



EMPLOYMENT TRIBUNALS

Claimant: Mr R George

Respondent: The Intrinsic Care Group Limited

HELD AT: London South ET (by CVP)

ON: 13 March 2024

BEFORE: Employment Judge McCluskey

REPRESENTATION

Claimant: In person

Respondent: Represented by Mr J Edwards, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal having been withdrawn by the claimant is dismissed.
2. The complaint in respect of holiday pay is well-founded. The respondent made an unlawful deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent shall pay the claimant **One Hundred and Eighty Seven Pounds and Fifty Pence (£187.50)**. The claimant is responsible for paying any tax or National Insurance.
3. The other complaints of unlawful deduction from wages are not well founded and are dismissed.
4. The complaints of breach of contract, including in relation to notice pay, are not well founded and are dismissed.

REASONS

Introduction

1. The claimant is making the following complaints: unlawful deduction from wages – holiday pay and wages; notice pay; breach of contract.
2. Parties had prepared and exchanged witness statements prior to the final hearing.
3. There was a joint bundle of documents extending to 111 pages. The joint bundle included the claimant's first and second witness statements and a witness statement for the respondent from Mr Warren Okeowo. Additional documents were lodged by the claimant during evidence. These were collated into a claimant's bundle of documents extending to 28 pages.
4. The claimant gave evidence on his own behalf. Mr Warren Okeowo, Regional Business Performance Manager gave evidence on behalf of the respondent.
5. The claimant entered into ACAS early conciliation from 8 November 2022 to 24 November 2022. His claim form was presented on 10 December 2022.

Issues

6. The claims and issues had been discussed at a case management preliminary hearing on 3 October 2023. The claims were identified as unlawful deduction from wages – holiday pay and wages; notice pay; breach of contract – to be confirmed.
7. On 20 October 2023 the claimant provided additional information in response to the case management orders. In addition to the information provided about unlawful deduction of wages, holiday pay and notice pay the claimant said that he was bringing a breach of contract complaint for unlawful disciplinary action against him, complaints/grievance protocols not followed and unlawful contract termination. Parties gave evidence about each of these complaints at the hearing today.
8. With reference to the draft list of issues in the case summary of the preliminary hearing on 3 October 2023 and the claimant's additional information, the final list of issues to be determined today are appended to this judgment. Parties had a copy of the draft list of issues and the claimant's additional information and agreed that these were the issues to be determined.

Findings in fact

9. The Tribunal has only made findings in fact necessary to determine the issues.

10. The claimant was employed by the respondent as a Recovery Support Worker from 9 August 2021 until 31 October 2022. His role involved supporting service users with their care needs, in homes operated by the respondent. The claimant was contracted to work in the respondent's homes in Medway and in London. In practice he worked mainly in the Medway homes.
11. The claimant signed a contract of employment with the respondent on 21 January 2022. It had been signed electronically by the claimant using DocuSign, the electronic signing facility. He had a previous contract when he began employment with the respondent.
12. The claimant's contract of employment was headed "Contract – employee agrees to work two weekends per month". The contract of employment also included the following clauses.
13. "You will be employed as a recovery support worker who works Saturdays and Sundays every week in a month but has the option of taking two weekends off within the month" - clause 2.1.
14. The pay rate was stated as £10.50 per hour on Saturdays and £11.00 on Sundays – clause 2.2.
15. "You will be able to take additional work in the week if desired to but this would be at the flat rate of 10 pounds" - clause 2.3.
16. "Your normal hours of work are at least 44 hours per week to be worked during the hours of 8.00am to 8.00pm (or 8.00pm to 8.00am) on weekends firstly and every other day of the week can be included with a daily unpaid lunch break of one hour" - clause 4.1.
17. "We may vary your hours of work or the pattern of your normal hours, as we consider necessary to meet the needs of the business" - clause 4.2.
18. "You authorise us to deduct any sums you owe to us at any time to include, without limitation.... salary" clause 5.4.
19. "Your normal place of work will be at within the houses at Medway or London but you agree to perform your duties in such other place or places as we may reasonably require from time to time" - clause 6.
20. "When your employment ends you will be paid in lieu of accrued but untaken statutory holiday allowance only. There will be no payment in lieu for any accrued but untaken contractual holiday allowance" - clause 7.8. Statutory holiday allowance was stated to be 28 days.

