EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr EO Adenigbagbe	**v**	Royal Mail Group Limited

Heard at: Reading **On:** 5 and 6 April 2018

Before: Employment Judge Chudleigh
Members: Miss J Cameron and Ms HT Edwards

Appearances
For the Claimant: Mr J Gun-Cuninghame, Counsel
For the Respondent: Mr S Peacock, Solicitor

JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. The claimant's complaint of an unlawful deduction of wages under section 13 of the Employment Rights Act 1996 (ERA) is not well-founded and is dismissed.

2. The claimant's complaint of direct discrimination under section 13 of the Equality Act 2010 (EqA) is not well-founded and is dismissed.

REASONS

1. In a claim presented on 7 July 2017, the claimant complained of unlawful deduction of wages and race discrimination. At a case management hearing on 22 September 2017, the issues were set out although those issues were refined at the start of, and during the hearing. By the end of the hearing, the issues for the tribunal to determine were as follows.

   Section 13: Direct discrimination because of race:

   1.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:-

      1.1.1 Delaying the payment of the claimant's wages for the period from 20 November 2015 until 15 January 2016

1.1.2 Combining four duties into one duty for the period between 14 March 2016 and 6 February 2017.

1.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators?

1.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

1.5 The claim form was presented on 7 July 2017. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 10 February 2017 is potentially out of time, so that the tribunal may not have jurisdiction.

1.6 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

1.7 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Unlawful deduction of wages:

1.8 What deductions from the wages of the claimant did the respondent make? The claimant says that the deduction in question amounted to £1,328.95.

1.9 Was the respondent authorised to make those deductions by virtue of the contract between the claimant and the respondent or otherwise?

2. In relation to the wages claim, it was agreed that the claimant received his most recent contract of employment from the respondent on 17 March 2016. It was also agreed that deductions made from the claimant's pay between the commencement of his employment on 30 November 2015 up until 17 March 2016 when the claimant received his contract of employment amounted to £533.96.

3. The claimant gave evidence on his own behalf. On behalf of the respondent, the tribunal heard from Glen Fletcher, who is employed by the respondent as a Recoveries Team Coach at Royal Mail Pay Services and Kenneth Coke, who is employed by the respondent as a Plant Manager at its International Logistics Centre (ILC).

4. The tribunal made the following findings of facts:

4.1 The claimant was born in Nigeria on 20 April 1978. He worked for the respondent, between 22 April 2005 and 13 January 2015, when he was dismissed due to his inability to legally work in the UK without a visa.

4.2 The claimant brought an employment tribunal claim arising from the termination of that employment which was settled by way of a COT3 signed by the claimant on 27 November 2015 and 3 December 2015 by the respondent. The agreement provided (amongst other things) that the claimant was to be re-employed on a permanent part time contract for 15.36 hours per week, that the claimant would commence his employment on 30 November 2015, the claimant's place of work during security vetting and training would be ILC and subject to passing security clearance and training, the claimant's place of work thereafter will be the Heathrow Worldwide Distribution centre (HWDC).

4.3 It was common ground between the parties that during the first period of his employment, the claimant was overpaid in the total sum of £2,376.36. This came about because the claimant had previously been in receipt of a higher basic rate of pay commensurate with working in London. He transferred from inner London to HWDC and was no longer entitled to receive the higher rate. The respondent agreed to pay the claimant a sum to compensate him for the loss of his inner London regional pay by adding an element to his pay which was described as "marked time". The marked time element of the pay was to reduce gradually until such time as the claimant's basic pay reached the same level as a comparably graded employee within the new office. In 2012 the respondent moved to a new payroll system. When the claimant was transferred onto the new payroll system, an additional marked time payment was erroneously attached in addition to the one that had previously been agreed. The effect of this was an overpayment in the sum of £1,584.03 in relation to basic pay, an overpayment of £699.86 in relation to overtime and £92.47 for scheduled attendance (a form of contractual overtime).

4.4 The claimant took a career break on 3 December 2013. The overpayment was identified on 18 April 2014. The error had occurred also in relation to about 630 other employees.

4.5 When the claimant was dismissed in January 2015, the respondent made various deductions from his final pay which meant that the total sum of the overpayment at the end of that period of employment was £2,114.96. The respondent took steps to recover the sum in question from the claimant but was unsuccessful. Eventually, the matter was passed to an external debt collection agency.

