



EMPLOYMENT TRIBUNALS

At A Hearing

Claimant: Mr K Thomas

Respondent: Abellio East Midlands Ltd

Heard at: Nottingham
On: Friday 14 August 2020

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Ms Christie Scarborough of Counsel
Respondent: Mr Ruaraidh Fitzpatrick of Counsel

RESERVED JUDGMENT

The Respondent has made an unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996 from 26 April 2019 until the termination of the Claimant's employment on 12 November 2019.

REASONS

Background to this hearing

1. The Claimant presented his claim to the tribunal on 10 March 2020. He had originally been employed by East Midlands Trains Ltd but his employment transferred to the Respondent on 18 August 2019 and his employment continued until his dismissal, which was effective on 12 November 2019.
2. The Claimant brings a claim of unlawful deduction from his wages in contravention of Section 13 of the Employment Rights Act 1996 pursuant to Section 23 of the Act.
3. In his Claim Form, he says that he had agreed with his line managers that

when he had taken over the role as Area Manager of Nottingham Station his pay would increase to £52,000 and the fact that he continued to be paid at his old rate of pay of £42,500 when he was Area Manager at Leicester meant that he had suffered an unlawful deduction of his wages.

4. The Respondent's case is that there was never any agreement reached in May 2019 or at any other time and that his pay remained at £42,500 due to his refusal to agree a staged increase first to £48,000 and then to £52,000.

Evidence

5. I heard evidence from the Claimant and from Grace Babawale, who is Head of Human Resources for the Customer Experience and Commercial parts of the business.
6. There was an agreed bundle of documents and where I refer to page numbers, it is from that bundle.

The facts

7. The Respondent is better known as "East Midlands Railway" or "EMR". It is the train operating company that runs mainline services between London St Pancras and the North of England, as well as local services in and around the East Midlands area. It has been in operation since 18 August 2019.
8. Before then, the train services in question were operated by East Midlands Trains Ltd. The Respondent had been successful in tendering for the Government's franchise to run the services and the whole of the business transferred to the Respondent on 18 August 2019. All employees transferred under the terms of the TUPE Regulations, including the Claimant.
9. Mr Thomas commenced employment on 25 February 2019 as Area Manager for the Leicester Area with a contracted salary of £42,500 per annum (pages B2 and B12).
10. On 11 March 2019, the Claimant met with Duncan Cale (Interim General Manager East) and Dan Lucas (General Manager South). At the meeting, he was told that Dan Robson (then Area Manager for Nottingham) was moving to a new role and Mr Thomas was asked if he was willing to take up the role of Area Manager for Nottingham.
11. Nottingham was the biggest and most complex station on the Respondent's network and there were many issues about performance and high levels of absence.
12. Mr Cale told Mr Thomas that there would be an increase in salary to acknowledge the greater responsibilities in the role. Mr Thomas had 10 years of experience in this type of role and expected a substantial increase in his salary but there was no specific agreement about the salary he would be paid at the time and he accepted the role.

13. On 25 March 2019, he started taking over from Mr Robson as part of a one-month handover period, which was completed on 26 April 2019.
14. I have seen the Employee Change Form issued 3 April 2019, which indicates that the date of change from his role at Leicester to Nottingham took place on 1 April 2019. It indicates that his line manager was Duncan Cale and there was no change in salary. No agreement had been reached at that stage.
15. On 15 April 2019, the Claimant was written to about the East Midlands rail franchise announcement. He was told that the Respondent had been selected to run the next East Midlands rail franchise with effect from 18 August 2019.
16. On 26 April 2019, Mr Thomas was sent a confirmation of his location change to Area Manager Nottingham (B18). That form required him to accept the offer of employment. He did not sign the acceptance because there had still not been any agreement about his salary.
17. On 2 May 2019, Mr Thomas met with Adam Piddington (Customer Experience Director of the Respondent) and Mr Cale. Also in attendance was Ms Turner. I am satisfied that they had discussions about his salary and it was agreed that Mr Thomas's salary should be increased to £52,000 per annum. Mr Piddington needed to obtain the agreement of HR before he would be able to confirm this increase in pay.
18. On 10 May 2019, Mr Cale wrote to Mr Piddington regarding Mr Thomas's salary. He said:

“ ...

