

Case No: 2302296/2019  
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# EMPLOYMENT TRIBUNALS

**Claimants:**

- (1) MR EDMOND BARROW
- (2) MR JOSEPH PERKINS
- (3) MR KEVIN CLUSKER
- (4) MR FITZLLOYD COOPER
- (5) MR MICHAEL BRESLIN

**Respondent:**

MEARS Ltd

**Heard by CVP**

**On:**

12-14 April 2021 and 15 April in chambers

**Before:**

Employment Judge Martin

**Representation**

**Claimants:**

Mrs Barrow (Mr Barrow's wife) acting for all Claimants

**Respondent:**

Mr Jupp – Counsel

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimants claims are unfounded and are dismissed.

## RESERVED REASONS

1. By a claim form presented to the Tribunal on 19 June 2019 all Claimants bring claims of unauthorised deductions from wages and Mr Breslin, Mr Clusker and Mr Perkins also bring claims for breach of contract. The Claims were defended by the Respondent.
2. I had a bundle comprising documents from both parties numbered to 760. Each of the Claimants provided a written statement. For the Respondent I heard from Mr Peter Baldwin (Managing Director); Ms Danielle White (former Human Resources Manager at Apollo Group) and Ms Trudy Hillman (former HR Advisor with the Respondent).
3. The Claimant complained that the Respondent had provided documents after the date set in the case management order. The Respondent explained that these documents only became known when discussing matters with the witnesses. I allowed the documents as there is an ongoing duty to disclose documents and that given the historical nature of this claim it was not surprising that some documents were not initially identified.
4. During Mr Barrow's evidence it became clear that he had a large bundle of payslips which he said were relevant to the question of bonus payments which were not in the bundle and had not been disclosed. He said he had only provided a "*snapshot*" of his payslips in disclosure. Mr Jupp did not object to these documents being introduced even at this late stage and suggested that Mr Barrow send the Respondent all his payslips after the first day of the hearing and that the Respondent would look at them at that point. Rather than adding all the wage slips to the bundle, the Respondent prepared a schedule of the payslips showing bonus payments and this was agreed by Mrs Barrow on behalf of all the Claimants.
5. Rather than set out a separate section on the law, I have structured this judgment following the questions and headings set out in the submissions from the Respondent for convenience. Given that the Claimants are not legally represented, and each issue raises distinct questions of law, it would be easier to follow if I deal with each section in turn, stating the law, my findings of fact and my conclusions.
6. I have made findings of fact on the balance of probabilities having heard the evidence and considered the documents and submissions. Not all matters given in evidence are recorded here. These findings are limited to those which are relevant to the issues and necessary to explain the decision reached. Even if not specifically mentioned, all evidence was heard and considered.

## **The Issues**

7. The Claimants bring the following claims relating to alleged non-payment of bonus claims:

- a. Unauthorised deduction from wages (s. 13 *Employment Rights Act 1996* ('ERA')).
- b. Breach of contract (Perkins, Clusker, Breslin only).a

Entitlement under both claims

8. In respect of each Claimant, have they established that a bonus was 'properly payable' (i.e., they had a contractual entitlement and one which was sufficiently certain)? More specifically, have they established:
9. How and when the contractual entitlement arose?
10. What the terms of the contract were?
11. How the bonus was to be calculated?

Alleged continuing entitlement

12. When was the bonus last paid?
13. If there was a contractual entitlement to a bonus did this come to an end at any point in time?

*The Respondent's case is that any bonus entitlement ended:*

- a. *In April 2011, if not before, when the system that the London Borough of Lambeth used for remunerating contractors changed from being based on a Standard Schedule of Rates to being based on the NEC3 form 'target cost' arrangement with bespoke Schedule of Rates;*
- b. *By each Claimant waiving the breach and/or affirming the contract without any such entitlement by not objecting for lengthy periods of time when the bonus was unpaid which was at least for 3 years during their employment with Apollo Group Limited/Keepmoat Homes Limited.*

The effect of transfers

14. If there was a liability for unpaid bonus and a liability to continue to pay a bonus has each Claimant established that this liability transferred:

- a. From London Borough of Lambeth to Team Lambeth in April 1997;
- b. From Team Lambeth to AWG Facilities Limited (who later became Morrison Facilities Limited) in March 2003;
- c. From Morrison Facilities Ltd to Apollo Group Limited (who later became Keepmoat Homes Limited) in April 2011;
- d. From Keepmoat Homes Limited to the Respondent in July 2014?

