



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Salmon

**Respondent:** Genix Healthcare

**Heard at:** Manchester

**On:** 16 September 2020

**Before:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** Not in attendance

**Respondent:** Mr J Owen, HR Advisor

# JUDGMENT

The judgment of the Tribunal is that:

The claimant's claims of unlawful deductions of wages fail and are dismissed.

# REASONS

1. Today's hearing took place by CVP by agreement in view of the pandemic and the need to avoid or reduce in person hearings.
2. The claimant did not attend today's hearing. She advised in advance that due to her personal circumstances she was not able to attend by CVP or otherwise and she had indicated she wished to rely on her written statement which was received and was included in the bundle.
3. The claimant following her resignation brought claims under the unlawful deduction of wages provisions in the Employment Rights Act 1996, namely that the respondent had underpaid her in accordance with an agreement to the effect that when she was promoted she would receive £1550 net per month, that the respondent had unlawfully deducted her general Dental Council registration fee, her training costs for one particular course and had

failed to register her attendance at her grandfather's funeral as compassionate leave marking it as holiday thus reducing her outstanding holiday.

4. The respondents submitted that there was never an agreement to pay any amount net, no employer would enter into such an agreement as it would be impossible to predict to what tax an individual was going to be subject . What was offered and accepted was an increase from £9.50 to £10.50 an hour and this was paid. In relation to the registration fee the registration fee should never have been paid, the claimant had submitted an invoice for this and it had been paid by mistake, the respondent only paid one person's registration in each region in order to fulfil the requirement of the CQC, there was already a person designated in this role in the North West and therefore the claimant's registration fee would never have been paid and indeed there was contractual authority for this.
5. In relation to the training course the claimant was required by her contract to pay back training costs on termination of the contract, and in relation to compassionate leave the claimant had herself booked holiday leave through the respondent's electronic system and had never asked at the time for compassionate leave, if she had received compassionate leave it would have been unpaid in any event.

#### Issues for the Tribunal

6. Was the claimant contractually entitled to a net sum on promotion as she alleged?. If so, did the respondent fail to pay it.
7. Was the claimant contractually entitled to have her GDC registration paid, her training costs and to receive a compassionate day either paid or unpaid.
8. If the claimant was not so contractually entitled the claimant's claims cannot succeed. If she was contractually entitled did the respondent unlawfully deduct such monies from her final payments.
9. The claimant does not bring a claim regarding the truncation of her notice pay when she was dismissed for gross misconduct.

#### Witnesses

10. I heard from Mr James Owen, HR Advisor. The claimant did not attend but submitted a witness statement, there was a PDF bundle provided electronically. Where an individual does not appear to give evidence, and be cross examined it is unlikely the same weight will be attached to their statement as it has been able to be subjected to challenge. In addition if new points came up the claimant was not there to offer any alternative view, although she had seen of course the respondent's response form and there had been a PHCM in this case where the issues had been discussed.

#### Findings of Fact

11. The claimant began working for the respondents as a Dental Nurse on 22 January 2019. Her contract of employment was very detailed and included provision that she be paid £9.50 an hour. In March the claimant was promoted and the documentation shows that she was to be paid £10.50 an hour in this promoted post she signed and agreed to this. The claimant's payslips do record that she was paid gross £10.50 an hour. There was an earlier agreement which suggested she would receive a £200 a month bonus on the promotion however the final agreement stated £10.50 an hour. Mr Owen denied in evidence today that there had ever been an agreement to pay the claimant a net sum. He stated that no employer would agree to pay a net sum as it was not possible to calculate in advance what the individuals deductions for tax, national insurance and other things such as debt repayments. I accepted his evidence. Mr Owen was a straightforward witness, his proposition in this respect was inherently plausible and all the matters he relied on were documented.
12. The respondent also agreed the claimant could attend two training courses whilst employed by them. The first cost £89. It was agreed on both sides that although the respondent had paid the amount the claimant did not actually attend the course. The claimant was unable to do it in her normal place of work, Peace Park because the dentist there was on a short term compassionate leave after the death of her mother and there needed to be an onsite dentist to complete the course. Mr Owen gave evidence today that the respondent arranged that the claimant could attend the training under the supervision of a dentist at Beeston which was six miles away. The claimant refused to take up this opportunity. In addition, Mr Owen gave evidence that the claimant could complete this course still if she wished at the practice she joined on leaving the respondent. The respondent was never charged for the second course
13. The claimant gave notice on 2 October, she was required to give a month's notice and she did so. On 6 October 2019 Mr Owen wrote to the claimant confirming her resignation and stating the following matters. He stated that she had accrued 12.25 days holiday and as she had used 16 days she had taken 3.75 days holiday in excess of her annual leave. He pointed out that clause 8.6 of the claimant's contract of employment allowed the company to recover this money from any outstanding amounts they owed the claimant. I can confirm that this is indeed the effect of clause 8.6 of the claimant's contract of employment. I was provided with a signed and dated copy.
14. He also mentioned that the cost of the claimant's GDC registration of £116 that was going to be also deducted as this was paid by mistake when the claimant submitted an invoice.
15. It was also stated that in accordance with the training agreement signed and dated on 6 August and her contract of employment signed and dated on 22 January, the cost of the training course they had paid for would also be deducted a sum of £89.

