Case No: 2304342/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr John Craig

Respondent: Abellio Limited

Heard at: London South **On:** 26 October 2020

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent Mr A Lord instructed by Backhouse Jones Solicitors

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed.
2. The claimant was not dismissed in breach of contract.
3. The respondent made an unauthorised deduction from the claimant's wages in the total sum of £1,851.54
4. There was no failure by the respondent to provide itemised pay statements.

REASONS

Background

1. Mr Craig worked for Abellio London Limited as a bus driver. He resigned on 20 July 2019 after several months off sick.
2. His decision followed a grievance about his entitlement to sick pay during his absence. Although initially unsuccessful, there was a grievance appeal hearing on 12 July 2019 which found largely in his favour and concluded that he was owed £6,144.04 in arrears of pay. That payment was to be made the next week, 19 July, but when it failed to appear in his account that day Mr Craig took the decision to resign that day. On his view, as expressed in his resignation letter that was the last straw and followed a series of efforts to resolve his pay and deal with other issues at work going back over a year.
3. In his claim form, lodged on 9 October 2019, he brought a complaint of

constructive dismissal and other claims for notice pay, holiday pay and unlawful deduction from wages. The unlawful deduction from wages claims comprises:

a. a claim that even more sick pay was due than was calculated on appeal, and

b. that he only received some of a bonus payable to all full time drivers in late 2018 - £720 rather than the full £900.

4. Since Mr Craig resigned with immediate effect, there is no entitlement to notice pay. That complaint was not mentioned at this hearing and so is not considered further.

5. There is a further claim relating to underpayment of holiday pay on termination for that holiday year and for other amounts going back to 2017.

6. In the course of these proceedings he has been allowed to add a claim for failure to provide pay statements, so there a number of smaller issues to resolve as well as the main question of constructive dismissal.

7. In resolving these issues I heard evidence from Mr Craig, and on behalf of the company from Mr Darren Jackson, his Driver Manager or line manager; Mr Raj Chadha the Operations Manager who heard the grievance over sick pay; Mr Mark McGuiness, the Performance Director who upheld or largely upheld the appeal; and Ms Debbie Waring, the Payroll Manager. She gave her evidence by telephone.

8. I also had an agreed bundle from the respondent with about 500 pages including insertions, and a further bundle from Mr Craig of about 250 further pages. That is a very substantial amount of paperwork, even for a two day case, as originally listed. But owing to other demands on the Tribunal diary I had to explain to the parties at the outset that only one day was now available. As it was the evidence and submissions finished at 5.30 pm necessitating a reserved judgment.

9. I explained to the parties at the outset that in order to make best use of the time available it was important to ask questions to establish was documents said, or about matters which were not in dispute. It is fair to say that Mr Craig, appearing I person, had more difficulty in following that advice. A number of people from the company who might have given evidence were not present and he was keen to explore issues with each witness which were not strictly within their remit. He clearly found this a frustrating process. Nevertheless at his request I allowed the respondent's witnesses to give their evidence first and their evidence occupied the morning until about 1.25 pm, over three hours. Questions to Mr Craig took place during the afternoon over a little under an hour and I so am satisfied that he had a full opportunity to explore the issues with the company's witnesses.

10. Having considered that evidence and the arguments on each side I make the following findings of fact.

Findings of Fact

11. Mr Craig began work as a driver at the company's Battersea depot in July 2014. He was initially employed on a full-time basis but in November 2014 he made a request to work part-time in order to help with child care. According to his letter he needed to be at home four days each week and so his hours were changed to three days per week. That was, until further agreement, a permanent change to his contract, but no updated contract of employment was issued, and the only record on his personnel file was the letter approving his request.

12. In practice however it is clear from his pay records that this was a temporary state of affairs and in practice he was soon working substantially more than that. He was back to work on four days each week, and each day was a long one, so that his total weekly hours of work was at or above 40 hours per week, the normal figure for a full-time driver. So from before 2017 he was effectively working full time, albeit over four days each week.

13. A change was proposed on 10 March 2018 which would have involved a substantial reduction in his hours. He was offered a change to "To be covered" or TBC duties on a different route, on Mondays to Wednesdays. This was put forward by the Operating Manager, a Mr Moran, apparently on the assumption that Mr Craig was only working three days a week. However another employee left at about the same time and Mr Craig was able to carry on with his four-day pattern, which ran from Monday to Thursday. The incident is only relevant in that it showed the confusion on the part of the company about what hours Mr Craig was supposed to be working.

14. The episode must have been an upsetting one however as Mr Craig went off work with stress on 16 March 2018, the first of three substantial periods of sickness absence. It lasted until 20 May, ten weeks later.

