EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 22 May 2023

Claimant: Ms Hazel Simmonds

Respondent: Croydon London Borough Council

Before: Employment Judge E Fowell

Representation:

Claimant Oliver Mills of counsel, instructed by Greenburgh Solictors

Respondent Jeffrey Jupp of counsel, instructed by Browne Jacboson Solicitors

JUDGMENT

1. During the period from November 2021 to March 2022 inclusive, the claimant suffered an unlawful deduction from her wages in the net sum of £14,527.09.

2. There is no order for costs.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons in her favour given earlier today.

2. Ms Simmonds worked for the Council in a senior capacity until her resignation on 6 September 2022. She has brought two separate claims as a result, one of which has been listed for an 11 day hearing later this year. The claim under consideration today however is much narrower. It concerns her entitlement to pay during her lengthy period of suspension, and whether the Council was entitled to reduce her pay during on the basis that she was off sick.

Procedure and evidence

3. Witness statements were provided by Miss Simmons and, on behalf of the Council, by Mr Dean Shoesmith, the Interim Head of HR from November 2021. There was also a bundle of 222 pages. Having considered this evidence and the submissions on each side, we made the following findings of fact.

Findings of Fact

4. The starting point is the claimant's contract of employment (page 141). Clause 9 sets out the sickness provisions, which in her case was an entitlement to 4 months' full pay and 4 months' half pay. It makes no mention of what would happen during a period of suspension. Clause 10 is headed "Disciplinary and employee complaints procedures" and provides:

> "Any disciplinary issues will be dealt with in accordance with the Council's disciplinary and capability procedures which will accord with any requirements of the Joint Negotiating position for Chief Officers of Local Authorities."

5. Hence, it references two other documents, the disciplinary procedure and these terms for Chief Officers. The disciplinary procedure is at page 67. Under the heading "suspension" it provides that employees "may be suspended on normal pay" Mr Mills, for the claimant, accepted that if "normal pay" was the correct test then this would be subject to the normal sick pay provisions.

6. Clause 12.2 then goes on to say that suspension may involve some or all of an employee's duties. Clause 12.4 also provides that suspended employees must make themselves available to participate in the disciplinary process. And clause 12.5 then states that while suspended the employee should not visit the council's premises or contact any of its staff or service users without prior approval.

7. The Joint Negotiating Committee for Chief Officers of Local Authorities (JNC) is the national negotiating body for Chief Officers in England and Wales. Their Conditions of Service Handbook is at page 116 of the bundle. Part 3 concerns disciplinary matters. According to paragraph 2.5 (page 127):

> "Where the chief officer's continuing presence at work compromises an investigation or impairs the efficient exercise of the local authority's functions, the chief officer may (subject to whatever consultation or approval may be required under the authority's standing orders) be suspended from duty. The Council, or appropriate committee or senior officer, acting under delegated powers, may carry out such suspension ***on full pay.*** Written notice stating the reasons for any such suspension shall be given at the earliest opportunity possible."

8. Those are the relevant contractual provisions. Turning to the way in which they were operated, Ms Simmons was suspended by letter dated 10 February 2021 (page 155). That provided (page 157) that while suspended she had to remain available during

normal working hours to answer any workrelated queries or attend meetings, although that did not apply during any prearranged holidays.

9. After about a month on suspension there was an exchange of correspondence, and on 15 March 2021 (page 162) Ms Simmons solicitors wrote to the council to say

> We note that the council has unilaterally decided to adopt the JNC for Chief Executives of local authorities in England and Wales model disciplinary procedure (the "JNC"). Our client accepts that change to her conditions of employment.

10. Hence the provisions applicable to chief executives would apply, not simply those applicable to chief officers. There is a separate Conditions of Service Handbook at page 79. At page 95 provides

> **2.3.2 Availability of the chief executive in case of sickness**
>
> It is possible that the sickness of the chief executive could impact on the ability to follow the disciplinary procedure …
>
> In principle, the sickness of the chief executive will invoke the local authority's normal sickness procedures. The nature of the investigation and the facts surrounding the sickness will dictate the appropriate way of dealing with the issue."

11. This however does not make any mention of suspension, simply the possibility that chief executive becomes sick during the process of an investigation, and I was not taken to any other provision.

12. Miss Simmonds' sickness absence began, as already mentioned, on 27 July 2021. Her first medical certificate is page 209. It stated simply that she was unfit for work – there was no mention of being able to attend meetings as part of the disciplinary investigation. However, having begun to submit medical certificates, the Council applied their sickness absence procedure and she was referred to Occupational Health. They provided a report on 1 October 2021 confirming that she remained unfit for work but was fit to attend meetings with adjustments. That was before any reduction to her pay so for the period in question she was in position to attend meetings and respond to any queries.

Applicable Law

13. S.13 of the ERA 1996 provides:

> "(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.

14. It is agreed here that there is no question of any agreement in writing to accept a deduction. Nor is there any scope for an implied term.

15. The question therefore is therefore essentially whether the contractual provisions about sick pay trump those relating to suspension or vice versa. There are policy arguments that could be made either way. On one hand, a suspended employee might be able to avoid meetings and frustrate the disciplinary process by pleading illness and still be able to take advantage of full pay, if that was the obligation while suspended. On the other hand, an employee suspended for a long period of time might well suffer the demoralising effects of such a process and become ill, in which circumstances it would be arguably be unfair on them to have their pay cut.

16. I am grateful to both counsel for their diligent research in this area and written submissions. I will not attempt to summarise them but will aim to address them in these conclusions.

