



EMPLOYMENT TRIBUNALS

London South Employment Tribunal (video) on 20th March 2023

Claimant

Between

Respondent

**Mr C McBrearty
Mr M Giltinane**

&

Phoenix Community Housing

Before

Judge M Aspinall
(Sitting as an Employment Judge)

Appearances

Mr McBrearty (in person)
Mr Giltinane (in person)
Miss E Skinner (counsel for Respondent)

FULL MERITS HEARING Judgment

1. Having heard from the parties, I find:
 - a. That the claims brought by the Claimants are not for unlawful deduction from wages but are, properly, related to the loss of opportunity for them to work overtime in a manner that they expected following TUPE transfer to the Respondent.
 - b. That the claims are properly, therefore, alleging a breach of contract by the Respondent.
 - c. That since the employment contracts of both Claimants remain in force (they remain employed), the Tribunal does not have jurisdiction (pursuant to the Employment Tribunals Extension of Jurisdiction Order) to consider their claims.
 - d. As a result, all claims are dismissed for lack of jurisdiction.
2. This was a joint claim brought by Mr Charles McBrearty and Mr Martin Giltinane against their employer, Phoenix Community Housing.
3. Both claimants have worked for the Respondent since December 2021 when their employment was transferred to the Respondent pursuant to the TUPE regulations. Mr McBrearty had worked for predecessor organisations since 2005 and Mr Giltinane since 2008.
4. At first glance it appears that the claims brought relate to the unlawful deduction from wages (contrary to section 13 The Employment Rights Act 1996), by the Respondent, of significant sums in relation to overtime payments due to the Claimants.
5. The matter is not, however, quite so simple. In fact, the Claimants do not claim that they are owed any money at all for work done or in relation to wages of a type defined in section 27 The Employment Rights Act 1996. Neither do the Claimants say that the Respondent has unlawfully failed to pay to them any monies in relation to wages properly due (per section

13(3) The Employment Rights Act 1996).

6. In the words of the Claimant's before me today, they are not seeking payment of money but do seek a judicial decision that a term should be implied into their contracts of employment that they are entitled to "at least one day overtime on alternating weekends plus bank holidays on a rota basis, increasing to potentially three days a month plus bank holidays at busy times".
7. The Claimants told me that these have been presented as unlawful deductions claims because they do not otherwise fit into a claim type in the claim form. They indicated that they may have received some advice on this; it was, of course, entirely proper that they neither told me what that advice was, nor that I should ask them to do so. Prior to TUPE neither was paid an amount for any 'overtime' that they had not, in fact, worked. Both confirmed this to be correct.
8. The Respondent said that, in fact, the claim brought is one for loss of opportunity to work overtime on the basis sought and is not one for unlawful deduction at all. The Claimants, in all fairness to them, agreed that this was correct.
9. In the case of *Lucy & Ors v British Airways Plc [2009] UKEAT*, HHJ Burke QC (as they then were), said (at 39) "...present claims are, in my judgment, not claims for wages i.e. for payable emoluments but for damages for loss of the opportunity to earn the allowances claimed or of the chance of earning them... Accordingly because of the jurisdiction, restriction imposed by article 3(c) of the Extension of Jurisdiction Order the claim could not be pursued in the Employment Tribunal."
10. I respectfully agree with the learned Judge. These are claims which, on their own submissions, the Claimants accept are related to the loss of opportunity and which ask me to imply a term into their contracts to give them that opportunity. My powers are constrained by the same jurisdictional restriction (3(c) of the Extension of Jurisdiction Order) which restricts the powers of the ET in contractual disputes of this nature to only arise on, or in connection with, the termination of the contract. As both claimants remain employed by the Respondent, I simply have no power to hear any such claim nor, as a result, to imply any such term as that sought by the Claimants. The correct forum for such claims is not, unfortunately for the Claimant's, the ET.
11. Taking that into account and bearing in mind the need for the Tribunal to avoid unnecessary hearings, use of time and - ultimately - cost to the parties and the public purse, I find that I must dismiss the claims for lack of jurisdiction.

Judge M Aspinall on Monday, 20th March 2023

Note

Reasons for this judgment having been given orally at the hearing, written reasons will not be provided unless they are requested - by either party - within 14 days of this notice.

PUBLIC ACCESS TO EMPLOYMENT TRIBUNAL DECISIONS

Judgments and reasons for judgments of the Employment Tribunal are published in full. These can be found online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties in a case.