EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Foote**

Respondent: **South Central Ambulance Service**

Heard at: **Havant** **On: 11 and 12 February 2019**

Before: **Employment Judge Oliver**

Representation
Claimant: **In person**
Respondent: **Mr J Gidney**

JUDGMENT having been sent to the parties on 21 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a claim for unauthorised deduction from wages.

2. The issues had been agreed at a preliminary hearing on 29 June 2018, and we discussed and agreed at the start of the hearing that these were still correct.

Evidence

3. There was an agreed bundle of documents. I have read these documents as referred to in the witness statements and during the hearing.

4. I took statements as read. I had a witness statement from the claimant and heard evidence from her. For the respondent I heard from Melanie Saunders, the Executive Director of Human Resources and Organisational Development.

5. I also heard submissions from both parties.

The Facts

6. I have taken account of all the evidence and submissions, and find the facts necessary to decide the issues.

7. The claimant works for the respondent at the Emergency Operations Centre as Control Duty Manager ("CDM"). She is employed on terms and conditions incorporated with nationally agreed Agenda for Change terms and conditions. There are nine pay bands with incremental spine points within each band, and there is potential incremental pay increase each year.

8. The claimant was seconded to the role of CDM in December 2007 and on 1 April 2011 she was moved to this as a substantive post. I have seen her terms and conditions. Her status was band 7 spinal point 29, giving a salary of £34,189 per year.

9. In 2006 there was a merger between Hampshire ambulance service and Buckinghamshire and Berkshire ambulance service. There were two control rooms - one in the north with CDMs who were on band 6, and one in the south where the claimant worked where CDMs were on band 7.

10. There was a major restructure in 2010/2011. There was a job evaluation process for the CDM role, and this was placed in band 6 in February 2011. I have seen the documents in relation to the Agenda for Change job matching and evaluation processes including extracts from the job evaluation handbook. Mrs Saunders' evidence is that the job matching process in this case was discussed during consultation around the overall restructure, but documentation about this is not available. All job matching and evaluations were carried out by a panel who have been trained.

11. The claimant says the process in the handbook was not followed. This includes there being no up-to-date job description, no job analysis questionnaire, and information set out in paragraph 7 Section 11 of the job evaluation handbook was not provided. The missing information includes a job match report containing a rationale behind the award levels, and details of the consistency checking that had been done. It does appear that this information was not provided to the claimant at that time.

12. In June 2011, Lucy Stevens (Director) told the CDMs that their roles had been re-evaluated as band 6. The claimant says she was told not to worry about it, as it would be reviewed again next year and move up to band 7. I accept this evidence, which was not contradicted by the respondent's evidence. However, I also accept the evidence of Mrs Saunders that Ms Stevens had no authority to make any decisions on a change in bands

13. On 19 July 2011 the claimant was told she could be re-slotted into the senior role as band 6 with five years' pay protection at her band 7 salary. I have seen the letter to the claimant explaining the position, which enclosed a new job description and a document entitled "decision to slot in" for her to sign. On 7 August the claimant signed to accept this change. The document had two options. Option A, which the claimant ticked, said "*I accept the decision to slot in outlining the accompanying letter and hereby*

accept the new job description and associated terms and conditions". Option B said that the individual could say they wished to register an appeal, with a requirement to attach all details of the grounds for that appeal.

14. On 9 September 2011, the respondent confirmed the claimant had accepted the offer to slot in as Emergency Operations CDM band 6. This letter explained that no pay protection was needed for the claimant as she was remaining on the same pay. This was because the top point of band 6 was also spinal point 29, so she moved to the top of that band with no change in pay.

15. In July 2013, the claimant indicated to her line manager that she wanted to raise a grievance about the respondent not following the correct job evaluation procedures.

16. In December 2013 the CDMs were asked to resubmit agreed signed job descriptions. There was a full evaluation, and in March 2014 the CDM role was again evaluated at band 6. The CDMs told Ms Stevens on 19 June 2014 they wanted to appeal this evaluation and their appeal was submitted on 25 September. There was then a lengthy process that included two CDMs going through the job description and person specification.

17. In September 2015 the CDM role was re-evaluated and matched as band 7. It was then consistently checked in November and the CDMs were told in January 2016 that the job was evaluated as band 7 with pay backdated to 1 November 2015. The claimant's salary was adjusted at that point to band 7 spinal point 30, so up one spinal point with a salary of £35,891.