4.6 Pursuant to the COT3, the claimant was re-employed on 30 November 2015. The contract specifically stated that the date on which the employment commenced was 30 November 2015 and that the employment began on the same date. The contract contained at paragraph 23.1 the following clause:

> *"You agree that Royal Mail may at any time deduct from your salary or any other benefit payable to you any sum including any overpayment of salary or loan made to you by Royal Mail or any deductions arising from disciplinary action (including deductions resulting from a reduction in pay, downgrading or disciplinary transfers) which in the reasonable opinion of Royal Mail is owing by you to it whether by reason of any default on your part or otherwise at the time of such deduction is made."*

4.7 It was understood between the parties that the claimant would have to be security vetted before he could work at HWDC. The respondent's recruitment vetting policy provides that individuals must have the appropriate vetting checks prior to starting their roles. It also requires employees returning from a career break to HWDC to have security vetting checks regardless of the length of time they had been away from the business. It was accordingly unusual for any employee to be taken on before being vetted. Indeed, Mr Fletcher said that this was the only time he had known of this to happen. The reason that it happened in this case is because it was agreed between the parties as part of an out of court settlement that the claimant would start work on 30 November 2015.

4.8 The vetting procedure took some time and required the provision by the claimant of various documents. On 11 December 2015, he supplied a driving licence with proof of his address and on 12 January 2016, he provided an HM Revenue & Customs document also setting out his address.

4.9 On 8 January 2016, the claimant was spoken to by Richard Tilling, a lead resource manager at HWDC was given the claimant's bank details. The claimant was to bring in proof of his national insurance number the following Tuesday.

4.10 The claimant was weekly paid but did not receive any payment until 15 January 2016. By this time, he had worked for a period of seven weeks. The net pay that was due to him was £812.16 however a deduction of £695.23 as part payment of the overpayments previously made to the claimant, leaving a net payment of £116.93. On 22 January 2016, a deduction of £51.18 was made and thereafter there were regular deductions of £15 per week save on 5 February 2016 when an overpayment adjustment was made and the claimant was credited with £317.45.

4.11 It was agreed between the parties that deductions totalling £533.96 had been made up to the time the claimant received his new contract on 17 March 2016. Further deductions were made thereafter totalling £1328.95.

4.12 When the claimant returned to work, he undertook two night shifts – Monday and Friday nights. He made an application on 30 January 2016 for flexible working arising from his family commitments.

4.13 On 14 March 2016, Danny Sullivan, the HWDC resourcing manager, agreed following an interview that the respondent would accommodate the claimant's request to change his working pattern from Monday and Friday nights to Monday and Saturday nights. By letter dated 14 March 2016, Mr Sullivan told the claimant that from the week commencing 14 March 2016, his duty would change to duty TS1 N41 working Monday and Saturday 22:29-06:17. The letter also said "Your work area will be PSM arrivals packet shake out/York tippers". The claimant was asked to complete a reply slip to indicate if he wished to accept the offer.

4.14 The duty in question – TS1 N41 – was a defined set of work functions to be carried out in the HWDC sorting office. Those functions or duties were agreed between the respondent and the Communication Workers' Union. There was a job description for that duty which set out the activities required of the postholder. This included many tasks associated with the inward receipt of mail. The duty was described as follows:

> *"Classify bags @ Induction classification stations, (Remove bags selected for RVP.) Cut & tip packet bags and Red Sleeves/Segregate packets as required (e.g. for Oversized, odd shapes and underweight to manual etc,) Remove all Letters, flats. Check every packet for fiscal, charges and red point that are on customs check list given by HMRC.*
> *Operate AYT (Automatic York tipper) in line with SSOW.*
> *To Process all priority services products including Airsure and Signed for. Assist with the portering of full York's to staging, bag opening, or other work stations To move full/empty York's via FYG.*
> *To assist with bag opening/manual sortation/bag closing/F bags as required. To identify and process all irregularities/Damaged.*"

4.15 The claimant made no complaint about undertaking these activities. He commenced this new role in March 2016 and indeed at his request he became full time from 9 January 2017. He continued with the same duties until 6 February 2017. The claimant made no complaint at all about the duties he was undertaking until he presented his ET1. The evidence of Mr Fletcher and Mr Coke which the tribunal accepted was that 20 to 25 employees working at HWDC had the same job description as the claimant during this

periods. The tasks that were required to be undertaken by those who held the job description in question would vary over the course of a shift depending on where the work was.

4.16 The claimant had claimed in his witness statement that Danny Sullivan who managed him at HWDC had been dismissed because of his attitude to ethnic minorities. The respondent produced documents relating to Mr Sullivan's termination and it was clear to the tribunal that his employment came to an end by reason of voluntary redundancy and that he had not been the subject of any disciplinary action relating to bullying, intimidation and/or discrimination.

