect of part of the training costs it was her submission that clause 5.5 of the contract of employment applied and the deduction was duly authorised. That training was she submitted personal training as it was not required for the job the claimant was employed to do. It was not necessary for the employer's business. The respondent accepted that in the longer term there might have been a benefit to the respondent had the claimant remained with them but that was not the situation here where the claimant had left within 6 months of the course being completed. The deduction had been made in terms of the contract of employment.

50. The respondent's position was that the claimant had requested the training. The respondent had refused that training on two occasions but the claimant had persisted in requesting it and they eventually agreed. It was her submission that there was no unauthorised deduction and the claim should be dismissed.

Decision

51. The claimant in this case has two claims. The first is that the respondent has made an unauthorised deduction from his salary in respect of the partial recovery of the costs of a training course which he attended. The second claim is that he has not been paid his full holiday entitlement upon termination of employment.

52. Section 13 of the Employment Rights Act 1996 provides, insofar as is relevant, as follows:-

(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.

53. In this case there was no suggestion that the claimant was not a worker within the meaning of the Act. He is therefore entitled to make a claim in respect of an unlawful deduction from wages.

54. The deduction which the claimant complains about is a deduction by the respondent in respect of the partial costs of a training course which the claimant went on in February 2018. The full costs of the training course amounted to £4182.50 but the respondent only sought to recover from the claimant's final salary partial recovery of that sum for the simple reason that there were not sufficient sums due to the claimant by way of salary to recover the full cost. It is their intention to recover the balance elsewhere.

55. The question which arises is whether the deduction which was made was authorised by statute, the contract under which the claimant worked or by a document in which the claimant signified in writing his agreement or consent to the making of the deduction. This case only concerns whether the claimant's contract authorised such a deduction. It is the respondent's position that it did.

56. The relevant part of contract is paragraph 5.5 which is contained at page 38 of the bundle. That narrates that the respondent may from time to time fund personal development training requested by the employee but that should the employment be terminated within 6 months of receiving that training the employee may be required to refund all costs relating to it.

57. The questions here are whether the training which the claimant undertook in February, that is to say the FPGA training, was personal development training and, if so, did the claimant request it.

58. I was satisfied from the evidence which was led that the respondent considered there was a difference between the training which was necessary for the job an employee was engaged to carry out and other training which was not necessary for that job but which could benefit the employee in his career progression. The respondent was prepared to pay for and not to seek repayment in respect of the first type of training but in respect of the second, they would seek recovery if the employee left their employment within 6 months of the completion of the training.

59. The training which the claimant undertook in February was not necessary for him in his capacity as a product development engineer. I accepted the evidence from the respondent's witnesses that they had no particular need for another employee, such as the claimant, to undergo FPGA training and that if there happened, at any time, to be too much work for the existing employee who had been so trained then that work would be outsourced. That evidence was not challenged.

60. I concluded that the FPGA training which the claimant undertook was indeed personal development training. There was no immediate benefit to the respondent, in the job for which the claimant was employed, for him to have undergone such training. It would however be a benefit to him in his own career progression, whether with the respondent or elsewhere.

61. Having concluded that the training was personal development training the next question to be considered was whether it had been requested by the employee. I had little hesitation in reaching the conclusion that it had been requested by the employee.

62. The claimant initially raised the question of the training in an email to Neil McGonigle on 3rd January and his request was refused. He raised the matter again on 1 February and again the request was refused. The claimant then received an email from the training provider advising there was only one place left on the course about which he had enquired and he then raised the matter for a third time with Mr McGonigle. At this stage Mr McGonigle agreed he could

go on the course and Mr McGonigle then negotiated a discount with the training provider.

63. There was no evidence that the respondent had ever requested the claimant to go on the course and all the evidence clearly pointed to the claimant requesting that he be sent on it. I therefore concluded that the claimant had requested the training.

64. Those conclusions are sufficient to dispose of the first claim. The deduction was authorised by the claimant's contract as the training was personal development training and had been requested by the employee. The claim for unlawful deduction from wages is dismissed.

65. The second claim is a claim for holiday pay in terms of regulations 14 and 30 of the Working Time Regulations 1998.

66. It was agreed between the parties that the claimant was entitled to 10 days payment in respect of accrued but untaken holidays up to the date of termination of his employment. It had been the intention of Mr McGonigle at the meeting held on 17 May that the claimant did not return to work and take his holidays during the remainder of his notice period. That however was not possible as the claimant was off sick for the balance of the notice period having sent in a fit note that to that effect.

67. The claimant's final salary slip at page 166, shows a payment in respect of holiday accumulation for 8 days. Mr Beale was clear in his evidence that the difference between the 10 days agreed as being due to the claimant and the 8 days in respect of which he was paid was due to the respondent recovering the 2 days remaining in respect of the previous overpayment of salary in January, which the claimant could not show he had repaid by working extra hours.

68. I was satisfied that the claimant had been overpaid in January, by being paid full pay for his period of sickness absence rather that statutory sick pay, and although he had worked to repay some of that overpayment he had not repaid

all of it. Two day's overpayment had not been repaid. There was therefore an overpayment of wages.

69. In terms of section 27 of the Employment Rights Act 1996 wages are defined as meaning **"any sums payable to the worker in connection with his employment including-**

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise… "

70. Section 14 (1) (a) of the Act provides that section 13 does not apply to a deduction from the worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

71. In this case whilst the claimant was entitled to be paid in respect of the full 10 days accrued holidays, the employer was entitled, in terms of section 14, to deduct from that payment a sum in respect of the overpayment of wages which had been made in January. It was clear, as noted above from Mr Beale's evidence that that was exactly why the deduction had been made. The overpayment made in January to the claimant of 6 days full pay had been reduced by the claimant's extra work to only 2 days overpayment. The respondent was entitled to recover from the final salary that earlier overpayment. That earlier overpayment is the same as the sum due in respect of holiday pay representing two day's pay. The claimant has been paid his full holiday entitlement but from that figure the respondent has deducted sums due to them in respect of an overpayment of wages.

72. The claim in respect of holiday pay is dismissed.

Employment Judge: IF Atack
Date of Judgment: 15 November 2018
Entered in register : 16 November 2018
and copied to parties