18. On 3 February 2016 the claimant was sent a letter setting out an amendment to her contract - being the move to band 7 point 30 at a salary of £35,891. The claimant refused the sign this, as did the others CDMs. The pay increase had been backdated to 1 November 2015 only. Since then the claimant has been paid on this basis, including annual increments. The claimant says that the change should have been backdated to when the appeal was lodged in 2014. She relies on paragraph 47.3 in Agenda for Change which says, "*where appeals are upheld the associated pay or benefits would normally be backdated to the date the appeal was lodged*".

19. The claimant submitted a grievance in relation to the banding on 1 May 2016. At around the same time, four CDMs in the north raised concerns about the process, and they asked the amendments to the contract be backdated to 9 February 2011. The claimant's grievance was put on hold while further discussions were carried out about the banding of the role. This resulted in a without prejudice offer letter on 4 October 2016, which offered to backdate to the spinal point the CDMs would have been on if they had been re-evaluated to band 7 in February 2011, in return for withdrawal of claims in connection with the re-banding and any grievances or appeals. All CDMs except the claimant accepted this offer. The reasons the respondent gave in the offer letter were that due process had been followed, but the process had been protracted and the role had matured during the evaluation period.

20. Mrs Saunders' evidence in tribunal was the job description of the CDMs had evolved over time. That included during the period from March 2014, when the role had previously been graded as band 6, until September 2015 when it was graded as band 7. There is an explanation about how the job developed into a more complex role in the document from Ms Stevens which responded to questions raised by the claimant in the grievance. The claimant says that the job description had been altered, but the actual duties had not changed, and it was all things that the CDMs had already been doing.

21. The claimant had a grievance and appeal process in 2016 and 2017, and her grievance was not upheld. ACAS was notified of this dispute on 1 November 2017 according to the early conciliation certificate, and the claim was submitted on 8 January 2018.

The Law

22. The applicable law is section 13 of the Employment Rights Act 1996 ("ERA"). There will be a deduction from wages where the total amount of wages paid to a worker on any occasion are less than the total amount payable to the worker on that occasion. "Properly payable" means a legal entitlement. This is not necessarily a contractual entitlement, but generally the tribunal will be looking for terms in the contract in relation to wages. Tribunals do have jurisdiction to construe the terms of the contract for this purpose.

23. The respondent's representative referred me to the Employment Appeal Tribunal ("EAT") decision in ***Hussman Manufacturing v Weir*** [1998] IRLR 228, where a transfer under an agreement caused a drop in income, and this was not an unauthorised deduction. Where an employer acts within the contract of employment, the fact that doing so causes a loss of income to the employee does not make that loss an unauthorised deduction from the employee's wages

24. I have also noted the EAT decision in ***Kingston Upon Hull City Council v Schofield and others*** UKEAT/0616/11, where jobs were wrongly evaluated under a job evaluation scheme which resulted in a lower grade and lower pay. The EAT held there was no jurisdiction to deal with this as a deduction from wages claim. The value to be attributed to a job is a question of judgment. The EAT's position was that, in an unlawful deductions claim, the tribunal could not be asked to put itself in the place of the employer and determine the value that should be attributed to the claimants' jobs.

Conclusions

25. The first issue is **what wages were properly due to the claimant under the contract of employment**? This is the main issue in this claim which is decided by answering the other issues.

26. Secondly, **did the claimant's terms and conditions incorporate the nationally negotiated Agenda for Change terms and conditions**? As established at the start of the hearing that is not in dispute. It was agreed

that pay was set by pay bands with incremental spine points as set out in the facts.

27. The third issue is - **was the claimant employed under a contract of employment containing an entitlement to band 6 pay under Agenda for Change between 1 August 2011 and 1 November 2015**? I find that the claimant was employed under such a contract. She signed to accept the slotting-in decision on 7 August 2011. This put her in band 6 at the top of the spine on a salary of £34,189. This was following a restructure and re-evaluation process under Agenda for Change. Her pay was the same as it was previously under band 7, so there was no actual deduction from wages at that point. The claimant was given a clear alternative option to register an appeal instead of slotting in. There was a change, in that she was moved to a lower band. Although she was kept on the same pay, she had lost the opportunity for annual increments by moving up band 7, because she was at the top of band 6 instead. However, I am satisfied on the facts that the claimant did accept this change at the time, and this became her contractual entitlement.

28. The claimant complains that the job evaluation process was not done correctly. It does appear there is some lack of evidence and documents from the respondent as to exactly how this was done. It is not clear that they followed all of the expected steps of the process, and not all of the relevant information set out in the handbook was provided to the claimant at the time she was notified of the match. The claimant says she didn't know at the time that the evaluation had not been done correctly. However, as shown by the legal authorities set out above, in a deduction from wages claim the tribunal cannot redo a job evaluation process conducted by an employer. The EAT was very clear on this point in ***Schofield***.

