



# EMPLOYMENT TRIBUNALS

**Claimant:** Deborah Poole

**Respondent:** Mitie Limited

**Heard at:** Cardiff

**On:** 10 September 2019

**Before:** Employment Judge Moore

## Representation

Claimant: Ms K Gardiner, Counsel

Respondent: Ms R Knight, Counsel

# RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction from wages in respect of the alleged verbal contract to increase her salary does not succeed and is dismissed.
2. The Claimant's claim for unlawful deduction for wages in respect of her maternity bonus succeeds. The Respondent is ordered to pay the Claimant the sum of £1634.61.

# REASONS

Introduction

1. This claim was presented on 17 April 2019. The Claimant brought claims of unlawful deduction from wages and breach of contract. The breach of contract claim was withdrawn subject to the Claimant reserving the right to bring the claim in another jurisdiction. The claim is in respect of unpaid wages the Claimant maintains she is contractually entitled to as a result of a verbal contract and also two week's maternity bonus.
2. The Respondent accepted that the jurisdiction point in respect of time limits for bringing the claim had fallen away due to the Claimant's KIT days.
3. The Claimant remains employed as a Senior Health Care Professional ("SHCP"). The Tribunal heard evidence from the Claimant, Janet Whitwell (SHCP colleague) and Sian Lewis (Lead SHCP) on behalf of the Claimant. Ben Saunders gave evidence on behalf of the Respondent. There was an agreed bundle of 246 pages and a list of issues that was not agreed. The decision was reserved.

Issues

4. An issue remained between the parties as to whether the Respondent could rely on the issue of waiver as it had not been pleaded.

The Law

5. The right not to suffer unauthorised deductions is contained within Section 13 of the Employment Rights Act 1996 ("ERA"). Section 13 (3) ERA provides:

**(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.**

6. In this case the substantive issue was whether there had been an

agreement between the claimant and the respondent to pay her a salary of £45,000 p.a namely an agreed term of the contract resulting in wages properly payable.

7. If there had been such an agreement then this would result in the respondent having failed to pay wages as agreed thereby resulting in an unauthorised deduction.
8. This required the Tribunal to consider whether an agreement had been reached and identify if the requisite elements for a contract are present. If so to then enforce the terms as agreed by the parties.

#### Findings of fact

9. I make the following findings of fact on the balance of probabilities.
10. The Claimant commenced employment as a Forensic Nurse with Tascor Medical Services Ltd (part of Capita Plc) on 23 September 2013. On 1 February 2016 the Claimant's employment transferred by way of TUPE to the Respondent. At the time her ET1 was lodged she was based at Swansea Central Police Station.
11. The Claimant was issued a Statement of Terms & Conditions of Employment ("Tascor terms") by letter dated 27 September 2013. It was a fixed term contract ending 30 September 2014. This was signed by the Claimant on 3 October 2013. It referred to an employee handbook "Your Guide to Capita" which contained details of employee benefits to which the Claimant would be entitled.
12. The Claimant's contract of employment provided she would receive statutory entitlements for maternity payments. The policy and procedures for maternity leave was set out in the employee handbook. This was not contractual.
13. Paragraph 23.5 of the Tascor terms provided:

**“Changes to Your Terms and Conditions of Employment**

**We reserve the right to make reasonable changes to your terms and to the Capita Handbook. You will be notified of minor changes by way of a general notice to all employees. These changes will have effect from the date of the notice. You will, following adherence to any statutory consultation process, be given not less than one month’s written notice of any significant changes and will be deemed to accept them unless you notify us of any obligation in writing giving reasons before the end of that period.”**

