EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Brian Collier	v	**Ministry of Justice**

Heard: In Leeds BY CVP **On: 3 November 2022**

Before: **Employment Judge JM Wade**

Representation:

Claimant: **In person**

Respondent: **Mr R Ryan, counsel**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 3 November 2022, the written record of which was sent to the parties on 9 November 2022. A request for written reasons was received at the Tribunal email inbox on 9 November 2022 but, through administrative oversight was not found or referred until the claimant chased for the reasons in January 2023. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 3 November 2023 are repeated below:

JUDGMENT

The claimant's unlawful deduction from wages/breach of contract claim is dismissed.

REASONS

Introduction and reasons for postponement refusal

1. It is not in dispute in this case that Mr Collier's employment with the respondent ended on 31 March 2022, having commenced in the summer of 2018. He had been appointed as a fixed term Senior Business Change Manager advertised through the Civil Service Jobs website, and there is no complaint concerning the ending of that role at its conclusion earlier this year. He contacted ACAS on 28 June, was issued a certificate on 19 July and issued his claim to the Tribunal online on 18 August 2022.
2. His claim concerns an alleged series of unlawful deductions and/or damages for an alleged breach of his contract, by failing to pay him at a particular rate during the second, third and fourth years of his employment. He seeks a remedy declaring those alleged underpaid sums and pension contributions either as compensation for unlawful deductions and/or damages. Those are both remedies this Tribunal can give if the claim succeeds. Negligent misrepresentation, if that is alleged, or equitable remedies, are the preserve of the county court.
3. The claim was served in the usual way on 1 September 2022. A response was presented on behalf of the Secretary of State on 28 September and sent to the claimant on 13 October 2022. Neither the response form (nor the attached grounds of resistance) indicated whether the claimant's calculations, in a document attached to his ET1 form, were accepted to contain the correct figures (if his claim succeeded).
4. The claimant had been made notified that the claim would be determined at this hearing in the notice of hearing sent to him on 1 September. 2022. That indicated that the hearing would take place this afternoon at 2 o'clock with a time estimate of two hours. There were standard Orders issued on service of the claim (remedy statement and documents relied on by the claimant at four weeks, respondent documents and hearing file at six weeks, and each party to ensure witnesses attend the hearing to give evidence, with a hearing date at nine weeks from service). These are the standard "short track" directions which ensure money claims, for unpaid wages and similar are determined quicky and at proportionate cost.
5. On or around 28 September 2022 the claimant sent again to the respondent's solicitors and the Tribunal the documentation and information on which he relied and his calculation of sums allegedly owing. His documentary evidence was, in essence, the employment contract and the communications between the parties about that which were attached to his claim. He also provided an email dated 18 July 2018 from his contact at the recruitment service, Mr Yale, indicating that a formal new contract would be issued after pay negotiations.