15. That absence brought into focus the appropriate level of his sick pay. Was he to be paid for a three day week or for four? The company had a sickness absence policy, introduced in 2012, based on a sick pay year from 1 April. In 2018 a new policy was introduced with effect from August which made no mention of the sick pay year.

16. Summarising matters, the managers who were considering it subsequently interpreted it, by and large, as meaning there was a rolling 12-month period, so that it was impossible for an employee to reach a point in the year when the new sick pay year started and he went back onto full pay. Others assumed that the sick pay year was the calendar year. It was not until the grievance appeal stage, much later on, that Mr McGuiness decided that it should be interpreted in the same way as the previous policy, with a sick pay year beginning on 1 April.

17. There was also a difficulty with the 2012 policy however. It was designed for those who work a standard five-day week, not someone like Mr Craig with compressed hours. The basic intention behind it is clearly to provide for three

months' full pay and three months' half pay. A week's pay usually varies from person to person and is easy to calculate in an individual case, so there is no unfairness. But here the policy provided for 13 weeks of "Normal Benefit" for those with his length of service, followed by 13 weeks of "Reduced Benefit". These were defined as a fixed amount, equal to a normal days pay of eight hours, so it operated unfairly for someone like Mr Craig working compressed hours. If he was off sick for a week he would get four standard days' pay, the same as someone working 32 hours a week.

18. That unfairness was compounded by the fact that the company's records, at least on his personnel file, appeared to show that he was employed three days a week, so he would in fact just receive three "Normal Benefits" for a week off sick.

19. The issue about these fixed benefits was resolved in the 2018 policy, which adopted the simpler approach of paying 13 weeks full and then half pay, but the issue about his weekly pattern of work continued, and these controversies bedevilled the rest of his employment.

20. His second period of absence began on 22 June 2018 (under the old policy) and continued for exactly 13 weeks to 23 September 2018. When his entitlement to full pay expired he returned to work. The third and final period of absence began on 3 February 2019 and he did not return to work after that.

21. One reason for his failure to return was the dispute he had with a manager at iBus, which I take to be a branch of the same business. This was in January 2018. They had a disagreement that day, and then again on 30 January 2019. Mr Craig raised a grievance against this manager, accusing him of harassment and bullying. That led to a grievance hearing on 27 March 2019, by which time he had been off work on his third absence for about six weeks. The grievance was not upheld, the manager concerned finding that they were equally at fault. An appeal was then raised about this, mediation was proposed for 26 June 2019 but Mr Craig did not attend as he was still off sick. By the time it was rearranged he had already resigned.

22. During that sickness absence Mr Craig became concerned about the level of sick pay he was receiving. On 5 March 2019 he raised this query with Mr Jackson, asking whether there was a rolling sick pay year or whether he would return to full pay on 1 April. He was provided with a copy of the new policy and contacted HR for clarification. Mr Moran became involved again. He asked payroll to work out what Mr Craig would be owed if a "rolling year" approach was taken. It seems that he was still under the impression that Mr Craig's normal working pattern was a three day week. The Payroll Manager, Ms Waring, made her calculations, and on the basis of (a) a rolling holiday year and (b) a three-day week, she worked out that in fact he had been overpaid by £2,005.62. Needless to say that was an unwelcome conclusion for Mr Craig, who knew very well that he was or had been effectively working full time.

23. Mr Jackson, his immediate manager, shared his frustration. He believed that Mr Craig should have been paid in full from April and was by then owed £1,193.64. He gave payroll an instruction to pay that sum and that seems to have led to the intervention of Mr Moran. When it was counter-manded Mr Jackson felt that he too had been disrespected and told Mr Craig that he intended to raise his own grievance about it.

24. Mr Craig raised his own grievance on 12 April 2019 and set out his calculations in detail, including his pay each week in the 12 weeks prior to each absence, and insisting that the sick pay year began in April. It was heard by Mr Chodha, the Operations Manager. His evidence at this hearing was relatively brief, given that it was accepted by the company that his conclusions were wrong. His view, mirroring that of Mr Moran, was that Mr Craig had been on a three-day week, and there was a rolling holiday year, so he owed the company over £2,000. No real attention appears to have been given to the points made by Mr Craig in writing about what he was actually earning.