### Jurisdiction

15. Unauthorised deduction from wages claims:

- a. In respect of each Claimant when should the claim have been presented?

*The Respondent's case is that time expired at the latest:*

- (a) Mr Barrow 18 June 2019 (sickness absence for over 3 months);*
  - (b) Mr Perkins 28 November 2018 (sickness absence for over 3 months);*
  - (c) Mr Breslin 30 April 2019 (employment terminated more than 3 months before*
- b. If the claim is out of time has each Claimant shown it was it not reasonably practicable for him to present his claim in time; and
  - c. If so in each case were the claims presented within such further period as the Tribunal considers reasonable?

16. Breach of contract claim (Mr Breslin):

- a. In respect of the breach of contract claim of Mr Breslin when should his claim have been presented?

*The Respondent's case is this claim should have been presented no later than 30 April 2019 as his employment terminated in January 2019.*

- b. Has Mr Breslin shown it was it not reasonably practicable for him to present his claim in time; and
- c. If so in each case was this claim presented within such further period as the Tribunal considers reasonable?

17. Remedy

- 18. Should the Tribunal award compensation to each of the Claimants, whether for breach of contract or unlawful deductions from wages?
- 19. If the Tribunal were to award compensation for unlawful deductions from wages, in respect of each of the Claimants:
  - a. has the series of alleged deductions been broken; and
  - b. should the sums awarded be limited to the two-year period prior to the date the claim was issued (i.e., 19 June 2019) in accordance with the *Deduction from Wages (Limitation) Regulations 2014*

**Background**

- 20. This claim is for unpaid bonuses. The history is long and complicated with several transfers from one employer to another involved. All the Claimants were initially employed by the London Borough of Lambeth. Some were initially employed directly as permanent employees, whereas some started as apprentices and were later given permanent contracts of employment. They say their contracts with London Borough of Lambeth were the same. They were first employed by the London Borough of Lambeth in or about 1995.
- 21. It is not surprising given the historical nature of this claim that not all the documents were available which would be relevant to the issues. For example, nearly all the original employment documents were not available save for a couple of statements of terms and conditions of employment which are discussed below.
- 22. The Respondent's evidence is that on a transfer it is often the case that the employee contracts are not sent to the transferee, merely a schedule of terms and conditions and pay details. Transfers from one contractor to another happen frequently in this industry.

23. The work done by the Claimants was to provide tailored rapid-response and planned maintenance services for London Borough of Lambeth's housing. The Claimants are tradesmen such as plumbers, glaziers etc.

24. There were a series of transfers:

<b>Date</b>	<b>Transferee</b>	<b>Transferor</b>
1997	London Borough of Lambeth	Team Lambeth
2003	Team Lambeth	AWG Facilities (who became Morrison)
April 2011	Morrison	Apollo later known as Keepmoat (South region only)
2014	Apollo/Keepmoat	Mears

25. The Respondent's position is that the transfer in April 2011 was not a transfer protected by the TUPE regulations as there was no organised grouping of employees into three regions prior to this transfer. This is discussed further below.

26. In their schedules of loss, the Claimants are claiming: £689.25 pcm (Mr Barrow, and Mr Cooper); £624.56 pcm (Mr Perkins and Mr Clusker) and Mr Breslin is claiming £616.81 pcm for bonus payments not made. It was accepted that the last bonus payments made were in 2011 and that neither Apollo nor the Respondent made any bonus payments. There is a dispute about whether the Claimants objected to the non-payment of bonus payments and carried on working under protest. The Respondent's case is that they did not and thereby affirmed any breach of contract that there may have been. This is discussed further below.