Submissions of the parties

5. On behalf of the respondent, Mr Peacock submitted that the tribunal had no jurisdiction to entertain the wages complaint as it was common ground that the monies that were deducted were deducted in respect of an overpayment of wages. He says that this type of deduction has been specifically excluded from Part 2 of the ERA. Alternatively, he argued that if he was wrong on that point, section 14 excluded the payment in question from the wages provisions of the Act. He said it was irrelevant that the overpayments were made in respect of a previous period of employment as there is nothing in section 14 that limits the employer's authority to deductions in respect of the reimbursement of overpayments of wages.

6. Mr Peacock agreed that his section 14 arguments did not succeed then £533.96 had been unlawfully deducted from the claimant's pay being the sums deducted before 17 March 2016, the date that the contract was delivered to the claimant.

7. It was argued that the respondent had adequately explained each of the alleged acts of discrimination. In relation to the delay, the employment was atypical as it arose from a COT3 and that it was unacceptable that there had been a delay in paying the claimant. The delay had arisen from administrative issues and nothing else. It was argued in relation to the complaint about the duties that the claimant was employed as a part of a team responsible for the inward processing of packets; he did one duty and not four duties in one. It was also apparent that both complaints were out of time and it would not be just and equitable to extend time.

8. The respondent's position on remedy was that the award should be in the region of £800.00-£1,000.00.

9. On behalf of the claimant, Mr Gun-Cuninghame submitted that section 14 applied only to the specific period of employment in question. He said that section 14.1 has to be construed in context and it cannot possibly mean previous periods of employment. The period of employment commencing

on 30 November 2015 was expressly the employment with no continuity of service before that date.

10. The same submissions were made with regard to section 13. Properly construed, the contract permitted deductions only in respect of the current period of employment.

11. Mr Gun-Cuninghame's submissions in relation to direct discrimination were that withholding of pay did not happen to anyone else and that the tribunal should find that the pay was withheld in order to belittle the claimant and that the withholding of pay was discriminatory. He argued that the evidence in relation to the four duties issues (refined during his submissions to three duties) from the respondent was unsatisfactory. Mr Coke initially accepted that the work that was set out in the appointment letter dated 14 March 2016 was broader than in the job description although he later resiled from that position. He argued that there was no prejudice to the respondent by the extension of time.

12. Mr Gun-Cuninghame argued that the claimant should receive compensation for injury to feelings in the sum of £8,400.00 if one allegation was proved, or £15,000.00 if both were proved.

The law

13. S. 13 of the ERA provides employees the 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) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(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.

....."

14. Section 14 provides for excepted deductions:

"(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

.....

(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

> *(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or*
>
> *(b) otherwise with the prior agreement or consent of the worker signified in writing,*
>
> *and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from*

the worker, if the deduction is made in accordance with the relevant notification by that person.

....."

15. In Tyne & Wear Passenger Transport Executive t/a Nexus v Anderson & Ors UKEAT/0151/16 the EAT decided that the employment tribunal had jurisdiction to construe the relevant contract where a claim for unauthorised deductions from wages was made, and there was no reason why it should not do so. It was just as equipped as the county court was to carry out that task.

16. In relation to any complaint of direct discrimination contrary to s. 13 EqA once a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate — s.136 EqA.

Conclusions

The wages claim:

17. The tribunal first turned its attention to section 14 of the ERA which provides at 14(1) that:

> *"Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –*
>
> (a) *An overpayment of wages*"

18. Part 2 of the ERA is concerned with protection of wages. It is provided at section 13 that:

> *"An employer shall not make a deduction from wages save in certain circumstances."*

19. Mr Peacock's first point was that section 14 takes out of the ambit of the ERA deductions made in respect of overpayments of wages. It was common ground between the parties that the deductions were made in respect of an overpayment of wages, albeit that the overpayment was made in relation to a previous period of employment.

20. Neither representative was able to point to any authority on whether or not the section was limited to overpayments made in respect of the current period of employment.

21. In the tribunal's view, there was nothing in section 14(1)(a) that limited its ambit to the current period of employment. It provides simply that section

13 does not apply to any deductions where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

22. The purpose of the deduction in the present case was the reimbursement of the respondent in respect of an overpayment of wages. The tribunal found that on a plain reading of the words of the statute it was irrelevant that the overpayment related to a previous period of employment. The previous contract of employment had been between the same parties.

23. Moreover, the provisions of part 2 of the ERA apply to workers. Workers are not always employed in the traditional sense and there may well be a series of contracts of employment. The tribunal did not see any reason why the ambit of section 14 should be limited to the immediate or most recent contract of employment.