16. In respect of the training agreement matters the claimant's contract of employment had indicated that if she left the respondent's employment during a paid for course she would have to reimburse the respondent; if she left after completing the course, there would be a proportionate recovery of the money. The training agreement amended this to a quantifiable amount. It stated that
- “if you were to leave the employer after completing these sponsored courses the following repayment terms will apply.
- (i) Leaving within the first 12 months after the finishing date of the training course – 100% of the training fees and the associated costs.
  - (ii) Leaving within 12 to 24 months after the finishing date of the training course – 50% of the training fees and the associated costs.”
17. The letter agreeing to the training course added further detail as it said “if you resign from Genix or your contract is terminated whilst being sponsored on the training course you will have to repay the financial assistance, this will be deducted from your final salary repayment or if insufficient funds are available you will be expected to pay the balance to your employer on agreed terms”. Mr Owen also said in the letter “please note the organisation will not pay the cost of the training fees until a copy of this letter has been signed and returned. “The respondent had a copy of the letter signed and returned on 8 June 2019.
18. In respect of compassionate leave the respondents stated that if compassionate leave was granted it was likely to be unpaid compassionate leave in a situation where it was to attend a grandparent's funeral, there was no particular documentary evidence of the respondents policy on compassionate leave however Mr Owen said that the claimant had booked a holiday for that day, they have an electronic system and the individual books her own holiday subject to whether the electronic system states that date is available. The claimant has alleged her manager should have applied for compassionate leave rather than marking this down as holiday, however Mr Owen said he had spoken to the claimant's manager and she had denied this. Further Mr Owen pointed out that the claimant had not complained about this at the time and he believed she had raised once she realised from his letter regarding the deductions that she had overtaken her annual and was seeking to claw some back. The claimant provided no additional evidence regarding this matter to support her contention, therefore in the claimant's absence and in the light of the fact the matter was not raised contemporaneously I accepted Mr Owen's evidence regarding the respondent's policy and the hearsay evidence he had gleaned from the claimant's line manager.
19. Following the claimant giving notice she was asked to work at Beeston on two occasions, as referred to above Beeston is six miles from the claimant's normal place of work, the claimant refused. It is correct that in her contract she was required to, within reason, work at another practice.

20. The claimant was dismissed during her notice period for failure to comply with a lawful instruction in respect of refusing to attend at Beeston. She makes no claim in respect of this which led to the early termination of the notice period.
21. The relevant parts of the claimant's contract of employment are as follows. At paragraph 4 it stated that the claimant's normal place of work was Genex Healthcare, East Park, Leeds. At 4.2 it stated, "the employer reserves the right to request you to attend at alternative locations, such a request will be made with notice and will be within a reasonable distance of the normal place of work stated above".
22. At 8.1 it stated that the claimant's rate of pay was £9.50 however this was later supplemented by an agreed, signed letter, when she was promoted, to £10.50.
23. Under deductions at 8.5 "for the purposes of Part 2 of the Employment Rights Act 1996 or otherwise you consent to the deductions of any sums owing to the employer at any time from your salary or any other payment due from the employer to you, you also agree to make any payments to the employer of any sum owed by you to the employer on demand by the employer at any time".
24. At 9.3 it was stated "if your employment starts or finishes part way through the employer's holiday year you will be entitled to 1/12<sup>th</sup> of the yearly holiday entitlement (calculated to the nearest half day for each complete calendar month of service in that holiday year)". The claimant was entitled to 20 days plus 8 days bank holiday. It was the respondent's evidence that the claimant had taken 16 days and this was an overtaking of her holiday by 3.75. Her absence from work was paid at statutory sick pay rates. Repayment of training allowance
- "17.6. If you resign from the employer or your contract is terminated whilst being sponsored on a training course you will have to repay any financial assistance, this will be deducted from your final salary payment or, if insufficient funds are available, you will be expected to repay the balance to the employer on agreed terms".
- 17.7 If, however, you are to leave the employer after completing a sponsored course the following repayment plans will apply: -
- "if you were to leave the employer after completing these sponsored courses the following repayment terms will apply.
- (i) Leaving within the first year after the end date of the training course – 50% of the training fees
- (ii) Leaving within the second year after the end date of the training course – 25% of the training fees"
25. There was a further relevant clause GDC registration at 18.15 which said:-

“it is the responsibility of the employee to ensure that a GDC registration is up to date and renewed when required. Payment for this registration is the responsibility of the employee, should an employee fail to comply with this clause and therefore not have an up to date GDC registration disciplinary action may take place which may result in suspension without pay or dismissal following a full investigation”.