***Did the Claimants have a contractual entitlement to a bonus when they were with London Borough of Lambeth?***

27. **S13 Employment Rights Act 1996**

**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.
28. The Claimants argue that as bonus payment had been paid until 2011, there was an implied term on custom and practice that bonus payment would be paid. Terms may be implied into employment contracts if they are regularly (but not necessarily universally) adopted in a particular trade or industry, in a particular locality or by a particular employer. There is no requirement in these situations that the term would be put into writing. The requirement is that the custom in question must be reasonable, notorious, and certain. There needs to be certainty about what the term implied was.
29. The burden of proof lies with the Claimants. As stated above, there is little by way of documentation from when the Claimants were employed by London Borough of Lambeth. There is no doubt that they received bonus payments whilst employed by the London Borough of Lambeth and after, up until 2011, however this is not sufficient on its own. The Claimant's must show a contractual entitlement to a bonus rather than a discretionary, non-contractual bonus.
30. The London Borough of Lambeth used standard statement of terms and conditions of employment which did not need to be signed. In the bundle there were two such statements. One for Mr Breslin and one for Mr Cooper. The other Claimants did not have a copy of their original terms and conditions of employment, but it was accepted that they received statements of terms and conditions in a similar form.
31. These statements have a section that says, "*Your weekly pay is supplemented by bonus payments*". This is left in, in Mr Cooper's document however it appears to be struck through in Mr Breslin's document. Mr Breslin disputes this saying the strike out is done by way of a scribble and relates to the section above this clause. I do not agree and consider this to mean it is struck out on his document. However, even if it had not been struck through and remained my decision would be the same.
32. For there to be a binding contractual term, that term must be certain. The individual terms of a contract must be sufficiently clear and certain for the courts to be able to give them meaning. In other words, the term must be such that the amount payable can be quantifiable and enforceable. There must be some mechanism whereby the bonus can be calculated.

33. Often, other documents are incorporated such as a bonus payment policy or plan. No such document appears to have been incorporated into the London Borough of Lambeth contracts. There is no mention of it on the statement of terms and conditions before me and there is no such policy or other document in the bundle either. None of the Claimants said that there was such a document that they were aware of. Contractual terms may be void if they are too uncertain to be enforceable.
34. There was evidence that in August 1997 the bonus scheme was discontinued, and an average pay scheme was introduced as an interim measure with a new bonus scheme being introduced towards the end of 1997. This new scheme had two relevant features. The first was that it was not paid during any period of sickness absence (save for industrial injury) and second that it was terminable on three months' notice with staff who had transferred under TUPE being returned to national pay levels until a new scheme was implemented. All Claimants accepted that these terms were applicable to them.
35. The Respondent submits that even if the bonus clause was operative and valid, it cannot be contractual and legally enforceable because the terms of the bonus are uncertain given the lack of any detail in the written particulars and the lack of any other document incorporated into that agreement which gives clarity as to the terms of the bonus scheme. Further, the fact that a bonus was paid at various times is not determinative of a contractual term as there was no consistency in how the bonus was paid.
36. I find that the clause relied on in the written particulars is void for lack of certainty and consequently cannot found a claim for breach of contract or unauthorised deductions from wages. There is no information on how to calculate a bonus payment, no information on what it is assessed against and no information of when it is paid. The Claimants were unable to give any explanation of how the bonus was to be applied and did not know how to calculate their entitlement. Many organisations provide non-contractual bonus schemes to incentivise staff. The fact that a bonus was paid at various points in the Claimants employment does not mean that it was paid pursuant to a binding contractual term.
37. Having come to this conclusion, the Claimant's claims are dismissed. Even had I found that there was a contractual term that a bonus would be paid, the Claimant's claims would still fail for the reasons set out below.

***Was there a valid TUPE transfer of the claimants to Apollo in April 2011?***

38. The Claimants told the Tribunal that when working for Morrison (when Morrison had the whole Lambeth region) that the Claimants were not assigned to any region. In 2011, Lambeth decided that there should be three distinct contracts, North, South, and Central and each area was to be



individually tendered. The result of this tendering process was that Apollo was awarded the South contract, Morrison retained the North region, and another contractor was awarded the Central region. It appears that to facilitate this, Morrison put its staff into the different regions.

39. Up to that time, the Claimants were working across the Lambeth area going where they were told to go. They were not assigned to any specific part of the borough. Following are extracts from my notes of evidence in relation to this point.

**Mr Barrow**

2011, there was a transfer to Apollo. There were three different sectors south, central and North	Yes
You worked on South	No. I emergency P1 section when with Morrison, worked all areas, when TUPED over I was put in South area.
You say when at Morrison you part of a grouping working across all three sectors	Yes, did emergency plumber, all areas.
Team doing emergencies	Yes, I was plumber, Eddie Branco, carpenter, Ted Lynch was Jetter and a contractor.
So none of other claimants part of this team	No, but covered other areas if called down there.
Your overall workload, how frequently would you go out of the south	Went where they sent me.
So you were not allocated to a South Team	My supervisor, Richard Lyons sent me places and I went there.
That was position whilst with AWG/Morrison, then April 2011 transfer, at that point you put in South Team	I was just working for Morrison.
You got TUPED out on South Team	Yes

