



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE ELLIOTT (sitting alone)  
**BETWEEN:**

**Mr A Rybacki**

**Claimant**

AND

**ISS Mediclean Ltd**

**Respondent**

**ON:** 6 February 2017

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr S Moon, consultant

## **JUDGMENT**

The Judgment of the Tribunal is that the claim fails and is dismissed.

## **REASONS**

1. This decision was given orally on 6 February 2017. The claimant requested written reasons.
2. By a claim form presented on 15 July 2016 the claimant Mr Artur Rybacki claims unlawful deductions from wages. The claim is for sick pay which the claimant says is contractual.
3. The claimant's employment with the respondent is continuing. He works as a catering assistant / porter at Kingston Hospital.

### **The issues**

4. The issue for the tribunal is whether the claimant is entitled to full pay as contractual sick pay for the period from 28 January 2016 when he went off sick due to knee surgery. The claimant says that he is contractually entitled to six months full pay and six months half pay.

5. Did the terms of the Agenda for Change (AfC) sick pay provisions apply to the claimant?

### **Witnesses and documents**

6. The tribunal heard from the claimant. For the respondent the tribunal heard from Mr Chris Feeney, Head of People and Culture for ISS Healthcare, an operating division of ISS and from Mr Paul Cronin, Employee Relations Director.
7. There was a bundle of documents of 280 pages.
8. Both sides made oral submissions which are not replicated here and were fully considered even if not expressly referred to below.

### **Findings of fact**

9. The claimant's period of continuous service commenced on 14 October 2004. On 31 October 2008 he was issued with and signed a Statement of Main Terms and Conditions of employment. He relies on this contract. At the top of that document which was at page 214 of the bundle, it said "(Agenda for Change)". The claimant confirmed that his signature appears on that contract.
10. The claimant had an operation on his knee on 28 January 2016 and inevitably had to take time off work. Just prior to this he took advice from the Waterloo Legal Advice Service who wrote to the respondent on 22 January 2016 (page 260) seeking assurances about the level of his sick pay and that his entitlement to six months full pay and six months half pay would be honoured.
11. In the respondent's Employee Handbook (Agenda for Change) under the heading "Sick Pay Allowances" and in the claimant's terms and conditions of employment at page 225 of the bundle it says: *Subject to your compliance with the foregoing rules, and your cooperation with any local rules relating to sickness absence reporting and instructions from the company's management, your entitlement to sick pay allowance shall be in accordance with the following schedule.* It goes on to state that after five years service the entitlement is to 6 months full then six months half pay.
12. The claimant was a member of Unison until August 2015.

### **Agenda for Change (AfC)**

13. A large majority of NHS employees are employed under the terms and conditions of employment known as Agenda for Change (AfC) which was implemented nationally in 2004. Doctors and very senior managers are not covered by AfC.

## The National Agreement

14. Originally it was not intended that AfC would apply to the workforce of private contractors, such as the employees of the respondent. However, due to a separate agreement made in October 2005 between the Department of Health and the relevant unions namely GMB, Unison and TGWU, it was recommended that as a statement of good practice, employers and unions would work together to extend the reach of AfC to private sector contractors. This was called the Agenda for Change and NHS Contractors Staff - a Joint Statement and is commonly referred to as the Joint Statement (bundle page 30).
15. A best practice guide was then issued by the Department of Health in January 2007 for implementing AfC for NHS Contractors Staff in England (bundle page 50-69).
16. The respondent's witnesses Mr Cronin and Mr Feeney were involved in working with the relevant unions, Unison, GMB and Unite to discuss a national agreement for the implementation by the respondent of AfC. It was made clear to the unions that the respondent was committed to implementing the AfC terms and conditions but this required the individual NHS Trusts to provide funding for that implementation to occur.
17. As a consequence, a National Agreement was agreed directly between the respondent and the relevant unions in which they agreed the mechanisms and terms under which the Joint Statement would be applied. The National Agreement was at page 70-78 of the bundle. The parties were the respondent and Unison, GMB and the T&G section of Unite and it was signed by the parties on 19 September 2007. The terms of the National Agreement were incorporated into the employees' contracts of employment and followed the principle known as "pay as paid".
18. The National Agreement (page 71) under the heading "Implementation" said:
- It is recognised that Mediclean will need and be obliged to negotiate with each of its Hospital Trust clients in relation to obtaining the funding and agreement to terms and conditions before local contract implementation of AfC can commence.*
- Each of these elements will involve a contract variation between Mediclean and the relevant Hospital Trust.*
- It is understood by all parties to this agreement that funding has already been made available to all Hospital Trusts and that this funding has come from central government. It is also recognised that it is within the individual Trust's control to release these funds to Mediclean and that without funds being released no AfC or other terms and conditions can be offered to our employees.*
- .....
- Where Trust's do not agree to the required funding, Mediclean will actively encourage Tripartite discussions. ....*
19. The above provisions became known as the "Pay as Paid" principle.