As discussed last week Kev Thomas has moved from Leicester AM on £42'500 to Nottingham on the same salary. In the CX Salary review in Dec 2017 the Nottingham AM salary came out at £53'500.

Precedent was set when Dan Robson moved from Derby to Nottingham and was uplifted.

Can you do right by Kevin and bring him into line with appropriate salary for the role.

If you need more detail please let me know.

...”

19. Mr Piddington then wrote to Grace Babawale on the same day (also B23) saying:

“ ...

Not sure how he transferred on this salary. Can we adjust?

...”

20. On 16 May 2019, Grace Babawale wrote to Mr Piddington in reply, saying:

“... ”

I have reviewed the paper trail and the salary banding.

Dan Robson initially came in at the mid quartile for the band at £48K on a Fixed term contract.

I would be in support of moving Keven from £42,500K to £48K with a journey to taking him up further after he has achieved some key objectives in Nottingham in 4-6 months.

Hope this is okay.

“... ”

21. There is no evidence of Mr Piddington's response to this but on 20 May 2019, Ms Babawale wrote to Mr Cale sending copies to Sarah Turner (HR) and Adam Piddington saying as follows:

“Hi all,

I am happy for Kev to move to £48K and once he's achieved key objectives in Notts we can look at reviewing to move to £52K.

We have salary bands and moving internal moves to 110% of the salary band is not something we would do in one go. £52K is 110% of the band for Nottingham.

My record shows that Dan was on £48K when he was in Derby for a year before he getting £4K increase when he moved to Nottingham. Hence it is reasonable to give Kev a £6K increase.

“... ”

22. I have also seen the Employee Change Form for Mr Thomas dated 7 June 2019 which says that he would increase to £48K with effect from that date and his pay would be backdated to 11 March 2019.
23. Mr Thomas had not been aware of these discussions. He had understood all along that his salary would be increasing to £52,000 per annum but later in May 2019 in a conversation with Mr Cale he was told that his salary had not been increased to £52,000 per annum as they discussed because Kirsty Derry (Human Resources Director) did not agree to the increase.
24. Mr Thomas was later told by Mr Cale, also in May 2019, that the Human Resources would not agree to his request for a salary increase. He was told that they would only agree to increasing his pay to £48,000 per annum even though they would have expected to pay more than £52,000 per annum if they

had recruited externally.

25. Mr Thomas made it clear to Mr Cale that he was not happy about the £48,000 per annum, especially after a conversation with Sarah Turner (Interim Customer Experience Director) who told him that Robson's salary of £52,000 per annum was not dependent on his achieving any KPIs and that the role had gone through the Hay assessment and had been graded at £52,000 per annum in 2016.
26. On 12 June 2019, Mr Thomas received a letter about a salary increase to £48,000 per annum with effect from 11 March 2019. He was told that it would be subject to review in July 2020 (page B31). He was asked to sign and return his acceptance of the offer.
27. Mr Thomas wrote to Mr Cale on 16 June 2019 (page B33). He said:

“... ”

I would like an explanation as to why HR state that my current role of Area Manager Nottingham should be paid £48K, when this role has been assessed by the company using the Hay model as paid £52K more than two years ago?

“... ”

28. He went on to say:

“... ”

EMT approached me during my 2nd week of company induction and dispatch training and I was offered the role of Area Manager Nottingham, acknowledged as the biggest and most complex station on the EMT network. I accepted, maybe stupidly, without asking some relevant questions such as salary, as I expected EMT to live up to the values I had just been taught of “We do the right things”.

I know that that the previous Area Manager for Nottingham was given the salary of £52K when he started at least 2.5 years ago and, deservedly, had 2 years of incremental pay rises due to good performance reviews.

The Salary is for the role and not individual, so I would also like to ask secondly why that Salary has not been kept in-line with other company increases over the 2-3 years since the role was first created and put through the Hay model?

On the basis that I should be receiving that increased salary (as identified in the Nottingham budget), I would undertake to continue to achieve my company objectives and KPIs and if this were not the case I would expect to be performance managed accordingly.

