



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Smith

**Respondent:** Derby & Derbyshire Local Medical Committee Ltd

**Heard:** Via Cloud Video Platform in the Midlands (East) Region

**On:** 25 February 2022

**Before:** Employment Judge Ayre, sitting alone

**Representatives:**

**Claimant:** In person

**Respondent:** Mr R Cater, Consultant

## JUDGMENT

1. The respondent's application to overturn the decision to strike out the response fails.
2. The claim for wrongful dismissal fails and is dismissed.
3. The claim for unlawful deduction from wages succeeds. The respondent made an unlawful deduction from the claimant's wages by failing to pay him overtime. The respondent is ordered to pay the sum of £4,622.70 to the claimant.

## REASONS

### Background

1. The claimant was employed by the respondent as Business Support Director from 23 November 2020 until 27 May 2021 when he was dismissed with immediate effect for poor performance.

2. On 5<sup>th</sup> October 2021, following a period of Early Conciliation from 25<sup>th</sup> July to 5 September, he presented a claim for breach of contract and ‘failure to comply with the rules of natural justice’ to the Tribunal. The claim was resisted by the respondent, who is represented in these proceedings by Peninsula.
3. The claim was sent to the respondent by letter dated 13<sup>th</sup> October 2021. That letter also contained a Notice of today’s hearing, and Case Management Orders. The Case Management Orders required the respondent to send certain documents to the claimant and the Tribunal by 1<sup>st</sup> December 2021.
4. The original Case Management Orders were subsequently varied, at the request of the claimant, and a new deadline for compliance was set for later in December 2021. The respondent did not comply with the Case Management Orders.
5. On 3<sup>rd</sup> February 2022 a CVP enquiry form was sent to the respondent’s representatives. The representatives did not reply.
6. On 15<sup>th</sup> February 2022 Regional Employment Judge Swann issued a strike out warning to the respondent for failing to respond to the Tribunal’s correspondence of 3 February 2022 and failing to comply with the Tribunal’s Case Management Orders. The warning stated that *“If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can make them by **22 February 2022**”*,
7. The respondent’s representative did not reply to the strike out warning, and on 24 February, Employment Judge Welch struck out the response to the claim.
8. It was only on 24 February that the respondent’s representative finally sent its witness statement and the bundle to the claimant. It also wrote to the Tribunal applying for the Order striking out the response to be set aside and for the response to the claim to be reinstated. I considered the respondent’s application as an application for relief against sanction under Rule 38(2) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (**“the Rules”**).

### **Application for relief from sanction**

9. At the start of the hearing I considered whether to grant the respondent relief from sanction under Rule 38(2) of the Rules and set aside the Order striking out the response. I heard submissions on this issue from the Mr Cater and the claimant. I also read a witness statement submitted on behalf of the respondent from a Ms Brenda Samuels, who is the consultant at Peninsula who has conduct of this case on behalf of the respondent. In her statement Ms Samuels sought to explain the reasons for the respondent’s non-compliance with the Orders and non-response to communications from the Tribunal.

10. Mr Cater submitted, on behalf of the respondent, that:

- a. The respondent's non-compliance was due to an oversight rather than any malicious attempt to avoid compliance and an explanation had now been provided for it;
- b. A witness statement and bundle had been prepared some time ago, but had not been sent to the Tribunal or the claimant due to a misunderstanding within Peninsula as to who was responsible for it;
- c. A fair trial is still possible. Although the claimant did not see the respondent's witness statement and bundle until yesterday, the respondent had no objection to today's hearing being postponed and the question of whether to make a Preparation Time Order could be considered;
- d. It would be in line with the overriding objective for the decision to strike out the claim to be set aside.