20. The claimant's contract of employment (signed by him on page 214 and set out at page 217) states:

INTRODUCTION

*This document sets out the terms and conditions of service, which applied to the company's service contracts for so-called "Soft FM" services within the national health service where the relevant NHS Trust client has agreed to provide the company with such funding is necessary to implement and maintain the provisions contained herein.*

*The terms and conditions of service in this document are those made by ISS Mediclean Ltd, (the company) and are subject to change for time to time. In setting out these terms and conditions of service, and in so far as it has been appropriate for the company to do so, reference has been made to the Agenda for Change NHS Terms and Conditions of Service Handbook (the Handbook) and, the National Agreement between the company, GMB, Unison and Unite (T.G.W.U.) signed by the parties on 19 September 2007, (the National Agreement).*

*In interpreting the terms and conditions of this employment, reference shall be made to both; to the handbook (to the extent provided for within the National Agreement) and, to ISS Mediclean Ltd standard terms and conditions of service". (Bundle page 217).*

MISCELLANEOUS PROVISIONS

*Any future changes to these terms and conditions arising from decisions made between the NHS employers and their recognised trade unions governing the terms and conditions of this employment shall be at the implemented at the discretion of the company, and shall be contingent upon such factors as affordability and funding being made available to the company.*

*The terms and conditions of service in this document are those made by ISS Mediclean Ltd, (the company) and are subject to change for time to time. In setting out these terms and conditions of service, and in so far as it has been appropriate for the company to do so, reference has been made to the agenda for change NHS terms and conditions of service Handbook (the handbook) and, the national agreement between the company, GMB, Unison and Unite (TGWU) signed by the parties on 19 September 2007, (the National Agreement).*

*In interpreting the terms and conditions of this employment, reference shall be made to both; to the handbook (to the extent provided for within the national agreement) and, to ISS Mediclean Ltd standard terms and conditions of service".*

*Acceptance of the terms of this contract of employment rescind the terms of all previous contracts of employment.*

*Copies of these documents and other relevant locally determined collective agreements, which are applicable to your employment, are available for inspection upon request to your Contract Manager. (bundle page 225)*

21. The above extracts were drafted by Mr Feeney with the intention of incorporating the pay as paid principle into the employees' contracts of employment as a result of agreement with the unions.

The claimant's position

22. The respondent admits that the claimant was originally entitled to sick pay as set out in his contract of employment signed on 31 October 2008

- following the AfC sick pay provisions. This was because the local NHS Trust agreed to fund the AfC sick pay provisions to the extent that sickness rates did not exceed 2.5%.
23. Negotiations between the respondent and Kingston Hospital NHS Foundation Trust took place in October 2007 were attended by the respondent's two witnesses Mr Cronin and Mr Feeney. The Trust only agreed to fund sick pay up to 2.5% of the total payroll cost. The benchmark for the respondent's negotiations is normally around 4% of payroll costs but Kingston only agreed to 2.5%.
24. By July 2013 levels of sickness absence at Kingston Hospital had risen to 8%. This was costing the respondent an additional £5million above budget (page 116). The respondent took steps to inform employees that they needed to bring sickness levels down otherwise the generous AfC provisions may be removed.

