



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

BETWEEN: Ms C Mathurin CLAIMANT

AND

Central London Community Healthcare NHS Trust RESPONDENT

ON: 5th September 2019

Appearances

For the Claimant: Mr J Neckles, Trade union representative

For the Respondent: Mr C Kennedy, counsel

JUDGMENT

The Judgment of the Tribunal is that:

- (i) The Claimant's claim for unpaid wages/breach of contract relating to contractual sick pay is not well founded and is dismissed;
- (ii) The Respondent's counterclaim in respect of overpaid contractual sick pay succeeds and the Claimant is ordered to pay the Respondent £1,085.31;
- (iii) The Claimant's claim for breach of contract/unpaid wages in respect of holiday pay succeeds and the Respondent is ordered to pay the Claimant £204.84 in respect of that claim.

REASONS

These written reasons, for a judgment delivered orally at the hearing are given the request of the Claimant's representative.

1. By a claim presented to Tribunal on 12 November 2018, the Claimant brought a number of complaints including a claim for breach of contract. The Respondent counterclaimed for overpaid sick pay.
2. At a case management summary following a (second) preliminary hearing on 11th June, it was recorded that the remaining complaints were for “breach of contract and/or unlawful deductions from pay in respect of unpaid contractual holiday pay in the sum of £799.40 and sick pay in the sum of £698.60. The Respondent counterclaims for overpayment of sick pay.”
3. In essence this was a dispute about the length of the Claimant’s reckonable service for both annual leave and sick pay entitlement. In the Claimant’s further particulars, it is contended that the Claimant should be treated as having more than 5 years’ service for the purposes of sick pay and annual leave. The Respondent’s case is that the Claimant has been paid her holiday entitlement and has in fact been paid contractual sick pay for longer than she should have been, and it counterclaims for the overpayment.
4. At the start of today’s hearing there was considerable confusion about the amount being claimed. The Claimant’s representative had included a calculation in the bundle which differed from the amount set out in the Claimant’s further particulars (and recorded in the June case management summary). This morning Mr Neckles had produced a further calculation. After an adjournment, Mr Neckles accepted that the newest calculation was wrong and provided different figures again. This was disappointing. The case should have been a straightforward one about the amount of contractual and holiday pay owed to the Claimant.
5. I heard evidence from the Claimant and, on behalf of the Respondent from Mr S Barrett “Workforce Business Partner for Children’s Health and Development.” There was a bundle of documents.

Findings of fact

6. The Claimant was employed by the Respondent as an Administrator, working 30 hours a week from 3 October 2016 to 5 July 2018.
7. Clause 5 of the Claimant’s contract of employment provide as follows: –

*“Continuous previous service with an NHS employer will count as reckonable service in respect of NHS agreements on redundancy, occupational maternity leave/pay, and occupational sick pay. Annual leave entitlement is to be calculated on the basis of aggregated NHS service. You may be entitled to additional entitlements. This will be calculated using a Staff Transfer Form. (My emphasis.)
No employment outside of the NHS will be considered when calculating reputable service.*”

Your NHS continuous service date is subject to confirmation from your previous NHS employer(s)

8. Clause 17 of the Claimant's contract is headed Annual leave. It provides that the entitlement to annual leave is as follows:
 - a. *On appointment to NHS 27 days annual leave +8 days public holidays*
 - b. *After 5 years NHS service 29 days + bank holidays.*
 - c. *After 10 years 33 days + 8 days bank holidays.*
 - d. Hours are prorated for part-time employees.It also provides that *"Previous NHS continuous service will be counted towards your allocation. Contact your line manager for clarification."*
9. Clause 17 is consistent with the Respondent's policy document for annual leave. Neither the policy document nor the Claimant's contract specifically refers to the position of those who have worked previously as employees on the Bank, whether for the Respondent or other NHS Trusts.
10. In relation to sickness, clause 22 of the Claimant's contract provides that *"Occupational sick pay is available and is based on reckonable service as set out in section 5."* It provides that during the first year of service employees are entitled to one month's full pay and 2 months half pay, rising to 2 months full pay and 2 months half pay in the 2nd year of service and with incremental rises thereafter.
11. The Claimant's offer letter states that the offer is subject to the Respondent seeking references and verifying her employment history. It recognises that the Claimant "had previously worked for an NHS organisation at the same grade or an overlap point of the scales. We will submit and ESR Inter Authority Transfer (IAT) request to verify your previous NHS service."
12. The Claimant's prior NHS work history was as follows

From November 1989 to November 1996 she was employed by Merton and Sutton Community NHS Trust on a permanent contract.

