EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101658/2023

Final Hearing held at Dundee remotely on 24 April 2023

Employment Judge A Kemp

Mr John Currie	**Claimant** **In person**
St Andrews Bay Development Limited	**Respondent** **Represented by:** **Mr B Duncan,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claim of unlawful deduction from the wages of the claimant by the respondent does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing of the claim made by the claimant against the respondent. He is a party litigant, and Mr Duncan represented the respondent.

2. The claim was for unlawful deduction from wages under Part II of the Employment Rights Act 1996, which included initially in the Claim Form what was alleged to be accrued holiday pay. At the commencement of the hearing the claimant confirmed that the only claims he made were for 138

hours of time off in lieu that he believed he had accrued, and was the money owed to him. The claim for unlawful deduction as to holiday pay was therefore not pursued. The claims made were all denied, and the respondent alleged that all sums due had been paid.

3. The hearing took place remotely by Cloud Video Platform. Case management orders had been issued in the case on 17 March 2023 in relation to a single file of documents, otherwise called a Bundle, and a Schedule of Loss. The claimant had not however provided either documents or that schedule. I took into account that he was a party litigant, and sought to provide assistance to him in accordance with the overriding objective, but explained that I could not act as if his representative.

4. Prior to the hearing of evidence I explained to the claimant how the hearing would be conducted, that he required to give all the evidence he wished at this stage as further evidence was allowed only in exceptional circumstances, and that documents if relevant and relied on required to be referred to in his oral evidence. I explained that he would be cross examined, that I may ask questions, and that he may then give further evidence in re-examination in response to such questions but not to give evidence on a new point. I explained that the same process would apply when the respondent's witness gave evidence and that the purpose of cross examination was to challenge any matter of fact spoken to by the witness not considered correct, and to put to that witness a fact known to the person not covered in their evidence in chief. I explained that after all the evidence had been heard that parties had the opportunity to make submissions as to the facts I should find, the law that applies, and the application of the law to the facts, but that there was no requirement for him to do so.

The issues

5. The issues before the Tribunal were:

   (i) Were there any unlawful deductions from the claimant's wages?

   (ii) If the claim succeeds in whole or part to what remedy is the claimant entitled?

The evidence

6. The claimant gave evidence himself, and spoke to a Bundle of Documents that had been prepared by the respondent. Evidence for the respondent was given by Ms Carol Ann Hibbert. During the evidence of the claimant he wished to refer to an email exchange with Ms Hibbert that he had not provided to the respondent as part of the Bundle. It was sent to Mr Duncan who took instructions, and although it was very late, and he had asked the claimant whether he had any documents to refer to without response, did not oppose its being received.

The facts

7. The claimant is John Currie.

8. The respondent is St Andrews Bay Development Ltd. It operates hotels, including one on the outskirts of St Andrews.

9. The claimant commenced employment with the respondent on 11 May 2022 as a Kitchen Porter.

10. The terms of his employment were set out in a letter with an offer of a contract of employment dated 6 May 2022, accepted by him on 12 May 2022. The provisions material to the present claim included that as to Hours of Work as follows:

> "You have no normal daily or weekly working hours. Your normal working hours will be worked on an annualised hours basis with the total number of hours worked per year being 2080, including holidays but excluding 30-minute unpaid meal breaks. The working year for these purposes runs from 1st April to 31st March….. Your working week will generally be flexible…..based on a notional average of 40-hour week, worked on five days in any week……You may be required to work reasonable hours in addition to your normal working hours."

11. The provisions as to Remuneration, Pension and Benefits confirmed that he was paid a gross annual salary of £21,320 paid monthly, and that "You

may be required to work more than 2080 hours in a year", and could be paid overtime at single time. It added

> "However, as an alternative to overtime, you may, at the sole discretion of the Hotel, be entitled to paid time off in lieu if you are required to work more than your normal working hours in a working year. Your accrued hours will be reset to zero balance on 1st April each year. If you work fewer than 2080 hours by 31 March in any year (pro-rated for employees who commence or end employment through the year) you accept and acknowledge that you will repay any excess to the Hotel or, as an alternative, you consent that the Hotel may deduct any such excess from your salary either in a single deduction or series of deductions."