6. The claimant did not provide any further supporting evidence. On 13 October he wrote to the Tribunal indicating that he had not been provided with the Secretary of State's documentation.
7. His first access to that material was some time between 15 October and 28 October when the respondent provided the hearing file for today. His assertion about that bundle was that it did not include all relevant documentation. He indicated that he had made a subject access request to the respondent, the same day, namely on 28 October 2022, and he drew attention to alleged missing documents implicit in the respondent's response. He made a written postponement application, which was refused but implicitly on the basis that it could be pursued again today.
8. The hearing file containing the respondent's and the claimant's documents is around 250 pages and includes a witness statement on behalf of the respondent from Ms Dobson, who was the claimant's most recent line manager until March 2022.
9. The basis on which the claimant's application to postpone is made is that a fair hearing cannot take place without a postponement to enable a further search of documentation to be undertaken, and/or for the respondent to complete its claim form indicating whether the calculations he has made are agreed or not, should his claim succeed.
10. As to the second matter, it is unlikely that the mathematics and/or calculations are going to trouble the Tribunal or the parties in this case, should the complaint succeed. Ms Dobson gives evidence which agrees the claimant's figures for salary, generally speaking. It is the matter of principle that needs a decision. This is a case which appears relatively straightforward in terms of issues. Having discussed matters with Mr Collier just now, his case is a contractual one. He says that understanding the contract of employment properly, it has to be read as implying that he would maintain the differential from the bottom of the pay grade, from which he benefitted on recruitment. He relies on his contract and the oral evidence which he is going to give is about his oral conversations as to the reason why that pay differential was granted in the first place; and the email to which I have referred.
11. Neither of those matters are likely to be affected or influenced by any further search for information and indeed Mr Collier puts his position not on the basis that he knows there to be particular further documents that might help the Tribunal, but that he considers that there must be. That is in the context of a bundle which already contains evidence of the parties' contractual negotiations, the business case which had to be made to enable the respondent to agree to the salary sought by Mr Collier at the outset, and the grievance which he brought and its determination. His own search after the claim was submitted has only yielded the one email to which I refer above, that is, his communication with Mr Yale.
12. If he has any concerns about the documentation in this case he will be able to ask questions of Ms Dobson because she is here and has produced a witness statement in the case. He can ask her generally any questions which are relevant to the issues.
13. In considering the application, addressing matters proportionately, it seems to me that justice is best served by refusing the application. Ms Dobson is here ready to

give her evidence and indeed Mr Collier is here and otherwise prepared. There is a substantial bundle to which the addition needs to be made of the email on which the claimant relies. Otherwise, I am not persuaded that any other documentation will be probative. Delay is generally not in the interests of justice, and particularly not in this case.

14. Justice also involves consideration of the Tribunal's resources. This case has been allocated for a hearing. It has been given two hours and that is sufficient for me to determine the claim, given the proportionate preparation that has been done. It is a breach of contract/arrears of wages claim properly allocated to this track and to grant a postponement on speculative grounds would not be an efficient use of the Tribunal's resources.

Evidence

15. I have heard oral evidence from Mr Collier himself, all of which I accepted, and from Ms Dobson who latterly was his line manager within the respondent Ministry. I also had a relatively concise bundle of documents, and at the conclusion of matters today I had helpful written submissions from Mr Ryan. Those included a table of the claimant's pay, the pay ranges and the Band ranges (unchallenged) with explanatory notes reflecting the evidence of Ms Dobson. The explanatory comments were also unchallenged, although the pay action taken by the respondent is alleged to be a breach of contract. It was as follows:

Pay Year	C's Pay	Pay Range	Comments
August 2018	£47,500	£43,038-£62,888	Band A. Starting salary as per contract
August 2019	£48,213	£43,958-£63,831	Band A. 1.5% pay increase was applied to his then current pay as he was already above the new band minimum
August 2020	£49,167	£49,167-£59,000	Band A split to G6 and G7. BC confirmed as G7. Brought in line with new band min. The band mins were significantly increased. The band minimum caught up with BC's higher starting salary. The 2020 MOJ

			pay award of 1.75% increased his salary to £49,056 however the minimum salary was revalorised and therefore the new minimum increased to £49, 167 for 2020.
August 2021	£50,427	£50,427-£59,000	G7 New Band Minimum The 2021 MOJ pay award was 1% but again the MOJ revalorised the minimum starting salary to £50 427 and he was placed on this salary which is in line with policy.