14. There was an updated Statement of terms and Conditions of Employment in the bundle stating that it was effective from 23 September 2014. It was not signed by the Claimant. It contained the same provisions in respect of maternity pay and the changes to terms and conditions quoted above.
15. Prior to the TUPE transfer, on 19 January 2016 the Claimant was sent a letter confirming changes to her terms and conditions of employment. This provided changes with effect from 25 January 2016 that the Claimant was to be employed in the position of Senior Forensic Nurse Practitioner with a basic salary of £33,000 per annum.
16. Following receipt of this letter on 25 January 2016 the Claimant raised concerns in an email to her Contract Manager (Jackie Marshall) that it did not reflect what had been agreed in relation to enhanced rates when covering her team leader, contracted hours and an agreement the Claimant could enroll on a Masters course of her choice. Ms Marshall responded on 2 February 2016. I set this out as the Respondent relies upon this as an example of the Claimant being willing to challenge matters that were not in her view correct. I return to this below.
17. Some months later the Claimant began to have discussions with her later Contract Manager, Joanne Vereker regarding a new role of SHCP. The Claimant was promoted to this role on 3 April 2017. Sadly Ms Vereker became very ill and left the Respondent’s employment in July 2017 and has since passed away.

18. The essence of the Claimant's claim is that she entered into a contractually binding agreement with Ms Vereker concerning the Claimant's salary. I therefore take care to set out my findings in respect of the Claimant's evidence and the contemporaneous documents.

Claimant's evidence about alleged contractual verbal agreement

19. The Claimant's ET1 set out that Ms Vereker agreed that the Claimant's pay would increase from £40,000 to £45,000 after a period of three months in the role of SHCP. This would then increase to £50,000 following completion of a Licentiate exam.

20. The Claimant and her witnesses witness statements' gave very limited evidence about the nature of this alleged verbal agreement. There were no specifics as to when the agreement was reached, on what terms, what words were used and what was agreed. At paragraph 5 of the Claimant's witness statement it stated as follows:

**"In the summer of 2016, she [Ms Vereker] discussed with us the creation of a new role called SHCP within South Wales in line with other Mitie contract areas. Our team of senior nurses was Sian Lewis, Jan Whitwell and myself. This discussion included the nature of the role, the pay and completing the licentiate exam along with other training that was to be provided... as part of these discussions, Jo said we would receive a salary of £45,000 which would increase to £50,000 following completion of all training."**

At paragraph 9 it states:

**"as a result [referring to the three-month pilot for the role commencing in April 2017] Jo agreed our interim pay at £40,000, hence the letter, but this would increase to £45,000 once the post became permanent.... The promised pay rise to £45,000 was not implemented in July 2017 when the pilot ended."**

21. It therefore appeared there were two separate dates when the Claimant alleged there had been the verbal agreement in respect of her salary, the Summer of 2016 and at some point, in April 2017.

22. The Claimant was asked about this in cross examination. Her evidence was that there had been numerous discussions in late Summer 2016 but the

main meeting was on 5 April 2017 attended by herself and Jan Whitwell where Ms Vereker informed her that she could only pay £40,000 for three months then after the interview it would go up to £45,000 in line with everyone else who attended the PACR course (see paragraph 29 below).

23. The Claimant's evidence was corroborated by Ms Whitwell. Her witness statement referred to a verbal agreement between herself, the Claimant, Ms Lewis and Jo Vereker in "2016/17". The agreement was described by Ms Whitwell as:

**"we would work as SHCP from April 2017 for 3 months at £40,000 rising to £45,000 after 3 months in line with our English counterparts. We were then to have our salary increased to £50,000 following completion of the licentiate exam."**

24. It was also corroborated to this extent by Ms Lewis who stated that following successful completion of the licentiate exam (commencing in December 2016):

**"...the SHCP role would go from £45,000 per annum to £50,000. There was to be a three-month secondment period April to July 2017. Following this three-month period the rate of pay would increase from £40,000 to the agreed £45,000. This was agreed by Jo. She was the contract manager. I believe she had the authority."**

25. There were no notes of any meetings attended by the Claimant, Ms Whitwell, Ms Lewis and Ms Vereker nor were there any contemporaneous documents, emails or anything in writing reflecting the alleged verbal agreement to pay SHCP's a salary of £45,000.

