



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Newman

Respondents: (R1) Solutions4health
(R2) ABL Health Limited

Heard at: Nottingham

On: Wednesday 21 April 2021

Before: Employment Judge Blackwell (sitting alone)

Appearances

For the Claimant: In person
For the Respondents: (R1) Ms E Wheeler of Counsel
(R2) Mr Grundy of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The Employment Tribunal Judge gave judgment as follows:-

The Claimant's claims of unfair deductions from wages fail and are dismissed.

REASONS

Introduction

1. Mrs Newman represented herself and gave evidence.
2. Ms Wheeler of Counsel represented Solutions4health, hereinafter called R1 and called Mr Sandiford to give evidence.
3. Mr Grundy of Counsel represented ABL, hereinafter called R2 and he called Ms Prescott to give evidence.

4. There was an agreed bundle of documents and added to that during the hearing was a schedule produced by Mr Sandiford which Mrs Newman adopted as the first part of her claim. The second set of documents were Mrs Newman's payslips through from 17 April 2020 to 17 April 2021.

5. The issues were identified and further identified in two case management discussions; the first held before Judge Jeram in April 2020 and at paragraph 6, Judge Jeram records:

"In summary the claim is about whether the Claimant is entitled to a cost of living increment that she claims arises from the fact that she was prior to the transfer to the Respondent on NHS agenda for change terms and conditions."

6. There then followed in July 2020 a further case management discussion this time held before Employment Judge Butler. She records as follows, paragraphs 5, 6 and 7:

Paragraph 5:

"The second argument submitted concerns whether the Claimant can enforce the agenda for change agreement against either the first or second Respondent. Reliance is placed **Alamo Heron v Parkwood Leisure Limited** [2013] C426/11. The second Respondent submits that the effect of this judgment is that where public sector employees have the benefit of a collective agreement by which their pay is negotiated if they are then transferred under TUPE to a private sector employer, that employer will be bound by the terms of the collective agreement only until it is re-negotiated. Thereafter the transferee employer will not be bound by the collective agreement and therefore in this particular claim the second Respondent cannot be bound by the terms of the agenda for change agreement at all."

Paragraph 6:

"On the facts before me it is agreed that the Claimant transferred from the NHS to the first Respondent in April 2016 and I understand the first Respondent honoured the annual salary increment in April 2017. In 2018 the agenda for change agreement was renegotiated and as in **Alamo Heron** the first Respondent was not a party to the renegotiation so there is merit in the argument that it was no longer liable to pay the increments and the second Respondent would not be bound by the agenda for change agreement at all."

Paragraph 7:

"However the Claimant has produced an e-mail dated 8 May 2018 sent by Mr Sandiford, Director of Information, Governance and HR of the first Respondent to their staff confirming that the first Respondent would apply the agenda for change pay increase and would back date it to 1 April 2018." Accordingly there is an argument that this became a term of the Claimant's contract of employment and one which may have survived a TUPE transfer to the second Respondent.

7. Those then are the issues to determine and the relevant law is section 13 of the Employment Rights Act 1996:-

“(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.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised:-

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker’s contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”

As a general summary of section 13 unlawful deduction from wages normally represents a failure to pay wages. In terms of the setting out of Mrs Newman's claims, page 3 of her witness statement initially set out her view of what she had lost by reason not having the benefit of increments after April 2017. Mr Sandiford however helpfully provided a schedule that produced a larger loss and Mrs Newman adopted that calculation which gave a loss between April 2018 to March 2020 of £2,038.71 and for the following year April 20 to March 2021 a loss of £1,710.21 meaning a total gross loss of £3,748.92. The second part of Mrs Newman's claim is set out on page 5 of her witness statement and relates to the period of her employment with the second Respondent beginning on 1 April 2020 and up to 17 April 2021. That produced a gross loss of £1,584.77. So that then are the claims both in principle and in amount.

History

8. On 27 April Judge Jeram ordered R2 to be added as a Respondent and that happened and as is recorded later it is common ground that Mrs Newman transferred to R2 from R1 on 1 April 2020. On 27 July Mrs Newman's breach of contract claim was dismissed on withdrawal because Mrs Newman recognised that she could not bring a breach of contract claim whilst still employed and to the date of this hearing Mrs Newman remains employed by R2.

Findings of fact

9. Mrs Newman began her employment with the NHS on 1 July 2013. As has already been agreed because of a relevant transfer her employment transferred to R1 on 1 April 2016.

10. Both Respondents are medium sized employers with HR resources. As to R1 Mr Sandiford was that resource and as to R2 that was Ms Prescott. I adopt paragraphs 2, 3 and part of 4 of Mr Sandiford's evidence as the initial history. They read as follows:-

10.1 In September 2015 Solutions4health Limited were awarded the contract via competitive tender to provide Integrated Tobacco Control and Smoking Cessation Services for all ages in Nottinghamshire.