25. That was therefore the background to the grievance appeal meeting with Mr McGuiness, the Performance Director. He noted that the claimant's case was based on his average weekly earnings prior to his absence. He accepted the evidence from payroll records that Mr Craig had been working about 40 hours over four days each week and also found that the rolling year approach was not right. On that basis he asked Ms Waring to recalculate the amount due, and she produced the table at page 233 of the main bundle with the figure of £6,144.04 which was due to Mr Craig. The figures were worked out to 19 July 2019, the date of the next payroll run. By then, Mr Craig was on half pay and so and extra half week's pay was added to bring him up to that date.

26. Nevertheless, the payment was not made on 19 July. That was a Friday. Payslips are generated on the Wednesday of each week on a portal where staff can see them. Ms Waring made it all out in time and Mr Craig could see the figures. She then went away on holiday. One of her assistants queried the fact that in addition to the £6,144.04, there was an extra half-week pay on the statement. He or she decided to spike the payment while this was clarified. When Ms Waring came back on Monday she was shocked to see that the payment had not been made and arranged for an emergency payment to be made.

27. By then however, Mr Craig had resigned. His resignation letter blamed this failure to make the payment on the due date. It stated:

> "The outcome [to the appeal] of making the due payment of £6,114 on the next pay date which was 19th July 2019 were not complied with. As a result, this has created a breach of confidence and trust between myself and, you, my employer.
>
> This has produced a last straw doctrine, Abellio has subjected me to unfair treatment and acted in breach of contract on numerous occasions previously, and although I waived your breach in the past, I am no longer willing or able to endure

this consistent pattern of emotional abuse and calculated deceit."

28. These are strong words, but Mr Craig had been at home with no pay at all since April.

Conclusions

Constructive Dismissal

29. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if) – …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

30. That definition does not provide any guidance as to what those circumstances might be. The leading case is *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, where the Court of Appeal held that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

31. Applying those words to Mr Craig's situation the question becomes whether, in failing to pay his arrears of sick pay on 19 July 2019, Abellio was guilty of conduct which went to the root of the contract, or which showed that it no longer intended to abide by an essential term of the contract. And framed in that way, it becomes clear without much further elaboration that they did not. In fact, the whole grievance appeal process showed that they were operating the mechanism provided by the contract for dealing with such complaints, and actually found in his favour. The failure to pay on time was simply a mistake, however galling for Mr Craig. He had at that stage the comfort of a letter from Mr McGuiness which specified the sum due to him, and could even see the payslip which had been made out in his favour. Realistically, there cannot have been any doubt that the money would be paid, even if there was a last-minute hitch of some sort.

32. Indeed it is hard to avoid the impression that Mr Craig was looking for an opportunity to resign by this stage, rather than stay and work things through. But whether or not that was the case, the test is not whether there had been *any* failure or breach of contract by the employer, or whether he was at the end of his tether; it was, to repeat, whether, judged objectively, the company was indicating to him that it was no longer prepared to stick to the contract. That does not appear to me a remotely fair reading of the situation.

33. Mr Craig attempted to broaden his argument, so that he was not simply relying on the lateness of the payment but on more general complaints about his treatment, arguing that his resignation letter did not set out all the reasons for his resignation; but that does not change the fundamental position. His resignation letter made clear that it was not this single failure that he relied on – this was just the last straw – but on the history of the way he had been treated. But that history is essentially the history of his sickness absences and the grievance process, which again found in his favour. No real mention was made at this hearing about the other grievance about the manager at iBus, and as already noted that process was still not complete at the time of his resignation. So whether focussing on the late payment as a breach in itself or as the final straw, the outcome is the same. However regarded, the company was not guilty of any fundamental breach of contract towards him, and the complaint of constructive dismissal must be dismissed.

Unlawful Deductions Complaints

34. Turning to the other complaints, the first relates to the amount of sick pay awarded by Mr McGuiness, which Mr Craig says was not in fact sufficient. As already noted there were three periods of absence, as follows:

    a. the first from 16 March 2018 until 20 May 2018;

    b. the second from 22 June 2018 to 23 September 2018; and

    c. the third from 3 February 2019.

35. There was therefore a gap of over three months between the second and third, which raises the question of whether the earlier periods are brought in time. There is a three-month time limit in which to bring such claims, but where there is a series of deductions, as is certainly the case for the third period, time starts to run from the date of the last deduction in the series: section 23(3) Employment Rights Act 1996.

36. *In Bear Scotland Ltd and ors v Fulton and ors* and other cases, 2015 ICR 221, Mr Justice Langstaff held that a gap of more than three months between any two deductions will break the 'series' of deductions. He reasoned that, since a tribunal has no jurisdiction to consider a claim brought more than three months after a one-off deduction or the last deduction in a series, parliament could not have intended that jurisdiction could be revived after that time.