**Mr Perkins**

Can you recall 2011 employed by Morrison before transfer to Apollo	Yes
When you transferred to Apollo they had South section	I just went where sent South central etc.
If think of Lambeth as a whole, with Morrison before April 2011, did you work across the borough	Yes, right across the borough, all over
	Couldn't say South or Central
But not confined to one area	No
When moved to Apollo work confined to South area	I can't remember
When went to Mears you confined to the South area.	Before April 2011 I was working mostly in the Norwood area.
You said you went all over	At one stage I was. With Morrison went all over.
When with Keepmoat and Apollo you in Norbury area before that with Morrison all over	Yes.
Same for all tradesman	Yes went where told
Not broken in to teams	I don't know, I don't recall this.
	I worked with one person mostly in Norwood area

**Mr Clusker**

Before Morrison where worked	Worked everywhere, only time put us in south for last 6m of the contract. Cherry picked who they wanted on different parts of the contract. For last years stopped you getting work so couldn't earn nothing (Morrison)
Why stop giving you work	As didn't want us to earn money. More time in van waiting for jobs.

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So no bonus with last year with Morrison	Definitely not last 3-4 months, couldn't as not enough work given.
When you say cherry picked people to certain contracts. Morrison trying to cherry pick	
So no teams in place with Morrison	Not technically had same people in all areas.
No, organised team where said you are South Team	No, you did have teams, but could work other areas as well. I worked with Joe Perkins and Michael Breslin sometimes.
Did not routinely come across them when working at Morrison	Only in the office, not in the field, not all the time anyway

**Mr Cooper**

When with Morrison were you working across Lambeth	Working all over until organised and put us into groups, my area mainly Norwood and Streatham. Last part of Morrison put us into groups.
When they knew lost the contract (Morrison) and going to Apollo, they decided to allocate people to different part of the contract. Into geographical area	Yes
When knew you were going to move you to Apollo, said you allocated to the South	Yes. I don't know if point of transfer as most of the time, when contracts going to be changed done well before hand. Don't know if at the time of transfer.
No docs about this.	If going through transfer, contract with Lambeth via TUPE is it my responsibility to dictate who I am going to transfer to and whether they put me.

**Mr Breslin**

History going forward. Went from council to Team Lambeth and then to AWG/Morrison. P292 your history. If trace	Mainly South, but did central...
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employment through working in Lambeth across the borough when started in 1990.	
Continued into Morrison	No, when first LB Lambeth, working in schools across Lambeth.
When to Team Lambeth?	Mainly in the south. Not top sure if across the borough but probably
	Morrison South and Central
But Morrison in 2003, they did entire borough	No
Mears won the North	I did not know
Before 2011 Morrison had the lot	Yes, did they?
	Might have done def had central and South

40. Having considered this evidence, I am satisfied that the Claimants were not assigned to any geographical grouping when Morrison had all the Lambeth work. The Claimants evidence is clear. They worked across the whole borough and went where they were told to go. Mr Clusker refers to Morrison cherry-picking what operatives it was going to put into which contract. i.e., they could choose who they wanted to retain for the North contract which they kept following the tender process.
41. The relevant legislation at this time was the Transfer of Undertakings (Protection of Employment) Regulations 2006.
42. I find that the Claimants were not employed in organised groups when Morrison had all the Lambeth work. They were not assigned to any particular group and went to whatever job they were told to go to which could be anywhere in the borough. The only time they were assigned to a region, was when Lambeth decided to split the region up into three geographical groups and the operatives were put into groups once the tender process was completed to facilitate the transfers. The allocation of operatives into the three groups was done for this purpose only.
43. The principal purpose of the contract between the London Borough of Lambeth and Apollo was to undertake work in the South region. Although the documentation shows that Apollo treated the transfer as a TUPE transfer, the Claimants contracts did not in law have to be honoured by Apollo as their contracts did not transfer under TUPE as they were not in an organised

grouping prior to the transfer.

44. I have spent some time researching this point, as on the face of it, it means that there is a group of employees who do not gain the protection of the TUPE regulations where their employer loses a contract, and the contract is then fragmented. However, I am satisfied following my research that this is the case.
45. From the time that Apollo took over the South region, no bonus payments were made. I find that there was no contractual obligation to pay a bonus as the original Lambeth contracts did not transfer pursuant to TUPE.
46. Even had I found that there was a contractual term that a bonus would be paid, and that term transferred to Apollo, the Claimant's claims would still fail for the reasons set out below and because of the lack of certainty of the bonus to be applied.

