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EMPLOYMENT TRIBUNALS

Claimant: Mr A Domun
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
On: 30 October 2019
Before: Regional Employment Judge Taylor

Representation

Claimant: In person
Respondent: Mr D Patel, Counsel

JUDGMENT

The respondent did not make unauthorised deductions from the claimant's wages; therefore, the claim is dismissed.

REASONS

1. This hearing was listed to determine the claimant's claim that the respondent had made unauthorised deductions from his wages by failing to pay him his salary for the period 10 December 2018 until 11 August 2019.
2. The background to the claim is that the claimant is a Mauritian national and he requires a visa to live and work in the UK. The claimant started working for the respondent in January 2015 and is still employed by them. The respondent resisted the claim on the ground that under his contract of employment, and the relevant policies, the claimant is obliged to ensure that he has permission to live and work in the UK. Additionally, under his contract he must provide evidence to the respondent that he either has such permission or has made an in-time application to vary or extend such permission to the Home Office. The claimant considers that the obligation to check his right to work is entirely borne by the respondent who can make employer checks directly with the Home Office. Moreover,

he did not sign his contract of employment and is not bound to answer questions from the respondent about his visa or right to work.

Claim for unauthorised deduction of wages 12 January 2016 until March 2016

3. The claimant did not provide evidence of his right to work to the respondent for the period beginning 10 December 2018 until 11 August 2019; he was suspended without pay for failing to do so during that period.

4. This was not the first occasion that the claimant had been suspended without pay for not providing evidence of his right to work. The claimant explained that there was an earlier period during his employment when he was suspended and his pay was stopped; that period was from 12 January 2016 until March 2016. The claimant submitted that he would like to claim for this period of unpaid wages as well as the most recent deductions.

5. A claim for unauthorised deduction of wages must be made within three months beginning with the date of payment of the wages from which the deduction was made (section 23(2) **Employment Rights Act 1996**).

6. The claim for the alleged unauthorised deduction of wages made between 12 January 2016 until March 2016 was presented outside of the applicable time limit. When asked directly, the claimant gave evidence that he had not intended to bring a claim for unauthorised deduction of wages at the time they were made. The claimant did not provide any evidence that might persuade the tribunal that it had jurisdiction to consider a claim presented several years outside of the applicable time limit. The claim was presented far too late to be considered. The Tribunal concluded that it was reasonably practicable for the claimant to have presented this claim in time, he had not shown a reason why it was not reasonably practicable for him to have done so and therefore that part of the claim was dismissed.

The remaining issues

7. The questions for the Tribunal to consider are:

7.1 Were the wages paid to the claimant on 9 December 2018 until 11 August 2019 less than the wages he should have been paid?

7.2 Was any deduction required or authorised by a written term or terms of the contract?

7.3 If his claim succeeds, how much is the claimant owed?

The applicable law

8. The claimant has a right not to suffer unauthorised deductions from his wages.

9. The relevant provisions concerning 'Protection of Wages' are at Part II of the Employment Rights Act 1996. The relevant parts of section 13 of the Employment Rights Act 1996 are:

(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.

(2) In this section "*relevant provision*", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4)

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)

The evidence

10. The claimant had not prepared a witness statement. He relied on the claim form he had completed, in which he had completed details of his claim at pages 7, 8 and continuation page 12 and gave his evidence orally.

11. Ms Antoinette McClue who is employed by the Trust as an HR adviser at Whipps Cross Hospital and Ms Ellen Butler who is employed by the Trust as Senior Sister/Unit Manager of the Plane Tree Centre (day surgery and clinics) at Whipps Cross Hospital, and who is the claimant's line manager, gave evidence on behalf of the respondent. They

both provided witness statements. The respondent prepared a bundle of documents comprising 384 pages and a chronology.

12. The claimant stated that he had an email from the Home Office that showed that he could continue to work dated July 2018. He had not served that on the respondent seven days before the hearing or at any other time, he did not bring a paper copy. In those circumstances the claimant was not granted permission to have his document.

The relevant facts

13. Having heard the claimant and the respondent's witnesses, the Tribunal has only set out the facts necessary for the determination of this claim.