37. In the course of his submissions, reflecting impressive research, Mr Craig referred me to the decision of *Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors* 2019 NICA 32, a decision of the Northern Ireland Court of Appeal declined to follow the ruling of the EAT in *Bear Scotland* on this point. The case involved claims by thousands of police officers and civilian employees for underpayment of holiday pay going back to 1998, and the relevant Northern Ireland legislation also provided that a 'series of deductions' from wages must be brought within three months of the last deduction in the

series. The Court noted that there was no definition of what amounted to a series of deductions, and what amounted to a series was a question of fact. So, in that case, a series of about 20 years in which without fail the amount of holiday pay was too low could amount to a series.

38. The *Agnew* case is not binding in Great Britain however, whereas I am bound by the decision in *Bear Scotland.* In any event, the situation here is very different from the facts in Agnew. This involves three separate periods, in each of which there is a series of weekly deductions (arguably) and between which there is a substantial gap. In my view, as a question of fact, that gap would break the series, even if it were less than three months. Accordingly I have to conclude that any claim based on the earlier two periods is out of time and cannot be considered any further.

39. For completeness however, I will just mention that for the first period Mr McGuiness was under the impression that Mr Craig was working a three day week, and rather than apply the policy strictly he increased the amount to four days per week at the "normal benefit" rate. In fact, this was still an underpayment, applying this generous interpretation, since Mr Craig was already working four days a week. Later, in the second period, when Mr McGuiness accepted that Mr Craig was working four days a week, he increased the payment to five days of normal benefit a week. For consistency the same approach ought to have been adopted throughout.

40. For the second period, there is very little between the figures on either side. Some confusion appears to have been caused by the fact that payments were made a week in arrears. Mr Craig's figures identify the week by the relevant dates of absence, the company's figures by the payroll date, which falls on the week after. This may not have been appreciated by Mr Craig. It affects when he went down to half pay, and on this point the company's figures appear to me to be correct. Nevertheless, once again, these periods are out of time.

41. The third period is therefore the only one which I can consider. It was a series of deductions ending with his resignation and so in time. This period was under the new policy, which provided for the simpler formula of 13 weeks' full pay and 13 weeks' half pay. The policy is silent on how it is to be calculated, but it seems to me that the correct approach is to provide an average over the previous 12 weeks. (The number of weeks to use is a matter of judgement, but section 222 of the Employment Rights Act 1996 provides for a 12 month rolling average for some purposes and that is a common yardstick.)

42. That is also the approach which now has to be taken to the calculation of holiday pay so that people who, for example, get a proportion of their income from significant overtime or commission should get the same amount when on holiday, otherwise they would be discouraged from taking holiday: *Lock and ors v British Gas Trading Ltd and anor (No.2)* 2015 IRLR 438, ET.

43. The same considerations do not automatically apply to sick pay, which is a matter for the company to provide, as it sees fit. But, in the absence of any set rate of calculation, as under the old policy, the fair rate is clearly the average rate of pay, as in the case of a holiday pay calculation. That also accords with the approach taken by Mr McGuiness, who attempted under the old policy to pay an amount which reflected his actual hours of work.

44. In his grievance letter (page 186) Mr Craig set out his average earnings in the 12 week period before this absence, amounting to £5759.64, giving an average of £479.97. These are the *net* figures, after tax. By contrast, the figure used by Mr McGuiness/Mrs Waring in their calculations was the gross amount, of £426.30. It is important to compare like with like, so I will start with the gross amount before considering the tax treatment.

45. Looking at that 12 week period, one of those weeks, paid on 7 December 2018, is very untypical. Firstly, it includes the £720 bonus and secondly the only other payments are of holiday pay only. There are no actual wages.

46. Removing that anomaly, and calculating the gross amount paid over the other 11 weeks (the payslips for which appear from pages 324 to 344) the gross average earnings were £550.38 per week. That seems to me to be the appropriate figure. It follows that a half week is worth £275.19 and a half day (actually one eight of a week) is worth £68.80. Substituting these figures in the table provided by Mrs Waring at page 233, the total which should have been paid in the third period is £8,599.61, not £6,634.68, a difference of £1,964.93.

47. (It will be noted that the company's figure of £6,634.68 for the third period is actually more that the total assessed for all three absences, indicating that the figures for periods one and two had actually been revised downwards slightly. But I have to deal with the third period only.)