***If the Claimant's contracts did transfer in April 2011, what was the obligation regarding a bonus?***

47. By the time that the Claimants employment transferred to Apollo there had been changes to the bonus scheme. The key changes, which the Claimants accept happened, were that the scheme was terminable on 3 months' notice and that a bonus would not be paid whilst the operative was on sick leave unless the reason for this was because of an industrial injury.
48. The evidence for this variation is in a letter dated 23 December 1997 from Team Lambeth. It states:

*"Termination*

*This scheme would be reviewed on an ongoing basis following implementation. Team Lambeth would have the right to give 3 months' notice of termination of the scheme at any point in time. If the scheme was terminated staff who were transferred under the TUPE regulations would return to national pay levels until a new scheme is implemented."*

49. I am satisfied that this scheme was brought into play as the Claimants accept that they had no entitlement to sick pay save for sick leave because of an industrial injury which is a term of the varied scheme.
50. Therefore, the legal analysis is that when Apollo did not make bonus payments it brought the scheme to an end and the Claimants remedy would be for three months bonus payments which is the required period of notice that should have been given. However, there is still the problem of how to calculate the bonus given the lack of any documentation setting this out and the Claimants inability to calculate it accurately. Although the Claimants have

put figures into their schedules of loss, these are not backed up with any calculations or any basis for them.

51. It would have been open to the Claimants to bring a claim for unauthorised deductions from wages within 3 months of the last payment being made. They did not do this, and this claim is about 10 years out of time (see below for further discussion on time limits).

***The effect of the change in remuneration of contractors in 2011***

52. Another factor is that the basis on which Lambeth remunerated the contractor changed. I accept the Respondent's evidence that these changes made it impossible to calculate a bonus on an individual basis. In 2011 the relevant law was the Regulation 4(4) TUPE 2006 which states that a variation of a contract was void where the reason for a variation was (a) the transfer itself, or (b) a reason connected with the transfer that is not an economic, technical, or organisational reason entailing changes in the workforce. I accept the Respondent's submission that the question I need to ask is, what caused the employer to do what it did?
53. I accept the case law cited by the Respondent that simply because a variation takes place against a backdrop of a transfer does not mean that the reason for the variation is because of or connected to the transfer. (**Smith v Trustees of Brooklands College** [2011] UKEAT 0128/11/0509 as applied in **Tabberrer v Mears Ltd** [2018] UKEAT 0064/17/0502).
54. Had there been a valid transfer of employment with an obligation to pay a bonus, then I must ask this question. At this time Lambeth made radical changes to the payment structure. Originally Lambeth calculated bonus payments by reference to a standard schedule of rates (SOR). It is not known if this was the system in place after 1997. I accept the Respondent's submission that even if this method of calculation was in place at the time of the 2011 transfer the change in how the contractor was paid made it impossible to calculate a bonus on an individual basis.
55. Mr Baldwin witness statement addressed this. He said:

*"35. The NEC3 form of contract is very different to a standard SOR based contract. It is a target cost" contract which was new to the market, seen as trendy within the sector and changed the commercial environment for the client and the contractor significantly. The new contract was intended to deliver a comprehensive service, incentivise contractors to perform well across all areas and benefit from the scale and volume of work (pages 451a to 451e and 451n to 451o of the Bundle).*

*36. The fundamental difference is that it has a "pain/gain" mechanism and performance profit is then linked to agreed Key Performance Indicators*

*("KPIs"). This was a fundamental change commercially to how the contract worked.*

*37. For example, where the target cost contract states that the contractor should deliver the job for a cost of £100, if the job actually costs £90 (so cheaper than originally anticipated), the "gains" are shared equally 50/50 between the client and the contractor. However, if the job actually costs £110 to deliver (so more expensive than originally anticipated) the contractor takes all of the "pain" and only gets paid £100 for the job.*

*38. After the "pain/gain" mechanism is applied, an agreed percentage based on performance against agreed KPIs is then applied to the overall monthly profit to determine what the contractor is actually paid. The contractor does not actually know what they are going to be paid until they go through the pain/gain process and performance profit link to KPIs for every single job undertaken.*

