EMPLOYMENT TRIBUNALS

Claimant: Mr Rob Cheer

Respondent: Servoca Nursing and Care Limited

Heard at: Southampton **On:** 5 April 2019

Before: Employment Judge Jones QC

Representation:

Claimant: In person
Respondent: Mr Abernethy, Solicitor

JUDGMENT

1. The Claimant's claims for unlawful deduction succeed.

2. The Respondent shall pay to the Claimant the sum of £601, which comprises the sum of £141 in respect of a deduction from his notice pay and a further £460 in respect of accrued but untaken holiday.

REASONS

The Claim and Issues

1. The Claimant alleges that there have been unlawful deductions from his pay consisting of:

   (1) A deduction of £141 made from his notice pay; and

   (2) A failure to pay him for 4 days of holiday which were accrued but untaken at the date of the termination of his employment.

2. In respect of the first alleged deduction, the Respondent says that it was entitled to deduct the £141. That sum represented the charge that should have been made to

clients for the work done by two care assistants provided by the Respondent. The Claimant had waived that charge. In the circumstances, the Respondent says that the Claimant acted either negligently or in "breach of authority" and in such circumstances, the Claimant had authorised a deduction by agreeing to a specific term to that effect in his contract of employment.

3. In respect of the second alleged deduction, the Respondent says that during a period of garden leave, the Claimant was "deemed" as a result of a contractual provision, to have taken 4 days of holiday.

Findings

4. The Respondent, Servoca Nursing and Care Limited, provides nurses, healthcare assistants and support workers throughout the UK. The Claimant worked for the Respondent as a Branch Manager.

5. On appointment, the Claimant underwent an induction which involved him spending time in the Liverpool, Manchester and Leeds branches observing their practice. One practice he observed was what he called "shadow shifts". The Respondent offers to provide staff with 6 months of recent care experience. If the particular individual supplied had not worked in care in the previous 6 months, they were offered to the relevant client on a "try before you buy" basis. The effect was that the carer would be paid by the Respondent but the client would not initially be charged.

6. When the Claimant began to run his own branch, he was told he had "autonomy" as to his "P&L", which it seems to me must mean that he had discretion over income and expenditure.

7. The Claimant says he adopted the "shadow shift" practice he had observed elsewhere. He did not seek specific permission from his own line manager but that given that the practice appeared widespread; given his own autonomy; and given that his own practice went unchallenged until termination, he didn't think he had to.

8. The Respondent led no evidence on the point. Mr Abernethy, for the Respondent, pointed to a field in the computer booking form which enabled (and he says, thereby compelled) a "charge rate" to be included. He also suggested that, as a matter of common sense, managers should not be giving carers to clients for free without express permission.

9. The Contract contains a deductions clause which allows for deductions to be made, *inter alia*, where the Respondent suffers losses as a result of the Claimant's "negligence, breach of authority or breach of the Company's Rules". No specific applicable rule was identified, so that the Respondent's case was either that when the Claimant waived £141 of charges to clients he was negligent in not asking his line manager for authority or else that he was acting in breach of authority.

10. I find that the Claimant was not acting negligently, nor was he acting in breach of authority. There was no evidence that he was told that providing staff on a shadow shift basis required specific authorisation, nor that it was outside the scope of the autonomy conferred on him. It was not suggested that it was made clear to him in induction that providing staff on shadow shifts required specific authorisation. What he observed at other branches and what he was told about his own autonomy would seem strongly to point to the contrary. The existence of a field on the booking form allowing a charge to be made does not require a charge. Indeed, it is obviously possible to include a nil charge since that is what the Claimant did and it is what was happening in other branches. Nor does common sense compel the seeking of permission. First, the grant of autonomy on P&L, if it means anything, appears to me to mean that the decisions as to whether and what to charge were explicitly a matter for the Claimant. Second, one can see the business sense, since if the client "tried" and then "bought" the carer who worked the shadow shift, the branch would earn money from using a carer they would not otherwise have been able to deploy.

11. In the circumstances, I conclude that the deductions clause was not engaged and the deduction was unlawful.

12. The Claimant gave one week's notice of termination on 2 July 2018. He was immediately placed on garden leave. The Claimant's contract of employment provides that:

> "The company will deem you to have taken any accrued holidays during the 'garden leave period'"

It is not possible to contract out of the entitlement to paid annual leave (see **Working Time Regulations 1998, reg 35**). The consequence of that provision is that a period which is not in fact leave cannot be "deemed" to be leave. The provision therefore only works if it is properly interpreted to mean that the Employer will require employees to take leave during any period of garden leave. An employer may require leave to be taken on specific days provided the notice requirements in **Reg 15** are complied with.

13. The Respondent sent a letter on 2 July 2018 placing the Claimant on garden leave. The letter stated:

> "We reserve the right to require you to attend the office at the Company's discretion. In any event you should ensure that you are contactable during working hours in case of any enquiries."

The letter also said that the Respondent would deem the Claimant to have taken any accrued holidays during the garden leave period.

14. The Claimant says that he cannot be taken to be on leave in circumstances where he was expressly at the Respondent's disposal. The instruction required him to attend the office if the Respondent required it. That discretion is not subject to any express

limits, so that it was open to the Respondent to require him to attend on every day of the garden leave period and for the entirety of the working day. The Respondent says that it did not exercise its discretion. There seems to have been some telephone contact between the Claimant and a Mr Oaks who made enquiries about computer passwords and perhaps about which carers worked which shifts, but that was all.

15. I agree with the Claimant that if he was required to remain at the Respondent's disposal throughout the Garden Leave period he could not be said to be on holiday. I do not consider that his statutory right to paid leave and/or to receive a payment in lieu under the **Working Time Regulations 1998** can be defeated by the artifice of a contractual deeming which does not reflect the reality of the situation. It amounts, in practice, to an impermissible contracting out of the right to paid annual leave.

16. If I had not taken that view, I would have had to consider whether the reference in the contract to deeming garden leave to be holiday would have satisfied the notice requirements set out in Regulation 15 of the 1998 Regulations. I would have found that they did not. **Regulation 15(3)** requires that a notice:

> "shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration"

17. Mr Abernethy's argument that the contractual deeming was in effect notice given at the outset of the employment was ingenious but I think fails because no days of leave are specified. In a case where the available leave is equal to or greater than the number of days in the garden leave period, the argument that all the days in the period are "specified" might seem initially plausible. However, it falls apart where the number of days of leave entitlement is less than the garden leave period. So if the Claimant had had only 2 days of leave, the contract would not have allowed him to know which days of garden leave were being treated as holiday. That makes it clear that the contractual provision does not specify days (as the regulation requires) but might, in certain but not all circumstances, allow someone to deduce what days the Respondent intends to treat as holiday.

16. In the circumstances, the Claimant's claim for 4 days of holiday pay succeeds. The parties are agreed that the deduction is in the sum of £460.

Employment Judge Jones QC
5 April 2019