EMPLOYMENT TRIBUNALS

Claimant	Mr S Ibrahim
Represented by	Ms B Balmelli (counsel)
Respondents	Maidstone and Tunbridge Wells NHS Trust
Represented by	Mr A Fletcher (solcitor)
Before:	**Employment Judge Cheetham QC**

24 August 2020 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Claimant was entitled to receive "full pay" throughout the period of his suspension.

2. If the parties are unable to agree what amount that should be, they should apply to the employment tribunal for a remedies hearing to determine the amount.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I received were those contained in the Tribunal case file.*

2. By a claim form lodged on 22 January 2020, the Claimant - Dr Ibrahim - has brought a claim for unlawful deduction of wages, following his dismissal as a "bank doctor" on 27 August 2019. The Claimant worked under a zero hours contract and the purpose of today's hearing is to determine whether

the tribunal has jurisdiction to hear his claim. In other words, the question is whether the Claimant, who was on a zero hours contract, was entitled to be paid when he was suspended.

The relevant law

3. Under the Employment Rights 1996 s.13, "Right not to suffer unauthorised deductions":

> *(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. At s.27A, a zero hours contract is defined as follows:

> *(1) In this section "zero hours contract" means a contract of employment or other worker's contract under which—*
>
> *(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and*
>
> *(b) there is no certainty that any such work or services will be made available to the worker.*

5. There is no clear authority on the issue in question. The Respondent relied upon ***Coors Brewers Limited v Adcock*** [2007] ICR 983, CA, which arose from a claim for losses resulting from the employer's alleged failure to introduce a new incentive scheme. There were a number of schemes that

could have been chosen using different combinations of targets and incentives. Wall LJ stated:

> *51. I agree with Chadwick LJ, whose judgment I have had the advantage of reading in draft, that if the scheme put in place by Coors was not a proper implementation of its obligation to its workforce, then the critical question in this appeal is that which I have identified in paragraph 42 above, namely whether the claim for damages which arises from Coors' failure to perform its obligation can be said to be an identifiable sum, failure to pay which is to be treated as an unauthorised deduction of wages.*
>
> *52. In answering these questions, and in particular the critical question identified in paragraphs 42 and 51, I have to say that I prefer the submissions made by Mr. Linden. In my judgment, the highest the case can be put for the claimants is that Coors was under an obligation to put in place a scheme which, properly and fairly operated, was capable of replicating the benefits of the BEPSS scheme. Whichever way one examines the case, however, the result is that that any payment due to the workforce under the 2003 incentive scheme was incapable of quantification in the Delaney v Staples sense. To put the matter another way, none of the claimants could properly say that on any given date in 2004, let alone the March date operated under the previous scheme, Coors had made an unlawful deduction of a quantified amount from their wages. For the reasons which Chadwick LJ sets out in his judgment, with which I respectfully agree, the claimants' remedy (if they have one) sounds in damages for breach of contract, not under ERA996 Part II .*
>
> *53. I therefore conclude that if the scheme, as operated, did not represent a fulfilment of Coors' obligation to create a replacement for the BEPSS , the result in jurisdictional terms is that the claimants would have suffered a loss, but that the amount of that loss was unquantified.*
>
> *54. Had Mr. Basu been able to advance his claim to the Tribunal on the basis that there had been a breach of an obligation on the part of the employer to pay a bonus of a specified amount (whether expressed in monetary term or as a percentage of gross earnings) — or even, perhaps, a term to be implied by custom and practice — that, every year on 30 March they would receive a bonus of x (whether expressed as £x or as a percentage of basic salary) I think it would be arguable that the claim was quantifiable, and that, as a consequence, the claim was justiciable as an unlawful deduction of wages.*
>
> *55. Mr Basu was, however, constrained to accept that the claim could not properly be advanced to the Tribunal on that basis. The fact is that the claimants were unable to quantify the breach, and required the Tribunal to do so. That, in my judgment renders the claim one for damages for breach of contract, as opposed to a quantifiable claim for unlawful deduction of wages.*

> *56. Part II of ERA, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure. Of course such claims would throw up issues of fact. The example canvassed in argument was of an employee being paid piece work, and asserting that his employer had deducted sums properly payable to him for work undertaken on the grounds that some of the items produced by the employee were defective. Delaney v Staples provides another example. Such a dispute would not take the case outside Part II of ERA 1996. I also accept that Part II is capable of expansion along Farrell Matthews & Weir v Hansen lines as envisaged by ERA 1996 section 27(3). However, in my judgment to extend it to the present case is a step too far.*

6. Ms Balmelli referred to two authorities. First, ***Lucy and Ors v British Airways*** UKEAT/0033/98, which held that the fact that quantification is disputed and/or difficult does not exclude the claim from the scope of Part II of the ERA. After considering the above passage in the ***Coors Brewers*** case, HHJ Burke said (at para. 35):