Issues and the Law

16. Mr Collier is a litigant in person, and we agreed, at the start of today, the way he puts his case. It is capable of being analysed in two ways, one as a breach of contract case properly brought in the Employment Tribunal after his employment has ended; and secondly as an Employment Rights Act 1996 deduction from wages case. In either claim it is alleged that the salary paid from August 2019 to the end of his employment on 31 March 2022 was less than was properly payable pursuant to the contract. It is very clear that both claims have been brought in time and can properly be determined.
17. As far as a deduction from wages complaint is concerned, the Employment Rights Act 1996 section 13 sets out the right not to suffer unauthorised deductions. There are also provisions about the Tribunal being permitted to consider a series of deductions, provided the last one alleged is in time; in this case that is exactly what Mr Collier asserts: in every month from August 2019 onwards he has had deductions made from his proper salary and from his pension contributions arising out of a failure to acknowledge his contractual pay rate.
18. Section 13(3) provides: "*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 wages properly payable by him to the worker on that occasion, 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.*"
19. That territory is very well known in this Tribunal. "Properly payable" as a matter of law means properly payable pursuant to the contract of employment or some other collateral contract or similar obligation in law. Sometimes there are separate

commission contracts, separate bonus contracts or other obligations in law to make payment of wages or other sums by way of remuneration or reimbursement.

20. Properly payable does not mean, and I give this direction to myself, a moral or other obligation of honour or subjective expectation between the parties, which does not amount to a contract.
21. Further, when interpreting express terms of a contract, the aim is to give effect to what the parties intended. In ascertaining that intention, the words of the contract should be interpreted in their grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party's intentions. (Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38)
22. The issues for me then, are: how to construe the contract that the parties entered into as to salary – what were its terms? I then ask myself for the purposes of the deduction from wages complaint (or as a breach of contract complaint), did the respondent observe that contract and its pay arrangements with Mr Collier.

Findings

23. The claimant came as a new appointee to the Ministry, responding to an advertisement in the usual way and in open competition for a post. He was initially offered the post at the grade minimum in that post, which was the respondent's practice on new appointees, but he was not prepared to accept it on that basis. In a collaborative conversation with his recruitment contact, he negotiated that he would be paid a salary at 10% above the grade minimum. This was because, in his discussions with Mr Yale, they discussed that he had an exceptional level of skills and experience. The grade range at that time was £43038 to £62888, which was a wide pay band. The salary that he agreed within his contact was £47500, slightly more than a 10% uplift on the grade minimum. The civil servant who approved that salary, did so on the basis of a business case email suggesting a struggle to fill the post, and a contractor then in post whose costs would mean that appointing the claimant on £47,500 would still achieve a "massive cost saving".
24. It is a matter of record but perhaps it is convenient if I read it into these reasons now, that the claimant's contract of employment was contained both within a summary of its terms, which was sent to him and which he signed, (page 94 onwards) and also in the collective agreements and collective negotiations in relation to pay, agreed with the civil service union.
25. So as far as that summary of terms was concerned, it said this under the heading pay: "y*our annual salary is £47500. Details of pay bands and progression arrangements can be found in the MOJ pay and allowances manual – pay policy on the Ministry's intranet. Your salary will be paid monthly in arrears from the last working day of each calendar month by credit transfer to your bank or building society. We reserve the right to adjust any monthly payments to recover any overpayment of salary made to you. Any underpayments of salary will wherever possible be included in your next available salary payment unless a prior payment has been made. Please note that payment of additional permanent allowances*

may alter your salary banding for pension purposes. Details can be found on the civil service pensions website."