#### Contemporaneous Documents

26. There was an email exchange in the bundle between Ms Vereker to the Claimant dated 2 November 2016. They were discussing a PACR course being run in December 2016 related to the development of the SHCP role (this was a different course to the Licentiate course – the PACR course was more of an introductory course whereas the Licentiate course was much

more detailed and lengthier). Ms Vereker confirmed to the Claimant that she could get the Claimant on the course as she had identified her as suitable for the position of SHCP but the position needed to be applied for and she would need to attend an interview. She goes on to say:

**“So this course does not mean you are a SHCP yet”.**

27. There is no mention in that email of pay for the SHCP role or any verbal agreement reached earlier that year in respect of a salary of £45,000.

28. I find at this point there may have been outline discussions regarding salaries but there is no evidence to say there was a contractual verbal agreement that the Claimant would be paid £45,000. The email from Ms Vereker does not corroborate any such promise and further it is unlikely that Ms Vereker would have made a commitment to pay the Claimant a salary for a role she had not even been appointed to at that stage.

29. The Claimant's attendance on the PACR course was confirmed and she duly attended in December 2016. During her attendance she discovered that other senior nurses in other contracts were receiving £45,000 towards a £5000 increment on completion of a Licentiate exam which reassured the Claimant as to the position as she understood it in respect of her own pay. I find that the Claimant understood this to be the likely level of pay if and when the SHCP role materialised.

30. There was an email in the bundle from Ms Vereker dated 6 April 2017 to the Claimant and a number of others. This would have been completed the day after the Claimant described in cross examination as the meeting where Ms Vereker promised the pay rise after the three-month pilot.

31. In this email Ms Vereker is introducing the SHCP role which was the Respondent's business model elsewhere but had not been introduced in South Wales. Ms Vereker advises there will be a three-month pilot of the SHCP role in South Wales Police with the Claimant, Ms Lewis and Ms Whitwell developing the role. She also states that all Mitie policies and guidance must be adhered to. Given the context of the email it is

unsurprising she does not go into the salary arrangements of the Claimant.

32. On 7 April 2017 Ms Vereker sent an email to a colleague headed “Change of job forms – SHCP Secondment”. This email attached a “Temporary change to contracts” form related to the Claimant completed by Ms Vereker dated 3 April 2017. Ms Vereker advises that the form needs to be signed by Seb – a reference to Mr Seb Stewart (Managing Director of the Respondent). There was space on the second page for an authorised signature which must have been for Mr Stewart. I find Ms Vereker was aware that she required authority for this change of contract.
33. Although the Claimant was not party to this correspondence it was relevant as it was contemporaneous evidence of what Ms Vereker’s intentions were at the time. Ms Vereker had completed Section B indicating it was a new role and a temporary internal move and specified the rate of pay as £40,000. There was a section below where Ms Vereker could have indicated different requirements which was blank. This would have been the obvious place to note any agreed £45,000 pay rise at the end of the pilot but she did not make any such indication. The date pay and benefits to be reviewed section was also left blank but below set out a review date of 30/6/17.
34. The bundle also contained an email exchange on 3 May 2017 between a Ms Addison, Recruitment Manager and others and Mr Seb Stewart (Managing Director) regarding the recruitment of the SHCP roles. Ms Vereker was not party to this email exchange. It discussed a salary of £40,000 rising to £45,000 on completion of the completed part 1 & 2 of the LLFLM (Licentiate exam). There was no mention that any of the parties to the email were aware of any agreement reached by Ms Vereker to raise the Claimant’s salary to £45,000 after the three-month pilot. Jackie Marshall later sent this email exchange onto a colleague on 9 May 2019 presumably in the context of searching for documents to verify if Ms Vereker had agreed the increase to the SHCP salaries as alleged by the Claimant. Ms Marshall refers to the emails as being the only email she could find in relation to SHCP salaries. The Claimant relies upon the following comment by Ms Marshall as evidence that Ms Vereker was authorised to increase her



salary:

