



EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT

AND

RESPONDENT

Mr J. Langton

Amdocs Systems Group
Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: BRISTOL

On Wednesday, the 28th August 2019

Employment Judge: Mr David Harris (sitting alone)

Representation:

For the Claimant: Mr Douglas Leach (Counsel)

For the Respondent: Mr Nicholas Siddall QC (Counsel)

JUDGMENT

- 1. There shall be judgment for the Claimant in the sum of £29,098.46 ('the judgment sum').**

- 2. The judgment sum is calculated on a gross basis and it shall be for the Respondent to account to HMRC in respect of the necessary tax and National Insurance deductions relating to the judgment sum before payment of the net sum to the Claimant.**

- 3. Payment of the judgment sum to the Claimant, as adjusted to take account of the necessary tax and National Insurance deductions, shall be stayed pending the outcome of any appeal in these proceedings to the Employment Appeal Tribunal.**

REASONS

1. When considering the remedy in this case, the following issues arise:
 - 1.1 the period of the award of compensation taking into account the provisions of sections 23(1)(a), 23(4A) and 24(2) of the Employment Rights Act 1996;
 - 1.2 the method of calculation of the award of compensation based on the construction of the contractual right to an annual increase in the payments made to the Claimant under the Respondent's income protection scheme;

- 1.3 whether there was a failure by the Respondent to comply with the ACAS Code on Disciplinary and Grievance Procedures entitling the Claimant to an uplift on the sum awarded to him, of up to 25%, pursuant to the provisions of section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.

The period of the award of compensation

2. Though it was accepted by the Claimant that the effect of section 23(4A) of the Employment Rights Act 1996 prevents the recovery by him of any unlawful deductions that were made from his wages prior to the 2-year period ending with the date of presentation of the claim on the 9th March 2018, it is nevertheless submitted by the Claimant that the Tribunal has a discretion to award a sum equivalent to the unlawful deductions that have continued to be made by the Respondent after the presentation of the claim.
3. The Claimant points to the provisions of section 24(2) of the Employment Rights Act 1996 in support of his submission that the Tribunal has a discretion to award compensation for the unlawful deductions that have occurred after the presentation of his claim.
4. The relevant provisions of section 23 of the Employment Rights Act 1996 are as follows:

23 Complaints to employment tribunals

- (1) A worker may present a complaint to an employment tribunal-**
 - (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**

...

- (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.**

5. The relevant provisions of section 24 of the Employment Rights Act 1996 are as follows:

24. Determination of complaints

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer-

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

...

(2) Where a tribunal makes a declaration under subsection (1) above, it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

6. Section 25 of the Employment Rights Act 1996 also needs to be considered as it was referred to by both parties in their submissions in relation to section 24(2). The relevant provisions of section 25 are as follows:

25 Determinations: supplementary

...

(3) An employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker.

(4) Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount.

(5) Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of any combination of deductions or payments falling within section 23(1)(c) or (d), the aggregate amount which the employer is entitled to recover (by whatever means) in respect of the cash shortages or stock deficiencies in relation to which the deductions or payments were originally made or required to be made shall be treated as reduced by that amount.

7. The Claimant contends that the effect of section 24(2) of the Employment Rights Act 1996 is to enable the Tribunal, if it considers it appropriate in all the circumstances, to award him an additional sum equivalent to the amount of the deductions that have continued to be made since the presentation of the claim on the 9th March 2018 up to the date of the remedies hearing on the 28th August 2019.
8. In his skeleton argument dated the 27th August 2019, supplemented by oral submissions, Mr Leach, on behalf of the Claimant, contends that “*the matter complained of*”, as used in section 24(2) of the 1996 Act, does not mean the ‘deduction’ that the Tribunal finds to have occurred. Mr Leach argues that “*the matter complained of*” in this case was the misconstruction of the Claimant’s contract of employment. It follows, Mr Leach argues, that the Claimant has continued to suffer a financial loss attributable to that ‘matter’, namely the misconstruction of his contract of employment, in the form of continued deductions from the date of presentation of his claim up to the date of the remedies hearing.
9. On the basis of that analysis of section 24(2) of the 1996 Act, the Claimant invites the Tribunal to make an additional award to him that effectively extends the period of recoverable deductions from the date of presentation of the claim up to the date of the remedies hearing.
10. For the Respondent, Mr Siddall QC contends that section 24(2) 1996 does not permit the Tribunal to do that which the Claimant contends can be done. The Respondent contends that section 24(2) of the 1996 Act permits the recovery of an additional award relating to consequential losses arising from an unlawful deduction of wages that the Tribunal has found to have occurred. Mr Siddall QC gave the example of defaults in mortgage payments arising from an unlawful deduction of wages. In that example, section 24(2) enables the Tribunal to make an additional award to reflect the financial losses suffered in relation to mortgage defaults that occurred by reason of an unlawful deduction of wages. Mr Siddall QC argues that section 24(2) does not permit the Tribunal to make an award of compensation

for further deductions of wages beyond the finding of an unlawful deduction of wages up to the date of the presentation of the claim.

