



## EMPLOYMENT TRIBUNALS

### Claimant

### Respondent

Ms Victoria Leach

v

Hillcrest Children's Services Limited,  
part of the Outcomes First Group

**Heard at:** Watford by CVP

**On:** 15 February 2021

**Before:** Employment Judge Cotton

### Appearances

**For the Claimant:** Ms V Leach in person

**For the Respondent:** Mr Tom Perry of Counsel

### Type of hearing

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was a video hearing. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

## JUDGMENT

1. By consent, the respondent's name was amended to 'Hillcrest Children's Services Ltd, part of The Outcomes First Group.'
2. The respondent has made an unlawful deduction from the claimant's wages.
3. After the claimant issued her claim the respondent paid the amount of unpaid wages to her so no financial award is made.
4. The claimant's breach of contract claim is dismissed. The parties agreed that the claimant was still employed at the date she submitted her claim so by virtue of paragraph 4 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 she could not have brought a breach of contract claim.
5. The respondent's employer's contract claim is also dismissed

## REASONS

### Introduction

1. The respondent provides services, including schools, for children with additional needs. The claimant worked for the respondent as a Teaching Assistant. Initially she was engaged as a 'bank worker' (from 1 October 2018). Later, by a contract made on 27 September 2019, she was employed permanently as a Teaching Assistant, assigned to New Barn School. She began work in her new post in October 2019. Unfortunately, on 10 October the claimant injured her left ankle while at work. During October she continued to work, but the ankle injury turned out to be serious and, from or around 7 November 2019, she did not return to work due to her injury. Her employment was terminated by the respondent by a letter 18 September 2020. She was given one week's pay in lieu of notice. This claim relates to the respondent's treatment of the claimant during her sick leave, in particular her sick pay entitlement during the period from the time she sustained her injury to the termination of her contract.
2. The judgment was delivered orally. The claimant requested written reasons at the end of the hearing.

### Claims and issues

3. The issues for the tribunal to consider were discussed at the outset of the hearing. The issues identified were as follows:
  - 3.1. The preliminary matter of whether, in light of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 ('the 1994 Order'), the Tribunal had the jurisdiction to hear (a) the claimant's claim of notice pay and any other breach of contract claim she may wish to make, and (b) the respondent's employer's contract claim.
  - 3.2. Whether, during the period from 1 November 2019 to 18 September 2020, the respondent had made an unlawful deduction from the claimant's wages contrary to sections 13 of the Employment Rights Act 1996. In considering this the Tribunal had to consider:-
    - 3.2.1. what entitlement did the claimant have to be paid while off work due to sickness and on what basis;
    - 3.2.2. did the claimant receive her full entitlement;

- 3.2.3. if not, was any shortfall due to an unlawful deduction made by the respondent.

**Documents and evidence heard**

4. I heard evidence from the claimant and from her witness Mr Sean Chaplin. In addition, the claimant produced a document headed 'Statements of Evidence' dated 30 January 2021 which I treated as her witness statement. I also heard evidence from witnesses Mr Cliff James and Ms Carmel Walberg on behalf of the respondent, both of whom produced witness statements.
5. There was a tribunal bundle of approximately 335 pages produced by the respondent and, in addition, the claimant produced around 15 documents, some of which were not also included in the respondent's bundle.

**Breach of contract**

6. In her ET1, submitted on 13 May 2020 when she was still employed by the respondent, the claimant claimed notice pay, arrears of pay and other payments. In their ET3, the respondent made an employer's contract claim relating to an alleged overpayment of wages in April 2020.
7. By a letter dated 3 November 2020, the Tribunal wrote to the parties explaining that, since the claimant was still employed by the respondent, the Tribunal lacked jurisdiction to consider the claim for notice pay and the respondent's counter claim. The claimant responded that she had claimed notice pay because the respondent 'stopped paying me without notice in December 2019'; and noted that her employment had now been terminated. On the day of the hearing the Tribunal had no further particulars about a possible breach of contract claim.
8. The 1994 Order says that a Tribunal can only consider breaches of contract which are outstanding on the termination of employment, and, further, that it can only consider an employer's contract claim if the employee brings a valid breach of contract claim.
9. The claimant submitted her claim in May 2020. There was no evidence that she had been dismissed at that time or was under notice of dismissal so as to trigger a right to notice pay. Her employment did not end until 18 September 2020.
10. I decided that the Tribunal did not have the jurisdiction to consider the claimant's breach of contract claims, whether relating to notice pay or otherwise, and, therefore, did not have jurisdiction to consider the respondent's employer's contract claim.
11. I therefore make no finding about the claimant's contractual entitlement to notice pay. I note that she was paid one week's pay in lieu of notice when

her contract was terminated on 18 September 2020 and that, as of that date, she had been on sick leave since 1 November 2019 and had exhausted her statutory sick pay.

