



# THE EMPLOYMENT TRIBUNAL

---

**Claimant:** Ms Jamieson

**Respondent:** East Sussex Healthcare NHS Trust

**Heard at:** London South Employment Tribunal (video hearing)

**On:** 12 October 2022

**Before:** Employment Judge Robinson

**Representation**

Claimant: In person

Respondent: Ms Jennings (Counsel)

## JUDGMENT

The judgment of the Tribunal is that the Claimant's claims for unauthorised deductions from wages are not well-founded and are dismissed.

## REASONS

### Introduction

1. The claimant, Ms Jamieson, is employed by the Respondent, East Sussex Healthcare NHS Trust as a Multiple Sclerosis Specialist Nurse. She began working for the Trust's predecessor as student nurse in 1990 and has been employed by the Respondent since 1995. She is currently employed as an MS Specialist Nurse at Band 7.

### Claims and issues

2. The Claimant has brought a claim for unlawful deduction from wages in relation to two separate but related issues:
  - a. From 30 November 2016 until 1 December 2019 that she was paid at a

band 6 rather than (the higher paid) band 7 level.

- b. From 1 December 2019 until 30 December 2021 that she was paid for 30 hours per week instead of the 37.5 hours that she claims she was actually working.
3. ACAS early conciliation started on 18 November 2021 and ended on 29 December 2021. The claim form was presented on 26 January 2022. The response form was received on 9 March 2022.
4. There was a preliminary point raised by the Respondent in relation to whether the first claim is within time given that it relates to a pay period up until December 2019 yet the ACAS early conciliation process did not begin until November 2021.
5. I heard submissions from Counsel for the Respondent that this meant that part of the claim was out of time. The Claimant's position was that the alleged incorrect banding dating back to 2016 had repercussions for her pay to this day because she had not progressed through the pay levels within band 7 because she was only paid at band 6.
6. I accepted the Claimant's position on this point and that her claim for unlawful deductions was not just for the pay discrepancy between band 6 and band 7 in the November 2016 to December 2019 period, but also the level of pay within band 7 pay from the date she became a band 7 until the date of her claim.

#### **Procedure, documents and evidence heard**

7. There was an agreed bundle of 572 pages, plus two witness statements; one from the Claimant and one from Gwyneth Adam, Head of Employee Relations for the Respondent.
8. I heard oral evidence from the Claimant and from Ms Adam for the Respondent.
9. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and closing submissions.

#### **The Facts that the Tribunal found**

10. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached. References to page numbers are to the main bundle unless otherwise stated.

#### **The Claimant's role from November 2015 to December 2019**

11. The Claimant originally applied for a band 7 role as a Multiple Sclerosis ("MS") Clinical Specialist Nurse, for which she interviewed in August 2018. It is clear from page 78 that there was a subsequent discussion within the

Respondent about offering the Claimant a role following her interview, but only at a band 6 level. A new band 6 level vacancy (for an MS nurse) was therefore created (page 241) for which the Claimant could, and did, apply. The Claimant was successful in her application for that re-banded role and the 19 October 2015 offer letter and terms and conditions of employment, at pages 44-59 make it clear that the role is at band 6.

12. The Claimant took up the role from 30 November 2015 and it involved her being contracted to work 15 hours per week. This complemented the role of Vicky Lester, a band 7, who worked 22.5 hours per week. Essentially, this meant a 37.5 hour role was shared between the Claimant and Ms Lester.
13. The Claimant sought to present this arrangement as a job share and described Ms Lester's role as one of "mentor". However, it is clear that she was the Claimant's line manager - page 82 refers to a discussion between Keith Talbott, Matron, and Ms Lester in which Ms Lester is referred to as the Claimant's "line manager."
14. The Claimant gave evidence that she had had an informal discussion with her then line manager when she first began the band 6 job in 2015 (Deidre Connors), that it would be developmental role and the Claimant could work towards becoming a band 7 once she had gained the necessary experience and having completed the necessary training. There was however nothing in writing to that effect.
15. The Claimant then began to raise the issue (orally) of the banding of her job with successive line managers from late 2017 into 2018. It was not until 4 October 2018 that the Claimant first put the issue in writing in an email to HR (page 84). The response to that email was that the Claimant's 19 October 2015 offer was for a band 6 role and that it was not formally labelled as a developmental post; but that that must have been an informal discussion with the Claimant's line manager.
16. The Claimant accepted in evidence that there would need to have been a process to go from band 6 to band 7 but that she wanted to know what that process was and how to start it.
17. At page 96 there is an email of 29 January 2019 from Vicky Lester, the Claimant's line manager, to Xanthe Knowles, the Deputy Head of Nursing. That email requested a discussion on how to take forward the Claimant's development from band 6 to band 7.
18. The Claimant stated that there was no difference between what she was required to do on her last day as a band 6 and her first day as a band 7. She also referred to testimony from Ms Lester at page 191 from 30 March 2022 in which she said she believed that the Claimant was effectively operating at band 7 level.
19. The Claimant believed that this was evidence that she was already a band 7 in reality. However, Ms Adam gave evidence on this point that it simply shows that the Claimant had pushed herself and started to step up to the

next role so that she had the skills and experience to hit the ground running at band 7 when a formal role at that level became available.