From October 2013 to March 2016 the Claimant worked for Hounslow and Richmond Community Healthcare as Bank.

August 2014 to February 2016 she worked for Kingston Hospital NHS Trust – also as Bank.

From October 2015 to October 2016 she was a Bank employee at Epsom and St Helier Hospital NHS Trust.

Annual leave

13. Mr Barrett, for the Respondent, gave evidence that, in calculating holiday entitlement, bank work is not accepted by the Respondent as qualifying

service for the purposes of entitlement to increased annual leave. This point is not made clear in any document to which I was referred.

14. In June 2017, the Claimant submitted a grievance about a number of different matters. One of her complaints was that she had prior NHS employment entitling her to an additional 2 days paid annual leave. She had been allocated a pro rata entitlement of 27 days annual leave (plus bank holidays). She considered that she had aggregated service entitling her to 29 days based on 7 years of previous qualifying employment.
15. The staff transfer form generated by the Respondent's system did not identify her employment with Merton and Sutton. It only indicated NHS employment from 2013 to 2016 as bank staff. In support of the Claimant's contention that she had qualifying NHS service she provided her contract of employment with Merton and Sutton dated 10th November 1989, a payslip from Merton and Sutton from April 1993. She was then told that this was insufficient evidence "as it demonstrated previous NHS service, but not the duration of service". The Claimant was asked to find further evidence as to the duration of her employment
16. Subsequently the Claimant submitted P60s as evidence from 1990 -1996, pay slips from July to December 1990, and a letter from Merton and Sutton dated 15th March 1995 identifying that she had been regraded to grade 4 and that a revised contract of employment would be issued. (113)
17. The Respondent was slow in dealing with the Claimant's grievance. Ms Tibbett had an investigation meeting with the Claimant in October 2017 but the outcome of that investigation was not sent to the Claimant until 15th March 2018, (157) by which time she was on sick leave. The Respondent said that the additional documents would be reviewed by Ms Hanchard of HR when she returned from a period of extended leave to verify that the documents confirmed her previous service and confirm if the Claimant should be awarded the additional leave (which, if awarded, would be backdated).
18. The Claimant was not satisfied, and a grievance hearing took place on 23rd May 2018 which concluded that "In relation to your leave entitlement concerted efforts had been made to obtain the required proof," but that this had been unsuccessful and that due to lack of evidence she was not entitled to further annual leave.
19. In the context of this litigation the Claimant has now provided a letter dated 18 November 1996 from Merton and Sutton evidencing that she was employed by them from November 1989 to November 1996
20. The Claimant resigned on 21st May 2018 stating that her last day at work would be 22nd June 2018.

21. In February 2018 the Claimant was given a conditional offer of employment as Bank with South West London and St George's Mental Health Trust.
22. In January 2019 she joined the bank at the Royal Marsden NHS Foundation Trust. The terms and conditions for the bank staff state that "time spent on the bank will not count as NHS service" (233)

Sick pay

23. The Claimant was off sick
 - a. From 25th May -12 June 2017, 17 days
 - b. From 12th July - 25th July 2017, 14 days; and
 - c. from 18th January 2018 to the end of her employment.
24. The Respondent discovered shortly after the Claimant's resignation that she had been overpaid. This was due to "late notification of her sickness absence in June and July 2017 and from February to June 2018". The Claimant had been paid in full through to the end of May 2018, despite having exhausted her entitlement to sick pay. It is not clear why payroll did not have the relevant information, and there is no evidence that this was because of any failure by the Claimant to notify the Respondent of her absences.
25. In evidence the Claimant was vague about what holiday she had taken while employed by the Respondent. Despite paragraph 8 of her witness statement she (i) accepted in evidence that she had taken her pro rata permitted entitlement to holiday (27 days plus bank holidays) in the period October 2016 to April 2017, (ii) was not able to say how much holiday she had taken in the remaining period of her employment. The Respondent's case was that the Claimant had 68.85 hours outstanding annual leave, (i.e. just over 10 days) which was paid by extending the Claimant's employment from 22nd June to 5th July 2019.
26. Sometime in June payroll discovered the overpayment of sick pay, so that in June the Claimant received only SSP. In July the Claimant was due to receive £182 net, but this was deducted by way of reduction of the overpayment. No explanation was given to the Claimant at the time and her payslips are opaque. It is unsurprising that the Claimant did not know how the amounts paid to her had been calculated.
27. In fact, no demand was made for repayment of the monies, nor an explanation given of her payments, until 16 October 2018 after ACAS had issued an early conciliation certificate.

