



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Kamanga & Others

**Respondent:** OCS Group Limited

**Heard at:** via Cloud Video Platform

**On:** 13<sup>th</sup> January 2022

**Before:** Employment Judge AE Pitt

## Representation

**Claimant:** Mr K Kamanga, in person and on behalf of all claimants

**Respondent:** Miss Barry of Counsel

# JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claims under section 13 Employment Rights Act 1996; accordingly, they are dismissed
2. The Tribunal does not have jurisdiction to hear the claims under Regulation 15 Transfer of Undertakings Regulation, and they are dismissed.
3. The Tribunal does not have jurisdiction to hear the following breach of contract claims:

2501540/2021	Barry West
2501532/2021	Barry Venus
2501535/2021	Jade Ratcliffe
2501536/2021	Siavash Vanavi
2501533/2021	Peter Ferrer
2501538/2021	Katie Lothian
2501531/2021	James Hall
2501529/2021	Paul McGarie
2501541/2021	Paul Megwa
2501537/2021	Craig Wilkins

They are dismissed.

4. The Tribunal has jurisdiction to hear the following breach of contract claims

2501539/2021  
2501530/2021  
2501527/2021  
2501534/2021

Brian Watson  
John Simpson  
Kalala Kamanga  
Christopher Twinn

5. For the avoidance of doubt, claim number 2501528/2021 Mr K Kamanga has been withdrawn by the claimant as it is a duplicate of 2501527/2021.

## REASONS

1. This is a claim by a number of persons who work for or previously worked for OCS within its Eldon Gardens complex. This is a preliminary hearing to determine the issues as set out by Employment Judge Morris in his case management orders.

2. I had before me a bundle of documents which included information relating to the Transfer, grievance letters and hearing notes, and Mr Kamanga's resignation letter.

3. The claimants were represented by Mr Kamanga, and the respondent was represented by Ms Barry of Counsel. I heard evidence from the claimant during which he confirmed the information in the ET1 and correspondence from the claimant including the further information.

### The Facts

4. The respondent provides cleaning and security services to a number of businesses. The claimants were employed to work at the Eldon Square Shopping Centre in Newcastle. They were employed in different roles, including Security. In 2021 the respondent was in consultation with 'INTU' who at that time owned the business. As a result, the respondent took over the operation of the business on 9th October 2021.

5. One of the claims is that the Transfer was not carried out in accordance with the Transfer of Undertakings Regulations. It is not necessary to detail those complaints here.

6. As a result of the Transfer, the claimants were informed that the respondent intended to change their payday. Whilst employed by INTU, the claimants were paid on the 28th day of each month. Their wages were calculated as an annual sum, and they were paid, by agreement, 1/12 of that sum each month. The respondent changed the pay date from 28th to 10th of each month.

7. It was agreed between INTU and the respondent that INTU would make a final payment of wages on paid on 28th October 2021. This was the usual 1/12 of their wages. The next payment was made by the respondent on 10th December 2021. It is the claimants' case that this sum did not include the days between 28th October and 9th November 2021.

8. Mr Kamanga told me that sometime in November, he and his colleagues were discussing matters surrounding the Transfer and contact was made with ACAS. They were advised to lodge a grievance. Mr Kamnaga told me that he understood the position was that the time limit didn't run until all internal grievances were concluded. They were also given advice in relation to a charity that may assist, and were provided with a link to contact it. Mr Kamanga also tried to contact CAB. It was not clear to me exactly when these events took place but what was clear was that from sometime in November, Mr Kamanga and his colleagues were aware that they had potential claims in relation to the Transfer, and there was a three month time limit. Mr Kamanga's evidence was he was trying to establish if the claim had to be made from the date of the Transfer or the date the internal proceedings were concluded. From the information, Mr Kamanga was able to glean time ran from the conclusion of the internal procedures.

9. At some point, Mr Kamanga contacted a local solicitor about the time limits. His evidence on when this occurred was inconsistent, he told me it was in 2020, but in cross examination, he said it wasn't until June 2021. He was again querying the time limit, and it was his understanding that time ran from the date of completion of the internal procedures. I concluded that Mr Kamanga is likely to have made this call much earlier than June 2021, as the internal procedures were completed in June. I concluded he made this contact probably in or around December 2021.

10. In relation to the deduction from wages claim, each of the claimants was aware from the date they were paid that the amount was incorrect.