> *Employment tribunals are familiar with difficulties of quantification, such as may arise in a number of jurisdictions or contexts, including claims under Part II of the 1996 Act. When an employee who is entitled to commission, in addition to his ordinary wage or salary, claims that commission has not been paid or paid in full, he may not, until after detailed disclosure, be able to specify the amount owing; and there may be complex disputes as to the correct quantification or calculation of commission due, if any, which the tribunal may have to resolve. Such disputes are not restricted to mathematical issues; a tribunal may have to determine, for example, whether the employee played a sufficient role in the obtaining of a particular sale to qualify for commission. The same exercise may have to be carried out by a Tribunal in assessing compensation for unfair dismissal. Similar difficulties may arise in relation to unpaid bonuses and in many other ways. In such circumstances, albeit often with difficulty, the Tribunal has to quantify and does quantify the relevant sum; such claims are quantifiable albeit not necessarily brought for a quantified sum. To this extent I agree with Mr Hogarth's arguments. I can see no reason based on principle or upon the judgment in Coors which would prevent a tribunal from considering under Part II a commission-based employee's claim to unpaid commission, even if the employee was not able to put a figure upon the unpaid amount, at least until after disclosure. It surely cannot be the case that there is jurisdiction to hear such a claim if the employee guesses a figure and puts it into his claim form but there is no such jurisdiction if he claims "Whatever commission is found on the evidence to be owing".*

7. She also relied upon a first instance decision, ***Obi v Rice Shack Ltd*** Case No 2402057/2016 (ET). That concerned a claimant who worked under a zero hours contract and was suspended for a total of nine months pending a disciplinary investigation (which appears not to have taken place). There was no power to suspend in the contract, but it was accepted by the

respondent in that case that, if an employer did in fact suspend, then there was no basis on which the claimant could be suspended without pay unless the contract expressly provided for this. During that period she was offered no shifts, and received no pay. After five months, she found another job, but did not tell the respondent. When the respondent again offered her work she declined it, and claimed for unlawful deductions from wages for the whole nine-month period.

8. The claimant argued that until such time as her contract was brought to an end, she was entitled to be paid her wages based upon her average weekly earnings and the ET agreed. Although the Employment Judge did not set out his reasoning, it was presumably upon the basis that there was no contractual basis to suspend without pay. However, there does not appear to have been any consideration of whether or not it made any difference that it was a zero hours contract and she was not being provided with work. For that reason and because in the present case there was a power to suspend, I do not think this case provides very much assistance. Although the case went on appeal (***Rice Shack Ltd v Obi*** UKEAT/0240/17), the entitlement to pay was not an issue before the EAT.

The relevant facts

9. The relevant facts are not in dispute. The Claimant joined the Respondent's internal staff bank as a Bank Doctor (Surgical Registrar) on 10 January 2018. The Statement of Terms and Conditions of Registration with Staff bank stated at clause 1 (Tenure):

> *You are registered on the Maidstone and Tunbridge Wells NHS trust staff bank on a paid as worked, as required basis. There is no obligation for the trust to offer work.*

10. Clause 8 stated:

> *We expect the highest standards of conduct from our workers. The disciplinary rules and procedures relating to your registration, including the managers with the authority to terminate your registration are contained in the Trust Disciplinary Policy, Procedures and Rules document which is available on the Trust intranet.*

11. In or about March 2019, the Claimant was the subject of a number of allegations, all relating to his personal conduct, as a result of which he was suspended from duty on 22 March 2019. The relevant provisions relating to suspension are set out in the Respondent's Disciplinary Policy. No distinction is made in this Policy between those working on zero hours contracts and those working on any other types of contract. At clause 5.5.4 it states as follows:

> *Suspension will normally be on full pay and benefits (including any additional allowance per normal shift pattern) and should be reviewed regularly by the suspending manager. However, there may be occasions*

in exceptional circumstances that suspension on low pay might be considered. Such situations should be discussed with the senior HR representative.

12. The Respondent also has a "Doctors' Conduct and Performance Policy and Procedure", which incorporates the principles of Maintaining High Professional Standards ("MHPS"). At clause 5.1.11, it states:

> *Exclusion under this procedure will be on full pay and the doctor must therefore remain available for work with their employer during their normal contracted hours. The doctor will be reminded of these contractual obligations but will be given 24 hours' notice to return to work. In exceptional circumstances the Case Manager may decide that payment is not justified because the doctor is no longer available for work (e.g. abroad without agreement).*

13. The suspension letter (5 April 2019) contained the following provisions:

> *Exclusion is an entirely neutral act; it does not prejudice you in any way whatsoever. The decision has been taken in order to allow the Case Investigator to continue with a formal investigation into the serious concerns outlined against you. The purpose of clarity this formal exclusion will run from Friday 5th April 2019 to Friday 3rd May 2019.*
>
> *As previously noted in my letter of 22nd March 2019, during this period of formal exclusion you will be unable to carry out further work within the Trust. You must also seek my consent, if you intend to undertake either voluntary or paid work elsewhere during the period of exclusion.*
>
> *…*
>
> *As previously noted in my letter of 22nd March 2019, please ensure you remain contactable during office hours (9.00 am to 5.00 pm) and make yourself available, sometimes at short notice, to attend meetings as requested by management.*

14. The Claimant remained suspended (with the suspension being extended by successive letters) until his summary dismissal on 27 August 2019.