24. The wages provisions of the ERA are intended to protect employees from reasonable deductions by employers who hold the balance of power. However, where the employer has made an overpayment of wages, it is not unreasonable to deduct the overpayment from wages that are later due and this is expressly recognised by section 14 of the Act. Accordingly, the tribunal considered that its finding in relation to the construction of section 14 was within the spirit of part 2 of the ERA.

25. In the circumstances, the tribunal agreed with Mr Peacock that that it did not have jurisdiction to entertain the claims as this type of deduction was specifically excluded from the ambit of s. 13 by s. 14(1). Alternatively, as the deductions that were made were in respect of the reimbursement of an overpayment of wages, section 14 applied, the deductions were excepted deductions and were not unlawful.

26. The tribunal went on to consider the claimant's case under section 13 in case it is wrong in relation to its findings about section 14. Section 13(1) provides that:

> *"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."*

27. "Relevant provision" is defined in section 13(2) as meaning a provision of the contract comprised in one or more written terms of the contract has been notified to the worker in writing.

28. The respondent conceded that the claimant was not notified in writing of the terms of the contract until 17 March 2016. However, the claimant argued that, properly construed, the deductions that were authorised by the contract were limited to the current period of employment.

29. The tribunal disagreed. Clause 23.1 of the contract provided that the respondent could make deductions payable to the claimant in respect of "any sum". It also provided that any deductions were authorised as long as in the reasonable opinion of the respondent the sum was owing by the claimant to it whether by reason of any default on his part or otherwise. The clause was extremely widely cast.

30. It was common ground that the respondent's view that the sums in question were owing to the claimant was a reasonable view. In the circumstances, the tribunal did not agree that the respondent was precluded from making deductions in reliance on clause 23 of the contract.

31. Accordingly, had the tribunal decided the case under section 13 of the ERA, it would have awarded the claimant the deductions made up until the time that the contract was delivered - £533.96 - and would have declared that the deductions thereafter were lawful and in accordance with the contract.

Direct discrimination:

32. The first issue was whether the delay in the payment of wages was direct discrimination. The evidence before the tribunal was that the claimant was in a unique situation because he was taken on by the respondent as an employee prior to his security vetting taking place as this is what had been agreed in a COT3. There was no actual comparator. The tribunal considered that the claimant had not discharged the burden of establishing primary facts from which it could properly and fairly conclude that the difference in treatment was because of his race. It considered that a hypothetical comparator in the same situation would have been treated the same.

33. Further, the tribunal also considered that the respondent's explanation was adequate. The tribunal accepted that the claimant was not paid until 15 January 2016 because security vetting had not been completed and because (importantly) the respondent had not received his bank details and national insurance number until shortly before the payroll run on 15 January. There was nothing at all sinister in the delayed payment albeit that it was unfortunate and should not have occurred. However, it was an innocent error. Accordingly, that allegation did not succeed.

34. The claimant also did not discharge the initial the initial burden of proof with regard to the second of his two complaints. He was not given four duties combined into one or even three duties combined into one. He was given one duty – TS1 N41. That was a job description or duty shared by 20 to 25 other people. It was a set job description that was agreed with the trade union and was not a bespoke arrangement devised for the claimant.

35. Further and in any event, the respondent has provided an adequate explanation for the treatment alleged. The claimant was given one duty or

set of activities albeit that this might have required him to work across three different work areas. Moreover, the claimant worked to this job description from March 2016 until February 2017 without any complaint. The claimant told the tribunal that he had complained to Danny Sullivan but the tribunal did not believe that evidence. Danny Sullivan left the respondent in early September 2016 so the claimant would have had ample time to have complained thereafter. Instead, the claimant applied to work full time and undertook the duties that he complained about to the tribunal on a full time basis until 6 February 2017.

36. The claim in respect of the delayed payment crystallised on 15 January 2016. The claimant did not present his ET1 until 7 July 2017. The agreed date when taking into account early conciliation for which any acts or omissions are potentially out of time was 10 February 2017. The complaint was presented over a year out of time. The complaint regarding the four duties into one crystallised on 6 February 2017 and was presented four days out of time.

37. The claimant did not give any cogent explanation for the delay. The tribunal did not consider that it was just and equitable to extend time. By the time of the tribunal hearing, Danny Sullivan had taken voluntary redundancy and was not easily accessible as a witness. In all the circumstances, the tribunal would have declined to extend time although this is of course academic because the tribunal considered the allegations on their merits and concluded that they were not well-founded.

_____
Employment Judge Chudleigh

Date: ……..

Sent to the parties on: ..19/05/2018...

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For the Tribunal Office