12. Notice of termination of employment required to be in writing and for a period of one month in the first five years of employment.

13. In practice the respondent kept records of the hours worked by an employee such as the claimant, and records of holidays taken, amongst other details. In any particular week the hours worked, or taken as holidays, may be greater than or less than 40 hours. If the total that week was greater than 40 hours the excess above 40 was added to what was termed a TOIL bank. If the total that week was less than 40 hours the balance below that figure was deducted from the TOIL bank. The records were provided each week to the claimant's line manager, but not to the claimant himself.

14. On 17 December 2022 the claimant's grandfather suffered a stroke and was admitted to hospital. The claimant called the respondent when informed of that, which was at a time when he was on his way to work. He spoke to the Head Chef called Alan, explained the position, and was told that he could not come into work that day. The claimant went to the hospital.

15. On or around 24 December 2022 his then line manager, Paddy Malcolm, spoke to the claimant indicating that he did not care what the reason for the claimant not attending work on 17 December 2022 was, his problem was making sure that the kitchen was clean and tidy, or words to that

effect. The claimant felt degraded by such a remark, and the way it was delivered to him.

16. On 26 December 2022 the claimant intimated to a chef he knows only as John, who was standing in the Head Chefs when not in the hotel, that he would not be returning to the hotel in view of how he felt he had been spoken to by his manager. The claimant did not in fact return to his employment thereafter.

17. On 29 December 2022 the claimant called the respondent and spoke to someone in their HR team. He confirmed that he would not be returning. The respondent treated that as a resignation on that day, and processed him as a leaver from their employment thereafter. They did not provide him with any letter confirming the termination of his employment or similar.

18. On 30 December 2022 the claimant was paid the normal salary for the month of December 2022, being one twelfth of his annual salary, less statutory deductions. That meant that he was paid for the whole of the month of December 2022, although he had not worked beyond 26 December 2022, and on that day had worked for about two and a half hours.

19. On 29 January 2023 the claimant spoke to a member of the respondent's HR team, and asked about what he thought was outstanding TOIL due to him. He had received pay only for his share of gratuities. He was told that the person he was speaking to had returned from holiday, but that there were 138 hours of TOIL and she had no idea where they had gone, or words to that effect.

20. The claimant commenced Early Conciliation as against the respondent on 3 February 2023 and the Certificate was issued on 6 February 2023.

21. The Claim Form was presented by the claimant to the Tribunal on 9 February 2023.

22. The claimant exchanged emails with Ms Carol Ann Hibbert, Director of Talent and Culture at the respondent, who operates in an HR capacity. The claimant's message on 27 February 2023 included the following "I

spoke to you and as you said you were off at the time but someone changed my end date, Used my 138 hours to pay for the difference and this made it run into the new year so I had no holiday pay either, this was the explanation I got. All this after I walked out because of the attitude of my own manager. I understand you wish to speak about it. And when I have a representative I will get them to call you." The claimant did not in fact arrange representation, and neither he nor Ms Hibbert emailed the other further.

Submissions

23. The claimant made a brief submission on the basis of what he had been told in a call on 29 January 2023.

24. Mr Duncan referred to the law as to unlawful deductions from wages and argued that there had been none in this case. He accepted that TOIL fell within the definition of wages in general terms, but argued that no sum for TOIL was properly payable, and that the claim should be dismissed, in brief summary.

