



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000064/2023

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Held by Cloud Video Platform in Glasgow on 7 August 2023

Employment Judge Sangster

10 **Ms M McCormick**

**Claimant
In Person**

15 **North Lanarkshire Women's Aid Limited**

**Respondent
Represented by
Ms A Stobart -
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Tribunal is that the claimant's complaints do not succeed and are dismissed.

REASONS

Introduction

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1. The claimant presented her claim on 17 February 2023, having engaged in early conciliation from 5-20 January 2023. She was employed by the respondent at the time her claim was presented.
 2. The final hearing took place remotely, by CVP, on 7 August 2023. In advance of the final hearing a joint bundle of documents was lodged, extending to 136 pages.
 - 30 3. The claimant gave evidence on her own behalf at the final hearing.
 4. The respondent led evidence from:

- a. Anne Murray (**AM**), Director and Chair of the respondent's Board; and
- b. Sarah Hollis, Chartered Accountant.

Issues to be Determined

5. The issues to be determined by the Tribunal were discussed at the outset of the hearing. The issues to be determined by the Tribunal were as follows:
- a. Did the respondent make unauthorised deductions from the claimant's wages (Section 13 ERA) in relation to:
 - i. A promised payment for holiday pay;
 - ii. Payment in respect of accrued but untaken holidays;
 - 10 iii. Contractually agreed cost of living increases; and/or
 - iv. Reimbursement of legal fees.
- if so, how much was deducted?
- b. In the alternative, did the claimant have any entitlement to holiday pay under the Working Time Regulations 1998?

15 Findings in Fact

6. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
7. The respondent is a small voluntary organisation that provides information, support and temporary accommodation to women and their children who have experienced domestic abuse. The respondent has approximately 4 employees.
- 20 8. The claimant commenced employment with the respondent in August 1989. She was latterly employed as Manager. In that role she was responsible for the respondent's day to day operations. She was the most senior employee in the organisation. She reported directly to the Chair of the Board, who was engaged on a voluntary/non-executive basis.
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9. In/after 1999, the claimant received a Statement of Main Terms and Conditions of Employment from the respondent (the Contract). This stated her salary at that time and indicated that the claimant's salary *'is linked to a standard pay scale'* and that she was at *'Spinal Column 40-42'*. In relation to overtime the Contract stated that this may be required, but if worked the claimant would *'only receive time off in lieu'* and *'no payment is available for overtime'*. In relation to holidays, the Contract stated that the holiday year ran from January to December and claimant's entitlement was to 2.5 days per month, plus 13 public holidays. The Contract did not contain any provisions regarding carry-over of untaken holidays from one year to the next, or for payment to be made in respect of these.
10. In around 2016, the respondent experienced financial difficulties. The claimant agreed to reduce her hours to assist with cost cutting. This remained in place from January 2017 to September 2018. Thereafter the claimant's salary and hours reverted to the level they were in 2016. The claimant did not receive any increases to her rate of pay from 2016 to December 2022.
11. In January 2020 staff members, including the claimant, raised with the respondent's Board that they had not received cost of living increases in line with the NJC Payscales, which they understood their contracts stated their salaries were linked to.
12. The respondent's general approach to holidays was, as stated by the claimant in an email to AM dated 8 October 2021 *'use it or lose it'*. The claimant was aware of this. On 17 October 2021 however, AM authorised the claimant to process payments to herself and one other employee in respect of holidays which they had been unable to take in 2020 as a result of the Covid-19 Pandemic. The sum authorised for the claimant was £3,146, which represented 4 weeks' holiday pay. The claimant instructed the payment for the other employee, but not the payment to herself.
13. In a further email to the claimant, dated 1 November 2021, AM stated that *'...all staff must ensure they take their holidays in line with current policy. This is really important to ensure the wellbeing of yourself and all staff and prevent*

burnout. However, as you still have most of this year's entitlement to take, we have agreed that any unused by 31st Dec 2021 can be carried forward to be used with next year's entitlement by 31st Dec 2022. This will require careful planning and the Board will require to see your schedule of holidays for the rest of this year & for 2022 as soon as possible.'