48. When Mr Craig was paid the sum of £6,144.04 some tax was deducted. It is now clear that Mr Craig did not begin earning again in the tax year 2019/20 and so he should have been able to recover this amount from HMRC. It also follows that if this extra £1,964.93 had been paid, that too would have been tax free as he would still have remained below the personal allowance threshold. He was however above the lower earnings limit for National Insurance purposes and so 12% of this extra amount would have been payable. That reduces the total by £235.80 to £1,729.14

49. I therefore award this figure of **£1,729.14** as the net unlawful deduction from wages.

50. I would add however that the existence of any such shortfall did not play any part in his decision to resign. He made no mention of it at the time, and it was – as made clear in his resignation letter – to pay the assessed sum on time that led to his resignation.

Holiday pay

51. Mr Craig claims underpayment of his holiday pay on termination, and also in respect of previous holiday years as an unlawful deduction. I will start with the holiday pay due on termination.

52. Unlike the sick pay year, holiday is calculated on a calendar year basis, so by the time Mr Craig resigned on 20 July 2019 he would be nearly 7 months into the holiday year. The contract provided for 33 days holiday after 5 years' service, including bank holidays. But that is for someone working a five-day week pattern. For someone working four days a week the total would be reduced pro-rata to 26.5 days, rounding up to the nearest half day. By 20 July 2019, he would therefore have accrued 15 days. (Naturally each day should be paid at a rate reflecting the average number of hours worked.)

53. This matches the company's figures. According to the response form, Mr Craig had also carried over one day from the previous year to make 16, and taken 5 days, leaving 11. On the basis of a four day week, with a week's pay of £550.38, each day would be worth £137.60, and 11 days would amount to £1,513.60. But that is actually less than the gross amount paid in Mr Craig's last payslip (page 197C and page 396) of £1,713.57. The basis for that larger figure is unclear, but if 11 days were due, there is certainly no shortfall.

54. Mr Craig on the other hand (at paragraph 107 of his witness statement) says that he would have accrued 19 days that year, had taken *15*, leaving 4. Again, this accrual is based on a five-day week pattern, so I believe the company's figure are correct. It is unclear why he says he had taken 15 days, but on any view there was no shortfall in 2019.

55. His main complaint about holiday however is about previous years. The first point to note is that there is now a two year limit on such claims. The Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322, impose this limit on most claims for unlawful deductions from wages, including claims for holiday pay. So no claims can be made, in this case, for deductions earlier than 9 October 2017.

56. The second point is that all of Mr Craig's calculations for those earlier years are based on this 5-day week pattern, accruing 33 days per year, or in fact 32 days in earlier years. He says, for example, that is 2018 he should have had 32 days, but only had 24 days, and so was 8 days short. But 32 days for a five-day week worker is 25.6 days, or 26 days rounding up so any discrepancy on this score would be very much less. (In the schedule in his own bundle the figures are different again. At page 11 he sets them out in a table. He states there that he only received 22 days in 2018, not 24 days.) There are other figures for 2017, at which point the company's records show that he was working 3 days a week, which makes it more likely that he received less than he might.

57. But would any such earlier case be in time? As already noted, Mr Justice Langstaff, in *Bear Scotland,* held that a three month gap was too much, a

decision which departed from previous cases in which underpayments going back years had been allowed. Again, this is a binding authority, and on that basis any claim based on holiday pay in 2018 or earlier is simply out of time.

Bonus payment

58. The next item is the bonus payment of £900 paid to the other full-time drivers. Mr Craig only found out about this in the course of these proceedings. Such claims have to be made within three months of the underpayment unless it was not reasonably practicable to do so in time. Clearly, not knowing about it, he was unable to pursue it. He also has to raise it promptly when he does find out, but no time limit issue was raised and so the underpayment of £180 should be made to Mr Craig, less tax and national insurance. That tax would have been at his marginal rate of 20% in 2018, and the national insurance at 12%, making 32%, so the net figure is **£122.40**

Itemised pay slips

59. The last item is a claim for failure to provide itemised pay slips. This relates to the period before his resignation when he received no pay. But section 8(1) of the Employment Rights Act provides that "A worker has the right to be given by his employer, *at or before the time at which any payment of wages or salary is made to him,* a written itemised pay statement. So, if there was no intention to pay wages in any given week there is no right to a pay slip. I note that there are examples of other employees getting zero pay slips, but that does not affect the legal position.

Outcome

60. It follows that Mr Craig succeeds in respect of these two items of wages only, which amount to **£1,851.54.** There is no power to award interest on these sums, but equally the recoupment provisions do not apply. These are sums which were due and owing on the date of his resignation, and all that can now properly be awarded. Since the sums have been capable of calculation without further evidence, there is no need for a remedy hearing, and that concludes these proceedings.

Employment Judge Fowell

Date 03 November 2020