Conclusions - annual leave.

28. It is accepted by the Respondent that annual leave entitlement is calculated on the basis of aggregated NHS service and that this does not need to be continuous. They accept that, had the Claimant been able to provide documentary evidence of the start and end dates of her

employment with Merton and Sutton, she would have been entitled to an extra 2 days annual leave. However, they say that she did not do that during her employment and to provide it in August 2019 over a year after she had left employment was not sufficient.

29. Mr Neckles, for the Claimant contends that both her permanent employment with Merton and Sutton and her subsequent bank service should be aggregated and counted towards her entitlement to annual leave.
30. Although not made clear from the documentation I am satisfied that the Claimant was not contractually entitled to additional leave on the basis of time spent on the bank. This was not the basis of her grievance and the issue that was being considered during the grievance process was additional leave for time spent at Merton and Sutton only. The nature of bank work is that it is provided on a casual, as and when basis, so that a year spent on the bank may involve very little actual work for the relevant trust.
31. Although not strictly relevant to a conclusion as to the terms of the contract between the Claimant and the Respondent, I am fortified in my conclusion that bank service does not count by looking at the terms and conditions of bank staff for the Royal Marsden (on whose bank the Claimant now works). These make it clear make it clear that time spent on the bank does not count as NHS service.
32. In relation to service with Merton and Sutton, I note that the Claimant's offer letter suggested clearly that the Respondent would verify her previous NHS service through the IAT request (see paragraph 11 above). The fact that the IAT response did not pick up on the Claimant's much earlier service with Merton and Sutton was not the fault of the Claimant. The Claimant had provided (i) a contract of employment. (ii) a payslip and (iii) a letter showing employment as at 15 March 1995.
33. Taken together this was pretty good prima facie evidence of at least 6 years with Merton and Sutton, entitling her to the additional days. Ms Tibbett acknowledged as much in her investigation. I was unclear why at the grievance hearing it was considered insufficient. If the Respondent considered it was insufficient it was up to them to make further enquiries. If they did not have the appropriate records that was not the Claimant's fault. I do not accept Mr Barrett's evidence that the Respondent had made "concerted efforts" to obtain further information about the Claimant's employment with Merton and Sutton. (When asked what those "concerted efforts consisted of, Mr Barrett was only able to tell me that they had checked the veracity of the documents that the Claimant had herself provided and checked the IAT).
34. I therefore find that the Claimant was entitled to an additional 2 days holiday for each year of her employment. As she was employed for 18

months, I find that she is entitled to an additional 3 days pay amounting to £204.

35. The Claimant's entitlement to pay for holiday accrued but not taken at the end of her employment was 68 hours, being just over 2 weeks on the basis that the Claimant worked 30 hours a week. This was paid to her by extending her employment by the relevant period, (though then clawed back to reduce the overpayment of sick pay).

Sick pay.

36. As set out above, the Claimant's contract makes it clear that in order to qualify for additional occupational sick pay it is necessary to have 5 years previous continuous service.
37. I accept that bank work does not count as service for these purposes. Secondly, even if it had counted, the nature of bank work is that there are often significant gaps in the periods when an individual doing bank work is working. The Claimant accepted in evidence that she did not have the relevant 5 years continuous service while she was on the bank.
38. As a result, the Claimant was contractually entitled to one month's full pay and 2 months half pay per annum. Through no fault of her own she was overpaid, but the Respondent is entitled to a return of the overpayment. She has not challenged the Respondent's calculation of that overpayment and I order that she return the pay that has been overpaid.

Employment Judge Spencer

20th September 2019

JUDGMENT SENT TO THE PARTIES ON

20/09/2019

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FOR THE TRIBUNAL OFFICE