11. The claimants were in discussion with management regarding both matters, but in particular, the deductions from wages. This resulted in the respondent issuing a document headed 'Q&A' on 12th January 2021. This contains a series of Questions from the claimants with a response from the respondent.

12. On 2<sup>nd</sup> February 2021, the claimants lodged a formal grievance, predominantly in relation to their wages but also referring to the consultation. The grievance was heard and dismissed; an appeal was lodged and dealt with. On 10th June, an outcome letter was received by the claimants.

13. One of the claimants was a member of the trades union and had access to advice. Mr Kamanga accepted he had access to the internet.

14. One of the issues for the claimants was that before they could act, they needed a consensus. I accept this was difficult because of different shift patterns and the number of persons involved. In any event, by 28<sup>th</sup> December 2020, the claimants as a group raised a number of questions about the Transfer. These were sent to Mr Paris.

15. A number of the claimants still work for the respondent, five of the claimants have left the respondents employment, the dates are shown below

16. The timeline therefore is:-

9th October 2020

Transfer from Intu to OCS

November 2020	Claimants aware they had a claim and the time limits
10th December 2020	Alleged deductions made, claimants aware
28 <sup>th</sup> December 2020	Joint Letter to management
12 <sup>th</sup> January 2021	Q&A from respondent
2 <sup>nd</sup> February 2021	Grievance lodged
10 <sup>th</sup> June 2021	Internal procedure complete
19th July 2021-	
19th August 2021	ACAS conciliation
30th June 2021	Simpson and Watson employment ends
20th August 2021	Kamanga employment ends
1st September 2021	Twinn employment ends
23rd September 2021	ET1 presented
6th October 2021	Ratcliffe employment ends

### The Issues

17. Were the complaints made within the time limits in, respectively, section 23 Employment Rights Act 1996, Article 7 Employment Tribunal's Extension Of Jurisdiction Order 1994 and Regulation 15 (12) of TUPE:

- i) was the claim made to the Tribunal within three months (plus early conciliation extension) of, respectively,
  - i) the date of the payment of the wages from which the deductions were made, the effective date of termination of the contract giving rise to the breach contract claim or the date on which the Transfer of the undertaking was completed?
  - ii) if not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
  - iii) if it was not reasonably practicable for the claim to be made within the time limit, was it made within a reasonable period thereafter?.

### The Law

18. I had regard to the following statutory provisions detailing the time limits for the relevant claims:

- i) Section 23 (2) Employment Rights Act 1996 sets out the time limits in relation to a breach of section 13 Employment Rights Act 1996. A person has three months to issue a complaint from the date of the deduction made by the employer. If it was not reasonably practicable for the claim to be made within that time limit tribunal may consider a complaint if it is presented within such further period as the Tribunal considers reasonable.
- ii) Regulation 15 (12) The Transfer Of Undertaking (Protection Of Employment) Regulations 2006 sets out the time limit for presenting a claim in relation to a failure to inform or consult under TUPE. The Tribunal shall not consider a complaint unless it is presented to the Tribunal within three months, beginning with the date of the relevant Transfer. Where it was not reasonably practicable for the complaint to be presented within the three months such further period as the Tribunal considers reasonable.
- iii) Pursuant to Employment Tribunal's Extension Of Jurisdiction Order 1994 Article 3, a Tribunal may consider a contract claim, where the claim is outstanding on the date upon which the employees ceases to work for an employer. The time limit for such a claim under Article 7 is again three months from the date of the

effective date of termination of the contract giving rise to the claim. Where the Tribunal is satisfied, it was not reasonably practicable for the complaint to be presented within the three month period, was it presented within such further period as the Tribunal considers reasonable.

- iv) Counsel also referred me to the case of Allen V Morrisons Facilities Services Ltd UKEAT/0298/13. This case relates to the correct party in the proceedings where there is an alleged breach of regulation 15 of TUPE. Where there is an alleged breach, the party responsible is the transferring employer (transferor). An employee must therefore bring a claim against that employer who may serve a notice upon the new employer (transferor) and seek to join them as a party.

### Discussion and conclusions

#### Section 13 Employment Rights Act 1996.

19. This claim is set out in Mr Morris's case management order in paragraph 37 as follows 'the claimant's contract of employment provided that they would be paid their wages by reference to an annual sum, in 12 equal instalments on the 28th of each month. Without any consultation, the respondent changed the payday to 10th of each month which amounted to a breach of contract and the claimants' losing wages.'