The Claimant's role from December 2019 to December 2021

20. After Ms Lester left the Trust, a 30 hour, band 7 role for a MS Specialist Nurse was advertised. The Claimant was successful in her application for this role and accepted it on the banding and hours offered.
21. It is clear from the offer letter (page 61) and the terms and conditions of employment (page 64) that the role was for 30 hours.
22. Paragraph 6.1 of terms and conditions of employment states that "*You may be required to work such additional hours as necessary to meet the requirements of the organization. Some flexibility in your core hours may be required*".
23. Section 3.4 of the NHS Terms and Conditions of Service Handbook at page 328 states that for overtime payments to be made, the employee's line manager or team leader must agree to the work being performed outside the standard hours.
24. The Claimant did raise this issue with her line manager at the time, Ms Phelps. At page 99 there is an email exchange in which the Claimant, at Ms Phelps suggestion, records a weekly log of all that she is doing minute by minute. It is notable that this week is in May 2020 at the height of the Covid-19 pandemic in the UK. In that week, the Claimant asserted that she worked even more than 37.5 hours, let alone 30 hours. In response to that log, Ms Phelps provided some helpful suggestions to the Claimant in terms of switching off her phone out of working hours and delegating work to an MS coordinator. However, the Claimant did not think these were helpful suggestions because she was bound by the Nursing and Midwifery Council code to care for her patients.
25. Ms Adam for the Respondent gave evidence that if there are situations (like Covid-19) where there is a clinical risk, it should be flagged to a line manager. Indeed that was done in this case, where Ms Phelps took the feedback onboard and offered some potential solutions to tackle the Claimant's workload. Eventually, a business case was put forward to expand the team which is now operating. Ms Adam believed that so long as the Claimant was flagging risks (which she was), then it was the Trust (rather than the Claimant) that has ultimate responsibility for patients.
26. The Claimant asked Ms Adam in cross-examination whether it was reasonable for the Claimant to take on consultant-level tasks while also being told to stick to her hours. Ms Adam gave evidence that when something comes up, the lead nurse *would* be the best placed person with the knowledge in the absence of the consultant. If there was a need to do something urgently, there is an expectation that the lead nurse would have the flexibility to carry out it out wherever possible. Indeed, that is included in the contractual terms and conditions.

## The Law

27. Section 13 of the Employment Rights Act 1996 (“ERA”) sets out the right not to suffer an unauthorised deduction from wages:

*“(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.”*

...

*(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.”*

## The Tribunal’s conclusions

28. Having found the facts as set out above, and applying the law and jurisdiction of the Tribunal as set out in the ERA, I have come to the following conclusions.

### The Claimant’s role from November 2015 to December 2019

29. In relation to the Claimant’s first claim, I find that the contractual position is clear. The Claimant applied for, and accepted, a band 6 job. The job offer, the contract and the terms and conditions all refer to the role being at band 6. Indeed, that point is not in dispute between the parties.

30. The Claimant believes that she was, in reality, operating at band 7 level. However, it is not within the jurisdiction of an Employment Tribunal to determine what pay band should be assigned to employees within an organisation. What the Tribunal *can* decide is whether there has been an unlawful deduction from wages under section 13 of the ERA.

31. In this case I find that there has been no such deduction. The Claimant sought to provide evidence that she was performing some duties that were expected of a band 7 as she gained the experience and training in the area of MS nursing. However, the Claimant was paid at her agreed contractual rate for the work that she did between December 2015 and December 2019 and it is not for this Tribunal, to unilaterally and retrospectively re-band the role she carried out at that time.

32. I agree with the Respondent's submissions that any badging of the band 6 role as a 'developmental' one was most likely an informal discussion about career progression within the area of MS nursing and not any sort of binding commitment by the Respondent of an automatic promotion to band 7 within any set timeframe. The Claimant has provided no written evidence of the Respondent giving any such commitment.
33. I also accept Ms Adam's evidence that the normal progression within the NHS would involve an increasing amount of overlap to the role above as an employee becomes in a position to formally apply for a higher graded role through the normal application and interviewing process.
34. When a role at band 7 did later come available, the Claimant applied and was then successful. Until that point, there was no legal and/or contractual entitlement to be paid at rate above band 6.

The Claimant's role from December 2019 to December 2021

35. In relation to the Claimant's second claim that she was contracted for 30 hours but in effect worked on average 37.5 hours, my conclusion is similar to the one reached in relation to the first claim.
36. The Claimant, and this Tribunal, are bound by the terms of section 13 of the ERA, and of the employment contract itself. The Claimant applied for, and accepted, a band 7 role that was for 30 hours instead of 37.5 hours.
37. Again, it is not for the Claimant or the Tribunal to unilaterally increase an employee's contractual entitlement. The terms and conditions of the contract itself provide for situations where a degree of 'going above and beyond' an employee's hours is expected in order to meet the requirements of the organisation. Much of the period in question relates to the height of the Covid-19 pandemic in the UK and I accept the position put forward by the Respondent that it was common for NHS staff to have to go 'above and beyond' during this time, for which the Respondent relied upon paragraph 6.1 of the terms and conditions of employment which say: "*You may be required to work such additional hours as necessary to meet the requirements of the organization. Some flexibility in your core hours may be required*".
38. Furthermore, the staff handbook requires overtime payments to be approved by a line manager or team leader. In this case, I conclude that the line manager was aware of the Claimant's concerns about working above her contractual hours and made some practical suggestions to help her not do so. However the Claimant provided no evidence that any overtime payment claims were approved by the Respondent.
39. I find it admirable that the Claimant puts patient safety at the forefront of her work and was prepared, particularly during an unprecedented global pandemic, to go above and beyond her hours in order to make sure patients got the treatment they needed.
40. However, I conclude that there has been no unlawful deduction from wages

under section 13 of the ERA. The Claimant's claims are not well-founded and are therefore dismissed.

Employment Judge Robinson  
Date: 21 November 2022