



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Khan

**Respondent:** Engie Services Limited

**Heard at:** Manchester

**On:** 8 October 2019

**Before:** Employment Judge Phil Allen  
(sitting alone)

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr D Campion

# JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The respondent did not make unlawful deductions from the claimant's wages.
2. The claimant's claim is therefore dismissed.

# REASONS

## The Issues

1. The claimant's claim was a claim for unlawful deduction from wages under section 13 of the Employment Rights Act 1996. The claimant is employed by the respondent as a Security Officer, with continuity of employment since 9 January 2009. His Employment Tribunal claim was entered on 15 October 2018 following ACAS early conciliation between 29 August 2018 and 29 September 2018.

2. The three issues which it was confirmed at the start of the hearing would need to be determined were as follows:

- (1) Did the respondent make a deduction from the claimant's wages which was not otherwise unauthorised?
- (2) Was the claimant's complaint presented within the period of three months beginning with the last deduction in respect of a series of deductions?
- (3) If so, were any of the deductions made within the period of two years ending with the date of presentation of the complaint?

In fact, the last issue did not turn out to be relevant to the claim as all the deductions relied upon were contended to have been made after 7 July 2017.

3. The claimant claimed that he was owed £19,000 from the respondent, an amount which he said was due since his move from Blackburn Hospital to Tameside General Hospital which had occurred shortly after 7 July 2017. To an extent the claimant's case was that he did not understand how the amount he had been paid had been calculated, but he had not been paid what he was due. The claimant relied upon a table which had been produced on his behalf which he believed showed that the amount claimed was due. As far as he was able to explain his complaint, essentially the claimant alleged that the money was due because:

- (1) he had been paid less following his change of site, without authorisation;
- (2) he was entitled to travel expenses for travelling to the new site;
- (3) he had not been paid overtime payments which he was due for overtime worked since the relocation; and
- (4) he had not been paid the sick pay to which he was entitled.

### **The Hearing**

4. The claimant represented himself at the hearing as he had done since the start of the claim. Although directions had been made for exchange of witness statements, the claimant attended the hearing without having prepared a witness statement and without having sent one to the respondent. At the outset of the hearing the respondent's representative submitted that the claimant should not be allowed to give evidence at the hearing and his claim should be struck out. The claimant, from answers given, clearly did not understand the process. As a result, and consistent with the overriding objective, the claimant was allowed to give evidence at the hearing despite the fact that no statement had been prepared. When allowing the claimant to do so it was confirmed that, if relevant, it would be taken into account that the claimant had seen the statements prepared by the respondent's witnesses in advance of giving his evidence, albeit this did not in fact turn out to be relevant to the decision.

5. The claimant provided to the Tribunal statements from Donna Ramsdale and Fiona Lamb. These were character references for the claimant which had been prepared for the purposes of the internal disciplinary proceedings. The statements were considered but did not add anything to the determination of the issues.

6. The respondent called only one witness to give evidence, Mr Andy Wood, the respondent's Assistant Security Manager at Tameside General Hospital and the claimant's line manager. The respondent had also prepared witness statements for Andrew Cairns and Daryl Parkinson, but the respondent ultimately chose not to call those witnesses and accordingly their statements were given no weight in reaching the decision.

7. An agreed bundle of documents was provided to the Employment Tribunal. Importantly, added to the rear of the bundle was a single page prepared by the respondent for the hearing, which detailed all of the sums which it contended the claimant was entitled to, and all of the payments which had been made to him. It is perhaps unfortunate that this document had not been prepared earlier and/or been given to the claimant prior to the hearing, as it does appear that this was the first time the claimant had received a breakdown of the sick pay due and paid to him.

### **Facts**

8. The claimant had been employed by the respondent to work at Blackburn Hospital. Following disciplinary proceedings (with which the claimant takes issue, but which are not part of the case being considered for this Employment Tribunal hearing), the claimant was informed in 2017 that he was to be dismissed for gross misconduct. However, as an alternative to dismissal, the claimant was offered the opportunity to relocate to Tameside General Hospital and instead have a final written warning imposed for 18 months. The claimant initially rejected that alternative option, but after a period of consideration he changed his mind and instead chose to accept. The offer was accepted on or around 7 July 2017.

9. There appears to have been some confusion from the claimant's perspective about what he was agreeing to. The claimant in his evidence seemed to be under the impression that after 18 months he would be able to return to Blackburn Hospital and therefore this was a temporary arrangement. In fact, the documentation records that the final written warning would be on his record for 18 months, and the relocation was a permanent change. It is clear that the claimant was unhappy about the relocation.