The Law

25. There is a right not to suffer unlawful deduction from wages created by section 13 of the Employment Rights Act 1996 ("the Act"), "unless the deduction is required or authorised to be made by …..a relevant provision of the worker's contract." There is a provision as to excepted deductions in section 14(1) of the Act "where the purpose of the deduction is the reimbursement of the employer in respect of – (a) an overpayment of wages….made (for any reason) by the employer to the worker." Wages are defined in section 27 of the Act, and include "any sums payable to the worker in connection with his employment…"

26. The Act can be used to challenge deductions from (or non-payment of) amounts which are not strictly payable under the contract but which are in the reasonable contemplation of the parties as being payable: ***Kent Management Services Ltd v Butterfield [1992] ICR 272***. There must however be some legal right to the payment in question, even if not

contractual as s 13(3) refers to a deduction from the wages 'properly payable': ***New Century Cleaning Co Ltd v Church [2000] IRLR 27.***

27. There are provisions under section 23(2) of the Employment Rights Act 1996, by which the claim must be commenced within three months of the date of payment of wages, amongst other provisions. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. To summarise the provisions, within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal.

Discussion

28. I was satisfied that both of the witnesses gave credible evidence, which they believed to be true. In so far as there were differences between the parties I required to consider all of the evidence before me, including issues of reliability, and address matters arising from the terms of the contract of employment. I do so more fully below.

29. I was satisfied that the proceedings had been commenced timeously such that I had jurisdiction.

30. The first question is whether or not there had been any unlawful deductions from wages. In this regard, that means considering the terms of section 13 of the Act, and the terms of the parties' contract, as well as the evidence before me.

31. The contract itself is in some respects far from clear. Initially it states that there are no normal hours of work but later that the employee may be required to work reasonable hours in addition to normal working hours.

Those provisions are I consider simply contradictory. What appears to have been the intention from the terms of the contract as a whole is that there was a salary payable for what is termed a "notional average" of 40 hours per week, spread over a full working year which commenced on 1 April each year, of 2080 hours, that included provision for holidays.

32. The provisions as to TOIL in the contract are not as clear and comprehensible as they might be. The way that they were operated in practice was also somewhat opaque from the point of view of an employee, who was not shown, at least from the claimant's evidence which I accepted, the running total of the TOIL bank that was maintained. He had however been sent the documentation for the Bundle by the respondent in advance of the hearing, and had an opportunity to consider their terms. He did not himself comply with the case management orders.

33. I accepted Ms Hibbert's evidence that the TOIL bank was managed on a weekly basis, and the detail sent to the manager at that time. If hours of work or holidays taken totalled above 40 were recorded for that week they were added to the TOIL bank. If hours totalling less than 40 were recorded for that week the balance below it was deducted from the TOIL bank.

34. As at the date of termination, which I consider was 26 December 2022 when the claimant stated to his colleague, acting in the place of his manager, that he was not returning, the TOIL bank had been exhausted. I considered from the evidence before me that the claimant had been justified in terminating the contract without notice given his evidence as to what had been said to him by his manager, which in the circumstances I considered amounted to a repudiatory breach. Mr Malcolm did not however give evidence before me, and has not therefore had an opportunity to respond to that evidence.

35. Whilst the respondent argued that termination was on 29 December 2022 there was no documentary evidence before me to support that and Ms Hibbert herself had not been the person taking that call. The person likely to have done so was still an employee, she said. No file note or other document such as a letter confirming termination of employment was available to me. That is far from best practice, and although following best

practice is not a legal requirement the absence of any written note of the meeting kept by HR of the respondent is a factor to weigh in the balance. I preferred the claimant's evidence on this point, and on the issue of what he had been told on 29 January 2023, but subject to those two points I considered that Ms Hibbert's evidence was reliable in general.

