



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Stanley

**Respondent:** The Secretary of State for Justice

**Heard at:** Leeds by Cloud Video Platform      **On:** 14 June 2021

**Before:** Employment Judge Evans (sitting alone)

## **Representation**

**Claimant:** in person

**Respondent:** Mrs Gray (Counsel)

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

# JUDGMENT

- 1) The name of the respondent is amended by consent to “The Secretary of State for Justice”.
- 2) The respondent has not made unauthorised deductions from the claimant’s wages. The claim fails and is dismissed.

# REASONS

## **Preamble**

1. The claimant presented a complaint to the Employment Tribunal on 14 April 2021 for “other payments” saying he was being “told to cover duties above my grade with no extra pay”. The claimant has been employed by the respondent since 1986.
2. A Notice of Hearing was sent to the parties on 23 April 2021 containing case management orders. At the hearing on 14 June 2021 before me (“the Hearing”), the parties agreed that I should have regard to the following documents:
  - 2.1. A bundle prepared by the respondent running to 175 pages;

2.2. A document titled "Fair and sustainable – Revision to proposal for working structures in HM Prison Service following the consultation with trade unions" dated 9 February 2021 ("the F&S document").

Page number references are to the bundle prepared by the respondent unless otherwise stated.

3. At the Hearing, the claimant gave evidence on oath adopting as his witness statement a short email dated 9 June 2021 which he had sent to the Tribunal and the respondent's representative. Mrs Wood, a B6 manager employed by the respondent, gave evidence for the respondent by reference to a witness statement dated 10 June 2021.
4. After the two witnesses had given their evidence, Mrs Gray and the claimant each made brief oral submissions.
5. There was some delay at the beginning of the Hearing as a result of technical problems experienced by some of those who needed to enter the virtual hearing room. The claim had only been listed for two hours. I was unable to give judgment on the day and this is therefore my reserved judgment.

### **The claim and the issues**

6. At the beginning of the Hearing there was a discussion of the issues which I would need to decide. During the course of that discussion the claimant consented to the name of the respondent being amended to "The Secretary of State for Justice".
7. The claimant's claim may reasonably be summarised as follows. In 2012 the Prison Service introduced new pay arrangements which were referred to as "Fair and Sustainable" ("the Fair and Sustainable terms"). The new pay levels were lower for existing staff and only new employees were put on them. Existing employees, such as the claimant, remained on their old pay arrangements ("the legacy terms"). At the same time, there was a Job Evaluation Scheme under which all existing roles were mapped across to new roles. The role of the claimant (Prison Officer with a specialist role as a Physical Education Instructor) was (according to the respondent) mapped to the new role of Specialist Officer B4. The respondent has since 2012 regarded the claimant as being in B4, i.e. Band 4.
8. Since 2012 annual increases to the Fair and Sustainable terms have been greater than those to the legacy terms. Consequently, by March 2020 the pay of a Band 4 officer under the Fair and Sustainable terms was £433 a year higher than under the legacy terms.
9. Officers who continue to be employed under legacy terms are given an opportunity annually to move to the Fair and Sustainable terms. The respondent wrote to the claimant in this regard on 9 March 2020 (page 52). The respondent indicated that if the claimant opted into the Fair and Sustainable terms he would receive a pay increase of £433.31 per annum and, also, estimated backpay of £397.20. The letter assured the claimant that "all of your other contractual terms and conditions are unchanged, including any individual protection e.g. whether you are required to take a fitness test". However, the claimant did not opt in to the Fair and Sustainable terms. He explained at the Hearing that this was essentially because as a 34 year veteran of the Prison Service he did not trust the respondent in relation to terms and conditions.

10. The immediate cause of the claim appears to be that in recent times, particularly as a result of Covid, the respondent has sought to give the claimant duties outside the gymnasium, which has for obvious reasons been closed. The respondent has required the claimant to work as a supervising officer which, the claimant says, can require him to have immediate management of a prison wing housing 150 inmates and of 15 prison officers. The claimant has complied with instructions to perform such duties but does not think that he should be required to perform them because, prior to the introduction of the Fair and Sustainable terms in 2012, as a Prison Officer with a specialist role he was simply deployed as a normal prison officer in a prison wing if work was not available for him in the gymnasium. He was not required to perform any kind of supervisory role.
11. The claimant contends, consequently, that as he is being required to perform the duties of a B4 prison officer he should be paid the B4 rate under the Fair and Sustainable terms, whether or not he has opted into them.
12. Consequently, the legal issue identified at the conclusion of the discussion at the beginning of the Hearing was whether the respondent had made unauthorised deductions from the claimant's wages in breach of section 13 of the Employment Rights Act 1996 ("the 1996 Act") by failing to pay the claimant the rate payable to B4 officers under the Fair and Sustainable terms since 2012.
13. The claimant had valued his claim going back to 2012 at £6499.65 (page 161). However at the beginning of the Hearing I explained that the effect of section 23(4A) of the 1996 Act was that he would not be able to recover any amounts deducted prior to the date falling two years before the date on which he had presented his claim to the Tribunal. In light of this, the parties agreed that, if the claimant were successful, the amount that would have been deducted would be £866.62.