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14. The claimant and her colleagues maintained their grievance in relation to their asserted entitlement to cost of living increases in line with the NJC Payscales. In December 2022, the respondent increased the claimant's salary to £44,624, the same as spinal column point 40 on the NJC Payscale and paid her the sum of £2,486.86 gross, as back pay for the period from 1 April 2022 to date, calculated by reference to the NJC Payscales. It was not known at that time that, on 1 November 2022, the NJC Payscale for 2022/23 had been published, further increasing the spinal column point 40 salary, with effect from 1 April 2022.
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15. On 28 June 2023 a further increase was applied to the claimant's salary, to bring her salary in line with the 2022/23 NJC Payscale and a further payment was made to her of £2,245.82, as back pay for the period from April 2022 to date.
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16. When reviewing the payments made to the claimant to calculate back pay in line with the 2022/23 NJC Payscale, it was noted that the claimant had received overtime payments on a monthly basis from January to August 2022, but not prior to that. This was paid at time and a half. The claimant authorised these payments for herself. This had not been authorised by the Board and was contrary to the provisions of the Contract.
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17. The claimant obtained legal advice in relation to her grievance and requested that the respondent reimburse her for the legal fees she incurred in doing so. The respondent declined to reimburse the claimant for her legal fees.
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18. The claimant was absent from work due to ill health in the period from 25 April to 28 May 2022 and then from 3 December 2022 onwards. She remained absent from work, due to ill health, at the time her claim was lodged on 17 February 2023.
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19. The claimant submitted her claim on 17 February 2023. Her employment then terminated on 21 June 2023.

Respondent's submission

20. In summary, the respondent submitted that:
- 5 a. Any complaint of unauthorised deductions from wages in respect of the payment authorised in November 2021 is now time barred. Alternatively, the Tribunal have no jurisdiction to consider the complaint given the terms of section 23(4A) ERA, given that the payment related to the claimant's 2020 holiday entitlement.
- 10 b. The claimant was not entitled to any payment in respect of untaken holidays, under her contract or otherwise.
- c. The claimant was not entitled to be paid in accordance with the NJC Payscales prior to 1 April 2022, when the Board agreed to reinstate this practice. If she was, her complaint is restricted to the 2 years prior to the presentation of her complaint, given the terms of s23(4A) ERA. Namely the period from 18 February 2021 to 17 February 2023. The respondent was entitled to deduct the sums overpaid to the claimant in respect of overtime, which she was not entitled to under the Contract, from any sums properly payable to her.
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20 Claimant's submission

21. The claimant declined to give a submission, but was given the opportunity to respond to the respondent's submission. She stated that time and a half was what other organisations, with the same funder, paid their staff for overtime and that it would not be fair to apply a backstop of two years to any sums due to her, given that other staff received backdated payments beyond a two year period.
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Relevant Law

Annual leave

22. Under the Working Time Regulations 1998 (**WTRs**) workers are entitled to 5.6 weeks' annual leave. The right is made up of basic leave of 4 weeks and
5 additional leave of 1.6 weeks. The maximum aggregate of the basic and additional entitlement is 28 days.
23. Regulations 13 & 13A provide the right for workers to take annual leave. Regulation 16 provides that workers are entitled to be paid when they take their annual leave. Regulation 13(9)(b) states that the right to take annual
10 leave may not be replaced by a payment in lieu except upon termination of employment.

Unauthorised deductions from wages

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:
- 15 a. The deduction is required or authorised by statute or a provision in the worker's contract; or
- b. The worker has given their prior written consent to the deduction.
25. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the amount of the wages properly payable
20 on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church*** [2000] IRLR 27).

Time Limits

26. The relevant time limits in relation to complaints of unauthorised deductions
25 from wages are set out in s23 ERA.
27. This states that a Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of three months beginning with the date the deduction was made, or within such further period as the Tribunal considers

reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

28. Section 23(3) ERA states that where a complaint is brought in relation to a series of deductions, the relevant time limit runs from the date of the last deduction in the series of deductions.
29. The question of what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).
30. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12).

Discussion & Decision

2020 Holiday Pay – s13 ERA

31. The Tribunal considered the claimant's complaint that the respondent had made unauthorised deductions from her wages by failing to pay her the sum of £3,146, which the respondent authorised to be paid, in respect of her 2020 holiday entitlement, on 17 October 2021.
32. The Tribunal considered whether they had jurisdiction to consider a complaint of unauthorised deductions from wages in relation to this sum. Section 23(2) ERA states that a Tribunal shall not consider a complaint of unauthorised deductions from wages unless it is presented before the end of the period of 3 months, beginning with the date of the deduction (i.e. the date the total amount of wages paid was less than the total amount of the wages properly payable (s13(3) ERA)). The payment received by the claimant on 30 October

2021 was less than the total amount of wages properly payable to her at that point. The claimant was, at that date, also entitled to a payment in respect of the sum which AM agreed to pay to her on 17 October 2021. Any complaint of unauthorised deductions from wages in relation to that sum ought, therefore, to have been presented on or before 29 January 2022. It was not presented until 17 February 2023, over a year later. The claimant has not demonstrated that it was not reasonably practicable for the complaint to have been lodged on or before 29 January 2022. There was no evidence to suggest that this was the case. The Tribunal accordingly does not have any jurisdiction to consider the claimant's complaint in relation to holiday pay authorised in October 2021. Her complaint of unauthorised deductions in relation to this therefore dismissed.