20. The claimants worked for the whole of November and into December and should have received pay for four weeks plus 11 days on 10th December 2020 but, in fact, only received pay for four weeks. The non-payment of wages for the 11 days amounted to an unauthorised deduction from the claimant wages.

21. I considered whether the fact that the claimant's case is that they were paid a 1/12 instalment on the 28<sup>th</sup> of each month and therefore their total salary was not paid by the end of the financial year as a possible argument, i.e. that it was an ongoing loss. However, the case was not pleaded before Mr Morris in this manner. I considered section 23, which is clear that time runs from the date of the deduction, in this case, 10th December 2020. I have to consider, therefore, whether it was reasonably practicable for the claimants to make their claim and present the ET1 by the primary time limit of 9th March 2021.

22. On the evidence Mr Kamanga gave me, he was told that time ran from the date that the internal procedures had this is clearly wrong. I took into account that this was a pandemic situation, and many organisations were not working at full strength or were working in new situations, which meant they were not able to assist people as fully or as quickly as they were usually. I considered the fact that there were a number of people making complaints. However, by the time the letter of the 28<sup>th</sup> December 2020 was sent to the respondent from Mr Kamanga with a list of questions, they were clearly an autonomous group and making decisions together. The grievance letter was sent on 2nd February, although the grievance hearing was not until 31st March. Whilst I can accept that it was difficult for the group to make decisions, by 28<sup>th</sup> December, they appear to be an autonomous group. This is reinforced because, by 2nd February, they lodged a joint grievance.

23. I considered the evidence from Mr Kamanga in relation to the advice the claimants had received. I also took account of the fact one of the group had access to Trade Union advice, and Mr Kamanga was conversant with the internet and could have found the relevant information with regards time limits there. Whilst the advice was clearly wrong, I am satisfied that there were other avenues open to the claimants which would have corrected this even if they did not place reliance on a lawyer, who may have given erroneous advice. The fact that

an advisor gives or may have given the incorrect advice does not mean that it was not reasonably practicable for a claimant to present a claim within the time limit.

24. Having come to that conclusion, it was reasonably practicable for the claimants to present the ET1 by 9th March 2022. The Tribunal does not have jurisdiction to hear the unlawful deductions from wages claims, and they must be dismissed.

#### TUPE Claim

25. In relation to the Regulation 15 TUPE claim, the time runs from the date of the Transfer, which was 9th October; the time limit, therefore, expired on 8th January 2021. I took into account the matters set out above. I have considered whether the fact that this was a large group of people trying to make a decision together would make it not reasonably practicable for the claimant to be submitted; however it would have been open to each claimant to make a claim prior to the 8th January, they all being aware sometime in November that this was a potential avenue for them to take. Therefore, the Tribunal, lacks jurisdiction in relation to this matter, and the claim is dismissed.

#### Breach of contract

26. The breach of contract claims as set out by Employment Judge Morris in paragraph 37 (3), 'the claimant's contract of employment provided that they would be paid their wages on the 28th of each month but, without any consultation, the respondent changed the payday 10th of each month which amounted to a breach of contract of employment and resulted in the claimants losing wages.'

27. Pursuant to the Extension of Jurisdiction Order, a breach of contract claim the claim must be outstanding at the time the employee leaves the employment.

28. In relation to these claimants, this means that Mr Kamanga, who left the respondents employ on 30th August, Peter Twinn who left on 1st September, Mr Simpson on 30th June 2021, Mr Brian Watson, who left on 30th June 2020, all have valid claims presented within the relevant three month time limit. The remaining claimants are still employed by the respondents, the Tribunal, therefore, does not have jurisdiction to hear their claims, and they must be dismissed.

29. I queried the position of Ms Ratcliffe with Ms Barry, who at the time the ET1 was presented was still employed, and therefore the Tribunal may not have jurisdiction. She left the respondent's employment on 6th October 2021, so if the claim had been presented any time after that, the Tribunal would have jurisdiction. It is clear this is a premature claim, and the Tribunal does not have jurisdiction. It is also dismissed.

30. I also hear briefly touched on the claim by the respondents that the claimants have joined the incorrect employer. It is clear, having read the regulations and having regard the case of Allen, any breach of the regulation should be against the entity who was the employer at the time the breach took place. I asked Miss Barry, and she confirmed that this is one of the exceptions to liabilities that transfer from one employer to another under regulations.

31. This means that there is a hearing required for four claimants. I will issue standard directions for its listing.

Employment Judge AE Pitt

Date 26<sup>th</sup> January 2022