#### July 2013 meetings

25. The respondent and Unison arranged three meetings with the respondent's employees which took place on 16 July 2013 to discuss levels of sickness absence. Mr Feeney of the respondent attended these meetings. The meetings were held in the restaurant. The claimant worked in the kitchen. I saw a number of internal emails of the respondent setting up those meetings (from page 117).
26. Additional meetings also took place on four other dates in July 2013 to ensure that all relevant employees had the opportunity to attend and to make sure that all relevant shift patterns were accommodated. Letters were sent to employees who were off sick. I am satisfied from reading the documents and find that the respondent took all reasonable steps to ensure that their workforce had an opportunity to attend one of the meetings or steps were taken to bring the information to their attention. The claimant did not attend any of the meetings.
27. The claimant's evidence at paragraph 7 of his witness statement was that he was part of Unison until August 2015 and was aware of discussions between the respondent and the unions in relation to sick pay and proposed amendments. I find that he was so aware.
28. At these meetings the respondent and Unison informed the employees that the levels of sickness absence were unaffordable and the AfC provisions could only be sustained if sickness absence levels were reduced to 4%. A Joint Statement was issued by the unions and the respondent after the July 2013 meetings confirming that if the sickness absence level did not fall then the AfC sickness scheme would be removed and would be replaced by SSP.

29. A review date was set for March 2014 when employees were advised that if sickness absence levels did not fall, the sick pay provisions may have to be withdrawn.
30. The review meeting took place on 19 March 2014 and this time sickness absence levels were at 6.3% which remained unaffordable for the respondent. As a consequence the respondent and Unison agreed that the AfC sick pay provisions under the pay as paid principle had to be removed. In its place Unison proposed a new sick pay credit scheme which was introduced from 1 May 2014. That provides so that for each month worked with no absence an employee accrues one days sick pay into the "bank". This is used to top up statutory sick pay entitlement and after it has been exhausted the employee reverts to SSP.
31. At around the end of March/beginning of April 2014 another Joint Statement was issued to all staff on behalf of the respondent the (bundle page 197) reflecting the agreement reached between the respondent and the unions. This confirmed that the replacement of the AfC sick pay provisions with the credit sick pay scheme as set out above. The claimant's evidence was that he was not aware of this Joint Statement. The respondent's case is that nevertheless this was an effective variation of the employees contracts of employment including the claimant's.
32. The respondent's evidence was that it was posted on notice boards at the clocking in and signing in stations. The claimant said it was not. Based on the respondent's evidence being corroborated by their two witnesses and the thoroughness with which they communicated regarding the setting up of the employee meetings in July 2013, I find that the respondent did take all reasonable steps to bring notice of this change to the attention of their employees working at Kingston Hospital.

#### The claimant's sickness record

33. The claimant's sickness record from May 2014 was shown in a document at page 234 of the bundle. It shows that the claimant was paid according to the credit sick pay scheme rather than AfC. He received pay under the new credit scheme in the following months: 2014 – June, July, August and November; 2015 – February, April, August, October and November and in 2016 – August.
34. The claimant was asked in cross examination to confirm that he was paid according to the new credit sick pay scheme in 2015. The claimant said he could not remember because it was a long time ago. Based on the respondent's evidence and the fact that the claimant could not remember, I find on a balance of probabilities that the claimant was paid according to the credit sick pay scheme from January 2015 onwards. There was no evidence that the claimant complained in 2015 about the new sick pay scheme and I find that he did not, despite being paid in accordance with it. It resulted in about seven days of nil pay in 2015.