14. The claimant was born in Mauritius and is a Mauritian National. He requires a visa to work in the United Kingdom and had obtained one so that he could work for the Trust when he was initially employed in January 2015.

15. Having worked for the respondent from January 2015, the claimant (as an internal candidate,) successfully applied for a different job in February 2018. His application was successful and the claimant began his role as Band 2 Ward Clerk working in Plane Tree Centre (Day surgery and Clinics) at Whipps Cross Hospital in March 2018.

16. At the time of his appointment to the Plane Tree Centre the claimant's visa, giving him permission to work, was valid until 9 December 2018.

17. The claimant's contract of employment is dated 16 January 2015 (76-93). There is a space on the last page for a signature. The claimant has not signed this. In the summary (at section 1) it states:

'This appointment is on a fixed-term basis commencing on 26/01/2015 and ending on 11/01/2016. This is because of limitations, determined by the overseas labour service, on your leave to remain in the UK, which expires on 11/01/2016. Fixed term contracts are managed in line with the Trust's policy, which you are advised to read. No further notice will be given to you if the contract is due to expire this end date.'(77)

18. On taking up his new role, the claimant was issued with an amendment to the contract and statement of principal terms and conditions of employment confirming that his employment was extended for a fixed term, in the new role, which coincided with the expiry of his visa on 9 December 2018 (150). He was asked to sign both copies of the amendment and to return one signed copy to the respondent. He did not do so and the respondent were unable to produce a signed copy for the tribunal bundle.

19. It is not disputed that the respondent stopped paying the claimant his salary upon his visa expiring on 9 December 2018.

20. The visa renewal process is managed by the Trust's Human Resources (HR) team. Ms Antoinette McClue was a member of that team at the time of these events.

21. In support of his contention that the respondent had no right to suspend him and stop his pay, the claimant submitted that he had not signed the contract of employment and therefore he was not bound by its terms. The Tribunal disagreed with his opinion of whether the contract of employment was valid. The claimant does not dispute that he

accepted an offer to work for the respondent and that he worked and was paid under that contract entered into in 2015. On being offered and accepting his most recent role in February 2018 the claimant did not inform the respondent at any time that he did not regard himself as not being bound by its terms or conditions. He started working at Plane Tree, carrying out his duties and receiving pay without reservation. The Tribunal is satisfied that the claimant has worked under a valid contract of employment and continues to be employed under the same contractual terms and conditions.

22. The terms of the contract relating to the claimant's duties towards the respondent as a foreign national are as follows:

Clause 23:

'(1) You warrant that you are entitled to work in the UK without any additional approvals and will notify the trust immediately if you cease to be so entitled any time during your employment with the trust....

(2) If any time during your employment you fail to provide proof of your entitlement to work in the UK or proof of your professional or state registration, where applicable, the Trust reserves the right to suspend you without pay pending the completion of an investigation which may result in termination of employment'.

Clause 19:

'Sickness Absence:

Sickness absence is managed as per the Trust's policy for managing sickness absence as a result of sickness and it is your responsibility to ensure that you adhere to local reporting arrangements as detailed in the policy and any local operational arrangements. If you do not do this any absence may be deemed to be unauthorised and you may not receive occupational sick pay and additionally disciplinary action may be taken.... notification of absence due to sickness or injury must be made as soon as you know you are unable to attend work. You should notify your line manager or his/her designated deputy and you must keep your line manager regularly informed of your progress.'

23. Ms McClue gave evidence, which the Tribunal accepted, that the respondent retains a checklist of all staff with visas and in respect of each individual keeps track of when their visas expire. The HR team are responsible alongside their line managers to keep the check list updated. The Tribunal was turned to the Pre and Post-Employment Checks Policy. (This was at 104-149.) The policy states it should be read in conjunction with the NHS Employment Checks Standards.

24. The parts of the Pre and Post-Employment Checks Policy relevant to the claimant are:

24.1 Clause 17:

'Right to Work Checks

17.1 Under the Immigration and Asylum and Nationality Act 2006 annual checks on right to work documentation are required for employees who are sponsored by the organisation to prevent illegal working. If an individual has a time limit on their right to work, repeat document checks are required every 12 months to meet the

statutory excuse for employing an illegal worker. If a prospective employee has provided documents from List B to prove their right to work, they have a time limit on their right to work and therefore must produce continuing documentary evidence of the right to work every 12 months. A copy of each of the documents provided must be taken and retained on file. All copies should be signed, dated and certified by the person taking the copy following the guidance...