21. The contract of employment said the claimant was subject to the respondent's "disciplinary and dismissal procedure" which could be found on the respondent's intranet. The disciplinary and dismissal procedure was stated to be non-contractual – clause 9.1.
22. The contract of employment set out provisions if the claimant wished to raise grievance in accordance with the respondent's grievance procedure. The grievance procedure was stated to be non-contractual – clause 9.3.
23. The contract of employment said the claimant required to give four weeks' notice of termination of employment – clause 12.1. The respondent was entitled to terminate the claimant's employment without notice or payment in lieu of notice in the event of gross misconduct by the claimant – clause 12.2.
24. In around January 2022 the respondent made an overpayment to the claimant of £505 of wages. Overpayments were made to a number of employees in error.
25. The respondent entered a discussion with the claimant about a payment plan to pay back the overpaid wages. The respondent proposed that the claimant repay the £505 overpayment by three split payments. The claimant did not confirm the proposed terms of the payment plan or make any offer to repay the £505.
26. As no arrangement had been made by the claimant for re-payment, the respondent made a deduction of £505 from the claimant's salary on or around 31 May 2022.
27. When the claimant asked for an explanation for the £505 deduction, the respondent told him by email on 6 June 2022 that the sum had been deducted in full as no agreement had been reached with the claimant for a repayment plan. The claimant responded on the same day by email saying "Okay, I understand what you are saying. Thank you for your response".
28. In around May 2022 the claimant moved home to Canterbury. The travel time and cost from Canterbury to his contractual work locations were significantly more than from where he had lived previously.
29. The claimant was allocated shifts for June 2022. At some point during June 2022 the claimant told the respondent he was unable to work any further shifts for the time being. This was because he could not afford the increased travel costs from Canterbury to work. He said this was due in part to his reduced income in May 2022 because of the £505 deduction. The respondent told the claimant to let them know when he was ready to work again.
30. The claimant worked around three shifts, totalling 33 hours, in July 2022.

31. On 25 July 2022 the claimant emailed the respondent about shifts for August 2022. He said he was available to work shifts from 8 August 2022.
32. The claimant worked around five shifts, totalling 55 hours, in August 2022.
33. The claimant worked around eight shifts, totalling 88 hours, in September 2022.
34. The payslips showed that each shift was 11 hours in duration.
35. The respondent's holiday year runs from 1 January. The claimant was paid the sum of £75 per day of holiday. The claimant was paid for two days of annual leave in June 2022, twelve days of annual leave in July 2022 and four days of annual leave in September 2022. He took sixteen days of annual leave in 2022 prior to termination of his employment. He was paid for those days. He had no holidays outstanding from the previous holiday year.
36. The claimant gave notice of his resignation to the respondent on 13 October 2022. He said he was unsure how much notice he was required to provide.
37. The notice required to be given by the claimant in accordance with his contract of employment was four weeks. His notice period was due to end on 10 November 2022.
38. The claimant was scheduled to work shifts on 13, 14, 15 and 16 October 2022. The shifts were mainly at Borstal house which is in the Medway area. The claimant refused to work any of the shifts. He told the respondent it was because he could not afford to pay for transport from his home in Canterbury to the Medway area.
39. On 31 October 2022 the respondent wrote to the claimant terminating his employment with immediate effect. The principal reason for immediate termination was his refusal of shifts. It had been difficult for the respondent to find alternative cover at short notice. This created a serious risk to the service users and the safe running of the respondent's services, for which the claimant was summarily dismissed.

Observations on the evidence

40. The claimant said that he could not remember signing his contract of employment on 21 January 2022. It had been signed electronically using DocuSign. The claimant said the signature on the document was not his signature.