Submissions

15. Ms Balmelli provided clear and helpful written submissions, which she developed orally. She argued that, if he were not paid, then the Claimant would be suspended without pay and that was contrary to the Respondent's policy. She submitted that, at the heart of this issue, is the interpretation of the words *"full pay"*. Whereas the Respondent contends that in a zero hours contract "full pay" in this case means no pay at all as the doctor will not have worked while on suspension, she would contend that in a zero hours contract "full pay" means the specific doctor's average monthly wages for the period he is on suspension.

16. With regard to ***Coors Brewers***, Ms Balmelli submitted that this case is very different, in that it is simple to work out the Claimant's average earnings and there is a specific period during which he says the unlawful deductions occurred. Therefore his claim is easily quantifiable.

17. Mr Fletcher's submissions were also clear and concise. Firstly, the Claimant had no contractual entitlement to be provided with work (or pay), consequently, no wages were *"properly payable"* to him. Secondly, the reference to suspension being "*normally on full pay*" has to be read in the context of a zero hours contract, where the employee does not have "normal hours". Thirdly, in reliance on ***Coors Brewers***, the Claimant is unable to point to a quantifiable loss due to the nature of his working arrangement and the variance in his hours and pay. In response to Ms Balmelli's point about the Claimant having to be available during suspension, Mr Fletcher said that he was only asked to be contactable and to ask permission before working elsewhere.

Conclusions

18. Under the contract, the Claimant was engaged on a "*paid as worked, as required basis".* The Respondent was not obliged to provide him with work, but was obliged to pay him if it did so. That means they could have chosen to offer him no work from the time the allegations were made or simply terminated his registration and I do not think the Claimant could have done anything to prevent that.

19. However, the Respondent chose to suspend him and, during the period of his suspension, required him to be contactable and available for meetings and also required him to obtain their permission before working elsewhere. There was therefore a difference between the Claimant being suspended and simply not being provided with work. It may have been a neutral act in terms of any pre-judgment about his culpability, but it was not a neutral act if it denied him the opportunity to work and earn a living.

20. Under the Trust's disciplinary policy, suspension is "*normally on full pay*". I agree with Mr Fletcher that a worker on a zero hours contract is only entitled to be paid when provided with work, so "full pay" is the full entitlement to pay when provided with work. I do not agree, however, that must therefore mean "no pay" when the Claimant was suspended, as he was not being provided with work. Although that argument has a certain logic, it disregards the purpose and effect of suspension.

21. The purpose of suspension on full pay is to maintain the status quo and not to cause financial detriment to the worker, pending resolution of the complaints. The status quo was not the Claimant's inability to work, but – to paraphrase s.27A - the Claimant's undertaking to perform work conditional on the employer making work available.

22. The effect of suspension for the Claimant on a zero hours contract was to deny him the opportunity to work for the Respondent, which is different to not requiring him to work. The suspension overrides any requirement. For example, if there was a period during which the Claimant was not required to work, he could - without any restraint – seek alternative work. While suspended, he was not provided with work, but he also could not obtain alternative work without permission and had to remain contactable and available, even though the condition of making work available to him no longer applied.

23. In my view, on a proper reading of the Respondent's policy, suspension on full pay applied equally to all workers, including those on zero-hours contracts. A different conclusion would ignore the purpose and effect of suspension. In other words, I would conclude that workers on zero hours contracts should also receive full pay during suspension, by which I mean pay that reflects what they would have received had they been required to work.

24. I am not sure Ms Balmelli is assisted by MHPS, because these were not allegations of "professional misconduct", but I do not think we need to go that far and enter into that debate. I also do not think that the decision in ***Coors Brewers*** stands in the way of the conclusion. The sums claimed by the Claimant are certainly not unquantifiable; they can be fairly easily calculated, for instance by taking an average over the 12 month period prior to suspension. It seems to me that this is the sort of case HHJ Burke had in mind in ***Lucy and Ors.***

25. If the parties are unable to agree how to calculate what the Claimant should have been paid during his suspension, then they should apply to the employment tribunal for a short remedies hearing before me. However, I hope that is something they can resolve between themselves.

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Employment Judge S Cheetham QC
Dated 13 September 2020