Case No: 2409763/2020
2409739/2020
2409741/2020
3300984/2021

EMPLOYMENT TRIBUNALS

Claimants: Mr Stewart Taylor
Mr Roy Addicottt
Mr John Beckerton
Mr David Murphy

Respondent: British Gas Services Limited

HELD AT: Manchester (by CVP) **ON:** 10 August 2021

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimants:
Mr S Taylor
(on behalf of all 4 claimants)
Respondent:
Mr J Cook (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. In respect of all four claimants, the complaint of less favourable treatment by reason of part-time worker status contrary to regulation 5 of The Part-Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded. This means that this complaint is unsuccessful.

2. In respect of all four claimants, the complaint of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is not well founded. This means that this complaint is unsuccessful.

3. The complaint of breach of contract brought only by the fourth claimant, Mr Murphy is not well founded. This means that this complaint is unsuccessful.

Introduction

1. This case involves claims brought by 4 separate claimants against their employer, the respondent British Gas Services Limited. The background concerning each of their claims is briefly discussed in turn, below.

Mr Stewart Taylor (first claimant)

2. Mr Taylor is employed by the respondent as a Heating Sales Advisor and on 12 August 2020, he presented a claim form to the Tribunal following a period of early conciliation from 8 June 2020 until 15 July 2020. He presented complaints of unlawful deduction from wages and less favourable treatment arising from part-time worker status.

Mr Roy Addicott (second claimant)

3. Mr Addicott is employed by the respondent as a Heating Sales Advisor and commenced employment on 1 June 2009. He presented a claim form to the Tribunal on 13 August 2020 following a period of early conciliation on 9 June 2020. Like Mr Taylor, he presented complaints of unlawful deduction from wages and less favourable treatment arising from part-time worker status

John Beckerton (third claimant)

4. Mr Beckerton is employed by the respondent as a Heating Sales Advisor and commenced employment on 1 April 2010. He presented a claim form to the Tribunal on 13 August 2020 following a period of early conciliation from 9 June 2020 to 9 July 2020. He also presented complaints of unlawful deduction from wages and less favourable treatment arising from part-time worker status.

Mr David Murphy (fourth claimant)

5. Mr Murphy was employed by the respondent as a Heating Sales Advisor by the respondent from 9 March 2009 until 20 November 2020. He presented a claim form to the Tribunal on 5 February 2021 following a period of early conciliation from 18 December 2020 until 22 January 2021. His claim was slightly different to those brought by the other three claimants as he also brought a complaint of breach of contract, in addition to the complaint of unlawful deduction from wages and less favourable treatment arising from part-time worker status.

Subsequent procedural steps

6. The respondent presented responses resisting the claims. A separate response was provided in respect of Mr Murphy's claim.

7. On 21 August 2020, Employment Judge Slater determined that the first, second and third claimants' claims should be considered together.

8. On 21 January 2021, Employment Judge Howard listed the first, second and third claimants' claims for hearing on 10 and 11 August 2021.

9. On 10 June 2021, Mr Murphy's claim was transferred to the North-West Region of the Employment Tribunals and it was determined that it should be considered together with the other 3 claims.

The issues

10. Mr Cook prepared a proposed list of issues to be used at the hearing and it was agreed that this would be used by the parties and the Tribunal during the hearing.

Unauthorised Deductions from Wages (s.13 Employment Rights Act 1996('ERA')) Commission (all claimants)

11. The claimants claim that they were paid incorrect commission between c.2018 and c.2020.

12. In respect of all claimants:

    a. What sums were properly payable to the claimants during each monthly pay period? This will involve consideration of the following questions:

        i. Did the claimants have a legal entitlement to be paid commission at a particular rate?

        ii. If so, what was that rate?

        iii. Did the claimants sustain any overall loss with reference to the total remuneration paid to them on each occasion?[1]

        iv. Have the claimants proved losses that are "capable of quantification"?

    b. If the ET finds that the respondent made deductions from the sums properly payable to the claimants, were those deductions the result of an error of computation for the purposes of s.13(4) ERA? If so the ET will not have jurisdiction to consider the claims.

c. In each case, was there a series of deductions within the meaning of s.23(3)(a) ERA?

d. If so, in each case were there any gaps in the series of deductions of three months or more such that the ET may lose jurisdiction to consider parts of the claims?

e. Insofar as the claims (or part thereof) are out of time:

i. Was it reasonably practicable to present any part of the claim which is out of time within the primary time limit?

ii. If not, were the claim(s) presented within such further period as the Tribunal considers reasonable?

iii. All the claimants acknowledge that the two-year backstop in s.13(4A) ERA applies to their claims. Over what period are they entitled to claim accordingly?

Base Salary (first and third claimants only)

f. A claim in respect of base salary is pursued only by Mr Taylor and Mr Beckerton. The respondent accepts that Mr Taylor's and Mr Beckerton's base salary was reduced from £749.38 per month to £666.00 per month with effect from July 2020. In Mr Taylor's case, he was paid the reduced rate until March 2021. In Mr Beckerton's case, he was paid the reduced rate until his employment terminated on 20 November 2020. It is understood that Mr Beckerton also pursues a claim in respect of his notice period.

g. Did Mr Taylor and Mr Beckerton have a legal entitlement to be paid base salary at the rate of £749.38 per month over the relevant periods?

All Unauthorised Deductions Claims

h. Does the Tribunal have jurisdiction to consider any claims post-dating the presentation of the ET1 in respect of each claimant?

i. If the claims succeed, the claimants will be entitled to the following remedies per s.24 ERA:

i. A declaration that the respondent has made an unauthorised deduction from their wages.

ii. An order that respondent pay to the claimant the amount of any deduction made in contravention of s.13 ERA.[2]

[2] Ordinarily, the ET would order a gross sum to be paid and that R is responsible for deducting any tax and national insurance contributions before paying the balance to Cs.

