

Case number: 1400316/2022 & 91 Others  
(See attached schedule)



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms Nicoleta Amarandi and 91 Others  
(See attached schedule)

**Respondent:** Royal Cornwall Hospitals NHS Foundation Trust

**Heard at:** Bristol Employment Tribunal

**On:** 24 April 2023

**Before:** Employment Judge Lowe

**Representation-**

**Claimant:** Lee Bronze (Counsel)

**Respondent:** Alec Small (Counsel)

## JUDGMENT

The determination of the Tribunal is that:

The Claimants' claim for unauthorised deduction from wages is dismissed as having been presented out of time.

## REASONS

The tribunal provided an *ex-tempore* judgment at the conclusion of the 1-day hearing. At the request of the Claimants, the Tribunal subsequently provided written reasons.

In a claim presented to the Employment Tribunal on 28 January 2022 the Claimants bring the following claim:

Unauthorised deductions from wages pursuant to sections 13 and 23(3) of the Employment Rights Act (ERA) 1996.

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

The Tribunal received evidence from Emily Gallagher, Regional Organiser, UNISON South West.

The Tribunal was provided a digital bundle comprising 154 pages. A chronology, Cast List, Recommended Reading List and a witness statement from Emily Gallagher have also been provided.

References in this judgment to the agreed hearing bundle are in the form **[B/page number]** and references to witness statements are in the form **[WS/surname/page number]**.

### **The issue for determination**

The matter is listed for a final determination hearing. Both parties agree, however, that the preliminary time limits issue falls to be determined before the substantive claim.

The Case Management Order dated 25 September 2022 identifies the following issues:

#### Time Limits

1.1 Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Right Act 1996? The Tribunal will decide:

- 1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of wages from which the deduction was made?
- 1.1.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
- 1.1.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 1.1.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable time period?

The Claimants commenced proceedings in the Employment Tribunal by a claim form dated 28 January 2022. The date of receipt of the ACAS Early Conciliation notification was 19 November 2021, with the date of issue of the ACAS Certificate being 30/31 December 2021.

### **Parties**

The Claimants were employed by Mitie before their transfer by way of an undertaking to the Respondent on 1 October 2021.

The Respondent is a National Health Service (NHS) Foundation Trust providing hospital-based care and community services.

### **Background Summary**

The Claimants' terms and conditions of employment, including pay, are negotiated by collective bargaining. UNISON is the recognised trade union.

The Claimants aver that they have suffered an ongoing series of unauthorised deduction of their wages following the failure of Mitie to pay them the Foundation Living Wage (FLW) of £9.50 per hour from 9 November 2020 until 1 April 2021.

On 9 November 2020 the FLW increased from £9.30 per hour to £9.50 per hour. The claim represents the differential between the rate of FLW before and after 9 November 2020 when the uplift was applied.

From 1 April 2021, the Claimants were paid FLW at the uplifted rate of £9.50 per hour [B/91]. In August 2021, the Claimants received backpay covering the period 1 April 2021 – July 2021. From August 2021 onwards, FLW was paid at the uplifted rate.

### **Relevant statutory framework**

#### Employment Rights Act 1996

Section 123(1) – (4) provides:

### **Complaints to employment tribunals**

*(1) A worker may present a complaint to an employment tribunal—*

*(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*

*(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),*

*(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or*

*(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).*

*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

*(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*

*(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

*(3) Where a complaint is brought under this section in respect of—*

*(a) a series of deductions or payments, or*

*(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*

*the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*

*(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).*

*(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

### **Summary of the parties' positions**

These are outlined fully in the skeleton arguments provided by both Counsel. In summary, however, they are as follows:

#### *Claimants' Submissions*

The Claimants' primary position is that their claim has been presented in time. They aver that the crucial dates are as follows and that the deduction takes place once the payment is made in respect of backpay i.e. 20<sup>th</sup> August 2021.