**“I can’t remember which MD was in place when Deb [the Claimant] and Jan were promoted but they will have given Jo the go ahead”**

35. However this does not correspond with the email exchanges at the time that show the SHCP recruitment, role and salary was still being discussed at a senior level. Mr Stewart, the managing director instructed Ms Addison not to rush rolling out the recruitment of SHCPs and that whilst he had no doubt it would happen, they needed to discuss and consider properly beforehand. This does not corroborate or make it likely that Ms Vereker would have made a contractual promise of a salary increase to the Claimant in April 2017. Further, Ms Marshall could have been referring to the promotion of the Claimant rather than the salary promise. For these reasons I do not find the email from Ms Marshall to assist in finding there had been a verbal promise made to the Claimant by Ms Vereker.

36. On 26 May 2017 the Claimant was sent a letter confirming changes to her contract of employment. It stated the changes took effect from 3 April 2017. Next to “Salary” it stated, “Your new salary is £40,000 per annum..”. The Claimant duly signed this letter on 30 May 2017. There is no mention in the letter of the role being temporary or the salary increasing after three months nor did the Claimant go back to anyone within the Respondent to set out her understanding there would be an increase to her salary after three months. The Claimant was asked about this in cross examination and why she did not challenge it as she had done before on another matter. The Claimant said she relied upon the email from Ms Vereker dated 6 April 2017 that there would be a three-month pilot and she believed the salary increase would take place at the end of the pilot. However this is not consistent with her earlier behaviour where she challenged, in detail, matters she perceived to be incorrect. It was unclear whether this was due to sensitivities about Ms Vereker being unwell.

37. No review took place of the Claimant’s position on 30 June 2017. It was around this time Ms Vereker was very ill. I accepted the Claimant’s evidence

that the reason was she felt it totally inappropriate to have raised and pushed the issue at that time given Ms Vereker's health.

38. An interim contract manager was appointed in August 2017, Mr Keith Waddell. The Claimant informed Mr Waddell of the discussions with Ms Vereker about the higher salary and he advised the Claimant to wait until after formal interviews and push for a higher salary at this point.

39. The Claimant was interviewed for the SHCP role and was successful. Mr Waddell sent an email on 22 September 2017 to the Claimant congratulating her on her appointment. He stated that "hopefully" the appointment would be made permanent from 1 October 2017. The Claimant was eventually confirmed in permanent post on 1 December 2017 as evidenced by an internal email from Mr Waddell. The Claimant continued to be paid £40,000 since the initial temporary appointment in April 2017 and this did not change upon her being made permanent.

40. The Claimant was not provided with any new contract or written confirmation of terms. This, along with the failure to confirm the SHCP role was temporary on the May letter was inconsistent with the Claimant's contract that provided changes should be confirmed in writing (see paragraph 13 above).

41. On 4 December 2017 the Claimant raised her concerns in an email to Sarah Lindsey, new Contract Manager. She set out her understanding of the agreement she believed she had reached with Ms Vereker. I set out the relevant sections of that email as follows:

**"£40,000 was never mentioned, always £45,000 when it could finally be implemented in S.Wales. Until we were advised it was all Jo could give us temporarily until it was brought in properly, which she hoped would be at the end of the 3-month period".**

42. The Claimant was subsequently informed that she was on the correct salary as far as the Respondent were concerned, acknowledging there may be others on different salaries in some early adopter contracts.