“... ”

29. Mr Cale responded to this (page B32):

“ ...

As explained the explanation I received is that the HR records show that the role was hay reviewed at 48K and that the increase Dan Robson received to 52K was performance/objectives based after a period of time and Grace has confirmed this will apply to you also (we need to agree this objective).

Grace – can you confirm this is correct please?

...”

30. No further action was taken, although Mr Thomas spoke to Mr Cale on several occasions about his disappointment regarding the increased pay salary, which had still not been implemented and it had still not been implemented when Mr Thomas received a letter on 15 August 2019 (page B35) confirming his transfer of employment to Abellio East Midlands Ltd.
31. At the beginning of September 2019, Mr Thomas had further discussions with Mr Cale about the increase in salary and the implementation of it. There were further discussions about the uplift of his salary to £52K and when this would be applied from. Mr Cale wrote to Mr Grabham and Ms Babawale about this on 11 September and received an immediate reply from Ms Babawale (page B38). She said:

“... I cannot agree to backdating the £52K back to March as this seems to defeat the objective of seeing how Kevin performs in the role?

He will get £48K as agreed from March to 11 Sept and the salary increase of £52K from now onwards.

Pls can you alter the form and resend to Neil and I.

...”

32. As a result, Mr Cale wrote to Mr Thomas on 11 September 2019 (page B39). It said:

“ ...

Further to recent discussions, I am delighted to confirm your salary will increase to £48,000 per annum with effect from 25 March 2019. Following successful completion of your probationary period, your salary will increase to £52,000 with effect from 2 September 2019. Any outstanding pay will be backdated.

...”

33. He asked for confirmation and agreement. The letter was handed by Mr Cale to Mr Thomas who said that he did not understand why his salary increase was conditional on passing a probationary period because this had never been

mentioned before. He worked long hours and fully deserved his increase in pay, he felt.

34. On 21 September 2019, Mr Thomas spoke with Neil Grabham (the new Customer Service Director) and told him he was disappointed at the way his salary issue had been dealt with.
35. On 22 October 2019, Mr Thomas wrote to Mr Cale to tell him that he was planning on raising a grievance about the unresolved pay issue. He then met with Mr Grabham and Ms Babawale on 5 November 2019 and was told that they would be terminating his employment with immediate effect with one week's pay in lieu of notice. Ultimately though, his employment did not end until 12 November 2019.
36. On 15 November 2019, Mr Thomas wrote to Bryony Northwood about his unresolved salary issue (pages B41-2). He told them that if the matter was not resolved, he would take legal proceedings.
37. Ms Babawale responded (page B41). She said that if he returned the signed pay offer letters of June and September by email, she would get his final pay rectified so that he would receive an increase to £48K for the period between 1 April 2019 and 10 September 2019 and an increase to £52.5K from 11 September 2019 to his termination date.
38. Mr Thomas would not agree to do this.

The law

39. The claim is made under section 13 Employment Rights Act 1996 (ERA), which provides:

“13 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.”*

40. Wages is defined by section 27 ERA, as:

“... any sums payable to the worker in connection with his employment ...”

41. Section 13(3) provides that a deduction occurs 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 ...”.

42. In his submissions to me, Mr Fitzpatrick refers to a number of cases, namely:

- ***Agarwal v Cardiff University & Anor [2018] EWCA Civ 2084***
- ***Hellewell & Anor v AXA Services Ltd & Anor UKEAT/0084/11***
- ***Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 WLR 401***
- ***Trollope & Colls Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333***
- ***Pitamber v Thakrar [2019] EWHC 836***
- ***Gestmin SGPS v Credit Suisse [2013] EWHC 3560***

43. Mr Fitzpatrick submits to me that:

43.1 there was never any agreement to increase the Claimant's salary to £52,000;

43.2 his rejection of the offers made to increase his salary meant that the salary he was due under the terms of his contract remained at £42,000, and

43.3 therefore there has been no unlawful deduction of his wages.

44. Ms Scarborough for the Claimant brings forward three arguments, which are:

44.1 that there was an explicit agreement made as to the salary that he should receive £52,000 per year to run from 25 March 2020.