33. For the avoidance of doubt, the Tribunal determined that there was no basis upon it could have concluded (if it had been required to do so) that the complaint was presented in a reasonable period after expiry of the time limit on 29 January 2022.

Cost of Living Increases – s13 ERA

34. The Tribunal considered the claimant's claim that the respondent had made unauthorised deductions from her wages by failing to increase the claimant's wages in line with the NJC Payscale. The claimant accepted that she had been paid the relevant amounts from April 2022 onwards. The respondent intimated an intention to pay the claimant in accordance with these scales going forward, prior to that date. The respondent has abided by their agreement to do so – increasing the claimant's salary and making back payments, where appropriate. The sums claimed by the claimant are in respect of the period up to 31 March 2022. The claimant was paid on the 30th day of each month.

35. Section 23(2)&(3) ERA states that a Tribunal shall not consider a complaint of unauthorised deductions from wages unless it is presented before the end of the period of 3 months, beginning with the date of the deduction or the date of the last deduction where there are a series of deductions. Any complaint of

unauthorised deductions from wages in relation to a series of deductions ending on 30 March 2022 should, accordingly have been made on or before 29 June 2022. The claimant's complaint was not presented until 17 February 2023, 7.5 months later. The claimant has not demonstrated that it was not reasonably practicable for the complaint to have been lodged on or before 29 June 2022. There was no evidence to suggest that this was the case. The Tribunal accordingly does not have any jurisdiction to consider the claimant's complaint in relation to unauthorised deductions up to 31 March 2022. Her complaint of unauthorised deductions in relation to pay increases up to 31 March 2022 is therefore dismissed.

36. For the avoidance of doubt, the Tribunal determined that there was no basis upon it could have concluded (if it had been required to do so) that the complaint was presented in a reasonable period after the expiry of the time limit on 29 June 2022.

15 *Legal Fees – s13 ERA*

37. The Tribunal considered the claimant's claim that the respondent had made unauthorised deductions from her wages by failing to reimburse the legal fees she paid, in relation to the grievance she had raised against the respondent. The Tribunal noted that a deduction occurs where the total wages paid on any occasion, by an employer to a worker, is less than the amount of the wages properly payable on that occasion. Wages are defined in section 27 ERA and are properly payable where a worker has a contractual or legal entitlement to them. Legal fees would not fall within the definition of wages, as defined in section 27 ERA, and the claimant has not demonstrated any contractual or legal entitlement to reimbursement of legal fees by the respondent. For these reasons, the claimant's complaint of unauthorised deductions from wages in relation to this does not succeed and is dismissed.

Payment in Lieu of Accrued but Untaken Holidays – s13 ERA

38. The Tribunal then considered the claimant's complaint that the respondent had made unauthorised deductions from her wages by failing to make a payment to her in respect of accrued but untaken holidays. In the claimants

further and better particulars, which were lodged with the Tribunal on 14 June 2023 and contained in the Joint Bundle, the claimant asserted that she was due the sum of £14,207.36, in respect of 77 days' annual leave accrued, but untaken, in the period from 2020-2023.

5 39. The claimant was entitled, under the WTRs, to take annual leave and to be paid for the time taken as annual leave. The claimant had no right under the WTR to a payment in lieu of accrued but untaken holiday pay, other than on the termination of her employment. At the time her claim was lodged, her employment had not terminated. She accordingly had no legal right to a
10 payment in lieu of any accrued but untaken holidays under the WTRs.

40. The Contract also provided for the claimant to take and be paid for annual leave. It did not give the claimant a contractual right to a payment in lieu of any accrued but untaken holidays. The claimant accordingly had no contractual right to receive a payment in respect of accrued but untaken
15 annual leave.

41. As the claimant has not demonstrated any contractual or legal entitlement to payment in respect of accrued but untaken annual leave, her complaint of unauthorised deductions from wages in relation to holiday pay does not succeed and is dismissed.

20 *Payment in Lieu of Accrued but Untaken Holidays – WTRs*

42. The claimant did not assert that she was not paid when she took annual leave. Her complaint was that she was entitled to a payment in lieu of her entitlement and did not receive this. Regulation 13(9)(b) states that a worker's entitlement to take annual leave cannot be replaced by a payment in lieu, except where
25 the worker's employment is terminated. At the time her claim was lodged, her employment had not terminated. She accordingly had no entitlement to any payment in lieu of annual leave.

43. As the claimant has not demonstrated that she was entitled, under the WTRs, to payment in respect of accrued but untaken annual leave, her complaint in relation to holiday pay under the WTRs does not succeed and is dismissed.

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Employment Judge: M Sangster
Date of Judgment: 11 August 2023
Entered in register: 15 August 2023
and copied to parties

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