Grievance

43. For valid and understandable personal and health reasons the Claimant did not raise a formal grievance until on or about 24 May 2018. The Claimant, in referring to the alleged verbal agreement with Ms Vereker stated that pay of £40,000 was promised by Jo **“with a view to increase to £45,000 on completion of secondment and competencies and again increase to £50,000 once our licentiate was complete.”**
44. The email also cited other contracts paying £42,500 - £45,000. An earlier email had referred to indirect discrimination as English counterparts were being paid more. The discrimination reference was not pursued and does not form part of this claim.
45. The grievance hearing was arranged for 21 June 2018 and was conducted by Sean Jenkins, Contract Manager for Hampshire. The outcome was delivered in a letter dated 15 August 2018. The grievance was not upheld except Mr Jenkins agreed that Mr Waddell should not have advised the Claimant to accept the role at £40,000 and negotiate afterwards. Mr Jenkins was satisfied that there was a range of salaries between £40 - £45k across Mitie and was this was not uncommon based on the differing contracts. Mr Jenkins does not appear to have investigated or understood that the Claimant was alleging she had been offered and accepted a pay rise of £45,000 by Ms Vereker, thereby creating a legally binding contract term.
46. The Claimant appealed on 20 August 2018. The appeal hearing was arranged on 10 October 2019 and heard by Ben Saunders, Regional Director. There was a significant delay in Mr Saunders deciding the outcome of the appeal. Mr Saunders conducted a benchmarking exercise for all SHCP salaries. He found that the reasons for the variations reflected SHCP's being assigned to different contracts. Each one had a different budget. Also some staff had TUPE'd to the Respondent on different terms. A number of SHCP's were on the same salary as the Claimant (now £40,800 due to a pay rise). The average salary was found to be £42,500. Mr Saunders says he found nothing to evidence a promise made to the Claimant. He was, for obvious reasons unable to discuss this with Ms

Vereker. He considered any salary increase would have needed higher authorisation than Ms Vereker was able to give and that the alleged verbal agreement contradicted the other findings he had reached (although it was not clear what these findings were).

47. Mr Saunders agreed, as a gesture of goodwill rather than any admission the Claimant was entitled, to backdate her salary to £42,500 with effect from December 2017 when the Claimant had been made permanent in the role.

### Maternity Bonus

48. The Claimant had commenced a period of maternity leave on 16 July 2018. On 10 December 2018 the Claimant was sent an email from Sarah Lindsey who was her new Contract manager, forwarding an email regarding a new maternity policy and pay provisions backdated to 1 October 2018. The Respondent's case was that this was not a contractual variation but a non-contractual policy.

49. The policy did not state that it only applied to certain categories of employees. It stated:

**"I am therefore delighted to announce that effective 1 October 2018, we will be paying an enhanced maternity package to all eligible salaried employees and encouraging mothers to return to work following maternity leave through the introduction of a return to work bonus"**

And

**"any employees currently receiving maternity pay at levels over and above the new policy will have their existing arrangements honoured, however going forward, for consistency and in the spirit of one Mitie, these enhanced arrangements as detailed above will apply to all salaried roles, regardless of level or grade."**

50. After the Claimant's employment had transferred to the Respondent, she had been sent an email containing a transition bulletin on 22 January 2016. This referred to Mitie welcome packs being issued to attendees at welcome meetings which included "your new Mitie handbook". Under "HR" it stated,

“you’ll find most of the answers to your HR questions in your new Mitie handbook.” There must have been an intention by the Respondent that this policy would apply to the Claimant.

51. There was nothing in the Claimant’s Tascor contract that stated the Tascor maternity policy was contractual and therefore requiring a written variation as per the term set out at paragraph 13 above. In any event the Respondent had not consistently applied that term. Given the wording of the communication from the Respondent set out at paragraph 49 and the fact that their communication after transfer stated their maternity policy applied to the Claimant, in changing that policy, that change must have applied to the Claimant.

52. The maternity bonus was defined as 2 week’s pay. In the Maternity Guide this was further defined as being calculated on the newrate (sic) of weekly pay at the time of returning. In the Claimant’s case this amounted to £1634.61 ( $£42,500 / 52 = £817.30 \times 2$ ).