20/8/21	Trigger for claims as backpay partially paid
19/11/21	3 months minus one day Early Conciliation started in respect of all claims
30/12/21	EC Certificates were issued by ACAS

The Claimants assert that a series of unlawful deductions has not been interrupted by a period of lawful deductions. There was nothing to suggest that payments from which unlawful deductions were made had to be contiguous to amount to a series. Lawful payments of the correct amounts would not interrupt the series.

In respect of whether it was reasonably practicable to present the claim within the time limits, the Claimants request that the Tribunal look at the surrounding circumstances and context at the time. Further, that the presentation of the claim was within a reasonable period, namely within three months minus one day of the backpay.

#### *Respondent's Submissions*

The Respondent avers that the limitation period had already expired prior to the Claimants approach to ACAS for Early Conciliation. The limitation 'clock' did not start to run from 20 August 2021; it started from 23 July 2021 in accordance with section 23(2) and (3) ERA 1996.

The 20 August 2021 remuneration payment was an accurate and full payment. It included the full FLW of £9.50 per hour for the 4 weeks prior to the payment, as well as the additional back-payment covering the period of 1 April until July 2021.

As there was no deduction on this date, the last payment form which there was a deduction was the payment on 23 July 2021. This, is it submitted, is the date from which limitation commenced.

The limitation period therefore expired on 23 October 2021, prior to ACAS conciliation.

In those circumstances, given the repeated request to Mitie to rectify the situation, it is difficult for the Claimants to argue that it would not have been reasonably practicable for a claim to have been made within the permitted timescales. The Claimants have simply made a mistake in law and that does not amount to a practical restriction on their ability to bring a claim.

#### *Findings*

##### *Section 23(3) - Series of deductions*

The Tribunal has been provided with several payslips from 6 of the Claimants: Mr Mark Gill, Mr Phillip Mitchell, Mr Christopher Putt, Mr Neil Purcell, Mr Richard Williams and Mr Mark Rapsey. Remuneration was paid to the Claimants at the end of every 4-week period.

The payslips provided to the Tribunal relate to the following periods [B/101-152]:

Pay date: 16 October 2020 [B/101-106]

Pay date: 13 November 2020 [107-1112]

Pay date: 11 December 2020 [B/112-118]

Pay date: 8 January 2021 [B/119-124]

Pay date: 5 February 2021 [B/125-130]

Pay date: 5 March 2021 [B/131-136]

Pay date: 2 April 2021 [B/137-140]

Pay date: 30 April 2021 [B/141-146]

Pay date: 28 May 2021 [B/147-152].

I have looked carefully at each of these and would note as follows:

Remuneration for this period has been paid at the 'Basic Pay Hours' at the rate of £9.30. There are additional 'Basic Pay Hour' rates where Claimants were paid at an enhanced rate, for example, for work undertaken during unsocial hours or for overtime.

The FLW in the sum of £9.50 per hour was not paid during this period.

Ms Gallagher was able to assist the Tribunal in relation to payment of the FLW after the date of the claim period. She clarified that the last remuneration period that did not have the uplifted FLW of £9.50 per hour, was 23 July 2021. From 20 August 2021 the uplift was included as part of the remuneration paid to the Claimants. Further, in the 20 August 2021 payment, the Claimants also received a backdated uplift for the period 1 April 2021 until July 2021.

It is accepted, therefore, that July was the last date at which the uplift to £9.50 per hour was not applied. From the August payment onwards, the uplifted FLW was not subject to any deduction. Accordingly, I make this finding.

In *Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT*, Mr Justice Langstaff, then President of the EAT, held that whether there is a 'series' of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. This, he said, meant that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition.

I find that the claim has a clear and repeated factual link between each remuneration period. All relate to the same ongoing issue, namely uplift in the FLW.

I find further that the claim is a series of deductions consisting of a continuing, sequential period. There are no breaks in the claim period. It is a time specific series of deductions limited to the dates outlined.

Section 23 (3) is clearly defined. Time limits are referenced 'to the last deduction or payment in the series'. It does not reference time limits in relation to backpay or subsequent rectification.

