



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101256/2023

**Final Hearing Held in Glasgow by Cloud Video Platform (CVP) on 17 April
2023 at 10.00am**

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Employment Judge Russell Bradley

Ms Judith Hicks

**Claimant
Represented by:
Mr M Ballantyne –
Solicitor**

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The Richmond Fellowship Scotland Limited

**Respondent
Mr Maguire –
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1. The claim of a failure to be offered or provided with suitable alternative work pursuant to section 67 of the Employment Rights Act 1996 is dismissed in terms of Rule 52 of the Employment Tribunal Rules of Procedure 2013 following its withdrawal;
2. The claim for a declaration that the respondent has made a deduction from the claimant's wages in contravention of section 13 of the 1996 Act does not succeed; it is dismissed.

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REASONS

Introduction

1. On 27 January 2023 the claimant presented an ET1. Its paper apart asserted three claims. They were (1) a claim for unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996; (2) a claim for failure to pay whole remuneration whilst on suspension on maternity grounds pursuant to section 70 of that Act; and (3) a claim for failure to be offered or

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provided with suitable alternative work pursuant to section 67 of the Act. The period of claim for (1) and (2) was said to be 28 July to 30 October 2022. The claims were resisted.

2. Immediately prior to the start of the hearing an updated indexed joint bundle was lodged. It contained 22 documents of 119 pages. It included (**pages 79 to 81**) a Schedule of Loss.
3. In discussions prior to hearing evidence Mr Ballantyne withdrew the third claim. It is dismissed under Rule 52 as per the respondent's application.
4. In those discussions, it became clear that (i) the sum sought for pay in the Schedule of Loss under the first two claims is the gross amount; (ii) Mr Ballantyne accepted that it ought to be the net version; (iii) the period of claim was 7.71 weeks being the period 28 July to 19 September 2022; (iv) the gross amount of the claim for pay was £736.73; (v) **page 82** (indexed as "*confirmation of payment made by the respondent*") disclosed a payment to the claimant of £556.00 made on or about 5 April 2023; and (vi) it was likely that this payment was the net version of the gross pay claimed. As a result, the claimant did not insist on her second claim insofar as it seeks an order for payment. That being so, the issue for determination was whether I should make a declaration under section 24 of the 1996 Act that the claimant's complaint under section 23 (that the respondent had made a deduction from her wages in contravention of section 13) was well founded. The respondent's position was that while the April payment was made, it was done without admission of liability and thus without admission that either it had failed to pay what was due as remuneration under sections 68 and 69 of the 1996 Act or it had made an unlawful deduction from wages due to the claimant.

Evidence

5. The claimant gave evidence. She spoke to a number of documents in the joint bundle. She was cross-examined. The respondent did not lead oral evidence.

Findings in Fact

6. From the tribunal papers and the evidence I found the following facts admitted or proved.
7. The claimant is Judith Hicks. The respondent is The Richmond Fellowship Scotland Limited. It is a charity. It supports about 2500 people across Scotland with a broad range of needs to live as independently as possible in their own homes and communities.
8. In terms of a written statement of terms and conditions of employment (**pages 48 to 57**) the claimant is employed by the respondent. Her employment began on 19 July 2010. She is employed as a Support Practitioner. Her hours of work are 30 per week. She is currently on maternity leave.
9. Her terms of employment provide that (clause 5, **page 49**) in addition to normal hours she *“will be required to undertake on-call duties on, a rota basis without additional payment.”* That clause also provides that the claimant *“may also be required to undertake sleepover and/or waking nights working for which you will receive the appropriate rate of payment.”* It goes on to say *“The organisation does not receive funding for overtime payments. You may be required to work additional hours in order to meet organisational requirements. In exceptional circumstances should this requirement arise, you will be entitled to receive time off in lieu “off additional’ hours-worked, with the prior agreement of your line manager; the organisation reserves the right to vary your hours of work. Any such variation will be discussed with you prior to implementation.”*
10. Her terms refer to a number of the respondent’s policies. They include; discipline; grievance; equal opportunities; and health & safety. Her terms do not expressly incorporate terms from any of them into her contract.
11. The respondent has a Maternity Rights and Benefits policy (**pages 103 to 119**). It is dated February 2022. It appears that the policy was introduced in July 2014 (see **page 104**). In its introduction, the policy says that it *“sets out the rights of employees to statutory and enhanced (where eligible) Maternity*

