# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr FD Toalombo Sanchez**

**Respondent:** **Envirotec Integrated Services Limited**

**Heard at:** **East London Hearing Centre**

**On:** **9 March 2020**

**Before:** **Employment Judge Burgher**

**Representation**

Claimant: Ms A Beech (Trade Union Representative)

Respondent: Did not attend

Ms MA Rodeanas, Spanish Interpreter

# JUDGMENT

**The judgment of the Tribunal is that:-**

1. **The Claimant's claim for unlawful deduction of wages succeeds.**
2. **The Respondent is ordered to pay the Claimant the sum of £3509.77 representing the series of deductions from 1 April 2019 until the date he presented his complaint.**

# REASONS

1 The Claimant brings a claim for unlawful deduction of wages. He remains employed but has not been paid by the Respondent since 1 April 2019.

2 The Claimant gave evidence on his own behalf. The Respondent did not present a response and did not attend the hearing.

3 I have found the following facts.

4 The Claimant has continuous employment with the Respondent as a cleaner on 21 November 2011, when the TUPE provisions have been accounted for. The Claimant actually transferred to work for the Respondent on 19 March 2012.

5 The Claimant initially worked 30 hours per week. His contract states:

> *"you will not be paid the time you have not worked and are not required to work by virtue of your contract. On occasion you may be required to work a number of additional hours to help the requirements of the business. These will normally be paid at your basic rate of pay but additional amounts may be paid at the absolute discretion of the company. Your hours of work and rate of pay is site-specific. In the event that you move site for any reason, whilst every effort will be made by the company to ensure your role, hours and rates remain the same, there may be times where this is not possible and in these circumstances the company will offer you a position that is compatible to your previous position. This may mean a change in location, role, hours all rate of pay."*

6 In 2015 the Claimant increased his hours to 40 hours a week split between two sites in Canning Town. The Claimant worked five hours per day at St Luke's and three hours per day at Salcombe Court. In 2017 the Respondent lost the contract at St Luke's however the Claimant transferred to Element UK and continue to undertake his three hours per day at Salcombe Court. The Claimant therefore worked 15 hours a week for the Respondent from 2017.

7 On 1 April 2019 the Claimant's supervisor, Francisco told him not to come to work anymore. The Claimant also received an email sent by Ms Sharon Bloxham, the Respondent's owner/ Director on 1 April 2019 stating:

> *"Hi Daniel*
>
> *The reason we have asked you not to attend work is that the company has not paid us an [sic] have said they are terminating so you will transfer to the new company – we are waiting confirmation from them about this but they are reluctant to give us any details, unfortunately we cannot allow you to work there if we or you are not going to get paid."*

8 The Claimant stated that he was available to work and specified the hours that he could work. He was not told that it was dismissed and was not told who the transferee company would be.

9 There was no further communication save that the Claimant was being sent monthly payslips stating zero hours and zero pay each month.

10 On 20 June 2019 the Claimant's union representative sent the Respondent a letter stating unlawful deduction of wages and unlawful dismissal. This stated that the Claimant was entitled to 15 hours a week pay and that he had not been told who the transfer company was. The Respondent did not respond to this email.

11 The Claimant contacted ACAS on 15 October 2019 ACAS certificate was issued on 16 October 2019 and the Claimant present his case on 17 October 2019. The Respondent did not present a response.

12 The Claimant remains employed, the Respondent has not explicitly dismissed him, they have not issued a P45 and continue to send him payslips each month.

**Law**

13 Section 13 of the Employment Rights Act 1996 states:

*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.*

*(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.*

14 In order to determine what is properly payable the terms of the contract and the necessity for the Claimant to be ready and willing to work must be considered..

15 In the case of Miles v Wakefield Metropolitan District Council [1987] ICR 368, HL, Lord Templeman stated as follows:

> *"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his* ***pay he must allege and be ready to prove that he worked or was willing to work****."*

16 Applying that principle to the facts of the case before it, the House of Lords held that the district council had been entitled to reduce the pay of a registrar who had refused to conduct Saturday weddings as part of an industrial dispute. However, the *Miles* case involved a deliberate refusal to work normally. In other situations, for example where the employee is prevented from working because of a road accident or a commuter train breaking down or where he loses a licence which he needs to perform his role, the maxim 'no work no pay' is far too simplistic and is not an accurate statement of the legal position.

17 In the recent case of North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, the co-dependency principle was considered in the context of modern employment cases. Lord Justice Coulson made the point as follows:

> *"… In my view developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution… the contractual analysis is fundamental:* ***if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay [in circumstances where the employee has not been at work] then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not****."*

18 In view of the above cases, if the contract does not give the employer the power to withhold pay, the consideration is whether the employee who was not able to work was ready and willing to work.

19 The Claimant's contract does not expressly permit zero hours of work as a possibility to be provided by the Respondent. The Claimant has indicated that is available for work and is not been provided any. The Claimant was ready and willing to work however was not provided with any work. The contract did not provide an express or implied basis to withhold work. Under the current contract terms, the Respondent is obliged to provide at least 15 hours of work each week.

20 The Claimant has not been offered work or paid for 15 hours each week. There is therefore an unlawful deduction of wages in respect of the months that the Claimant was not provided with work. The Respondent could have either dismissed the Claimant or notified the Claimant of the transferee. It did neither and is therefore liable for the continued loss of wages for the Claimant.

21 There were 28.5 weeks from 1 April to 17 October 2019, the date of the claim. The minimum wage is £8.21 per hour. The Respondent is therefore ordered to pay the Claimant £3509.77 (28.5 x 15 x £8.21) in respect of his claim for unlawful deduction of wages.

22 The Claimant remains employed and unless and until his employment is terminated he is suffering an ongoing loss of earnings of £123.15 per week. However, section 23(4A) of the Employment Rights Act 1996 limits any series of deductions to 2 years ending with the date of the complaint and this will be relevant in respect to any further claim for continued series of deductions that he may choose to bring.

**Employment Judge Burgher**
**Date: 17 March 2020**