10.2 It was a contract in which TUPE applied and therefore workers who were employed in that contract by the incumbent provider of the service were entitled to transfer to Solutions4health with their terms and conditions at the point of transfer maintained.

10.3 The Claimant transferred to Solutions4health from the Nottinghamshire Healthcare NHS Foundation Trust under a TUPE transfer of 1 April 2016. The Claimant was a Stop Smoking Adviser and her grade was 5.23. Her job role was to contribute to the delivery, monitoring and evaluation of the local stop smoking service, organise and deliver locally based group and one to one stop smoking sessions to diverse groups in a variety of settings.

10.4 The Claimant was a part time worker ie 30 hours per week and her first pay increase in April 2017 was 1% which was the Agenda for Change standard at the time. To be clear her April 2016 salary was £22,769.60 and her April 2017 salary was increased to £22,996.80.

11. I would add at that point that Mrs Newman has been paid at that rate, ie £22,996.80 per annum to the date of this hearing.

12. In June 2018 the Agenda for Change terms were renegotiated. The consequences for R1 are set out at page 74a in an e-mail from Ms Sankla of R1. She says as follows:

“Dear colleagues,

Following the government’s announcement of extraordinary pay increases for NHS Staff the Agenda for Change pay scales for the next three years have now been published (see attached). As you know we have a significant number of staff who have TUPE transferred under NHS terms and conditions. The pay increases range from 2% to 13%, depending upon the NHS banding. We have performed a high-level analysis of the impact of the new pay scales and the average pay increase year on year is 6%. For the Smokefreelife Nottinghamshire Service, this will result in an additional liability in the region of £25,000 per annum. This extraordinary announcement was not expected and not accounted for in the financial envelope and we are now looking to work with you on how additional funding could be found to meeting this liability, presumably this additional funding will be from central government?”

This e-mail was addressed to the Commissioners from Nottinghamshire County Council.

13. There were a number of communications from Mr Sandiford to staff beginning with the document at page 74, replicated at 74f culminating in a final letter addressed to each employee at 75. I will deal more fully with that correspondence in my conclusions on the variation of contract point. R1 attempted to get funding for the pay increase but were finally rebuffed by NHS pay in a lengthy e-mail of 26 March 2019 beginning at page 78. The e-mail cites the **Alamo v Heron** case and relies upon its findings throughout. At page 78 the e-mail says:

“If TUPE took place before the AfC pay deal the handbook in place at that time applies but we do not think there is any legal obligation to match any future changes, pay or T and C’s that might be agreed unless such an undertaking were made to staff by the receiving employer.”

14. The lack of funding continued up until the time of Mrs Newman’s transfer to R2 on 1 April 2020.

15. In late 2019 R1 lost the contract to provide Integrated Tobacco Services to R2.

16. In December 2019 as a consequence of the proposed transfer Mrs Newman spoke to Mr Thompson, her line manager and did so again in January 2020 to express her concerns about the fact that her pay had been frozen.

17. There then began group and individual consultations with the employees who were to transfer including Mrs Newman. There was a measures letter of 16 December 2019 at page 92 and in particular also on page 92 there is a paragraph relating to pay date. This is a letter that was sent from Mrs Prescott to Mr Sandiford and was not sent to staff. However it sets out in that letter the pay date change that is envisaged and Mrs Newman was made aware of that change. Mrs Newman’s individual consultation took place on 15 January 2020. The notes are at pages 100 to 104. Those notes do not record Mrs Newman expressing any concerns about her salary.

18. Mrs Newman then raised with Ms Prescott the effect of the proposed change to pay dates. Mrs Newman was advised to apply for a salary advance which she duly did. Such was approved and the sum of £600 was paid to Mrs Newman on 18 April 2020 described as “advanced pay”. It was repaid in the subsequent 3 months’ wages at a rate of £200 per month.

19. On 13 February 2020 Mrs Newman obtained an early conciliation certificate from ACAS and began these proceedings against R1 on 14 February 2020.

Conclusions

The First Part of the Claim namely the Increment Claim

20. Mrs Newman's contract of employment with the NHS is set out beginning at page 64. It begins as follows:

"This Contract together with the NHS Terms and Conditions of Service Handbook (as amended from time to time) sets out the terms and conditions of your employment and includes the particulars of terms of employment required by the Employment Rights Act 1996.

The NHS Terms and Conditions of Service Handbook is supplemented by locally negotiated variations and collective agreements negotiated by the Trust and Trade Unions recognised by the Trust."

The law

21. Unfortunately for Mrs Newman and many thousands like her the English law was changed as a consequence of a European Court of Justice decision in **Alomo v Heron**. It concluded and ruled at paragraph 38 of that judgment as follows:

"Article 3 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the member states relating to the safeguarding of employee rights in the event of transfer of undertakings business or parts of undertakings or business must be interpreted as precluding a member state from providing in the event of a transfer of an undertaking that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer."