Conclusions

17. The starting point is the contract of employment, which incorporated the disciplinary procedures, which in turn provided for "normal pay" during suspension.

18. Those disciplinary procedures then had to be amended, if need be, to accord with the JNC Handbook for Chief Officers. In other words, the disciplinary procedure itself recognised that more favourable terms may have been agreed nationally for Chief Officers, and if so those more favourable terms would apply. That is the only meaning I can give to the phrase "will accord with".

19. Those JNC terms clearly stipulate an entitlement to full pay during the period of suspension.

20. There is however the potential variation of contract to consider, resulting from the letter dated 15 March 2021, but a careful reading of those provisions does not indicate any lower level of pay during suspension. It would be highly surprising if that was the case, so that a chief executive officer was less well protected during suspension than one of her surrounding chief officers. There is certainly no clear wording to displace the entitlement for chief officers to full pay.

21. If that conclusion is wrong for any reason, it does not seem to me that this letter from the claimant's solicitors can be taken as an express variation of contract. Pay is a fundamental term of the contract. Parties can agree any variation of contract they wish, but for there to be an agreement there has to be a meeting of minds on the point. No mention was made in that letter regarding pay, let alone an acceptance that the Council was entitled to reduce pay during the suspension. It was put forward as an additional protection for the claimant, and so it would be quite wrong to interpret the acceptance of such an offer in the way now suggested. It was no more than an acceptance of the greater procedural safeguards that applied.

22. Mr Mills cited two unreported authorities of the Employment Appeal Tribunal which appear to me of direct relevance here. In **Heatherwood & Wrexham Park Hospitals Trust v Beer** UKEAT/0087/06 the respondent argued that the claimant was not entitled to full, average pay during a period of suspension when she was also off sick. The Employment Appeal Tribunal noted that there was nothing that said expressly that her full average pay would only continue while she was suspended and fit to work and went on to state:

> "56. A further reason why this ground of appeal has to be rejected is that the Trust did not lift the suspension of the claimant or tell her that she was free to return to work. Thus an (if not the) operative reason for the claimant not working continued to be the suspension and this means that the terms on which she would be paid during suspension continued to apply."

23. The same situation arose in **Wright v Weed Control Limited UKEAT/0492/07.** The respondent argued that the implicit assumption underlying the duty to pay basic pay is that the employee must continue to be ready and willing to work. Since he was not ready to work because he was sick, he should only receive what the contract would have provided in those circumstances, and that was the right to statutory sick pay. The operative reason for the absence from work, it was submitted, was the sickness and not the suspension. The Employment Appeal Tribunal responded:

> "28. We reject that. … There is no provision expressly stating that an employee must remain ready and willing to work, nor that he should simply receive what he would have done had he not been suspended. We see no reason to qualify the clear language of the contractual term in that way."

24. The lesson to be drawn from this is that it is the employer who needs to specify in clear language that the right to pay during suspension is subject to the sick pay arrangements rather than the other way round.

25. Against that, Mr Jupp relied on the subsequent Court of Appeal authority in the case of **Gregg v North West Anglia NHS Foundation Trust** 2019 ICR 1279. It is a case on somewhat different facts. Mr Gregg was an anaesthetist. Under his care two patients died. Following the first death he was suspended by the Trust - although they preferred to use the term "excluded" and it may be that there is some confusion over the terminology. Having excluded him there was an intervention by a Medical Tribunal which, on 12 May 2017, imposed an interim suspension on him, preventing him from working anywhere in clinical practice. On 31 August 2017 the Trust ended his exclusion so that the only reason he was not able to fulfil his side of the employment contract was that he remained suspended by the Medical Tribunal. The Trust then took the view that this was no fault of theirs and so there was no entitlement to pay him at all.

26. The key conclusion of Toulson LJ, as in the previous cases referred to, was that the starting point was the terms of the contract. There was nothing in the contract about pay during such suspension from practice, so a review was undertaken on previous common law authorities in that area. The Court looked at cases going back to the 1920s about the entitlement of employees to pay when unable to work. The fundamental position, it found, was that if an employee was not able to carry out their side of the bargain, to provide work, there was no automatic entitlement to pay. The same applied while suspended, or in prison. The position was then summarised at paragraph 52.

> 52 It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial.
>
> > (a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay: Petrie v MacFisheries Ltd [1940] 1KB 258.
> >
> > …

27. But it is clear from the context that this remark concerned situations where there was no clear contractual term about the entitlement to pay while suspended. It does not mean that in all circumstances, where there is such a term, the employee still has to be ready, willing and able to perform work.

28. Accordingly, I conclude that there was a clear contractual term here that Ms Simmonds receive her full pay while suspended, and that the pay she received from November 2021 to March 2022 was less than the total due to her. The agreed shortfall is the net sum of £14,527.09. (The Council remains liable for any tax or national insurance due on that sum.)

29. Section 24(2) Employment Rights Act 1996 provides that the Tribunal may award:

> "… such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by her which is attributable to the matter complained of."

30. However, there is no authority to the effect that this includes a general power to award interest, and although it may include consequential losses such as bank charges or interest payments, no such evidence was provided, and so the net payment only is awarded.

31. I rejected an application for costs by the claimant on the basis that this was essentially a legal argument, with counsel on either side. It called for some points of interpretation and the consideration of various potential sources of contractual terms, and whatever the position in hindsight it could not be said that the Council's position had no reasonable prospects of success.

Employment Judge Fowell

Date 22 May 2023