*39. In addition, to complicate matters further, the new NEC3 target cost contract was tendered on the basis of a bespoke SOR specific to Lambeth. To explain, there are National Housing Federation Schedule of Rates (known as the Nat Fed Schedule) which is a schedule of nationally recognised rates used for valuing jobs. The benefit of using the Nat Fed Schedule is that a contractor could look at the schedule for a particular job and it would tell them exactly how much they would get paid for that particular job. For example, if the Nat Fed Schedule says that you will get paid £100 for the job but it cost you £90, you know the profit is £10 and can be confident to share that calculation when it comes to a bonus. However, instead of using the Nat Fed Schedule, Lambeth took it as a base and changed the rates to what Lambeth thought they should be, creating a bespoke SOR.*

*40. The point I am making in respect of the bonus issue is that you cannot pay a bonus based on a contract that has so many variables. The NEC3 target cost approach significantly undermines bonus schemes as a contractor is not simply working to the SOR and cannot know what they would be paid for a particular job."*

56. This explanation was given to Mr Martin in response to his grievance in 2011 and to Mr Barrow in response to his grievance with Apollo/Keepmoat in 2014.
57. Therefore, the reason for any change to a bonus scheme would not be because there was a TUPE transfer but rather because of the change in remuneration initiated by Lambeth.

### ***The 2014 Transfer from Keepmoat to the Respondent***

58. By 2014 when there was the transfer to the Respondent the TUPE regulations had been amended to say that any purported variation of a contract of employment that is, or will be, transferred by paragraph (1) “*is void if the sole or principal reason for the variation is the transfer.*” As submitted by the Respondent the wording is more restrictive than a reason ‘*connected*’ to a transfer.
59. It is necessary to ask the question why the Respondent did not pay the bonus at this time and against the legislation in force at that time. The reason given for not paying the bonus given by the Respondent is simply because by 2014 no bonus had been paid for three years and the bonus was not considered to be contractual. Grievances were raised at the time of the transfer by Mr Barrow on behalf of all the Claimants. The matter was investigated (resulting in a delay to the transfer taking effect of one week) and the evidence that the Respondent had was that there was no contractual bonus applicable to their employment.
60. I find that the sole or principal reason the bonus was not paid, was not because of the transfer but because no bonus had been paid for three years and the Respondent did not consider the bonus to be contractual.

***What was the effect of the Claimants failing to challenge the non-payment of the bonus?***

61. Despite the Claimants not receiving a bonus from 2011, following the transfer to Apollo, the first written documentation of any complaint is in 2013 when Mr Martin raised a grievance. He was originally a Claimant in these proceedings but later withdrew. Mr Martin raised a grievance about several matters including the bonus. The outcome letter dated 8 April 2013 said in relation to the bonus:

***“Bonus Scheme***

*In the meeting you stated that since you have been with Apollo. and now Keepmoat, you have not received any bonus payments and that you were told by Tony Goodban, Partnership/Branch Manager that when you transferred this would be something that remained. Given the limited information we have on this and the fact that Tony Goodban has not been with the company for two years. this would have been difficult to investigate. but I can confirm having discussed this with the HR department that during the initial TUPE process it was explained to all employees transferring from the Lambeth contract that the schedule of rates that you once worked to changed for all contractors prior to any moves and was not linked to the transfer. I believe this schedule of rates to the bonus scheme that you referred to in the meeting and as such I therefore believe that this matter can now be closed.”*



Mr Martin did not appeal that decision. The decision was shared with the Claimants.

62. The Claimants said that they raised issues with the non-payment of bonuses on a weekly or even daily basis with their managers from the time they first transferred to Apollo in 2011. They say that were in contact with their union and left it to them to deal with. Mr Baldwin and Ms White (who had both worked at Apollo at the relevant time) said that they did not know of any complaints about the bonuses until just before the TUPE transfer in 2014 when it was raised at the 11<sup>th</sup> hour resulting in a weeks' delay to the transfer happening. This is despite the consultation process which they had undertaken on a collective and individual basis.
63. I find it curious that if as the Claimants said had not been receiving bonuses which they claim to be over £600 per month and that they were regularly complaining that they did not escalate matters when they realised that their managers were doing nothing about their complaints.
64. I also find it curious that there is no correspondence from their union representative to them or to Apollo, until 2014 when they made their complaint just before the transfer date. On their evidence they simply did nothing to escalate matters if indeed they had complained. As Ms White said, she would have expected them to raise the issue with her, as the Human Resources Manager with Apollo. She said she had no knowledge of any issue with a bonus until just before the 2014 transfer and neither did Mr Baldwin who had been brought in by Apollo to bring the contract back on track as it had not been operating well. I accept their evidence.
65. I also find it strange that during the grievance process with the Respondent, the Claimants did not refer to them having raised complaints about the bonus issue on a very regular basis from the time of their transfer to Apollo.
66. It was put to all the Claimants that that their evidence was tailored when they realised this was an issue that the Respondent was raising. Mr Breslin initially agreed. Then he suddenly changed his evidence. It appeared to me that there was someone in the room with him, as immediately he said he agreed, there was a noise which he reacted to by looking to his left. He then changed his evidence saying he disagreed. I asked if he had someone in the room with him and he said he did not, however I was not convinced by this. My note made at the time is reproduced here.