35. The claimant had a substantial amount of sick leave in 2016 due to his knee operation. He was off sick from 28 January to 8 July and was absent again from September 2016 due to a second operation although this post-dates the issue of these proceedings. He is unfortunately due to have a third operation on his knee.
36. Just prior to his first knee operation his legal advisers wrote to the respondent to seek an assurance that he would be paid according to AfC (letter 22 January 2016 referred to above, page 260). The respondent replied referring him to the credit sick pay scheme (letter pages 261-262) and said that his previous sick pay had been paid according to this method. The claimant said that he did not receive this letter. The fact that the claimant asked legal advisors to write to the respondent to seek an assurance that he would be paid at AfC rates, supports my finding that he was aware of the credit sick pay scheme.
37. The claimant calculates that under the AfC provisions he has been underpaid his sick pay by £8,840 gross. This understandably has a significant effect on his ability to manage his finances and his personal obligations.

#### The law

38. Section 13(1) of the Employment Rights Act 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. Where the total amount of wages paid to a worker is less than the amount properly paid, the deficiency is treated as a deduction.
39. Section 27 defines wages as including:
- (1) In this Part "wages", in relation to a worker, means 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,*
40. The right to bring a claim for unlawful deductions from wages is set out in section 23 ERA.
41. In **ISS Mediclean Ltd v O Elesina EAT/0427/11** it was held (Cox J) that the claimant was not entitled to enhanced pay rates for working unsocial hours and that the respondent (being the same respondent as in this case) had made no unlawful deductions from her wages by not paying those enhanced rates. In that case the claimant had not received any enhanced pay rates. The EAT held that on a correct construction of the claimant's contract of employment, which was contingent upon the

respondent receiving funds for unsocial hours from Kingston Hospital NHS Foundation Trust where she worked, she was not entitled to the enhanced pay rates.

## Conclusions

42. As with *ISS Mediclean Ltd v O Elesina* (above) this case turns on the correct construction of the claimant's contract of employment.
43. The claimant's position was that he had signed a contract on 31 October 2008 which entitled him to sick pay under AfC terms and conditions. He submitted that he had never agreed to anything else, he had not signed anything else and that he worked for the respondent and not Unison.
44. The claimant's contract of employment is subject to collective bargaining. This is made clear in the Miscellaneous provisions of his contract at page 225 of the bundle and as set out above. I find that the collective agreement between the respondent and the unions is incorporated into the claimant's contract of employment and as such the making of a new agreement is a valid and effective means of varying that contract of employment, whether or not the claimant is a member of one of the relevant unions.
45. This claimant was a member of Unison at the time the collective agreement was made to vary the AfC sick pay provisions to the credit sick pay scheme on 1 May 2014. Even if he had not been a member of Unison at that date, the collective bargaining vehicle would have been sufficient to vary his contract.
46. I have also found above that in 2015 the claimant was paid in accordance with the credit sick pay scheme and that he did not complain about it at that time. I find that he was aware of it and this was the reason, when anticipating a lengthy period of sick leave from January 2016, he instructed legal advisers to write to the respondent on the point.
47. I find that the *Elesina* case is fully on point with the facts of this case, concerning the same agreements and the respondent's workforce at Kingston Hospital, even though it concerned a different category of payment (unsocial hours). I am bound by the decision of the EAT in that case in which the claim for unlawful deductions from wages ultimately did not succeed. The EAT found at paragraph 33 of the judgment that the provisions of the National Agreement (which are set out at paragraph 18 above) and the Joint Agreement sent to the staff in the form of a Memo were relevant to the construction of the contract.
48. For the above reasons I find that there was a valid collective agreement which varied the claimant's contract of employment. It was not necessary for there to be individual consultation or for the claimant personally to sign an amendment to his contract of employment. The sick pay scheme was validly varied on 1 May 2014 to the credit sick pay scheme and this is the



sick pay scheme that applies to the claimant.

49. This very unfortunately has a significant impact on the claimant's income when through no fault of his own he has had to take time off work for a knee problem and faces yet more surgery.

50. As a result of the above findings the claim for unlawful deductions from wages fails and is dismissed.

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**Employment Judge Elliott**  
**Date: 6 February 2017**