### **The Law**

14. Section 13 of the 1996 Act provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.
15. "Wages" means any sums payable to a worker in connection with their employment, including any fee, bonus, commission, holiday pay or other emolument referable to their employment, whether payable under their contract or otherwise (section 27 of the 1996 Act). It is necessary for the worker to show some legal entitlement to the sum in question, although the entitlement need not necessarily arise from an express term in the contract (New Century Cleaning v Ltd v Church [2000] IRLR 27).
16. Section 23 of the 1996 Act deals with complaints to an employment Tribunal. Where a Tribunal finds a complaint under section 23 well-founded it shall make a declaration to that effect and order the employer to pay the worker the amount of any deductions made in contravention of section 13.
17. As noted above, a Tribunal may not, however, consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint (section 23(4A) of the 1996 Act).

**Findings of fact**

18. I do not of necessity refer to all of the evidence before me but I have taken all of it into account in making these findings.
19. The claimant remains employed under the legacy terms. This is his choice. He prefers not to opt in to the Fair and Sustainable terms (and thereby agree to a variation of his terms and conditions) which would result in him being entitled to be paid in accordance with the Fair and Sustainable terms which would, as of March 2020, have resulted in his annual pay increasing by £433.31 a year.
20. There appears to be some confusion in the F&S document. Mrs Wood for the respondent accepted in cross examination that this part of the flowchart at page 16 of the F&S document meant that it was not “clear” (the claimant’s point being that this part of the flowchart suggests that he should have been treated as a B3 officer under the JES which coincided with the 2012 changes):



21. Mrs Wood pointed out that elsewhere the text of the F&S document pointed to the claimant’s role having been mapped to a B4 role (in particular, paragraphs 96 to 99 of the F&S document).
22. However, the contents of the F&S document are of very limited relevance to the claimant in the context of this claim. It is clear that the claimant remains employed under the legacy terms. He does not contend otherwise and, indeed, is clear about the reason for his refusal to opt into the Fair and Sustainable terms (and thereby vary the terms under which he is employed).
23. I find that there is nothing in the legacy terms which entitles the claimant to be paid at a higher rate than he is currently paid when he is required to perform the duties of a B4 officer.

**Submissions**

24. The submissions of the parties were brief and may reasonably be summarised as follows. Mrs Gray for the respondent submitted that the claimant would be entitled to wages at the higher rate provided for by the Fair and Sustainable terms if he opted in to those terms. The claimant had, however, chosen not to do so. He was unable to point to any provision under the legacy terms entitling him to a higher rate of pay than the one he was receiving for carrying out the duties appropriate to a B4 officer. Consequently no unauthorised deduction had been made from his pay.
25. The claimant submitted that the Fair and Sustainable terms were “as clear as mud”. It was not clear whether his role had been mapped to a B4 or B3 role. The Prison Service had moved the goalposts in 2012 saying that whether or not he opted into the Fair and Sustainable terms he could be required to carry out a supervisory role which he had never previously been required to perform.

**Conclusions**

26. In order to succeed in his claim, the claimant needs to prove that the respondent has paid him less than the amount payable to him by reference to a legal entitlement. The claimant does not dispute that he continues to be employed under the legacy terms and was unable to identify anything in the legacy terms which entitles him to be paid at the rate applicable to a B4 role under the Fair and Sustainable terms for performing his current role. Nor did he identify any other legal entitlement for him to be paid at the B4 rate under the Fair and Sustainable terms for performing his current role.
27. Because the claimant has failed to prove that he has been paid less than the amount payable to him by reference to a legal entitlement, he has failed to prove that the respondent has made unauthorised deductions from his wages in breach of section 13 of the 1996 Act. Consequently his claim for unauthorised deductions fails and is dismissed.
28. Realistically, the dispute between the claimant and the respondent is about duties and not pay. This was reflected in the claimant's contention that it appeared that perhaps his pre-2012 role should have been mapped to the new B3 role not the new B4 role, given that pre-2012 he had no supervisory responsibilities. The claimant's argument, in reality, is not that he is being paid incorrectly under the legacy terms, but rather that he is being required to perform duties which he should not be required to perform. However that is not a question to be determined in the context of a claim for unauthorised deductions from wages.

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Employment Judge Evans

Date: 16 June 2021

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