22. That decision was codified by the additions of Regulation 4A to the TUPE Regulations 2006:-

"Regulation 4:-

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer:-

(a) All the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is:-

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is:-

(a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or

(b) a reason unconnected with the transfer.

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.”

That Regulation came into force on 13 January 2014 long before Mrs Newman transferred to the first Respondent. Given that R1 did not take part in any negotiations indeed had no status to take part in negotiations that led to the 3 year pay deal in 2018 and further that the 3 year pay deal was negotiated after the date of Mrs Newman’s transfer from the NHS to R1, Mrs Newman unfortunately cannot rely on her NHS contract of employment in respect of the increments agreed in June 2018.

23. The matter however does not end there because Mrs Newman also argues in the attachment that there was a variation to her contract to the effect that R1 agreed, notwithstanding it had no legal responsibility so to do to apply the 2018, three year agreement insofar as it related to pay. It is necessary to examine both the documentary evidence and the evidence given by Mrs Newman.

24. The first relevant document is that at page 74 and is in the format of a question and answer document which was supplied to all relevant staff. The question is “will Solutions4health recognise the new NHS pay deal?” “The simple answer is yes Solutions4health have always applied” the annual Agenda for Change pay increases for the employees on AfC TUPE contracts. Plainly that applied directly to Mrs Newman.

25. There then came 74e. Again an e-mail from Mr Sandiford to staff of 20 July 2018. He says:

“I am pleased to inform you that we are working closely with our Commissioners and the Department of Health and Social Care, on their recent guidance, published last week (13 July 2018), on the process to access the centralised funding to support the increase. At this stage it is unclear how long this process will take. Our understanding from the DHSC is that pay increases will be backdated to 1 April 2018.”

26. There then followed on 31 August a further e-mail at 74d which indicated that:

“NHS pay are working through a complex and protracted process. They expect to be in a position to write to organisations such as ours during September and then funding will be made available following that. This means I will have to ask for your patience a little longer.”

27. There was a further e-mail of 18 October 2018 but added no new information. It simply asks for continued patience.

28. At page 75 is a letter which was sent to all staff including Mrs Newman. It concluded:

“Whilst we are engaged in this legal dispute with NHS Pay, we are, regrettably, unable to honour the April 2018/2019 AfC pay award.

For the avoidance of doubt Solutions4health have not received any funds from NHS Pay in relation to this pay award.”

29. That is the relevant documentary evidence. Mrs Newman in her evidence said as follows:

“I attended a further meeting with Stan Thompson, Director of Strategy and Megla Smithlani, Public Health Improvement Lead of Solutions for Health on Monday 13 January 2020 to discuss again my concerns regarding my salary increments not being honoured. I was advised that Solutions4health Limited was still engaged in a legal dispute with NHS pay and this could take some time due to Brexit and having a new Prime Minister. However once the legal dispute was finalised I would receive the increment payments.”

30. Taking that evidence together as a whole it seems to me that R1 moved from the position of stating that it would honour the 2018 pay increase to a position of that they would honour the 2018 agreement only if they were funded so to do. In respect of Mrs Newman’s meetings with Mr Thompson that seems to me to adopt the latter position, ie we are still negotiating with NHS and if we are funded we will pay. I accept Ms Wheeler’s submission that the written evidence supplemented by Mrs Newman’s oral evidence lacks the essential element of certainty. There was no clear offer made in the May 2018 communication at 74 and the letter at page 75 which contradicted the May communications is in my judgment to be read as a conditional offer ie we will honour the pay award if we are funded so to do. Ms Newman did not respond to any of Mr Sandiford’s communications.

31. Thus I come to the conclusion that there was no variation of Mrs Newman’s contract and her claim to the increments must therefore fail.

The Second Element

32. This is set out at page 5 of her witness statement and as I understand it her claim is based on the fact that she should have received by the twelfth pay or tax period the gross sum of £22,996.80 when in fact she received only £20,095.68. This seems to me to discount two relevant factors, firstly that she was paid by R1 up to the point of her transfer on 31 March 2020 and secondly that there was a change to her pay reference and pay date.

33. I am satisfied on the basis of Ms Prescott's evidence and the evidence of the pay slips that Mrs Newman has been paid throughout at the rate of £22,996.80. At worst the delay of the pay date could have meant that she worked for two further weeks in hand but in fact that was covered by the £600 advance payment in wages which was duly repaid as I have said over 3 months.

34. I therefore conclude that the second element of Mrs Newman's claim cannot succeed.

35. I would end by saying I have every sympathy with Mrs Newman. She along with thousands of other employees transferred from the public sector to the private sector have suffered from the **Alamo v Heron** decision codified in Regulation 4a. They would have felt on transfer that they would be able to rely on annual pay increases agreed within the NHS. Unfortunately as a matter of law that is no longer the case.

Employment Judge Blackwell

Date 6 May 2021

JUDGMENT SENT TO THE PARTIES ON

7 May 2021

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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