In accordance with this section, I find that the last deduction that was applied in the series was 23 July 2021; this was the last date at which the uplifted FLW was not applied.

*Section 23(2) - Three-month time limit requirement*

Was the claim presented to the Tribunal in accordance with this time limit, namely three month plus early conciliation extension?

The Claimants commenced proceedings in the Employment Tribunal by a claim form dated 28 January 2022. The date of receipt of the ACAS Early Conciliation notification was 19 November 2021, with the date of issue of the ACAS Certificate being 30/31 December 2021.

Three months from the 23 July 2021 deduction is 23 October 2021, before the ACAS early Conciliation notification on 19 November 2021. I find, therefore, that the three-month time limit had expired prior to presentation of the claim form.

*Section 23(4) – Was it reasonably practicable to present the claim before the end of the three-month time limit?*

The question of what was or was not reasonably practicable is essentially one of fact for the Tribunal to decide. The leading authority as to the test to be applied was the decision of the Court of Appeal in Palmer and Saunders-v-Southend-on-Sea Borough Council [1984] IRLR 119, CA in which May LJ undertook a comprehensive review of the authorities and proposed a test of 'reasonable feasibility'.

*"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done..... Perhaps to read the word "practicable" as the equivalent of "feasible"..... and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."*

The possible factors were many and various, and as May LJ stated, they could not have been exhaustively described. They depended upon the surrounding circumstances of each case.

This is a matter where the Claimants' terms and conditions were the subject to collective bargaining, with UNISON being the recognised trade union. The latter were fully engaged with the concerns around payment of the FLW. It was an ongoing issue between the parties from the inception of the increased FLW figure announcement on 9 November 2020.

Members contacted UNISON shortly after this date enquiring as to why they were not in receipt of the uplifted figure [WS/Gallagher/8]. UNISON were put on immediate notice as to the dispute.

There were repeated attempts at resolution of the issue, with the UNISON recording members 'becoming increasingly frustrated' [WS/Gallagher/9]. UNISON's position was again reiterated to Mitie 'in the strongest possible terms' in July 2021 and a meeting arranged for 26 July 2021 [WS/Gallagher/9]. Despite not attending the meeting, Mitie did confirm in writing on the same date that the FLW uplift would be paid from August 2021 onwards, and that this would be backdated for the period 1 April to July 2021. Backpay would not be paid, however, for the period 9 November 2020 until 1 April 2021.

Ms Gallagher again assisted the Tribunal in her evidence by confirming that, as a result of this email confirmation and the payment uplift in the August 2021 pay, the position had become 'crystallised'. Mitie's position had been clarified and the series of deductions had ended.

In my view, therefore, there could be no doubt as to Mitie's position from the date of the email in July 2021. They had confirmed their position in writing – it was clear and unequivocal. Despite UNISON's extensive endeavours to resolve the matter by negotiation, this had not elicited an agreement between the parties.

The Claimants' representatives were fully engaged with the issue from its inception in November 2020, had undertaken extensive negotiation on the matter and obtained a clear answer from Mitie as to their position in July 2021.

Taking all the circumstances into consideration, I find that it would have been reasonably practicable for the Claimants' to have presented their claim to the Tribunal before 23 October 2021 in accordance with section 23 (2) ERA 1996.

### **Conclusion**

The Claimants' claim for unauthorised deduction from wages is dismissed as having been presented out of time.