26. Mr Owen gave evidence that the respondent was obliged to have one person in each region designated for purposes of the Care Quality Commission and that the respondent would pay their registration fee but no one else's. As they already had a designated person in the claimant's region there was no need to deviate from the terms of the claimant's contract. The claimant had submitted an invoice, he did not know why and it had been paid by mistake.

### The Law

27. Section 27(1) of the Employment Rights Act 1996 (the 1996 Act) defines wages as “any sums payable to the worker in connection with his employment”. This includes “any fee, bonus, commission, holiday pay or other emolument referable to the employment”.
28. Section 13.1 “a worker has the right not to suffer an unauthorised deduction, a deduction is defined as “whether 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 deficiencies shall be treated ... as a deduction made by the employer from the worker's wages on that occasion”.
29. The reference to after deductions refers to a statutory deduction such as tax and national insurance.
30. Properly payable as referred to requires the Tribunal to ascertain what was properly payable. This can involve complex applications of contract law and however in this case the contract was available, signed and agreed and supplements to it were all available signed and agreed. The relevant issues were ones of fact as to whether any supplementary oral agreements had been reached between the claimant and any agent of the respondent.

### Overpayment

31. Following a decision by the House of Lords in 1999 in Kleinwort Benson Limited -v- Lincoln City Council it was established there was no difference between an overpayment made as a mistake of law and a mistake of fact. The situation now is that an overpayment is recoverable unless:-
- (i) The employer has led the employee to believe that he or she is entitled to treat the money as his or her own; or
  - (ii) The employee has in good faith changed his or her position i.e. spent the money believing it was his or her own; and

- (iii) The overpayment was not caused primarily by the fault of the employee.”

## Conclusions

### Re GDC Registration

32. It is clear from the claimant’s contract which she agreed to that her GDC registration was not payable by the respondent, the fact that the claimant submitted an invoice and was paid in error does not alter this fact. In respect of overpayments it is very clear from the claimant’s contract that she was not entitled to be paid for her GDC registration. The claimant did not address this point in her statement, she did not say why she submitted an invoice when her contract clearly stated that she was not entitled to be paid. The claimant has not provided me any information therefore to establish that she comes within any of the three criteria which would bar the respondent from recovering an overpayment. Accordingly, I find that the money was paid by mistake and is recoverable by the respondent. It is not even that the claimant turned a blind eye to the overpayment, she had initiated the overpayment in contradiction to a very clear and express term in her contract.

### Compassionate Leave

33. The evidence of the respondent which I accepted was that the claimant had booked a holiday electronically and that even if this had been done by a line manager which Mr Owen gave heresay evidence was not the case the claimant had not complained about this at the time which undermines her credibility in asserting that it was her line manager’s mistake. I have accepted the evidence of the respondent in respect of this and I accept that the fact that the claimant did not complain at the time does suggest that this is a post hoc consideration put forward by the claimant. Accordingly, I find that the claimant chose to apply for a holiday day for the date of her grandfather’s funeral and that there was no request for a line manager for compassionate leave.

### Training Costs

34. In respect of the £89 training costs the respondent deducted from the claimant’s final salary the matter rests in my view on what the meaning of sponsored is. The claimant had not started this course and she had certainly not finished it. Whilst the respondent had given her the opportunity to undertake the course and she had unreasonably failed to take that opportunity there was nothing in the contract that specifically covered that situation. What did cover the situation was whether she was sponsored at the time she resigned/was dismissed. In my view I find that the word “sponsored” means that the respondent has agreed the claimant can go on the course and has paid for it and that it is not necessary to the definition of sponsorship that the claimant has actually started the course. The respondent pointed out that the claimant could still attend this course whilst employed as she is by rival practice and therefore it would be inequitable if they were to have to in effect pay for her to be trained, the benefit of which would attach to a rival practice, however, there was no need for me to consider this point in deciding the issue.

Salary Rise

35. I accept the respondent's evidence that it was inherently unlikely that any employer would offer an employee a net salary increase as they would not be aware precisely of what the claimant's tax and other liabilities would be. The claimant suggested that to some extent, although it was not clear from her witness statement that her line manager may have been involved in this calculation, however without any further information my finding is that the respondent did not offer the claimant a net amount and this was the result of speculation on the claimant's part. The only query in respect of this was that there was documentation suggesting that the claimant was offered £200 a month bonus for taking the promoted post, however, the final letter which the claimant signed and returned stated that her salary rise would be £10.50, accordingly, as this was the last word on the matter and the claimant agreed it I have not taken any further the relatively small difference between an offer of £200 a month and £10.50 per hour. There is a small difference of roughly £23 a month however I am satisfied the claimant was paid in accordance with the last agreement which was for £10.50 an hour.
36. Accordingly, the claimant's claims fail and are dismissed.

Employment Judge Feeney

29 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 September 2020

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[JE]