Leave and Pay.” Its contents table lists a number of issues covered by it. In summary it makes provision for what is to happen to an employee for the period beginning with notification of pregnancy until returning to work. One part (4) deals with “*Health and Safety*”. Part 4.7 provides, “*If it is not possible for the organisation to alter the employee's working conditions to remove the risks to their health and there is no suitable alternative work available to offer them on a temporary basis, the organisation may suspend them from work on maternity grounds until such time as there are no longer any risks to their health. This may be for the remainder of their pregnancy until the commencement of their Maternity Leave.*” Part 4.8 provides, “*If an employee is suspended in these circumstances, their employment will continue during the period of the suspension and it does not in any way affect their statutory or contractual employment and maternity rights. The employee will be entitled to their normal salary and contractual benefits during the period of their suspension, unless they have unreasonably refused an offer of suitable alternative employment.*” “*Normal salary*” is not defined. The policy is not incorporated into the claimant’s contract of employment.

12. The claimant’s work ordinarily requires her to work; shifts (early or back); overtime; and on sleepovers. Her work is generally regulated by a rota which is prepared by the respondent. Overtime work and sleepover work are carried out regularly. She has done those types of work regularly over the last 12 years. She is paid for each of them. All of the claimant’s wage slips in the period 30 June 2021 to 31 August 2022 (**pages 83 to 97**) show payments for both overtime and sleepovers. They show that the amount of time worked on each varied per month. Payment for overtime and sleepovers was made in arrears. Thus, for example, pay for that work shown on the payslip dated 31 July 2021 was for the work done in June. The claimant regarded the time she worked as overtime and in sleepovers as part of her regular hours.

13. In or about June 2022 the respondent told the claimant that when she was 28 weeks pregnant she would be placed on suspension. On 5 July 2022 the claimant raised a grievance (**page 58**). One of her four grounds (3) was “*the [respondent’s] decision to medically suspend me as they are unable to*

provide a safe place work. I should not be discriminated against on the grounds of pregnancy.” Another ground (4) was “The employer has failed to acknowledge that full pay should be based on usual earnings and not contractual basic pay. This may be considered as an act of discrimination.”

- 5 14. The claimant’s grievances were not upheld. Neither of the claimant’s two grounds of appeal against the respondent’s rejection of them were upheld.
15. On 28 July 2022 the claimant was suspended from work on maternity grounds. On 15 September 2022 the parties discussed a possible return to work. On 22 September 2022 the claimant began a period of maternity leave.
- 10 In the period between 15 and 22 September the claimant did not attend work. This was because she was awaiting a risk assessment relative to that return.
16. In neither of the wage slips dated 30 September or 31 October 2022 (pages 98 and 99) was the claimant paid for either overtime or sleepovers.

Comment on the evidence

- 15 17. The claimant’s evidence was in large measure uncontroversial. The limited areas of dispute related to her opinion as to how her pay for overtime and sleepovers should be seen.

Submissions

- 20 18. Mr Ballantyne lodged a written submission to which he spoke. Mr Maguire made an oral submission. I mean no disservice to either by not repeating or summarising them here. To the extent necessary and relevant I comment on them below.

The Law

- 25 19. Section 23(1)(a) of the Employment Rights Act 1996 read short for present purposes provides that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13. Section 13(3) of the Act provides that “*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."