Breach of Contract (fourth claimant only)

13. Only Mr D Murphy has a cause of action in breach of contract. He brings a claim for loss of commission only between November 2018 and November 2020.

    a. Did Mr Murphy have a contractual right to be paid commission at a specific rate?

    b. If so, has the respondent breached that contractual term by underpaying Mr Murphy's commission?

14. Is any part of Mr Murphy's breach of contract claim out of time?

    a. If so, would have been reasonably practicable for the claim to be presented in time?

    b. If not, was the claim presented within such further period as the Tribunal considers reasonable?

15. If Mr Murphy's claim succeeds on liability:

    a. What loss has Mr Murphy sustained as a result of the breach of contract?

    b. Does respondent have a defence of equitable set-off in relation to alleged overpayments of base salary and other benefits over the same period?

Regulation 5 Part Time Workers (Prevention of Less Favourable Treatment) Regulations ('PTWR') 1999

16. The following questions arise:

    a. What is the treatment complained of? The respondent understands that it relates to the alleged underpayment of commission?

    b. Who is the claimants' comparator? The claimants must identify an actual comparator employed by the respondent under the "same type of contract".

    c. Was the treatment less favourable?

    d. If so, was it on the ground that the claimants were part-time workers?

    e. The respondent does not pursue any justification defence.

f. Are any parts of the claimant's claims out of time? If so, would it be just and equitable for time to be extended?

17. If the claimants claims succeed on liability, the ET should consider each of the following potential remedies insofar as considers it just and equitable to do so:

    a. A declaration as to the rights of the claimants and the respondent in relation to the matters complained of.

    b. An order that the respondent pay compensation to the claimants.

    c. Appropriate recommendations.

Evidence used

18. Mr Taylor helpfully represented the other 3 claimants as he had some previous relevant experience as a national lead representative for field sales employees in the GMB union. All four claimants gave witness evidence in support of their claims. As the case proceeded as a CVP hearing, each claimant attended remotely from their own home address.

19. The respondent relied upon the witness evidence of one management witness, Phillip Cox (National Field Sales Manager). Two observers were present, Chloe Freeman (HR) and Abbie Leatherbarrow (HR), although neither gave evidence during the hearing.

20. There was a pdf hearing bundle available to all of the parties and the Tribunal and this was 352 pages in length.

Findings of fact

Background and the original contracts

21. The respondent is a large UK wide company involved in the energy industry and can be expected to have access to Human Resources ('HR') support and to review its policies and procedures on a regular basis.

22. All four claimants commenced work with the respondent as Heating Sales Advisors ('HSAs') during 2009 or 2010. They were engaged using contracts which contained terms which were broadly identical. Hours of work were a *'minimum of 12 hours per week'.* Basic salary was £6,000 per annum and was described as accruing on a daily basis. It confirmed that the claimants were part time and therefore their salary had been 'pro-rated' as a result. Section 6.3 of the of Mr Taylor's contract explained that his salary would be reviewed in line with collective agreements and this reflects the role played by the recognised trade unions, (such as the GMB), in the respondent's workplace.

23. Indeed, clause 20 of the contract confirmed that *'[i]n addition to this Contract of Employment there are collective agreements…which affect Terms and Conditions of your Employment, which are available for inspection. The Company may agree changes to collective agreements with its recognised trade unions which could affect your Terms and Conditions of Employment.'*

24. Although other matters of pay are in issue, this claim is primarily about the question of how commission should be paid. Clause 8.2.1 of the claimants' contracts noted that they were;

    '…eligible to participate in the Company's Performance Bonus Scheme or Commission Scheme (dependent upon your role)…as applies from time to time subject to and in accordance with the rules of any such scheme as they may apply.'

    However, clause 8.2.2 goes on to say that;

    '[t]he Company reserves the right at any time to suspend, modify, reduce or withdraw this benefit or to amend the terms upon which it is provided'.

    It can be seen that bonuses and commissions were treated differently to pro rated pay as described in section 6 of the contract and did not amount to an entitlement to a bonus payment, rather a right to participate in the scheme and which the respondent could unilaterally vary.

<u>The new part-time contracts</u>

25. In 2011, the respondent introduced new part-time contracts with hours of work set at 13.5 hours per week. It will be noted that the claimants' working hours were set at 12 hours per week in their contracts which pre-dated this new part-time contract. As the years passed, increasing numbers of HSAs were recruited or moved to the 13.5 hour per week contract and by 2015, the majority of HSAs were employed on a 13.5 hour basis. Indeed, at this point in time, I accept that there were only 5 HSAs, including Messrs Taylor, Addicott and Beckerton who remained subject to the 12 hour contract.

26. I understand that the respondent asserts that the fourth claimant, Mr Murphy, was in a different position by 2015. They argued that he had moved onto the 13.5 hour contract in September 2014 and I was taken to the relevant letter informing him of the change to his contract which was included within the hearing bundle. Mr Murphy however, disputes that he had seen this letter and that at no time did he agree to the contractual change asserted by the respondent. Additionally, this assertion by the respondent is contradicted by their response to Mr Murphy's grievance which is discussed below and where they appear to acknowledge that he remained working on a 12 hour contract.