- 17.3 Employees who have a limited right to work in the UK have a responsibility to renew their applications in a timely manner and provide documentary evidence of their ongoing right to work in the UK as and when requested. Failure to do so will lead to suspension from work/cessation of pay pending the provision of required documentation.'

The Home Office Guide

25. The Home Office provides employers with a guide entitled 'An Employers Guide to Right to Work Checks' (160-199). At paragraph 5 of it the following guidance is given:

'...You are required to carry out an initial right to work check to prevent illegal working on all people you intend to employ before you employ them. Once you have completed this check, you will be required to carry out follow-up right work checks if the individual's permission to be in the UK and to do the work in question is time-limited. When conducting follow-up checks, you may use either the manual right to work check all the online right to work check where applicable, irrespective of the type of cheque you conducted originally before employment commenced.... (185)

Contacting the Home Office

...If on the date on which permission expires... You are reasonably satisfied that your employee:

- has submitted an interim application to us to extend or vary their permission to be in the UK; or....

...your statutory excuse will continue from the expiry date of your employee's permission for further period of 28 days to enable you to obtain a positive verification from the Employer Checking Service... (186) You can reasonably satisfy yourself of a pending application through, for example, a home office at number letter or a home office or appeal Tribunal reference number, and proof of data posted. If your employee cannot provide this evidence, this does not necessarily mean that they have not made an application, appeal or applied for an administrative review (187).'

NHS Employers Right to Work Checks

26. The NHS also provides guidance on making right to work checks which must be followed by its HR staff (200-215). Part of the guidance is that:

'In-time applications

The workers application must be made before their permission to work in the UK expires for it to be regarded as being 'in-time'. Any right work will continue until the outcome of the application is determined.

Employers must:

- seek acceptable proof of and in time application being made, such as a Home Office and acknowledgement letter or proof of postage which indicates that an application was sent to the Home Office
- go to the home offices online employer checking service portal to confirm that an application has been received and the individual continues to have a right to work while their application/appeal is being determined....
Employers are required to take copies of all documentary evidence, including the positive verification notice, in order to retain a statutory excuse.'

Failure to carry out checks

27. The NHS Guidance sets out the potential penalties for an employer who fails to comply with these policies:

'Failure to carry out the necessary checks can result in the Home Office issuing the employer with a civil penalty of £20,000 per illegal worker or imposing up to 5 years imprisonment and/or an unlimited fine where they are found to have knowingly employed an illegal worker.' (205)

The claimant's visa application

28. The claimant made an in-time application to the Home Office to extend his visa and informed Ms Butler, on 12 November 2018, that he was in the process of renewing it. He had posted his application form by recorded or special delivery and had retained the recorded or special delivery receipt.

29. Ms McClue was the person responsible for carrying out the right to work check in respect of the claimant. By an exchange of emails on 12 November 2018 Ms Butler informed Ms McClue that the claimant was in the process of submitting an application to extend his visa. Ms McClue asked for the claimant to bring in evidence of his in-time application to renew or extend his visa (252-253).

30. When Ms Butler told the claimant that she needed some proof of his application to send to HR, the claimant did not provide any. He gave evidence that he did not have any documents to give to his employer; this is because the Home Office no longer provided acknowledgement letters on receipt of such applications. In an email sent to him by the Home Office this policy was confirmed (358). He understood from that respondent could make enquiries as to the status of his visa on their own initiative by checking the employer's roster and the Employment Checking Service.

31. The claimant's visa expired on 9 December 2018. By 28 December 2018, having not received any documentary evidence of his in-time application a request for this was chased by the respondent. In accordance with this contract of employment, as amended, his pay was suspended on that day.

32. The claimant's visa extension was being processed by the Home Office and he sent an email to a member of staff at the Home Office, copying in his employer's request, asking that they reply to the respondent's query confirming that he was legally allowed to work (255, 256, and 257). The Home Office did not contact the Respondent.