<p>You saw issue raised that you had not complained so belatedly said raised it before</p>	<p>Yes. [Then said No. Seems like someone in room with him. EJ asks he says no. but he looked up to the side and I thought I heard a voice and then changed his answer]</p>
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67. On the balance of probabilities taking all these matters into account, and despite the Claimants saying that they did complain on a regular basis, I find on the balance of probabilities that the Claimants did not complain about a bonus as they say they did. Mr Clusker, when asked about this said, "*I raised a few questions with management who said would look into it, but nothing done.*" (Taken from my notes of evidence). Even if they had mentioned it to management, it appears that it was not mentioned regularly as they maintained at this hearing, and not with any indication of them working under protest.
68. If there was a valid contractual right to a bonus, and if this right transferred under TUPE, the Claimants would have been entitled to a bonus each month from 2011. I am satisfied that had the bonus been contractual, then non-payment of it would be a repudiatory breach of contract entitling the Claimant's to terminate the contract or to continue the contract and affirm or waive the breach.
69. I find that the Claimants affirmed any breach of contract. They continued to work and continued to accept wages. This is not a case where the effect of the breach would not be known for some time. The effect of the breach would have an immediate effect in that they were not receiving substantial bonus payments monthly.
70. Therefore, on the balance of probabilities I find that by the time of the transfer to the Respondent, there was no longer a contractual right to a bonus.

### ***Time limits***

71. The Claimants entered into ACAS early conciliation on 27 January 2019 and the early conciliation certificate was issued on 27 February 2019. The claim was presented to the Tribunal on 19 June 2019.

### **Unauthorised deductions from wages**

72. The time limit for bring a claim of unauthorised deductions from wages is three months of the deduction or three months from the end of a series of deductions pursuant to s23(2) Employment Rights Act 1996.
73. All claimants agreed that they did not receive pay when they were on sick leave (save for industrial injury). The following periods of sick leave are relevant and they accepted that they would not be entitled to bonus during these periods:

Mr Perkins	28 August 2018 to 8 February 2019
Mr Breslin	20 April 2018 to 7 January 2019

74. Consequently, the last deduction in a series was made on 28 August for Mr Perkins, giving a limitation date of 27 November 2018 and for Mr Breslin the last deduction in a series was on 20 April 2018 giving a limitation date of 19 July 2018. ACAS conciliation began after these dates, and consequently has no impact on time limits. For these two Claimant's their claims are out of time.
75. I have a discretion to extend time if the Claimants can show it was not reasonably practicable to have brought their claims in time. This test is a narrow test and requires the Claimants to show was it was not practicable or possible to have brought their claims in time. The Claimants witness statements do not deal with this matter however they were asked questions both during cross-examination and by me.
76. The following facts are relevant to my decision. The Claimants were represented by the GMB union throughout; the Claimants were acting together throughout; Mr Barrow or the GMB on the behalf of all Claimants contacted ACAS in 2014 and obtained an early conciliation certificate; the reason given for not bringing a claim earlier is that they were waiting for the Respondent and the GMB to sort things out despite on their evidence having waited for about three years.
77. Taking all of this into account I find it was reasonably practicable to have brought the claims in time. There was nothing stopping Mr Breslin or Mr Perkins from presenting a claim within the time limit. I understand that they criticise how the GMB handled matters on their behalf, however they appear to have taken a very passive stance, just waiting for something to happen. I cannot understand why they would do this, when they are claiming over £600 pcm in unpaid bonuses which had not been paid since 2011. I can understand waiting a few weeks or even a couple of months, but not for as long as it took the Claimants to pursue their claims.
78. I therefore find that the claims of unauthorised deduction from wages for Mr Breslin and Mr Perkins are out of time and are dismissed. The other Claimant's claims were brought in time.