26. There were other similar provisions giving a considerable amount of detail about pensions, sick pay and other arrangements in that summary of employment conditions. The summary ran to 8 pages and it ended with a heading: "please accept or decline employment based on the terms contained and referred to in this letter and thus confirm that you have read the civil service code by responding to the email to which this contract was attached confirming either I accept the role or I decline the role as appropriate".
27. That version of the contract was the second version to be sent out to Mr Collier, after the pay negotiations that I have described. He had also taken issue with clarity in other terms and sought amendment.
28. Relevant also is that there is no formal or informal means for an individual to progress through the pay band by the awarding of incremental points within it. I gave the example of a 7.1 (after a years' service), a 7.2 (after two years') and so on, which exist in other public sector and indeed some private sector organisations. This employer does not operate that practice. The means, therefore, by which anybody comes to be employed on a salary which is not the minimum for the pay grade range is by negotiation on entry or appointment. I accept Ms Dobson's evidence that she is aware people are able to do that, because otherwise everyone would be on the minimum and there would be no range. The claimant, on the other hand, assumed pay progression and/or that his differential would be maintained.
29. The range that is advertised in open advertisement indicates to applicants that they can seek a salary on commencement, it seems, anywhere within that band. It also enables there to be transfers between different civil service departments within the range for the band, without causing salary hardship to people on transfer to departments where the grade bands differ.
30. Within the pay announcements made in respect of the period of this claim, in 2021 for a three year pay award covering 1 August 2020 to 31 July 2023, (pages 171 to 189), there is some indication of a concept of maintaining percentage differentials from a pay grade on relocation from regional to the London pay bands (for example 5%). There is also reference to particular awards as a percentage of the grade minimum for particular extra responsibilities (for example 15%). This is an agreement negotiated between the employer and the unions to be applied during the course of a particular pay award period. This is the relevant factual matrix in this case.

<u>Conclusions</u>

31. On the contract that was signed by the parties, it is clear that there was no written express agreement to "Grade minimum plus 10% at all times or throughout employment", nor did the claimant allege that Mr Yale had said that. Indeed the precise calculation on appointment is something a little more than that. The agreement as to salary is expressed as a precise number only.
32. I have accepted Mr Collier's evidence that he negotiated a salary above the grade minimum on commencement. He asserts that there must be some email reflecting a commitment to pay the "grade minimum plus 10% at all times". I treat with some caution the notion that it is somehow surprising that there was no reference to his

exceptional skillset in the business case email A recruiter (for that is what Mr Yale was), and I take judicial notice of this, is, in effect, a broker. They are trying to fit candidates with posts and organisations. Much like estate agents and other brokers they often say one thing to one person and one thing to another in order to close a deal. The basis on which the responsible civil servant decided to approve that appointment was on the basis that using contractors for this particular post at the time was going to be far more expensive than appointing Mr Collier. They were happy to appoint on that basis and pay the premium to do so. This business common sense is what is reflected in the contractual language in the contract, which simply promises the agreed salary, together with all other civil service terms and conditions.

33. There is simply no necessity to imply for business efficacy the additional clause for which Mr Collier contends. The working assumption that he made, that he would always remain on a salary which was 10% higher than the grade minimum cannot sensibly to be read into, or inferred, or implied, into the contract which he accepted.
34. The contract he accepted contained a salary on entry which was considerably above the grade minimum on entry. Thereafter ordinary industrial relations took their course to result in grade boundary changes and inflationary increases. Anyone who is unhappy with their pay is quite at liberty to express that unhappiness and ultimately leave an organisation if those pay expectations are not met. The claimant discovered that he was no longer above the grade minimum not long before he was due to leave, and decided to raise it both in writing and in a subsequent grievance which was rejected. His assumption, which he described as reasonable, is the limit of the factual basis for his case. That assumption was also perhaps with hindsight. Given that other matters occurred to him to be amended in the contract at the outset, this one did not occur to him then. In short, there cannot be read into this contract a contractual obligation to pay 10% above the band minimum to Mr Collier throughout his employment.
35. This may be a learning curve for Mr Collier or others. Forewarned is forearmed in negotiating an entry level salary of this kind. Having accepted the evidence of Ms Dobson, one would seek, would one not, for the differential to be included in the contract in order that pay band changes and inflationary increases do not erode matters, if, and I say if, that departure from the minimum is very important to the applicant. I accept salary can indicate status and value to some, but if the matter is so important, then it needs to be written in. To that extent I endorse the recommendation that Mr Collier made during his evidence which is that when advertising and agreeing these matters this particular feature of pay arrangements ought to be made very clear.
36. For all those reasons this claim is dismissed.

Employment Judge Wade
Date 17 March 2023