11. Both Mr Leach and Mr Siddall QC are in agreement that there are no authorities, of which they are aware, that deal with the application of section 24(2) of the Employment Rights Act 1996.
12. In approaching this issue, the Tribunal reminded itself of the complaint that had originally been made by the Claimant in these proceedings. This was a case that was presented as a complaint that the Respondent had made a series of deductions from the Claimant's wages in contravention of section 13 of the Employment Rights Act 1996. The jurisdiction to make the complaint was conferred by section 23(1)(a) of the 1996 Act.
13. In the judgment of the Tribunal, the "*matter complained of*" in these proceedings, for the purposes of section 24(2), was the series of deductions from the Claimant's wages in contravention of section 13 of the 1996 Act. On the basis of that analysis, the Tribunal's decision is that the ongoing deductions that have occurred after the presentation of the Claimant's claim do not constitute financial losses sustained by the Claimant that are attributable to the matter complained of in these proceedings.
14. It follows that the Tribunal prefers the Respondent's interpretation of section 24(2) rather than the interpretation advanced by the Claimant.

The method of calculation of the award of compensation

15. The issue here concerned the question whether the deduction for state benefits should be made before or after the application of the

5% escalation to the benefit to which the Claimant was entitled under the Respondent's income protection scheme.

16. The starting point when considering this issue was the wording of the letter offering employment to the Claimant and the accompanying Summary of Benefits.

17. The relevant passages from the offer letter are as follows:

Income Protection and Sickness Payments

Cramer will pay staff on sick leave their full salary (less any statutory sick pay) for the first 13 weeks that they are ill. Thereafter, an income protection plan has been established that will pay employees 75% of their annual salary, less basic rate state long-term incapacity benefit, up to their 60th birthday.

Please see the attached "Statement of Benefits" for further information about the above benefits.

18. The relevant passages from the Summary of Benefits are as follows:

**INCOME PROTECTION SCHEME & GROUP
LIFE ASSURANCE SCHEME**

In order to protect you and your family from the potential loss of income resulting from long term sickness or disability, the company have established an Income Protection Scheme with Sun Life Financial of Canada.

...

What benefits are provided?

Under the Group Income Protection Scheme, the payment of benefit commences after the first 13 weeks of incapacity. You will be asked to provide medical certification for the insurance company in respect of any incapacity lasting longer than this period.

After benefits have been paid continuously for 52 weeks the benefit will increase by 5% every year, until you return to work. In this way, your benefits will have a degree of protection from inflation.

...

How much is the benefit?

For the Group Income Protection Scheme, the maximum initial benefit is 75% of your salary less a deduction in respect of the State benefit for a single person.

19. The Claimant contends that the 5% annual escalation should be applied before the state benefits are deducted. Put the other way round, on the Claimant's analysis, the state benefits should be deducted from the income protection benefit after the 5% escalation has been applied. It is submitted on behalf of the Claimant that the wording of the offer letter and the Summary of Benefits is ambiguous as to when the 5% escalation is to be applied. Faced with that ambiguity, the Claimant argues that his analysis reflects what was actually intended between the parties and, further, that his analysis makes business common sense. For those reasons, the Claimant contends that his analysis on this issue should be preferred by the Tribunal.

20. The Respondent contends the reverse. The Respondent contends that the 5% escalator should be applied to the income protection benefit after the state benefits have been deducted from the income protection benefit.

21. On this issue, the Tribunal prefers the Respondent's analysis for the following reasons.

22. The 'benefit' under the income protection scheme was initially set at *"75% of ... salary less a deduction in respect of the State benefit for a single person"*. It follows that the 'benefit' under the income protection scheme was calculated net of the relevant state benefits. Provision was then made for the 'benefit' to be increased by 5% every year after it had been paid continuously for 52 weeks.

23. The Tribunal was not persuaded by the Claimant's argument that the wording of the offer letter and the Summary of Benefits, on this matter, was ambiguous. In the judgment of the Tribunal, the proper construction of the offer letter and the Summary of Benefits was that the 5% escalation was to be applied after the state benefits had been deducted from the benefit payable under the income protection scheme.