<u>The Financial Conduct Authority ('FCA') and changes to bonuses</u>

27. I accept that the respondent being a business involved in the sale of products to the public which could give rise to commission, were subject to FCA regulation. In 2015, the FCA imposed limits upon the proportion of remuneration that could be earned as commission. The respondent called Philip Cox to give evidence and he is employed by them as the National Field Sales Manager which means that he is *'responsible for leading the Field Sales team which included 23 local leaders and approximately 310 Heating Sales Advisors ("HSAs")'.*

28. In anticipation of this change, the respondent carried out a detailed review of its job profiles and the main terms and conditions. Mr Cox confirmed that the respondent worked closely with Unison and the GMB to agree changes to salary and the rewards structure for HSAs. Terms and conditions were agreed and contained in a *Pay and Conditions Document* which described the agreed terms and conditions in respect of HSAs. Mr Cox conceded that the 12-hour part-time HSAs were *overlooked* when this document was drafted and he specifically referred to paragraph 6.4 which stated that *'we [the respondent] only operate part time hours on 13.5 hours'.* Full time hours of 37 hours, part-time hours of 13.5 hours and *flex* of 22 hours were recorded as the only working time categories which applied. This unfortunate omission appeared to contribute to subsequent issues which arose between the respondent and the claimants as a consequence of the new agreement between management and unions.

29. In accordance with the restrictions required by the FCA, a commission cap of 300% of *base salary* was imposed, but with a consequential increase to base pay which aimed to remove any of the losses this would cause to HAS pay. Mr Cox explained that the level of increase varied because it took into account different contracts and time served, but that on average, it amounted to 17%, made up of a 2.5% annual pay increase and a 14.5% base salary increase. The decision of course, was made without consideration of those remaining employees working on the 12-hour part-time contracts.

30. A table was prepared which explained the changes. However, it did not include the impact upon the 12-hour contracts and a series of national briefings took place and which all HSAs were required to attend. However, as has already been mentioned, the presentations did not recognise the distinction between 12 hour and 13.5-hour part time contracts. This is likely to have caused the claimants some consternation and it is unfortunate that the respondent's managers did not account for the contracts existing at that time in respect of those HSAs. The presentation which took place in August 2015 included the claimants and confirmed that the *full-time equivalent* salary increase for HSAs would be to £22,000 applying the percentages described above.

31. The consequence of the omission was of course that the claimants were paid as if they were working 13.5 hours per week. Their base salary was therefore higher than it should have been, being pro-rated at 13.5 of 37 hours rather

than 12 of 27 hours and resulted in the payment of an additional 1.5 hours pro-rated pay per week without a formal variation of their contract, (subject to my findings below concerning Mr Murphy). Holiday entitlement, sick pay, quarterly bonus payments and benefits relating to hours worked were also increased in a similar way.

32. While the claimants did enjoy some benefits of this error in terms of basic pay, a disadvantage arose in that their monthly commission target. This change assumed the productivity of a 13.5 hour employee, rather than a 12 hour employee and with the inevitable assumption that more business would be generated with the additional 1.5 hours the respondent believed these claimants to be working. This had the impact of providing the claimants with a commission *threshold* which was not proportionate to the hours worked under the 12 hour contract and making it harder to reach the target which generated commission, than compared with a part-time employee contracted to work 13.5 hours.

33. It appears that the issues concerning the respondent's omission was not noted by either employer or employees until November 2018. Mr Taylor queried his commission thresholds, (though not the other consequences of the 2015 changes) and on 30 December 2021, Messrs Taylor, Addicott and Beckerton raised a collective grievance.

<u>The claimants' grievances</u>

34. James Low, who is a Customer Delivery Manager was appointed to investigate the collective grievance. He produced a letter which provided details of the outcome on 24 February 2020. It explained how the error had arisen in 2015 with the respondent overlooking the existence of the 12 hour contract. However, he disagreed with the claimants' argument that they had not been overpaid base salary because of an uplift in relation to working *'unsociable hours'.* There was an acknowledgement by Mr Low that the revised commission threshold *potentially* made it more difficult for the claimants reach the maximum commission threshold. He adopted a pragmatic approach and noted that had the claimants achieved the hypothetical maximum commission threshold each month, (which he believed was unrealistic given that it was the maximum figure), they could have suffered a shortfall of £77 per month, but the enhanced 13.5 hours basic salary and other benefits more than offset this potential shortfall.

35. Mr Taylor disputed that it was not unusual for employees to hit the maximum figure for commission each month. I was not taken by him to any documentary evidence to support his contention. Mr Beckerton conceded that he did not adduce evidence concerning any loss of commission. On balance, I find that while achieving 100% was not an impossible task to achieve, I doubt very much that as we are dealing with commission based upon performance, an employee would reach the 100% threshold each month. However, I also accept that when the impact of the error concerning bonuses

was balanced against its impact in respect of basic pay etc, the claimants would not have suffered an overall loss because of the mistake in 2015.

36. Messrs Taylor, Addicottt and Beckerton decided to appeal and this was raised on 3 March 2020. Rizvana Patel, who is the Area Customer Manager was appointed as the appeal hearing manager. She investigated the appeal and produced an outcome letter on 3 April 2020 which broadly concurred with Mr Low's conclusions and which did not uphold the grievance.

37. Despite the decision in the grievance process, the respondent appeared to recognise the problematic nature of the ongoing omission regarding the 12-hour contract and had sought to resolve the problem with the claimants and their union representatives during December 2020. The respondent's aim was to remove any disadvantage to commission, while removing the benefits of being treated as working an additional 1.5 hours each week in terms of pay and benefits. It was not possible to conclude an agreement with the claimants and the matter was revisited once the appeal had been dealt with.