#### Breach of contract

79. The time limit to present a claim for breach of contract is within three months of the termination of employment. Claims for breach of contract are brought by Mr Breslin, Mr Clusker and Mr Perkins. Mr Clusker and Mr Perkins presented their claims in time.
80. Mr Breslin's employment with the Respondent terminated in January 2019 (no specific date has been provided). Therefore, I have used the 31 January 2019 as the effective date of termination for the purposes of this judgment.

Considering ACAS conciliation, the final date to bring a claim was 30 May 2019. A claim was not presented until 19 June 2019.

81. I therefore considered the evidence given by Mr Breslin as to why he did not bring his claim in time. The same test of reasonable practicability applies to this head of claim as to the unauthorised deductions from wages claims. Mr Breslin did not provide any information in his written witness statement which addressed this issue. He provided no information in his evidence either. I have considered the same points I have set out above in relation to unauthorised deductions from wages.
82. The burden is on him to provide information to show why it was not reasonably practicable. This was not done and consequently I do not have any information on which to exercise my discretion to extend time. In the circumstances Mr Breslin's claim for breach of contract is out of time and dismissed.
83. The Claimant's claims are therefore dismissed for the reasons set out above.
84. On a final note, I would like to thank both representatives for the way they conducted the hearing. A particular mention goes to Mrs Barrow, who despite not being legally qualified had prepared well, had a good command of the paperwork, and asked relevant questions of the Respondent's witnesses.

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Employment Judge Martin

Date 28 April 2021

**Appendix**

**Chronology (prepared by the Respondent)**

<b>Date</b>	<b>Event</b>	<b>Page</b>
1979	Perkins commenced employment with LB Lambeth	p160
1990	Breslin commenced employment with LB Lambeth	p292
Sep-74	Clusker commenced employment with LB Lambeth	p232
Aug-86	Barrow commenced employment with LB Lambeth	p69
23/06/1987	Cooper commenced employment with LB Lambeth	p265
30/10/1995	Notice given by LB Lambeth of changes to terms and conditions including pay	p72, p232a, p331
29/11/1995	LB Lambeth impose changes to terms and condition in a dismissal and reengagement exercise with effect from 1 December 2015	p298a, p332
12/02/1997	LB Lambeth reimposed permanent contracts on those who had entered temporary contracts	p75
07/04/1997	Service transferred from LB Lambeth to 'Team Lambeth'	p476
14/08/1997	Team Lambeth indicate that bonus scheme could not be continued so an average pay scheme was being introduced	p477
23/12/1997	Notice given by Team Lambeth that the bonus scheme based on average pay would end on 31 December 1997. Team Lambeth indicate New Performance Pay Scheme. With terms including no payment during sickness absence and termination of the scheme on 3 months' notice	p76, p85, p161, p233, p341, p479
22/02/2000	Memo Team Lambeth apologising for incomplete bonus payments	p299, p387, p488
08/07/2002	Best Value Review	p389
27/03/2003	Service transferred from 'Team Lambeth' to 'AWG Facilities Services Ltd' (became Morrison Facilities Limited)	p95, p489
24/04/2003	Letter from AWG announcing payroll changes	p491
08/12/2003	JVA Renegotiations Paper	p430
01/08/2005	Morrison give notice of increase in bonus	p103, p171, p494
18/04/2006	Morrison salary review April 2006	p105, p172, p495

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06/12/2006	Morrison indicate it is unable to produce accurate bonus calculations	p107, p173, p233, p300, p496
28/03/2013	Grievance hearing for Martin in which issue of non payment of bonus is raised	p350
08/03/2013	Keepmoat respond to Martin Grievance	p374
14/05/2014	Keepmoat respond to complaint by Barrow including bonus	p117, p500
01/04/2011	Service transferred from 'Morrison Facilities Ltd' to 'Apollo Group' (became Keepmoat)	
17/06/2014	Mears provide details of measures	P193, p243, p315, p452, p459
01/07/2014	Service transferred from Keepmoat to Mears Limited	
01/09/2014	ACAS Notification re Barrow	p148
01/10/2014	ACAS certificate issued re Barrow	p148
20/09/2018	Collective Grievance	p468
06/12/2018	Grievance outcome	p589
10/12/2018	Grievance Appeal	p601
Jan-19	Breslin 's employment terminated	p292
27/01/2019	ACAS notified	p1 to p7
27/02/2019	EC Certificate issued	p1 to p7
Apr-19	Clusker's employment terminates	p232
10/05/2019	Appeal outcome	p630
31/05/2019	Perkins' employment terminated	P160
19/06/2019	ET1 issued	p9