41. On balance I concluded that the claimant had signed this contract of employment. The signature was in the style of an automatically generated signature rather than the style of the claimant's actual signature. The automatically generated signature is common when using Docusign. It is a common way for contracts to be signed, especially since the pandemic. Further, it was clear that the claimant was relying on the terms of this contract of employment, in support of each of the complaints that he made to the Tribunal.
42. The claimant produced a pay slip dated 31 January 2022. It showed a deduction from the claimant's wages of £543.35. The claimant's evidence was that he thought the deduction of around £505 made in May 2022 had in fact already been made by the respondent on 31 January 2022. The respondent was therefore not entitled to make another deduction for the same overpayment.
43. The respondent's evidence was that the deduction of £543.35 shown on the 31 January 2022 wage slip had not been made by the respondent at that time. This was despite the fact that the claimant's payslip showed this deduction. The respondent relied on its email to the claimant dated 6 June 2022. The email said that as the claimant had not confirmed the proposed payment plan to repay the overpayment in three split payments, the deduction had been made in one sum from his salary payable for May 2022. The claimant had acknowledged that response on the same day and had not said at that time that the deduction had already been made in full on 31 January 2022.
44. On balance I thought it was more likely than not that the deduction of £543.35 shown on the payslip had not been made in January 2022. This was because the contemporaneous written evidence recorded that the claimant had been told on 6 June 2022 that no deduction had been made in January 2022 and the claimant had not disputed this at that time.
45. The claimant was paid the sum of £75 per day of holiday. The parties were in agreement that this was the correct daily rate for holiday pay.
46. The respondent's written notice of immediate dismissal on 31 October 2022 stated that it was because of his refusal to work shifts and because insufficient notice had been given. In evidence Mr Okeowo said that the principal reason for dismissal was the refusal of the claimant to work the allocated shifts. The claimant had refused shifts at short notice. It had been difficult for the respondent to find alternative cover at short notice. This created a serious risk to the service users and the safe running of the respondent's services. I accepted Mr Okeowo's evidence that this was the principal reason for dismissal. I accepted his evidence that refusal of shifts at short notice is a very serious matter which created risk as he described. I accepted that the

claimant's conduct in so doing amounted to gross misconduct for which the respondent was entitled to dismiss summarily.

Relevant law

47. Section 13 Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.
48. A complaint for unlawful deduction from wages must be made within three months beginning with the date due for payment (section 23 ERA). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.
49. Where a claim is made in respect of a 'series of deductions', the three-month time limit starts to run from the date the last deduction in the series was made (section 23(3) ERA).
50. Under section 27(1) ERA "wages" means any sums payable to the worker in connection with their employment.
51. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England) Order 1994 when the claimant's employment has come to an end. That is the case here.
52. The conduct of the employee "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment" Neary and anor v Dean of Westminster 1999 IRLR 288; Briscoe v Lubrizol Ltd 2002 IRLR 607, CA.

Discussion / decision

Deduction on or around 1 June 2022

53. The claimant asserts that there has been an unlawful deduction from his wages on various dates starting on 1 June 2022 and ending on 7 November 2022. He presented his claim form on 10 December 2022. The date of the payslip with the deduction of £505 is 31 May 2022. The claimant's evidence is that he was sometimes paid after the date shown on his payslips. I accepted this evidence and accepted that payments had been made to him during the date range shown above. These dates were not challenged by the respondent.

54. The claimant entered ACAS early conciliation from 8 November 2022 to 24 November 2022. His claim form was presented on 10 December 2022.
55. The alleged deduction on 1 June 2022 is out of time on the face of it, taking account of the date of presentation of his claim form and the period during which ACAS early conciliation took place. I am however satisfied that the alleged deduction on 1 June 2022 was part of a series of alleged deductions. In accordance with section 23(3) ERA the three-month time limit starts to run from the date the last deduction in the series was made. Accordingly, the complaints about each of the alleged deductions, including on 1 June 2022, is in time and the Tribunal has jurisdiction to hear them.
56. The claimant asserts that the deduction of £505 made on or around 1 June 2022 was a duplicate deduction and that the lawful deduction for overpayment of wages had been made on 31 January 2022.
57. The respondent's evidence was that a deduction of £543.35 had not been made by the respondent on 31 January 2022, even though the claimant's payslip showed this deduction. Instead, the respondent had tried to enter an arrangement with the claimant to recover the overpayment in instalments. The respondent relied on its email to the claimant dated 6 June 2022. The email said that as the claimant had not confirmed the proposed payment plan of repaying the overpayment in three split payments, the deduction had been made in one sum from his May 2022 salary. The claimant had acknowledged that email on the same day, also by email. He had not said in his email that the deduction had already been made on 31 January 2022.
58. I concluded on balance that if the deduction had been made on 31 January 2022, it is likely that the claimant would have been much more vociferous in his email of 6 June 2022 in saying that the deduction had already been made. Instead, he had said simply "Okay, I understand what you are saying. Thank you for your response".
59. Further, the claimant did not provide any evidence by way of bank statements to show that the sum he received on 31 January 2022 had included the deduction of the £543.35, as shown on his payslip. This was surprising as the claimant knew, in advance of the hearing today, that it was the respondent's case that no deduction was made on or around 31 January 2022.
60. I am also satisfied that the respondent was entitled to make the deduction of £505 in one sum, as it had done in May 2022. The claimant's contract of employment, signed by him on 21 January 2022, included a clause which permitted deductions in full for overpayments of salary.
61. The complaint of unlawful deduction from wages of £505 fails.