38. Eventually, Mr Cox to the claimants on 27 April 2020 and which offered them two options in order that the ongoing error could be resolved. They were as follows:

    a) Option 1 involved the claimants moving to a 13.5-hour contract and retaining the basic salary. From the respondent's point of view, this was perhaps the '*tidiest'* way of resolving things as it would have assimilated the claimants into the respondent's understanding reached in 2015 and which assumed that the only part-time contract for HSAs was 13.5 hours.

    b) Option 2 however, allowed the claimants to remain working on a 12 hour contract, but with a consequential reduction in base salary etc and with a revision of the commission threshold.

39. Sensibly, the respondent acknowledged its own failings in relation to its auditing of the contracts which existed in 2015 and confirmed they would not seek to recoup any overpayment made between 2015 and 2020. Messrs. Taylor, Beckerton and Addicott were required to reply with their decision concerning their preferred options by 1 June 2020. In the absence of a reply, they were informed that the respondent would impose Option 2 upon these claimants. This backstop was understandable as the respondent recognised that the 12-hour contracts had not been varied and that the claimants were still working 12 hours per week at this point.

40. Messrs Taylor, Addicott and Beckerton all provided the same response to Mr Cox on 31 May 2020. Each of them declined to accept either of the proposed options and asserted that if Option 2 was imposed, they would continue to work under protest. Consequently, Option 2 was applied to them from 1 July 2020. Strangely, Mr Addicott's salary was then reinstated and he received a backdated payment in respect of the July shortfall arising from the imposition

of Option 2. However, his commission threshold was adjusted to 12 hours. Messrs Taylor and Beckerton remained subject to Option 2 in its entirety.

41. Mr Murphy was not a party to the grievance and did not receive a letter in similar terms to that sent to the other claimants. He presented his own grievance on 28 September 2020 and this reached an appeal stage, but was not upheld. His line manager Huw Daviesand met with him on 19 October 2020. His reply to Mr Murphy on 23 October 2020 confirmed the error and accepted that he remained a 12 hour employee, but was paid as a 13.5 hour employee. Accordingly, the respondent did not continue to assert that the Mr Murphy's hours had been varied previously as had originally been suggested. This would suggest that Mr Murphy's contract was treated in the same way as the other claimants, especially as Options 1 and 2 as offered in Mr Cox's letter sent to the other 3 claimants in April 2020. Mr Davies did not think Mr Murphy had suffered an overall loss and confirmed there would be no attempt made to recover any overpayments that had been made.

42. Mr Murphy decided to appeal the decision and did so by letter dated 5 November 2020. Carl Vaughan Operations Support Manager, PH Jones Limited, (which is understood to be a part of British Gas), was appointed to hear the appeal and an appeal meeting took place on 18 November 2020 remotely using Teams software. Mr Taylor attended as Mr Murphy's union representative. An outcome letter was sent by Mr Vaughan on 30 November 2020 and the decision was not to uphold the grievance. Although not entirely clear, it appeared to remain the case that the respondent no longer believed that Mr Murphy's hours had been varied in 2014 and he had remained as a 12 hour employee. A right of appeal was offered again, although as the letter was the appeal outcome letter and the date to lodge an appeal predated this outcome letter (19 November 2020), I assumed that this had been inserted into the letter in error.

43. Accordingly, it appears that Mr Murphy was treated in broadly the same way as the other claimants, albeit some time after the first three claimants raised their grievance. I accept that although a letter was produced which was dated September 2014 purporting to change his hours of work, I accept that Mr Murphy did not receive this letter and continued to work as a 12 hour employee. The respondent ultimately accepted this because they were unable to produce any documentary evidence that he had accepted this change and ultimately agreed that he remained subject to his 12 hour contract.

44. Mr Beckerton and Mr Murphy subsequently accepted voluntary redundancy on 20 November 2020, when their employment terminated. Mr Murphy left his employment with the respondent before any options could be put to him concerning the rectification of the ongoing problem concerning basic pay and commission.

The Law

45. I have sought to refer to the relevant statutory provision which apply to the complaints being brought by the claimant in this case. However, as part of his very detailed and thorough final submissions, Mr Cook helpfully provided details and analysis of the relevant case law and I have referred to the authorities which he relied upon as part of my summary of the relevant law in this case. Both Mr Cook and Mr Taylor also referred to case law in their final submissions.

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR')

46. The right for a part-time worker not to be treated less favourably than a comparable full-time worker is contained in *reg. 5 PTWR*. Materially, the regs state:

> (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–
>
> (a) as regards the terms of his contract; or
> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) The right conferred by paragraph (1) applies only if–
>
> (a) the treatment is on the ground that the worker is a part-time worker, and
> (b) the treatment is not justified on objective grounds.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

47. Mr Cook relied upon a number of cases as part of his final submissions and in relation to regulation 5 of PTWR, he referred to EAT decision in ***Hendrickson Europe Ltd v Pipe*** **UKEAT/0272/02**, where they identified four questions which the ET must ask when addressing the test under regulation 5:

    a. What is the treatment complained of?
    b. Is that treatment less favourable?
    c. Is that less favourable treatment on the ground that the worker is part-time?
    d. If so, is the less favourable treatment justified?

48. It is important that claimants identify a full-time comparator who is employed by the same employer under the "*same type of contract*" as the comparator (reg. 2(4)(i)). An actual comparator must be identified, and hypothetical

comparators are impermissible (Mr Cook referred to ***Carl v University of Sheffield* [2009] ICR 1286, EAT**).