29. The claimant also argued that the contract was voidable because not all the facts were disclosed to her at the time, including in particular the detail of how the matching would be done. She had also understood that the CDMs would go up to band 7 in the future due to the comments made by Ms Stevens, and she said that matters had been misrepresented to her.

30. I have considered this argument. However, I find that this was not a case where the claimant was provided with misleading facts which caused her to sign the contract. Some of the missing information may have been needed for her to give details of an appeal. But, the appeal was a clear option for her at the time, and she could have requested further information then. Ms Stevens had no authority to comment about moves to new banding in the future. I have accepted that some assurance was given by her, but this was not specific in relation to when and how this change was going to happen. I do not find that this was sufficient to make this a contract that was actually entered into by misrepresentation of fact.

31. The next issue is - **did the claimant receive the appropriate salary as per Agenda for Change from 1 August 2011 until her post was re-banded from 1 November 2015**? On the basis of my finding that the claimant was contractually entitled to band 6 pay from 1 August 2011, the claimant did receive the appropriate salary. This was paid at the top of band 6 as agreed in the document signed on 7 August 2011. I find that this

was the salary properly payable to her at this time, and therefore there was no unauthorised deduction from wages.

32. The next issues is - **was the claimant's contract validly varied with effect from 1 November 2015 so that she was re-banded at band 7**? I find that the claimant's contract was validly varied from that date. She was regraded as band 7 and moved to spine point 30. The claimant was paid on this basis from that date, including annual increments which have continued to date. The claimant did not actually sign any letter accepting this amendment, but that is the basis on which she has been paid since that date and continued to work.

33. **If so, did the claimant receive the appropriate salary as per Agenda for Change from 1 November 2015 until the date of her claim**? The claimant's case is that the respondent should have backdated the re-banding to the date of the appeal in 2014, and she says that this is in accordance with paragraph 47(3) of Agenda for Change. That document does say that this would be what would normally happen.

34. The respondent has given me an explanation as to how the role had evolved, and that is why the re-banding was only backdated to November 2015. I do feel that this explanation was somewhat overstated by the respondent, as is partly indicated by their subsequent offer to the affected CDMs to backdate to 2011. The explanation given in response to the claimant's appeal about why this was backdated only to November 2015 I also find somewhat unclear. I accept that the job description was changed during this re-evaluation process, but it is not clear how much involved new duties and how much was just a new description of previous duties.

35. However, I am looking here at deduction from wages claim, and so the issue is whether the claimant was legally entitled to a new banding backdated to 2014. I cannot reopen the job evaluation process to assess whether the job should have been evaluated as at band 7 in 2014. The wording in Agenda for Change is that it would "normally" be backdated to the date of the appeal. The respondent has given me an explanation as to why that was not the case here, and there was evidence that the job had been evolving to some extent. Therefore, I do not find that backdating to the appeal date was an actual contractual or other legal entitlement of the claimant at that time.

36. On that basis, I find the salary paid to the claimant from 1 November 2015 was properly payable to her. This was as a result of the re-evaluation to band 7 which the respondent had backdated to that date.

37. In light of those findings, I find there have been no unauthorised deductions, and there is no need for me to go on and consider points about whether the claim was brought within time.

38. I do want to make a few concluding remarks. I would like to make it clear that I have decided this case on the basis of the legal tests and what the claimant is legally entitled to under the deduction from wages provisions. I have not decided this on the basis of any moral considerations, or whether or not there has been fair treatment of the claimant.

39. I would like to note that there appeared to have been lengthy delays in the process from the respondent's side. In particular, the significant delay from June 2014 to January 2016, which was the time the respondent took to deal with and communicate the outcome of the appeal by the CDMs. It is possible that, if this had been dealt with more quickly, all CDMs may have been re-banded at an earlier date. However, I have found no legal or contractual entitlement to have this matter dealt with more quickly.

40. There was also a lack of documentation from the respondent to support the original job matching process, and it appears not all of the information required from the job matching handbook was provided to the CDMs in 2011. Overall, the banding process for the CDMs was clearly not handled efficiently by the respondent. I also note that the protracted nature of this process was given by the respondent as one of the reasons for their settlement offer on 4 October 2016. However, the claimant chose not to accept this offer. Obviously this offer did not involve any admission of liability by the respondent. So, on the facts and the applicable law, there has been no unauthorised deduction from the claimant's wages. That means that the claim must fail and is dismissed.

_____

Employment Judge H Oliver

Date: 23 April 2019