20. Section 24 provides the remedy of a declaration of a well-founded complaint under section 23.
21. Section 68(1) of the Employment Rights Act 1996 provides that "*An employee who is suspended from work on maternity grounds is entitled to be paid remuneration by her employer while she is so suspended.*"
22. Section 69(1) of the 1996 Act provides that "*The amount of remuneration payable by an employer to an employee under section 64 or 68 is a week's pay in respect of each week of the period of suspension; and if in any week remuneration is payable in respect of only part of that week the amount of a week's pay shall be reduced proportionately.*"
23. Section 220 of the Act provides that "*The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter.*" The Chapter is Part II (sections 220 to 229) of Part XIV of the Act.
24. Section 221(1) provides that "*this section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*" Section 221(2) provides that, "*Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.*"

Discussion and decision

25. In her written submission, the claimant said that the question of what wages are "*properly payable*" to a worker is the key issue at the heart of section 13(3) of the Act. I agree.

26. I also agree with her when she said that the key issue in this case is whether her sleepover shifts and overtime count within her week's pay as a matter of statute pursuant to sections 221 to 224 of the 1996 Act. The parties agreed that the question becomes whether sleepover shifts and overtime are properly within "*normal working hours*" within this Part of the Act. In my view they are not. The contract expressly provides that the claimant's normal working hours are 37.5 hours per week. By agreement those normal working hours have reduced to 30. I agree with the respondent's submission that, in terms of section 221(2), the claimant's remuneration for employment in those normal working hours does not vary.
27. The Claimant's submission was that she worked regular and consistent sleepover shifts and overtime and, in line with various reported decisions (some of which are noted below) these were part of her normal salary pursuant to not only the maternity policy, but also sections 221 to 224 of the 1996 Act.
28. The express terms of clause 5 set out that in exceptional circumstances should there be a requirement to work additional hours, the claimant would receive time off in lieu. In the context of clause 5, those additional hours are overtime hours. Obviously, I accept that in practice the claimant has worked (and been paid for) overtime hours for some considerable period, including the period vouched by her wage slips. But that does not detract from or vary the express provisions of her contract. Mr Maguire accepted that the result contended for by the respondent may not appear "*fair*" to the claimant; but that is not the question for me.
29. Mr Ballantyne referred to the decisions in the cases of ***Bear Scotland v Fulton*** [2015] IRLR 15 ***Dudley Metropolitan Borough Council v Willets*** [2017] IRLR 870. Both concern claims for holiday pay under the Working Time Regulations 1998. Neither of them considered the concepts of normal working hours or pay for those hours in the context of Chapter II of Part XIV of the Employment Rights Act 1996. They are, thus, obviously distinguishable from this case.

30. Mr Ballantyne also referred to the decision of the employment tribunal in ***McFarlane and Ambacher v easyJet*** 1401496/2015 and 3401933/2015. He accepted that the claims in that case were of indirect discrimination as well as under section 70 of the 1996 Act. The tribunal deals with the latter claim at paragraphs 61 to 67 of its reasons. Mr Ballantyne referred to paragraph 66 which says “*The claimants were therefore entitled to be suspended on full pay.*” That reference is of no real assistance in this case when considering whether Ms Hicks was entitled to expect overtime and sleepover work and pay included in “*a week’s pay*”.
- 10 31. The claimant appeared to rely on the respondent’s Maternity Rights and Benefits policy separate from sections 221 to 224. I do not accept that that is the correct way to analyse the question. The policy is not a contractual document. Its relevance could only have been in deciding whether or not overtime or sleepovers were part of the claimant’s normal working hours as that expression has meaning with the Act. The policy does not create a “*stand alone*” remedy, and even if it did it is not one which I am asked to decide.
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32. The claim for a declaration does not succeed. It is dismissed.

20 **Employment Judge: R Bradley**
Date of Judgment: 25 April 2023
Entered in register: 26 April 2023
and copied to parties

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