49. Mr Cook also explained that the law is not entirely settled on whether the Tribunal should adopt a *term-by-term* approach or look at the *overall* remuneration package. He noted that the wording of reg. 5(1)(a**)**, refers to "the terms of his contract" (note the *plural*), suggests the latter conclusion. He also referred to Lady Hale's *obiter* comments in the case of ***Matthews and ors v Kent and Medway Towns Fire Authority and ors* [2006] ICR 365, HL**:

> 49. I would not wish to rule out the possibility that, in certain cases, a less favourable term might be so well balanced by a more favourable one that it could not be said that the part-timers were treated less favourably overall. Nor would I wish to rule out the possibility that more favourable treatment on one point might supply justification for less favourable treatment on another.

50. Mr Cook reminded the Tribunal that the less favourable treatment must be "on the ground" that the worker is a part-time worker for the claim to succeed. He noted that there was some conflict in the case law but submitted that the prevailing view seems to be that part-time work must be the "sole" reason for the less favourable treatment. That was the approach recently taken by the EAT in ***Engel v Ministry of Justice* [2017] ICR 277** and has also been approved by the Court of Session in ***McMenemy v Capita Business Services Ltd* [2007] IRLR 400**. However, different divisions of the EAT have reached a contrary view and Mr Cook noted that in ***Sharma v Manchester City Council* [2008] ICR 623**, the EAT found that it was sufficient for part-time status to be "one of the reasons" for the less favourable treatment. However, he argued that if it is necessary for the respondent to assert a position, it will argue that the approach in ***Engel*** and ***McMenemy*** (above) is to be preferred. He reminded the Tribunal that while ***McMenemy*** is not strictly binding on the ET or EAT in England, the Court of Session is the highest court in the UK to consider this issue and its decisions are highly persuasive on English Tribunals. Additionally, he noted that ***McMenemy*** was apparently not cited to the EAT in ***Sharma*** and it is arguable that is therefore wrongly decided.

51. Less favourable treatment can be justified under reg. 5(2)(b).

52. Regulation 8 provides that if a complaint under the PTWR is successful, the following remedies can be awarded on a just and equitable basis:

    a. A declaration as to the respective rights of claimants and respondent;
    b. An award of compensation;
    c. A recommendation that the respondent take, within a specified period, action appearing to the Tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

Unauthorised Deductions from Wages

53. Section 13 of the Employment Rights Act 1996 ('ERA'), provides as follows:

> (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.

54. Section 27 ERA provides a definition of "wages" for the purposes of claims brought under section 13:

> (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…..

55. Mr Cook referred to case law relating to the legal entitlement to the payment of commission and the case of ***New Century Cleaning Co Ltd v Church*** **[2000] IRLR 27, CA** which establishes that payments which are *discretionary* will not fall within the definition of wages in section 27 ERA and therefore cannot be recovered via a claim under section 13. He asserted that a worker must have a legal entitlement to the payments in question and explained that while an entitlement need not be contractual, in practice, the employment contract will be the source of the legal entitlement in the majority of cases.

56. Mr Cook specifically referred to paragraph 43 of the judgment of Morritt LJ in ***Church****,* where he clarified the correct approach to be adopted by a Tribunal:

> The reduction in b was imposed with effect from 1 April 1996. Thus the question, in terms of s.13(3), is: what was the wage properly payable to Mr Church on the first payday thereafter? The word 'payable' clearly connotes some legal entitlement. The adverb 'properly' is also consistent with a legal requirement, but is not necessarily limited to a contractual entitlement. This is confirmed by the provisions of s.27(1)(a), which show that the wages 'properly payable' may not be due under the contract of employment. But the words 'or otherwise' do not, in my view, extend the ambit of 'the sums payable to the worker in connection with his employment' beyond those to which he has some legal entitlement. With the exception of the 'bonus' referred to in s.27(1)(a), all the subparagraphs of that subsection refer to sums to which the employee has some legal entitlement. The case of a bonus is specifically dealt with in s.27(3), which provides that the amount of the bonus paid is to be treated 'as payable'. The bonus is thereby deemed to have been a legal entitlement. In my view, the provisions of s.27(1) and (3) confirm that 'the wages properly payable by him [sc. the employer] to the worker' are sums to which the employee has some legal, but not necessarily contractual, entitlement.

57. Mr Cook further relied upon the decision in **Church** where Morritt LJ drew a clear distinction in paragraph 47 between a deduction from the wages payable and a change in one of the components necessary to the calculation of the wages:

> It follows that the reduction of b by 10% was not a deduction from the wage payable, but a change in one of the components necessary to its calculation. This distinction was recognised by this court in the context of the Truck Acts in Sagar v Ridehalgh & Son Ltd [1931] 1 Ch 310 and is, in my view, equally applicable to the proper construction and application of the provisions of the Employment Rights Act 1996 relevant to this appeal. It follows that in my view both the industrial tribunal and the Employment Appeal Tribunal were wrong in the conclusion they reached on the basis of the evidence tendered by Mr Church, so that the appeal should be allowed on that ground alone.

58. Mr Cook suggested that section 13 ERA provided that a Tribunal must assess whether there has been a deduction from wages by reference to the total remuneration due to the employee rather than adopting a term-by-term approach. In accordance with his overriding duty to the Tribunal under Rule 2, he acknowledged that there was some authority suggesting a term-by-term approach is appropriate (see ***Pendragon Plc v Nota*** **UKEAT/0031/00** and ***Laird v AK Stoddart Ltd*** **[2001] IRLR 591, EAT**).