11. The claimant submitted that:

- a. Rule 2 of the Rules requires that the Tribunal deal with cases fairly and justly, to avoid delay and save expense. Deliberation or malice are not relevant considerations;
- b. Case Management Orders are serious and should be treated as such. Reinstating the response would make a mockery of the Rules;
- c. It is not possible to have a fair trial today, as he had only received the respondent's bundle and witness statement yesterday afternoon and had not had the chance to go through it in any detail yet;
- d. The respondent is 64 days' late in supplying the bundle. The claimant should not be subject to delay because of the negligence of the respondent's representatives;
- e. The respondent had been reminded of the need to comply with Case Management Orders previously, but failed to do so;
- f. Mr O Emuimukoro v (1) Croma Vigilant (Scotland) Ltd and (2) Miss C Huggins & others EAT/0014/20 is authority for the proposition that it is not necessary, in order for the power to strike out to be triggered, for a fair trial not to be possible at all; it is enough for the power to be exercisable that, as a result of a party's conduct, a fair trial was not possible within the trial window.

12. Having considered carefully the submissions by both parties, my decision is that it is not in the interests of justice or in line with the overriding objective to overturn the decision to strike out the response and / or grant the respondent relief from sanction.

13. The claimant is a litigant in person who has managed to comply with the Case Management Orders. The respondent is represented by a large and specialist provider of employment law advice and representation who should be aware of the importance of complying with Case Management Orders and responding to correspondence from the Tribunal.
14. There have been multiple failures on the part of the respondent's representatives. They were 64 days late in complying with the Case Management Order. The delay on their part is significant and has resulted in a fair trial not being possible within today's trial window.
15. In addition, the respondent's representatives have failed to respond to communications from the Tribunal on 3<sup>rd</sup> February 2022 and 15<sup>th</sup> February 2022, the latter of which was a strike out warning issued by the Regional Employment Judge.
16. The witness statement of Brenda Samuels states that Ms Samuels recalls opening the email containing the strike out warning, and Mr Cater accepts that Ms Samuels, whilst on holiday for some of the 7 day period allowed for replying to the strike out warning, was not away for all of it.
17. The respondent is a large organisation and, should Ms Samuels have been unable to respond to correspondence from the Tribunal, should have been able to arrange for a colleague to do so.
18. This is not a case in which there has been a one off error on the part of a professional representative, but rather multiple errors and a day of over two months. I accept that the failure to comply with the Orders is not malicious, but that does not justify overturning the decision of Employment Judge Welch to strike out the response.
19. It would not in my view be in line with the overruling objective to overturn the decision and grant relief from sanction. A fair trial is not possible today if the respondent were allowed to participate in the hearing due to the late service of the bundle and witness statement on the claimant who is a litigant in person.
20. For these reasons, the decision to strike out the claim stands. In accordance with Rule 21 of the Rules, the respondent shall only be entitled to participate in today's hearing to the extent that I permit them to do so. I have decided to read the witness statement of Dr Crawley and any relevant documents in the respondent's bundle but will place limited weight on them. Mr Cater will not be permitted to cross examine the claimant or make submissions on the substantive issues in the claim.

### **The Proceedings**

21. Having decided the issue above, I then went on to hear evidence from the claimant on the substantive issues in the case. I was provided with

a witness statement for the claimant, and copies of documents referred to in that statement. I was also provided with a bundle on the part of the respondent, which I have read as it contained documents which were relevant to the issues that I had to determine. I also read the witness statement of Dr Gregory Crowley.

## **The Issues**

22. The substantive issues that I had to determine were as follows:

- a. Did the respondent breach the claimant's contract of employment when it dismissed him, i.e. was he wrongfully dismissed?
- b. If so, what sums should be awarded to the claimant by way of damages for breach of contract? The claimant seeks damages of between £3,666 and £7,332.
- c. Did the respondent make unlawful deductions from the claimant's wages by failing to pay him for overtime?
- d. If so, what sums should the respondent be ordered to pay to the claimant?

## **Findings of Fact**

23. The claimant was employed by the respondent as Business Support Director from 23 November 2020 until 27 May 2021 when he was dismissed with immediate effect. The terms of his employment were set out in an offer letter dated 4 November 2020 and in a contract of employment. There was also an Employee Handbook, which the claimant was provided with.

24. The claimant's normal working hours were 30 hours per week, and these were the hours of work set out in the offer letter. Unfortunately, there was a mistake in the contract of employment, which stated that the claimant's normal hours of work were 25 hours a week. The claimant accepted in evidence that his normal hours of week were 30 hours a week.