36. I was initially troubled by the terms of contract, and whether that gave a sufficient basis for the practice as to TOIL the respondent operated. It appeared to me, after consideration of that point, that there was just sufficient detail within it. It did in the final sentence of clause 5.1 regarding remuneration refer to the situation where an employee worked less than 2080 hours, or the pro-rata equivalent where employment ended part way through the year – which for this purpose starts on 1 April. That was I concluded an important provision in this context, and was a basis to found the practice of TOIL bank deductions, particularly as the deductions that sentence referred to could be single or by a series. Whilst the deductions referred to there were deductions from pay, and what happened was a deduction from the accrued positive TOIL, it appears to me that the contract should be read as a whole, and that included the reference to annualised hours in the preceding clause on hours of work. Pay is a term that is clearly within the definition of "wages" in the Act and includes TOIL in this context, I consider, as hours above the 40 hour week were to be paid, and hours less than that deducted from pay.

37. I accepted the claimant's evidence as to what he had been told by someone in HR on 29 January 2023 as to his having 138 hours of TOIL. That is consistent with the written records produced. It is supported to an extent by the email exchange including that in February 2023 quoted above. Ms Hibbert denied that it was her who had taken the earlier call, but did not reply to his email to challenge that, and no evidence was given by any other witness. I was not able to decide who the claimant did speak to on 29 December 2022 or 29 January 2023, as there was insufficient evidence of who that was, and the claimant himself stated that it could have been Ms Hibbert but that it might not have been, but I did accept that the person said that there was a record of 138 hours of TOIL for him, and she did not know what happened to it.

38. That remark is, he explained, what had led him to make the Claim. That is entirely understandable in those circumstances, and having regard to the opacity of the TOIL bank arrangements during his employment it would be natural for him to seek what he thought was money owed to him for work he had carried out. It required this Claim for the records to be provided, and explained in evidence. I have however accepted that explanation, based on the documentary records as Ms Hibbert spoke to, together with her evidence overall and the full terms of the contract, which means that the conversation he had on 29 January 2023 is not determinative of the issues before me. It raised a form of suspicion which has now been demonstrated to be not accurate.

39. Separately, an overpayment of wages being deducted is specifically authorised by the Act, as is a deduction authorised by the contract of employment, and given the facts that I have found even if there had been a deduction from wages that were properly payable in the first instance, those provisions would have meant that that was not an unlawful one. That is partly as the terms of section 14 quoted above apply where for any reason there is a deduction made, which is a wide term in the context it applies.

Conclusion

40. I find in favour of the respondent, as there was no unlawful deduction from the claimant's wages in my opinion, and I dismiss the claim accordingly.

41. Doing so should not be taken as approving of the terms of the contract or operation of the practice as to the TOIL bank. It is, as I have stated, not a contract in the most clear and comprehensible terms, and some of it is simply contradictory in my view. Its terms are not obvious to the employee working under them, and require a measure of construction to reveal their intended meaning. That should not ordinarily be necessary for such a document.

42. Secondly, the practice of the TOIL bank is not as clearly founded in the contract as it could be. The way that it operated in practice was that 40 hours per week was not a form of notional average, the phrase in the contract which implies something less precise, but an exact figure used as

a form of requirement, such that if it was not met, there was a deduction from banked TOIL.

43. Thirdly, the operation of the TOIL bank is not as clear to an employee as it could be. No reason for not giving employees access to the records of their own TOIL bank, and other information such as for holidays and others, was given in evidence, and none is obvious to me. All that the payslips do is refer to the monthly salary and statutory deductions and related matters, so that there is nothing that states how TOIL is managed. It is a further reason why it is unsurprising that the claimant pursued this claim.

44. Fourthly, whilst the claimant did not resign in writing, or give notice of any alleged repudiatory breach that entitled him to resign without notice, in writing at the time (it was referred to in the email exchange in February 2023), the respondent did not provide him with any letter of termination, no file notes of conversations with him were kept, and the P45 was not before me.

45. There are obvious benefits of having a salary, such that income is fixed although weekly hours may vary, and an advantage for the employer in having flexibility for differing hours week to week as the activity levels in an hotel vary, but the matters raised in the preceding paragraph are ones that the respondent may wish to consider for the future.

Employment Judge : A Kemp
Date of Judgment : 9 May 2023
Date sent to parties : 9 May 2023