Shifts not given in August 2022

62. The claimant asserts that he had a contractual entitlement to work 44 hours per week. He had not been given shifts totalling 44 hours per week in August 2022. He had only been given shifts totalling 55 hours in the month and had been paid for those 55 hours. He asserted that he ought to have been paid £1364.64 net and that he had been underpaid by £800. The claimant did not provide any further breakdown of his calculation.
63. I am satisfied that the claimant did not have a contractual entitlement in August 2022, or in any other month, to be given shifts totalling 44 hours per week. The contract of employment was for weekend working. The various payslips showed that a shift was 11 hours. This totalled 22 hours per weekend and 44 hours per month.
64. The contract of employment provided that the claimant could work hours in addition to the weekend working if he wished. In practice the claimant did so during some months. The payslips which were provided did not record that the claimant had worked 44 hours per week in any month, as he asserted.
65. The contract of employment did say at clause 4.1 that the claimant's hours of work were at least 44 hours "per week". In practice this had not happened in any month upon which evidence was led. There was no evidence that the claimant had asked the respondent, whether orally or in writing, in any week or month why he was not being given 44 hours of work per week.
66. On balance I concluded that it was likely that the reference to 44 hours per week was not what the parties had intended. I concluded that the intention of the parties was 44 hours per month, which accords with two weekends of working per month. Nor did the claimant work 44 hours per week in practice. Rather what had happened was that the claimant had been given shifts over two weekends per month and additional hours when these were available.
67. I am also bound to say that the claimant was only asserting that he ought to have been given 44 hours per week in August 2022 and in October 2022 (see below). He did not assert that he ought to have been given these hours in any other months. The reason for this was not clear. This also supported my conclusion that, on balance, there was no contractual entitlement to be given 44 hours per week in August 2022.
68. The claim for £1364.64 for shifts not given in August 2022 fails.

Shifts not given in last four weeks – October 2022

69. The claimant asserts that he had a contractual entitlement to be given shifts in October 2022. He claims a payment of £1760 net. The claimant did not work

any shifts in October 2022. As already stated, I have found that the claimant did not have a contractual entitlement to work 44 hours per week. The email from the respondent on 31 October 2022, bringing the notice period to an end early, said that he had refused to work shifts given to him on 13, 14, 15 and 16 October 2022. This included weekend working on 15 and 16 October 2022. The reason given by the claimant was that it was too far for him to travel from his home in Canterbury. However, the shifts given were in Medway, which is where the claimant was contractually bound to work.

70. I accepted the evidence of Mr Okeowo that the claimant had refused shifts at short notice in October 2022, and this created a serious risk to the service users and the safe running of the respondent's services. I was satisfied that the claimant's conduct was gross misconduct. I accepted Mr Okeowo's evidence that this was the principal reason for the respondent electing to bring the claimant's notice period to an end before expiry of the four weeks. Whilst the claimant was only given one weekend of working in October 2022 (which he refused) I am satisfied that respondent was not bound to offer him any other shifts in October 2022. The claimant had made clear that he was unwilling to work in Medway, where he was contractually bound to work. The respondent was not contractually bound to offer him shifts in other locations which were closer to his new home in Canterbury.

71. The claim for £1760 for shifts not given in October 2022 fails.

Holiday pay

72. The respondent's holiday year runs from 1 January. The claimant was paid the sum of £75 per day of holiday. In 2022 the claimant was paid for two days of annual leave in June 2022, twelve days of annual leave in July 2022 and four days of annual leave in September 2022. He took sixteen days of annual leave in 2022 prior to termination of his employment. He was paid for those days. He had no holidays outstanding from the previous holiday year.

73. The contract of employment provided that the claimant would be paid in lieu of accrued but untaken statutory holiday allowance only. Statutory holiday allowance was stated to be twenty-eight days. In the period from 1 January to 31 October 2022 the claimant had accrued twenty-three days of annual leave. This is calculated as $304/365 \times 28 \text{ days} = 23 \text{ days}$. He had taken sixteen days of annual leave. He was entitled to be paid in lieu of a further seven days (23 – 16 days). On or around 31 October 2022 he was paid in lieu of four days of holiday. He was paid the sum of £337.50 for this. The claimant is entitled to be

paid for the outstanding three days of accrued but untaken leave on termination of his employment.