#### Conclusions – Salary increase

53. I accepted the Claimant and her colleagues’ evidence to the extent they believed from discussions with Ms Vereker that she would receive a pay rise to £45,000 at a point in time in the future. These were genuinely held beliefs but not, in my judgment, beliefs that could reasonably be equated to legally binding agreements. It is not clear at which point in time they believed this would happen. The Claimant’s ET1 stated it would be after three months in the role. Her witness statement stated it would be when the post became permanent, which ended up being in December 2017. The three-month period was corroborated by Ms Whitwell and Ms Lewis, who I also have no doubt believed they would receive the same pay rise. They were also entitled to assume that Ms Vereker had the relevant authority to agree salary levels. They were not party to internal procedures such as knowing change of contracts forms required sign off. They reasonably assumed Ms Vereker as Contract Manager had authority.

54. Notwithstanding this belief, I have considered whether all of the requisite

elements of a contract were present namely offer, acceptance, consideration and intention to create legal relations. The burden of proof lies with the Claimant to prove, on the balance of probabilities that there was a contractually binding agreement reached between her and Ms Vereker that she would be paid £45,000. In my judgment, the Claimant has failed to do so.

55. I have taken into account Ms Vereker's behaviour and written communications at the relevant time and find whilst there had been discussions with the Claimant about a salary of £45,000, Ms Vereker did not intend to create or enter into a contractual agreement with the Claimant. This simply was not borne out by the contemporaneous documents. In particular the change of contract form where Ms Vereker could have recorded such discussions about the £45,000 salary but did not do so. Further, Ms Vereker's covering email dated 3 April 2017 indicated she knew even the temporary role had to be approved by the managing director, as she requests that it is signed by him. In my view it is not plausible that Ms Vereker would have made a verbal promise to raise the Claimant's salary after three months without having any evidence of any authority to do so.

56. What was also fatal to the Claimant's claim in my view, was the Claimant's own subsequent correspondence as referred to in paragraph 40 and 42 above where she refers to Ms Vereker "hoped" there would be an increase and agreeing a salary at £40,000 "with a view" to the increase. The Claimant's evidence was already vague as to the actual words used by Ms Vereker. In my judgment this accurately summed up the agreed position at the time that there certainly had been discussions and aspirations that should a state of affairs come into play, the Claimant would receive a salary of £45,000. This however lacked the fundamental element of certainty enabling the Tribunal to determine the exact meaning of what the Claimant says was agreed and when. Even on the Claimant's own account, exactly when the salary would increase was inconsistent.

57. I do not consider what other SHCP's were paid in other contracts to be either relevant or helpful in assisting the issues. Miss Gardiner submitted that

these added weight to the Claimant's position as the exact same terms were offered to someone else. However the Respondent's benchmarking showed there were variations in salary and could have pointed to some else earning a different amount.

58. Given my conclusions that there was no verbal contract between the Claimant and Respondent that she would be paid £45,000, I have not gone on to consider whether the Respondent should be permitted to raise the issue of whether the Claimant had waived her right to enforce the term. Nor do I need to consider whether the term described at paragraph 14 above would have prevented a term being reached orally, although I would observe that had I done so I would have agreed with Miss Gardiner that this holds little weight as it was not adhered to on other occasions by the Respondent.

#### Conclusions – Maternity Bonus

59. The Claimant's contract of employment pre and post transfer provided that she was entitled to SMP only. Post transfer the Respondent introduced a new maternity policy providing for the return to work bonus. The Respondent's case was that the mere issuing of a new maternity policy did not mean the Claimant became entitled to the benefits set out under that policy. This did not reflect what the Respondent communicated to the Claimant both shortly after the transfer, where it was clear that they communicated the Mitie employee handbook would apply, and at the time of issuing the new maternity policy. The wording of the communication set out in paragraph 48 above was such that the new policy was intended to apply to all employees. There was no carve out for employees who were on different terms and conditions due to TUPE transfers. The Claimant's line manager sent her the policy and at no time informed the Claimant it did not apply to her. For these reasons I find that the Claimant was entitled to receive the bonus. I have calculated this based on two week's gross pay at her salary on returning from maternity leave which was £42,500 as per the decision of Mr Saunders.

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Employment Judge Moore

Date: 8 November 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....9 November 2019.....

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FOR EMPLOYMENT TRIBUNALS