#### *Relocation and pay*

10. Part of the claimant's claim arose from a belief that his pay had dropped when he relocated. The claimant's annual salary at the time was £16,698 per annum, and this remained unchanged on his relocation as was evidenced by his payslips. The claimant was clearly confused about his rate of pay. He did not understand the deductions for tax and national insurance which had been made (something which was particularly raised by him during the internal grievance process) and the focus of his evidence at the Tribunal was on net pay and the fact that he believed he took home less money after the change. The documents produced by the respondent, including the claimant's payslips, appeared to evidence that the claimant's basic pay did not change on relocation. This was also confirmed in evidence by Mr Wood.

#### *Travel expenses*

11. The claimant contended that he should have been paid travel expenses for travelling to Tameside General Hospital after relocating. According to the document

that had been completed on his behalf, this was a journey of 27.86 miles each way each day, and he therefore claimed he should have been paid £12.54 for each journey, and £25.08 per day.

12. No document was produced for the Tribunal which evidenced an entitlement for the Claimant to be paid for the mileage or for any expenses for travelling to Tameside General Hospital. The claimant accepted that he had never previously been paid travel expenses for travelling to his base location, and also that other security officers were not paid the costs of travelling to their base location. The claimant's evidence when questioned was that he had spoken to Andy Wood about travel expenses shortly after relocating and Mr Wood had made a promise that he would look into the issue and would get back to him, but had never done so. When questioned, the claimant's evidence was not that he had been promised that he would be paid travel expenses, but that he thought he should be because it was otherwise a significant expense for him and he was aggrieved that Mr Wood had not got back to him after saying that he would look into the issue.

13. Mr Wood's evidence was that he had never agreed to pay the claimant's travelling expenses, as this was inconsistent with how all security officers were paid. He did not agree that he had made any offer or promise to the claimant to look into the issue. Mr Wood explained this by saying that there was nothing that he could have done about it, and therefore he would not have said that he would have looked into it.

14. The Claimant has not travelled to Tameside General Hospital since he commenced ill health absence in January 2018.

#### *Overtime*

15. In terms of overtime, the claimant contended that he had not been paid for all of the overtime which he had worked. The claimant's case was based upon a spreadsheet which he had prepared and which detailed hours worked, upon which his calculations had been based.

16. Mr Wood's evidence was that the supervisor always checked what was claimed against the rota. If something claimed was not valid, it would not be put through for payment. One such example was that an individual was not entitled to be paid both uplifts and enhancements for the same time. In questioning, both the claimant and Mr Wood were taken to a number of examples within the claimant's spreadsheet of such claims which would not be approved. On this basis, the claimant accepted that the document he produced did not prove an entitlement to payment. The claimant was also not entirely clear in his evidence about the spreadsheet that had been prepared for him.

17. The claimant worked overtime following the relocation in the period between the start of July and 1 October 2017 only. He did not work overtime after 1 October 2017, either in November or December 2017. He certainly did not work any overtime after he commenced sick leave in January 2018.

18. It is clear that the amount of overtime worked by the claimant appears to have dropped following his relocation to Tameside General Hospital. The amount of overtime worked had been variable anyway. There was no evidence of any

contractual obligation on the respondent to provide the claimant with any specific amount of overtime. It appears to be the case that the amount of overtime available, and certainly the amount worked, was lower at Tameside General Hospital. The claimant's resulting lower take home pay at the end of the months he worked, may have led to his overriding perception/complaint that he was paid less after relocating to Tameside and certainly contributed to his view that he could not afford to continue to work for the lower amounts he was receiving at Tameside. However, that is, of course, different from the issue which the Employment Tribunal was asked to determine, that is whether there had been an unlawful deduction from the claimant's pay.

#### *Sick pay*

19. With regard to sick pay, the claimant was contractually entitled to six months full pay during sickness absence. The claimant commenced sick leave on 2 January 2018.

20. There had initially been some confusion about a previous period of suspension, which appears to have been recorded by the respondent on its systems as a period of sick leave. This had been raised by the claimant and the respondent's position was that this had been rectified and the claimant had ultimately been paid full pay for the six month period.

21. The claimant was clearly very confused about what he had received in terms of sick pay payments. The claimant was not assisted in this by payslips which showed a number of variations in the amount of sick pay being paid and large amounts being both deducted and added to his payslips when adjustments were made to the sick pay period. The respondent's evidence was that when the period of absence and sick pay was corrected, the system showed this as a deduction and repayment.