74. The parties agreed that the claimant was entitled to be paid £75 per day of holiday and I accepted this. The claimant was paid £337.50 in lieu of the four days of holiday on termination of employment. This is more than the agreed daily rate of £75 which totals of £300 (£75 x4) by £37.50.
75. The outstanding three days of accrued but untaken leave on termination of his employment total £225 (3 x £75). From the sum of £225 the sum of £37.50 already paid requires to be deducted. The claimant is entitled to be paid £187.50 (225 - £37.50) for accrued but unpaid leave on termination of employment.
76. The claim for payment of accrued but untaken leave on termination of employment succeeds. The respondent shall pay the claimant the sum of £187.50.

Other breach of contract complaints

77. On 20 October 2023 the claimant provided additional information in response to the case management orders. He said that he was also bringing a breach of contract complaint for unlawful disciplinary action against him, complaints/grievance protocols not followed and unlawful contract termination. These matters were narrated in his claim form.
78. I considered the assertion that the respondent was in breach of contract for having taken disciplinary action against the claimant. The claimant's contract of employment provides that claimant was subject to the respondent's "disciplinary and dismissal procedure" which was non-contractual – clause 9.1. The respondent had not followed a disciplinary procedure prior to dismissal, in the sense of an invite to a disciplinary hearing and giving the claimant an opportunity to state his case. As the disciplinary and dismissal procedure is non-contractual, I concluded that there was no contractual requirement on the respondent to do so. If the claimant had had two years or more of continuous service such that he had ordinary unfair dismissal rights, the position on the fairness or otherwise of any dismissal may have been impacted. That did not apply here. The respondent was not in breach of contract for having taken disciplinary action against the claimant.
79. I considered the assertion that the respondent was in breach of contract for allegedly not following complaints / grievance protocols. The contract of employment set out provisions if the claimant wished to raise a grievance in accordance with the respondent's grievance procedure. The grievance procedure was stated to be non-contractual – clause 9.3. As the grievance

procedure was non-contractual, I concluded that the respondent was not in breach of contract for allegedly not following complaints / grievance protocols.

80. I considered the assertion that the respondent had unlawfully terminated the claimant's contract. For the reasons already given, including my conclusion

that the claimant's conduct in refusing shifts was gross misconduct, I concluded that the respondent did not unlawfully terminate the claimant's contract whether by way of breach of contract or otherwise.

Employment Judge McCluskey

Date: 21 March 2024

JUDGMENT SENT TO THE PARTIES ON

28 March 2024

For the Tribunal Office

P Wing

Notes

Public access to employment tribunal decisions

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Recording and Transcription

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/>

APPENDIX 1 – LIST OF ISSUES

Wrongful dismissal / notice pay

1. What was the claimant's notice period?
2. Was the claimant paid for that notice period?
3. If not, was the claimant guilty of gross misconduct? Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Unauthorised deductions – holiday pay

4. Did the respondent make unauthorised deductions from the claimant's wages in relation to holiday pay and if so, how much was deducted? The claimant says he is owed for 8 days holiday that he accrued but had not taken.
5. What was the claimant's leave year?
6. How much of the leave year had passed when the claimant's employment ended?
7. How much leave had accrued for the year by that date?
8. How much paid leave had the claimant taken in the year?
9. Were any days carried over from previous holiday years?
10. How many days remain unpaid?
11. What is the relevant daily rate of pay?

Unauthorised deductions - wages

12. Were the wages paid to the claimant on the dates below less than the wages they should have been paid? The claimant says as follows:

Date paid	Amount paid	Amount due	Amount owed	Reason
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1/06/2022	308.21	851.56	543.35	Unauthorised deduction
7/10/2022	1149.76	1749.76	600	Holiday pay deduction
31/08/2022	564.64	1364.64	800	Lack of shifts given
7/11/2022	0	1760	1760	Last 4 weeks (no shifts given)

13. Was any deduction required or authorised by statute?
14. Was any deduction required or authorised by a written term of the contract?
15. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
16. Did the claimant agree in writing to the deduction before it was made?
17. How much is the claimant owed?

Breach of Contract

18. Did this claim arise or was it outstanding when the claimant's employment ended?
19. Did the respondent do the following: The claimant says the respondent breached his contract of employment by not providing him with his contractual hours. He says this led to him resigning. The claimant must set out the terms of the contract he relies on and when he says he was not given shifts. The claimant says as follows:
 - a. Unlawful disciplinary actions against me;
 - b. Complaints / Grievance protocols not followed
 - c. Unlawful contract termination
20. Was that a breach of contract?
21. How much should the claimant be awarded as damages?