33. At this time the claimant was continuing to work even though he had been suspended. He had received a letter dated 24 December 2018 from the Home Office. This

letter confirmed his application for permission to stay in the UK and required him as part of his application to have his biometrics (scanned fingerprint and photograph) taken. The letter explained that his application would only be valid when he gave biometrics and had paid the required fee (258-261). The letter bore a reference number and a date which evidenced that the claimant had made an in-time application.

34. Ms Butler assumed that the claimant had been communicating with HR and that he had given them what they needed to continue his employment and pay, because the claimant had not raised any concerns with her. However, by the end of December the claimant had not sent the respondent the letter dated 24 December 2018. Had he done this he would have provided the respondent with the documentary evidence of his application for an extension of his visa that they had requested.

35. Ms Butler met the claimant on 31 December 2018. During the meeting she asked about the current position with the visa, but found that the claimant was reluctant to speak to her about it in any detail. However, she saw that he had the 24 December letter with him. He said to her that HR did not need to be involved, they could just make employer's checks on their own initiative. Ms Butler explained to him that this was a matter for the HR team to deal with and she telephoned the HR Department during their meeting. Through her the HR officer who answered asked the claimant to bring the letter he has with him to the HR team that very day. The claimant refused. The claimant refused to take the letter to the team even though Ms Butler assured him several times that he could take the rest of the day off to go and his duties would be covered during his absence. The member of the HR team also sent an email to the claimant that same day explaining that HR needed to see the document first hand in order to confirm with the Home Office that they had seen the original (257).

36. Still the claimant did nothing to assist the respondent confirm it had seen proof of his having made an in-time application for an extension of his visa to the Home Office. On 9 January 2019, he stopped going into work and correspondence between him and the respondent continued, including a period during which he claimed to be sick (265-266). This correspondence continued until 29 July 2019 when the claimant provided HR with his Residence Permit on 29 July 2019 and he provided a copy of the December Home Office letter to the respondent on 12 August 2019, after he presented this claim.

37. The claimant returned to work on 12 August 2019. He received pay from 9 December 2018 to 9 January 2019, which is the period during which he worked, despite having been suspended on no pay.

The conclusions

38. The first question for the Tribunal to consider was were the wages paid to the claimant on 9 December 2018 until 11 August 2019 less than the wages he should have been paid?

39. The claimant considered that it was for the respondent to contact the employer checking service to check whether he could or could not work. He did not think he had to do anything at all and considered it intimidating to be asked for proof of his application for a visa. He said he was too busy to send take the letter to HR in person as requested by Ms Butler and HR on 31 December 2018. He claims he should not have been suspended without pay.

40. Having considered the claimant's contract of employment and the applicable policies, the Tribunal was satisfied that the claimant was obliged to show the respondent that he had the right to live and work in the UK. It was a contractual burden that he had and it was not an onerous one. When Ms Butler found out the predicament the claimant had got himself into she told him exactly what to do and offered him the time off to do it. This was confirmed to him in an email sent on the same day by HR who were responsible for checking visas renewals. The HR team needed to see the letter the claimant had received from the Home Office, and/or proof of postage and a Home Office reference number in order to gain access to the Home Office checking service. The claimant did not accept any of this and chose not to provide any of these things until 11 August 2019. The claimant had the policies available to him to check independently if he wished to do so.

41. The Tribunal finds that the claimant was not entitled to receive pay under the terms of his contract of employment during his suspension from 9 December 2018 until 11 August 2019 under the terms of his contract of his employment.

42. The claimant sought to claim sick pay during this period, but he was suspended by then and was not entitled to receive any pay at all.

43. The claimant had a copy of the contract or written notice of the contract term before the deduction was made. The claimant provided no evidence to suggest that he had not agreed in writing to the deduction following a suspension being made.

44. The Tribunal is satisfied that the deduction was required and authorised by the written terms of the contract and the applicable policies, as referred to above. The wages paid to the claimant on 9 December 2018 until 11 August 2019 were not less than the wages he should have been paid.

45. Therefore, the Tribunal concludes that the respondent did not make unauthorised deductions from the claimant's wages; therefore, the claim is dismissed.

Regional Employment Judge Taylor

31 December 2019