59. While referring to these cases, Mr Cook went further in his discussion of the law relating to section 13 claims and referred the Tribunal to the well-regarded text on practical employment law, namely *Harvey on Industrial Relations and Employment Law.* He submitted that the view given in *Harvey* was that ***Nota*** and ***Laird*** are wrongly decided in relation to term by term versus aggregate approach of remuneration due. In particular, I was taken to *Division B1 of Harvey*:

> *The fact that the employee in the Laird case succeeded, despite there being no overall shortfall in his wages, suggests that a term-by-term approach is necessary when determining what is properly payable, albeit there is no suggestion of that in the statutory language of ERA 1996 s 13(3). On the contrary, the section refers to the "total amount of wages paid on any occasion", which appears to call for an aggregate approach.*
>
> Paragraph 361.02 continues, in reference to ***Nota****:*
>
> *This differentiation between different types of wages appears to have persuaded the EAT that overtime pay could be "isolated from other contractual terms as to pay". However, there was limited discussion of the point in the judgment and no reference to any case law, so the point may be revisited in the future.*

60. Mr Cook also relied upon the case ***Coors Brewers Ltd v Adcock*** **[2007] ICR 983, CA,** which provided that claims for wages must be capable of being quantified for them to be claimed within the provisions of Part II ERA.

61. Mr Cook referred to the case of ***Yemm v British Steel Plc*** **[1994] IRLR 117** where the EAT that that the wording of subsection 13(3) should be given a wide meaning where the deduction is attributable to an error. However, this case also determined that a deduction made as a result of an employer misinterpreting the law will not amount to a computational error contrary to section 13(4).

62. Finally, it is important to that section 23(4A) ERA provides that the Tribunal does not have jurisdiction to consider deductions which occurred more than two years prior to the presentation date of the ET1.

<u>Breach of Contract Claims</u>

63. Regulation 4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that an employee may bring a claim for breach of contract to the Tribunal where the employment contract has terminated and the claim has been presented within 3 months of the effective date of termination ('EDT').

64. Mr Cook referred to the the Court of Appeal decision in ***Capek v Lincolnshire County Council*** **[2000] ICR 878**. He also referred to the case of ***Asif v Key People Ltd*** **UKEAT/0264/07** which confirmed in statutory wages claims, a respondent cannot rely on the doctrine of equitable set off to offset damages claimed by a claimant against overpayments made to them. However, he reminded me that in ***Ridge v HM Land Registry*** **UKEAT/0485/12** equitable set off is available as a defence to a breach of contract claim, regardless of whether an employer' counter claim has been pleaded in the response.

Mr Taylor's cases

65. Mr Taylor referred me to the case of ***Tyne and Wear Passenger Transport Executive (t/a Nexus) v National Union of Rail, Maritime and Transport Workers*** **[2021] EWHC 1388 (Ch).** This case primarily dealt with the preliminary issue of whether an employer was estopped from pursuing its claim for rectification of a letter of agreement amending a collective agreement in respect of its employees terms and conditions by reason of the letter being subject to prior employment proceedings. The decision of the court was it was not an abuse of process and the court had the power to rectify the agreement. While I am grateful to Mr Taylor for referring this case to me for consideration as part of his final submissions, I was not clear as to its relevance in the proceedings before me. This case was one where the interpretation of collective agreements was not a relevant issue and instead it concerned an error regarding the respondent's understanding of the claimant's contracts when implementing the 2015 changes, required by the FCA changes concerning the level of commission allowed in relation to basic pay.

66. Mr Taylor also referred to the case of ***Wood v Sureterm Direct Limited*** **[2015] EWCA Civ 839.** This Court of Appeal case considered the correct interpretation of an indemnity clause in relation to mis-selling relating to the sale and purchase of shares. Again, while I am grateful to Mr Taylor for referring me to cases which he felt might assist me in my deliberations, I was unfortunately not able to see what relevance the case of ***Wood*** had to the case before me. I was not being asked to consider the question of enforceability of indemnity clauses in this case and it did not seem to have any application in relation to the issues to be determined.

Discussion

PTWR

67. The respondent accepts that the claimants in this case, were all part-time workers.

68. Additionally, I acknowledge that the respondent is not seeking to rely upon the justification defence under reg. 5(2)(b).

69. I did not hear any significant evidence or submissions from the claimants or Mr Taylor (as their representative) concerning this particular complaint, but I have nonetheless felt it appropriate to consider the question of less favourable treatment for completeness and taking into the overriding objective, given the absence of legally qualified representation on the claimants' side.

70. I considered Mr Cook's submissions concerning the case law relating to the Part-Time Workers Regulations. I agree that the meaning of the wording in regulation 5(1)(a), '*the terms of the contract…'*, would tend to suggest a Tribunal should look at the *overall* remuneration package, rather than a *term by term* approach. The EU directive from which these regulations are derived has used the same wording and it is clear to be that the legislation is designed to deal with overall less favourable treatment rather than looking at terms and conditions in a piecemeal way. This is consistent with the broad concept of fairness and I therefore agree with Mr Cox and of course the obiter comments of Lady Hale in ***Matthews*** *(above).*

71. The implications of adopting this approach is that I must consider the overall remuneration of the claimants in this case and it is clear that despite the respondent's failure to recognise the 12 hour part-time contract back in 2015, in material terms, the claimants enjoyed a net increase in pay, with their receipt of pay and other benefits calculated on 13.5 hour basis. Therefore, even if the claimants were entitled to claim in respect of commission payments under these regulations, there was no overall detriment which could constitute a claim for less favourable treatment.