22. The additional spreadsheet produced for the hearing by the respondent, provided an apparently clear record of when the claimant was paid the full six months sick pay and how this was recorded in the payslips the claimant had received. The claimant was not arguing that he had not actually received the amounts showing on his payslips.

#### *Time/jurisdiction issues*

23. In answering questions, the claimant confirmed that whilst he had been unwell following 2 January 2018, he had still been able to raise a grievance. He had sought some external assistance. He had received advice from Scatlift Community Advice Centre in or around February 2018. He had also spoken to at least one solicitor and the GMB. There was no real explanation from the claimant as to the reason why his claims had not been entered at an earlier date.

#### **The Law**

24. It was highlighted to the parties that this was an issue about how much the claimant was entitled to and it was not about the fairness of the disciplinary process or its outcome. The Tribunal could not order the respondent to relocate the claimant's place of work. The key questions were: what amounts were the claimant

entitled to; whether there had been an unauthorised deduction from wages; and, if so, when it/they had occurred.

25. Section 23 of the Employment Rights Act 1996 requires a complaint to be presented before the end of the period of three months beginning with the date of the payment of the wages from which the deduction was made. Where a complaint relates to a series of deductions or payments, the complaint must be brought within three months of the last such payment. If a claim is brought out of time, the question is whether it was reasonably practicable for the claimant to have presented the claim in time and, if it was not, whether it was presented in such further time as was reasonable.

26. The respondent did make reference in their submissions to the case of *Besong v Connex Bus (UK) Limited UKEAT/436/04*. This related to the claim for overtime. It was submitted that if the claimant's allegation was that he had not been given the overtime to which he was entitled (as opposed to not being paid for the overtime worked), that was a breach of contract claim not a claim for unlawful deduction from wages. As the claimant is still employed, the Employment Tribunal did not have jurisdiction to consider a breach of contract claim.

27. The other legal principle highlighted by the respondent was that it was for the claimant to prove that an unlawful deduction from wages had been made.

### **Application of the law to the facts**

28. The claimant's contention that he had not been paid the salary which he was due following his relocation was not something that was evidenced at all. From the documents and the evidence heard it appeared that the claimant's salary continued to be paid following his relocation at the same level as it had before.

29. With regard to the claim for travel expenses, the claimant was absent from work on ill health grounds from 2 January 2018. The last possible deduction of any such expenses was in January 2018, and in all likelihood the last such potential deduction was actually made in December 2017. The claim should have been entered (or early conciliation commenced) by the end of April 2018 at the latest. Early conciliation actually commenced on 29 August 2018, just under four months late. This claim was accordingly out of time. It was reasonably practicable for the claimant to have entered a claim for this in time, evidenced by him raising a grievance and taking advice within the primary period.

30. In any event, the expenses claim was not made out. There was no entitlement to such expense. Even on the claimant's own evidence there was no binding contract committed to by the respondent to pay him the expenses of travel to his new location. It is accordingly not necessary to determine the conflict of evidence between the claimant and Mr Wood on this issue, but had it been necessary to do so I would have preferred Mr Wood's account as it was consistent with the genuine reasons he gave for not making any commitment to look into it.

31. In terms of overtime, this claim is also out of time as the last overtime worked was in October 2017, with the last potential deduction therefore being the end of October 2017 (or at the latest the end of November 2017). Early conciliation was not

entered into until 29 August 2018, being just under six months late. It was reasonably practicable for the claimant to present this claim in time.

32. In any event, there was no genuine evidence available to the Tribunal of overtime which had not been paid and which was due. Whilst the claimant had some calculations which led him to believe that he was entitled to more than had been paid, for the reasons outlined in the evidence section above, this fell short of evidence that amounts due had not been paid

33. The deduction from wages claim in relation to sick pay was entered at the Tribunal within time. It is entirely understandable that the claimant was very confused about the sick pay he received, as the documentation which was sent to him showing what he had been paid was very confusing. Nonetheless, the evidence available to the Employment Tribunal and, in particular, the spreadsheet produced for the hearing, does show that the claimant was paid the full amount to which he was entitled during his sickness absence.

### **Conclusion**

34. For the reasons given above, the Employment Tribunal has determined that the claimant has not established that the respondent has made any unlawful deductions from his pay.

Employment Judge Phil Allen

Date: 29 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 November 2019

FOR THE TRIBUNAL OFFICE

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