Alternatively,

44.2 the Claimant had a legal right to increased pay, notwithstanding a lack of agreement as to the amount of pay rise between the parties. This is what she described as her quantum meruit submission. In that respect, she relies on:

- ***Ajar-Tec Ltd v Stack [2012] EWCA Civ 543***
- ***Benedetti v Sawiris [2010] EWCA 1424.***

44.3 Ms Scarborough says that in the event of a lack of agreement between the parties as to the correct remuneration for Mr Thomas's services, then Mr Thomas is entitled to payment for his labour on a quantum meruit basis. She says that this falls within the definition of wages in section 27(1)(a) ERA.

44.4 Her final contention if I do not agree with the other two is that Mr Thomas's entitlement to higher pay is because of the Respondent's pay rise letters on 12 June 2019 and 11 September 2019.

44.5 She acknowledges that the difficulty in respect of those letters are that the letters say explicitly that no changes would be made until they had received Mr Thomas's signed response and that he did not respond to the letter to accept the changes.

My Conclusions

45. I am satisfied that the statement of terms of employment make clear that the salary of £42,500 per annum is paid in respect of his role as Area Manager at Leicester.
46. I am also satisfied that when he was offered the position as Area Manager in Nottingham, which is an entirely different role, he took up the position without any agreement as to his salary. As Mr Thomas conceded in his letter to Duncan Cale on 16 June, he accepted the position "maybe stupidly" without asking questions about the salary.
47. I am also satisfied that the Respondent "maybe stupidly" had also offered him the position and allowed him to take up the position without agreeing a salary with him.
48. I am satisfied that both parties anticipated reaching an agreement but they never did so.
49. I am satisfied that the Respondent acknowledged that the Claimant should ultimately receive £52,000 per annum for his job but did not want to pay that sum from the commencement of his position.
50. I reject the Claimant's argument that there was a specific explicit agreement as to salary. His line managers, Mr Cale and Mr Piddington both felt that he should be paid £52,000 per annum, which was the same salary as his predecessor but they had no power to reach any such agreement and the evidence shows that Mr Thomas also knew that his salary had to be ratified by HR before he had a specific agreement to be paid that salary.
51. I also reject Ms Scarborough's submission regarding Mr Thomas's entitlement to higher pay on the basis of the pay rise letters. I am satisfied that those offers of a salary increase required him to accept them and that he would not accept them because they offered him less than he felt that he was entitled to.
52. I am satisfied in this case and the very unusual circumstances of it, that Mr Thomas has a legal right to increased pay, notwithstanding a lack of agreement as to the amount of the pay rise made between the parties.
53. His signed contract of employment whereby he was to receive a salary of £42,500 per annum related to his position as Area Manager at Leicester.
54. Both parties realise in this case and accept that the position of Area Manager in Nottingham is an entirely different position carrying a salary with it of £52,000 per annum. This is evidenced not only by what was paid to the previous incumbent, Mr Robson, but it also had been valued at that level under

a Hay evaluation survey and the Respondent had advertised the position subsequently at that higher salary.

- 55. What this case highlights is that both parties should ensure that before a person commences a new position, they should agree what the employee should be paid for that position. I reject the contention by the Respondent that if there is no agreement, then the Claimant is only entitled to what was payable in his last position.
- 56. I have no hesitation in this case in saying that Mr Thomas is entitled to payment for his labour on a quantum meruit basis. This is not a difficult process in this case. It is clear from all the evidence that I have heard that he was entitled to be paid £52,000 a year.
- 57. I am satisfied that this sum was payable from the time that he took up the position on 25 March 2019 and that he should have been paid that sum until his dismissal with effect from 12 November 2019.
- 58. The non-payment of the difference in wages in this case amounts to an unlawful deduction of wages.
- 59. The Claimant is also entitled to his pension contributions and pay in lieu of untaken annual leave on termination of his employment, as well as his earnings.
- 60. If the parties cannot agree the sums due to the Claimant, I will conduct a remedy hearing but I hope that this is not necessary in this case.

Employment Judge Hutchinson

Date: 9 October 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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