72. As to whether any detriment (if it existed), could be attributed to the claimants' part-time status, it cannot be correct that the 2015 changes which gave rise to the potential detriments was on the ground that the claimants were part-time workers. The changes arose from a consideration of all HSA contracts with a variety of hours worked, both full time and part time. A pro rata approach was adopted and the 13.5 hour employees were not treated less favourably than the comparable full time employees. The treatment which the claimants complained about related to an error on the part of the respondent where its manages forgot or assumed that 13.5 hours was the only part-time working pattern available. Mr Taylor accepted that commission was correctly pro-rated in respect of the 13.5 hour employees. Mr Beckerton and Mr Murphy accepted that the treatment which he complained of, was not connected with their part-time status. The claimants were treated as 12 hour employees in error, but the less favourable treatment as alleged was not because of part time status and the claimants have not sought to compare themselves with full time employees.

73. For these reasons, the complaint of less favourable treatment under the Part-Time Worker Regulations must fail.

Unlawful deduction from wages

74. This case is concerned, primarily, with commission payments and whether the claimants have a legal entitlement to the payment of commission. However, in relation to Messrs Taylor and Beckerton, they have complained about the reduction in their base pay following the imposition of Option 2 by the respondent, (with Mr Addicott reverting to his old pay and Mr Murphy not being subject to the 'Options letter' referred to above).

75. A fundamental difficulty in relation to the primary complaint of commission is that during the hearing, the claimants were not able to identify a term of their contracts which provided that the respondents were required to pay commission to some degree, or at all. Clause 8 of the claimants' contracts which deals with bonus payments, was very clear in this regard. It was a form of payment which was solely within the discretion of the respondent and for which there was no contractual entitlement.

76. The 2015 pay and conditions document also provided in clause 12 that the respondent had a right to review and amend its structure of its commission schemes or withdraw them as required, review and amend targets and in the event of a dispute, the decision of the Sales Director is final. The absence of an entitlement was confirmed by Mr Cox in his evidence to me in the hearing and I found his evidence to be credible and reliable on this matter. While there was some confusion about the application of the 2015 document, neither the original contracts which the claimants received or the 2015 document provided a contractual entitlement to a bonus or commission.

77. Given that the entitlement to commission was something which was discretionary, in accordance with the case ***Church*** (see above), the commission claim in this case cannot fall within the definition of wages under section 27. This of course means that the claimants cannot bring a claim for commission under section 13 and it must fail.

78. I have considered the question of whether losses should be considered on an overall or term-by-term basis. Given the findings which I have made above concerning commission, these are somewhat 'academic'. However, I think it is appropriate to consider them nonetheless for completeness. I have paid attention to the submissions of Mr Cook on this matter and his helpful discussion of the caselaw, particularly in relation to ***Nota*** and ***Laird.*** I have taken into account these decisions but have also taken the opportunity to revisit section 13(3) of the Employment Rights Act 1996. This says as follows:

'Where the total amount (my emphasis) of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of 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.

This is a case where the claimants received more basic pay etc properly payable under the contract following the imposition of the 2015 changes and even if the commission or bonus payment was a contractual entitlement (which I have determined it is not), the total amount of wages paid between 2015 and 2020 is *more* than what was properly payable.

79. Additionally, as I have mentioned above, section 13(4) of the ERA provides that deficiencies attributable to an error of computation cannot be applied to section 13(3). Mr Cook asserted that this was the case in the claim that I am considering here. I would disagree. I think that the error was not one of computation error, but a failure to appreciate the different hours of work which existed with the claimants working 12 hours rather than 13.5 hours. The computation was correct, except that it arose from a failure to account for the claimant's different circumstances. I do not accept the wide meaning encouraged by ***Yemm*** (above), can be applied to the circumstances in this case. But while this might be the case, it does not materially affect the outcome of this particular complaint concerning commission given my decision above.

80. I would therefore agree with Mr Cook that in relation to the claim concerning commission, none of the claimants can succeed with the unlawful deduction of wages complaint. Mr Murphy has of course been able to present a breach of contract case because his employment terminated before he presented his claim, and this will be discussed below.

81. I now move on to Messrs Taylor's and Beckerton's claims under this complaint in respect of the variation to payments to base salary under Option 2 in July 2020. Their argument appears to be that the enhanced pay that they received from 2015 was connected with working unsocial hours and was not connected with the implementation of the new pay and conditions where the respondent treated them as working 13.5 hours. It was something which Mr Taylor asserted during the grievance process, but which has not been supported by any documentary evidence. Clause 6 of their contracts of employment clearly states that pay is calculated on a pro-rated basis, where part time hours are measured against the full-time equivalent hours. No mention is made of part time employees having enhancements for working unsocial hours. Mr Taylor's oral evidence did not provide any reliable evidence to support this assertion being restricted to a belief that part time workers tended to work more unsocial hours than full time employees without any explanation as to how this might be interpreted in the calculation of basic pay.

82. On balance, considering the time when the pay rise took place, I am satisfied that the improvement in basic pay was because of the 2015 changes and the

mistaken belief that the claimants worked 13.5 hour contracts. There was no recoupment of this overpayment until Option 2 was implemented in July 2020. As such, the claimants enjoyed a higher rate of basic pay than they were entitled to and in respect of Messrs Taylor and Beckerton, they were simply returned to the proper pro rated 12 hour system of remuneration taking into account the 2015 changes which had previously been calculated in error.

83. It seems that the claimants who were informed of the changes in 2015 arising from the FCA requirements, acquiesced to the changes and the increase in basic pay was perceived to give rise to an overall higher system of remuneration. It was only when the claimants began to realise that the 'flip side' of the error was that the bonus threshold would increase slightly, that they felt this part of the 2015 changes should be challenged.

84. Accordingly, all of the complaints of unlawful deduction from wages must fail.

Breach of contract (Mr Murphy only)

85. This is a complaint which has solely been brought by Mr Murphy. He was entitled to bring such a complaint because his employment had terminated when he presented his claim to the Tribunal. His employment terminated 20 November 2020 and presented his claim within 3 months of his effective date of termination.