### **What was the claimant's sick pay entitlement**

12. The claimant's offer of employment as a Teaching Assistant, made on 19 September 2019 and accepted on 27 September 2019, made no mention of sick pay. However, I had before me some Outcomes First Group documents relevant to sick pay entitlement. These were standard terms and conditions for a Teaching Assistant, an Attendance Policy and a Discretion for Company Sick Pay ('CSP') policy. In summary, these documents said that during a probationary period there was no sick pay entitlement; following a probationary period there was entitlement of one week's pay; and that in certain circumstances – broadly, circumstances involving injury sustained during the course of work – the respondent could in its discretion award sick pay of up to a maximum three months pay in any rolling twelve month period. I find that while the claimant was injured during her probationary period, this discretion was not limited to those who had completed their probationary period.
13. I find that, on a balance of probabilities, these documents applied to the claimant's contractual relationship with the respondent. I find that while the claimant was not entitled to a specific amount of CSP, in the circumstances accepted by both parties it was more likely than not that the claimant was entitled to a consideration by the respondent about whether to exercise its discretion to pay CSP in her favour and that, in fact, this discretion was exercised to the extent that a decision was made that she was to be paid in full for November 2019. The evidence – including a text from a member of staff to the claimant dated 28 October 2019 saying 'Just spoke to Alice [headmistress of New Barn School] and she said yes to paid time off', and the fact the claimant was in practice paid in full for November 2019 - supports this.
14. In December 2019 the claimant received no salary and no SSP. The evidence from the respondent was that a decision had been made that it had been an error to pay the claimant CSP in November and that the relevant sum should be deducted from her December salary.
15. The claimant brought a grievance, which included complaints about the deduction from her December salary and the fact that she was paid only SSP for January 2020. A meeting took place on 4 February 2020. The evidence from the claimant's witness Mr Sean Chaplin and the respondent's witness Mr Cliff James – both of whom attended the grievance meeting - was that Mr James had said that the claimant should have been paid a full salary up to the date of the meeting as her accident had happened at work and that, had he been made aware of the situation earlier, he would have ensured that she was paid in full; and that the claimant would be paid in full up to 4 February 2020. This is also reflected in the notes of that meeting.

**What sick pay did the claimant in fact receive**

16. Based on the payslips included in the bundle and the oral and documentary evidence provided to me, I find that the claimant was paid in full for October 2019 because she was working during that month. Thereafter, her pay was as follows:-
  - 16.1. Full CSP for November 2019.
  - 16.2. No CSP or SSP for December 2019 – a deduction was made for this month on the basis of an alleged overpayment in November with the result that the claimant received no pay.
  - 16.3. SSP for January, February and March 2020.
  - 16.4. Full salary in April 2020. (The respondent's position is that this was paid in error, since the claimant was still off sick in April and only eligible for SSP. The claimant did not contest this.)
  - 16.5. SSP in June and July 2020.
  - 16.6. During the period up to the claimant's dismissal in September 2020 the claimant had exhausted her SSP entitlement and did not receive any payment.

**Did the respondent make any unauthorised deductions from the claimant's wages?**

17. I find that in December 2019 the respondent made a deduction from the claimant's wages and this was an unlawful deduction. The claimant was entitled to receive her full salary in November 2019 because she was entitled to CSP for that month. The discretion to pay the claimant CSP had been exercised in her favour in relation to November 2019. Therefore, the deduction made by the respondent from her December salary was an unauthorised deduction.
18. The claimant conceded that by the date of the hearing, she had received a payment which put her in the position she would have been in had she received CSP for the period from 1 November 2019 to 4 February 2020. Any SSP she had received during that period, and the overpayment she had received in April, were deducted. It is not clear exactly when this sum was paid, but it was offered by a letter dated 4 February 2021 which said that the payment would be made within 7 days.
19. I find that the deduction of the April salary was not an unauthorised deduction. The claimant was still off sick during that month; there was no evidence that a discretion to pay her CSP had been exercised in her favour in relation to April; therefore, her entitlement for April was limited to SSP.

20. On this basis, the claimant has now received the amount to which she would have been entitled had the unlawful deduction not been made from her salary in December 2019. She has also received the amount to which she would have been entitled had the discretion been exercised in her favour to pay her CSP for maximum period of 3 months set out in the respondent's Discretion for Company Sick Pay Policy. Therefore, by the date of the hearing nothing was owing.

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Employment Judge Cotton

Date: 5 March 2021

Sent to the parties on: 24 March 21

For the Tribunal Office