25. The claimant was employed on a contract of employment which contained the following relevant provisions:

### ***"PROBATIONARY PERIOD***

*You join us on an initial probationary period of nine months. During this period your work performance and general suitability will be assessed and, if it is satisfactory, your employment will continue. However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action (which may include the extension of your probationary period) or terminate your employment at any time. You will be informed of the outcome of your probationary period by your Manager*

*and you should not consider your probationary period to have passed until such notification has been received. We reserve the right not to apply our full contractual capability and disciplinary procedures during your probationary period....*

**HOURS OF WORK**

*Your normal hours of work are 25 [should read 30] per week with a 30-minute unpaid break each day. Your hours of work are not variable, however, you may be required to work additional hours when authorised and as necessitated by the needs of the business.*

**REMUNERATION**

*Your salary is current annual starting salary of £55,000 p.a. FTE (£44,000 pro rata)...*

*For additional hours worked, you will be given time off in lieu. The date when the time of in lieu is taken is to be mutually agreed and should be taken within the same pay reference period...*

**NOTICE OF TERMINATION TO BE GIVEN BY EMPLOYER**

*Under 1 month's service – Nil.*

*1 month up to successful completion of your probationary period – 1 week.*

*On successful completion of your probationary period but less than 9 years' service – 8 weeks.*

*9 years' service or more – 1 week for each completed year of service to a maximum of 12 weeks after 12 years...*

**PAY IN LIEU OF NOTICE**

*We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party."*

26. The respondent's Employee Handbook contained a section headed "TIME OFF IN LIEU (TOIL)" which states as follows:

*"No TOIL is to be logged or taken without prior approval by a Manager. BrightHR must be used to log and request approval for TOIL. For any TOIL that is approved statutory break entitlements will be deducted in line with the Working Time Regulations.*

*All TOIL should be taken within the same pay reference period.*

*TOIL will not be authorised during busy times or when the office or service is not comprehensively covered. The Manager will use their discretion at all times and be as supportive as possible."*

27. The entirety of the claimant's employment took place during the Covid 19 pandemic and during a period when GPs were extremely busy rolling out the vaccination programme. The claimant therefore worked significantly more than his normal working hours. He kept a record of the additional days that he worked – which came to 30 in total.

28. The claimant's workload was such that he was unable to take TOIL. He raised the issue in several meetings and it was agreed by Dr Peter Williams, Chair of the respondent and Dr Peter Holden that TOIL could

be carried forward until such time as it was possible for the claimant to take it, or that the claimant would be paid overtime in lieu of taking TOIL.

29. The claimant recalled being sent overtime forms on one or two occasions. He did not complete them because he did not initially want to be paid for overtime, but instead to take the TOIL when he could.
30. The respondent had concerns about the claimant's conduct and performance. He was invited to a Probation Review meeting to discuss these concerns. The meeting took place on 27 May 2021 and was chaired by Dr Peter Holden, Treasurer and Director of the respondent.
31. At the end of the meeting the claimant was dismissed by the respondent. The respondent confirmed its decision in writing in a letter dated 27 May 2021, which included the following wording:
- “Further to your probation review meeting held on 27<sup>th</sup> May 2021 I am writing to confirm my decision. As you are aware, when you started work with us we had high hopes and expectations that you would meet the standards we require. Unfortunately, this has not proved to be the case.*
- I gave careful consideration to your responses in the meeting but reached the conclusion that you have failed to demonstrate your suitability for your role during your probationary period.*
- It is with regret that I confirm that your employment is terminated with immediate effect. You will be paid in lieu of notice until Friday 04 June plus any untaken holidays. You mentioned the considerable extra work you had undertaken over and above your contracted hours. Unfortunately there is no record of this extra time either on Bright HR or in any other timesheet form so without evidence I am unable to quantify this aspect. If you will provide evidence I will consider it...”*
32. The respondent subsequently paid the claimant one week's salary in lieu of notice and his outstanding holiday entitlement.
33. On 3 June 2021, the claimant wrote to the respondent asking to be paid for the 30 additional days that he had worked during the course of his employment. The claimant attached a table containing the dates that he had worked overtime.
34. Dr Holden responded to the claimant's email in a letter dated 10 June, stating that the claimant would not be paid for the overtime. The reasons given by Dr Holden were that the respondent's Employee Handbook states that any additional hours worked need to be authorised, and that time off in lieu will be granted provided that it was agreed and taken within the same pay reference period as it had been worked. Dr Holden also wrote that overtime forms had been sent to the claimant monthly, but the respondent could find no record of the claimant having submitted any overtime forms.