86. His claim relates to a loss of commission between November 2018 and November 2020.

87. First of all, I would refer to the previous determination concerning commission above. Mr Murphy's contract of employment did not provide him with a contractual right to be paid commission at a specific rate. As a consequence, I am unable to find that the respondent breached any contractual term by potentially underpaying his commission by reason of the erroneous treatment of his contract as being 13.5 hours rather than 12 hours.

88. Although it is not necessary to consider the question of equitable set-off in relation to any overpayments of base salary and other benefits over the same period, I think it would be appropriate to deal with this for completeness.

89. Mr Murphy has struggled to be precise as to his loss in relation to the additional 1.5 hours he would be expected to work when calculating his bonus threshold. In the absence of any evidence from Mr Murphy regarding this loss, at its highest he could not have sustained a loss higher than £77.43 per month as calculated by the respondent in its consideration of the claimants' grievances. While this might be the case, following the imposition of the 2015 changes, Mr Murphy did not only potentially suffer a shortfall in monthly bonus, he also enjoyed an increase in the contractual basic pay and other payments by being treated pro rata as a 13.5 hour employee, rather than a 12 hour employee. This continued to exist in parallel to the increased bonus threshold. I had no reason to disagree with the evidence of Mr Cox and the

documents available in the bundle that even if Mr Murphy was £77.43 worse off in terms of his bonus, (and I have already questioned whether this would be achievable each month), this would have been outweighed by the other erroneously increased payments relating to basic and other payments.

90. Mr Cook referred me to the case of ***Ridge*** which was the first judgment of the EAT in relation to this case and which concerned the grounds of defence to a breach of contract claim. This decision reminds the Tribunal that the power of the Employment Tribunals to deal with breach of contract claims was provided by the Employment Tribunals Act 1996, section 3. The Tribunal's jurisdiction was conferred by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and was a practical step to allow certain contract claims to be considered in the Tribunal and there was no indication that Parliament intended the law of contract to work differently in this jurisdiction when compared with other civil courts. Accordingly, the Order did not restrict the grounds of defence available to an employer and they were not required to bring an Employer's Contract Claim in order that they can resist the employee's complaint for breach of contract if they wished to rely upon set-off.

91. This argument was part of the list of issues and was explained in Mr Cook's skeleton argument. There was no need for this argument to be specifically pleaded in the original grounds of resistance and I accept that this defence is something that I can consider in these proceedings. While this discussion is academic taking into account my findings that there is no entitlement to claim commission as it is a discretionary payment, even if this finding is incorrect, the respondent has grounds to rely upon set-off by reason of the erroneous enhanced basic pay and other contractual payments received by Mr Murphy each month.

92. For this reason, the claim of breach of contract must fail.

<u>Time limits and jurisdiction</u>

93. The claim of unlawful deduction from wages under section 13 of the ERA brought by Messrs Taylor, Beckerton and Addicottt claim loss of commission payments from October 2016 to October 2018 when they presented their grievances and then October 2018 to March 2020, calculated at a monthy loss of £77, (being the maximum potential loss arising from the error in bonus thresholds. From March 2020, Mr Taylor explained that from April 2020, an interim scheme was introduced to take into account the impact that Covid 19 was having upon the ability of HSA's performance and accordingly it is conceded that the claims in respect of loss of commission cannot proceed beyond March 2020. This is conceded by the respondent and I agree that the potential prejudice caused by the incorrect bonus threshold would not arise from this date and this situation has continued due to the ongoing problems arising from Covid 19 up to and including the hearing date in August 2021.

94. Under section 23(2) and (3) ERA, a series of deductions for unlawful deduction of wages a worker must present their complaint to the Tribunal before the end of the three-month period of the last deduction or payment. Section 23(4A) ERA, the Tribunal cannot consider a complaint brought under section 23, where the deduction was made before the period of two years ending with the date of the presentation of the claim. Consequently, the Tribunal has no jurisdiction to hear the complaint in respect of deductions which took place before 12 August 2018, (in respect of Mr Taylor presented his claim form on 12 August 2020) and before 13 August 2018, (in respect of Messrs Beckerton and Addicottt who presented their claims a day later).

95. Mr Murphy presented his claim form on 5 February 2021 and by applying the provisions of section 23 of the ERA as described in the previous paragraph, he can claim for the period of 20 November 2018 until his termination of 20 November 2020. I heard no evidence to suggest that Mr Murphy was not subject to the respondent's interim bonus scheme introduced in April 2020 and described above. Accordingly, Mr Murphy would not have suffered any loss in commission during the period of April 2020 to November 2020, arising from the respondent's error made in 2015.

96. In terms of the Part-Time Worker Regulations, I find that the claimants presented these claims in time in accordance with regulation 8(2). Additionally, Mr Murphy presented his claim for breach of contract within 3 months of the effective date of termination of employment, but that has already been discussed above.

Conclusions

97. In respect of all four claimants, the complaint of less favourable treatment by reason of part-time worker status contrary to regulation 5 of The Part-Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded. This means that this complaint is unsuccessful.

98. In respect of all four claimants, the complaint of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is not well founded. This means that this complaint is unsuccessful.

99. The complaint of breach of contract brought only by the fourth claimant, Mr Murphy is not well founded. This means that this complaint is unsuccessful.

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Employment Judge Johnson

Date 5 November 2021

Case No: 2409763/2020
2409739/2020
2409741/2020
3300984/2021

JUDGMENT SENT TO THE PARTIES ON
16 November 2021

FOR THE TRIBUNAL OFFICE