The issue concerning the ACAS uplift

24. The Claimant contends that the Respondent failed to comply with the ACAS Code on Disciplinary and Grievance Procedures in the respects set out in Mr Leach's skeleton argument dated the 27th August 2019.
25. The Claimant's central contention is that the grievance that he submitted to the Respondent on the 12th October 2017 (**at pages 408-409 in the liability hearing bundle**), in respect of the non-payment of the 5% escalator, was not dealt with fairly by the Respondent. The reason that the grievance was not dealt with fairly, according to the Claimant, was because of the use made by the Respondent of the 2005 Cramer Employee Handbook to support its position that the Claimant was not entitled to the 5% escalator.
26. On behalf of the Respondent, Mr Siddall QC submitted that there had been compliance with the relevant ACAS Code in relation to the Claimant's grievance. He submitted that the fairness requirement set out in paragraph 4 of the Code related to process and procedure and not substantive decision-making. There was no overarching requirement under the Code that substantive decisions made by an employer should be fair.
27. Paragraph 4 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) provides as follows:
4. **That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:**
- ...
- **Employers and employees should act consistently.**
 - **Employers should carry out any necessary investigations, to establish the facts of the case.**
 - **Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.**

28. There is no doubt, in the judgment of the Tribunal, that the Respondent misdirected itself as to the status of the 2005 Cramer Employee Handbook both when dealing with the Claimant's grievance and in responding to the proceedings alleging unlawful deductions from wages. On the evidence before the Tribunal, the Respondent was wrong to assert, as it did in the grievance process, that the 2005 Cramer Employee Handbook was the 'Manual' referred to in the Claimant's contract of service dated the 25th July 2003. No evidential basis for that assertion had been demonstrated to the Tribunal.

29. It was also clear to the Tribunal that the content of the 2005 Cramer Employee Handbook was at the heart of the Respondent's decision, in response to the Claimant's grievance and subsequent appeal, that the Claimant was not entitled to the 5% escalator that he contended for.

30. The fact that the Respondent asserted with confidence in the grievance process that the 2005 Cramer Employee Handbook was the 'Manual' referred to in the Claimant's contract of employment indicated to the Tribunal that the Respondent's investigation into the Claimant's grievance and subsequent appeal had not been conducted in a fair manner in accordance with the ACAS Code. The Tribunal was accordingly satisfied that there had been a failure to comply with the Code. It should have been obvious to the Respondent that a 2005 Employee Handbook could not have been the 'Manual' referred to in a 2003 contract of employment. Instead of recognising that obvious mismatch between the 2005 Cramer Employee Handbook and the 'Manual' referred to in the Claimant's contract of employment, or demonstrating that the 'Manual' in the 2003 contract of employment was in the same terms as the 2005 Employee Handbook, the Respondent simply made the bald assertion that the 2005 Employee Handbook was the 'Manual' referred to in the Claimant's contract of employment and thereby maintained its position that the Claimant was not entitled to the 5% escalator.

31. Having found that the Respondent did not deal fairly with the Claimant's grievance and subsequent appeal for the reasons set out above, the Tribunal was persuaded that this is a suitable case for an uplift for the failure to comply with the ACAS Code. In the judgment of the Tribunal, the failure to comply with the Code was serious. Had the Respondent investigated the Claimant's grievance fairly, the Respondent would not have asserted that the 2005 Employee Handbook was the 'Manual' referred to in the Claimant's contract of employment in support of its position that the Claimant was not entitled to the 5% escalator and the result would have been that the central plank of the Respondent's case that the Claimant was not so entitled would have fallen away.

32. Having found that there had been a serious failure on the part of the Respondent to apply to the Code, the Tribunal was satisfied that it is just and equitable to increase the award made to the Claimant by 25%.

Remedy

33. The parties were in agreement that the award made to the Claimant should be on a 'gross' basis, leaving it to the Respondent to account to HMRC for any necessary tax and National Insurance deductions. It follows that it will be for the Respondent to calculate the 'net' payment to the Claimant that the 'gross' judgment represents.

34. The Tribunal was grateful to the parties for carrying out the mathematical calculations of the award to be made to the Claimant subject to the Tribunal's findings on the issues set out above.

35. On the basis of the Tribunal's decisions in relation to the three issues identified at the outset of this judgment and on the basis of the figures agreed between the parties, the award to the Claimant (net of the 25% uplift under section 207A of the Trade Union & Labour Relations

(Consolidation) Act 1992 is £23,278.77. Applying the 25% uplift to that figure gives a total award of £29,098.46.

Employment Judge David Harris

Dated: 6th October 2019