35. The claimant has not been paid for any of the 30 days overtime that he worked. He was not able to take time off in lieu when he worked overtime because he was too busy to do so, and he had agreed with the respondent that he would take the time off at another time or be paid for the additional hours worked.

## **The Law**

### Breach of contract

36. Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 provides that:

*“Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*

- (a) The claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
- (b) The claim is not one to which article 5 applies; and*
- (c) The claim arises or is outstanding on the termination of the employee’s employment.*

37. This provision gives employment tribunals the power to hear claims for damages for breach of a contract of employment or any other contract connected with the employment.

### Unlawful deduction from wages

38. Section 13 of the Employment Rights Act 1996 states that:

*“(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

- (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*
- (b) The worker has previously signified in writing his agreement or consent to the making of the deduction...*

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

39. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal.



## Conclusions

### Breach of contract / wrongful dismissal

40. At the time of his dismissal the claimant had been employed by the respondent for 6 months. His contract of employment contained a nine-month probationary period during which the respondent could terminate his employment by giving the claimant one week's notice or making a payment in lieu of his notice period.
41. The claimant has, on his own admission, been paid one week's pay in lieu of notice.
42. The claimant argued that the respondent should have followed its own capability procedure before dismissing him, and that if it had done, his employment would have been prolonged. He referred me to the case of *Gunton v Richmond upon Thames LBC [1981] Ch.448* which he said is authority for the proposition that where an employer did not comply with a procedure when dismissing an employee, the employee is entitled to damages for the period for which he would have been employed had the procedure been correctly carried out.
43. The *Gunton* case involved a disciplinary policy which was, on the facts, found to be incorporated into the employee's contract of employment. It is distinguishable from the current case as the respondent in this case expressly reserved the right, in the claimant's contract, not to apply its capability and disciplinary procedures during the probationary period.
44. The respondent was therefore not obliged to follow its capability or disciplinary procedures during the claimant's probationary period. It can be assumed that a party to a contract will terminate that contract in the manner that is most beneficial to itself. The respondent in this case terminated the contract by providing the claimant with a payment in lieu of his contractual one-week notice period. In doing so it complied with the terms of its contract with the claimant. The claim for wrongful dismissal therefore fails and is dismissed.
45. In his claim form and his witness statement the claimant raised a number of issues, including allegations that the respondent had failed to comply with the rules of natural justice in dismissing him, and did not have sufficient grounds to dismiss him. Whilst these allegations could be relevant in a claim of unfair dismissal, they are not relevant in the current claim for wrongful dismissal.

### Unlawful deduction from wages

46. I am satisfied, on the evidence before me, that the claimant worked an additional 30 days during the course of his employment. He was required by the terms of his contract to work such additional hours as were necessary. His contract also provided for him to be compensated for additional hours worked by way of time off in lieu.

47. I accept the claimant's evidence that, although his contract provided for time off in lieu to be taken within the same pay reference period that it had been worked, this was not possible due to the pressures of the Covid 19 pandemic. I also accept his evidence that there was an agreement between the claimant and the respondent that he would be allowed to carry forward his unused TOIL until such time as he was able to take it, and that if he were unable to take it he would be paid overtime for the additional time worked instead.

48. There was, therefore, an agreement between the parties that the claimant would be paid for his overtime if he were not able to take it. As the claimant was not able to use his TOIL before his employment terminated, he is entitled to be paid for it on the termination of his employment.

49. The claimant's FTE gross salary is £55,000 a year. Using the online salary calculator, this gives a net daily payment of £154.09. The claimant is entitled to 30 days' net pay which totals (30x154.09) £4,622.70.

50. The respondent has made an unlawful deduction from the claimant's wages by failing to pay him on the termination of his employment the sum of £4,622.70 for the overtime he worked during the course of his employment. The respondent is ordered to pay the sum of £4,622.70 to the claimant.

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Employment Judge Ayre

14 March 2022