Employment Judge Lowe  
19 May 2023

Sent to the parties on:

26 May 2023

For the Tribunal Office



	<b>Case Number</b>	<b>Claimant Name</b>
1.	1400316/2022	Ms Nicoleta Amarandi
2.	1400317/2022	Mr Andrew Baber
3.	1400318/2022	Miss Jodie Bane
4.	1400319/2022	Mr Adrian Bardgett
5.	1400320/2022	Mr James Barker
6.	1400321/2022	Miss Evelyn Bartlett
7.	1400322/2022	Miss Maria Bean
8.	1400323/2022	Mrs Anne Black
9.	1400324/2022	Mr Simon Bourne
10.	1400325/2022	Mr Kevin Bourne
11.	1400326/2022	Mrs Sarah Brook
12.	1400327/2022	Mr Mark Chamberlain
13.	1400328/2022	Mrs Laura Loo Chapman
14.	1400329/2022	Mrs Hilary Collett
15.	1400330/2022	Mr Michael Counter
16.	1400331/2022	Mr Michael Cox
17.	1400332/2022	Mrs Lynda Curtis
18.	1400333/2022	Mr Robert Denny
19.	1400334/2022	Mrs Dawn Denton
20.	1400335/2022	Mr Daniel Earl
21.	1400336/2022	Mr Zachary Ferrell
22.	1400338/2022	Mr Mark Gill
23.	1400339/2022	Mr Arshad Gondal
24.	1400340/2022	Mr Michael Gray
25.	1400341/2022	Mrs Mary Green
26.	1400342/2022	Mrs Mary Gummow
27.	1400343/2022	Mrs Karen Halford
28.	1400344/2022	Mr David Halliburton
29.	1400345/2022	Mr William Harris
30.	1400346/2022	Mr Gary Hayes
31.	1400347/2022	Mr Richard Hebbro
32.	1400348/2022	Miss Stella Hicks
33.	1400349/2022	Mrs Ewelina Hohlweg
34.	1400350/2022	Mr Kevin Hurrell
35.	1400351/2022	Mrs Rosie Jackson
36.	1400352/2022	Mr Nathan Jewell
37.	1400353/2022	Mrs Olga Kacorri
38.	1400354/2022	Mrs Sarah Kemp
39.	1400355/2022	Mrs Debbie Kemsley
40.	1400356/2022	Mrs Jane Kitts
41.	1400357/2022	Miss Carol Linthwaite
42.	1400358/2022	Mr Paul Marriage
43.	1400359/2022	Mrs Teresa Martin
44.	1400360/2022	Miss Lisa Mayes
45.	1400361/2022	Mrs Hayley-Jane MCGovern-Bray
46.	1400362/2022	Mrs Sarah Medlyn-Woods
47.	1400363/2022	Mrs Adrianna Mitchell

48.	1400364/2022	Mr Phillip Mitchell
49.	1400365/2022	Mr Chris Mugford
50.	1400366/2022	Mrs Milena Murton
51.	1400367/2022	Mrs Mo Noall
52.	1400368/2022	Mr Daniel Paul
53.	1400369/2022	Mrs Susan Piekarz
54.	1400370/2022	Mrs Susan Porter
55.	1400371/2022	Mrs Sheila Pridham
56.	1400372/2022	Mr Neil Purcell
57.	1400373/2022	Mr Chris Putt
58.	1400374/2022	Mr Nicholas Quinn
59.	1400375/2022	Mr Mark Rapsey
60.	1400376/2022	Mrs Claire Reid
61.	1400377/2022	Mrs Rachel Richards
62.	1400378/2022	Ms Geraldine Richards
63.	1400379/2022	Mrs T-Jay Roach-Corin
64.	1400380/2022	Mr Richard Roberts
65.	1400381/2022	Mr Anthony Roberts
66.	1400382/2022	Mr Alan Sainsbury
67.	1400383/2022	Mr Tivi Sejahtera
68.	1400384/2022	Mr Andrew Sheppard
69.	1400385/2022	Mr Gary Sinclair
70.	1400387/2022	Mr Bobby Snider
71.	1400388/2022	Mrs Diane Sockett
72.	1400389/2022	Mr Paul Sockett
73.	1400390/2022	Mr Matthew Stephens
74.	1400391/2022	Mr Damion Stoddern
75.	1400392/2022	Mrs Jane Summers
76.	1400393/2022	Mr Wayne Thompson
77.	1400394/2022	Mrs Teresa Thompson
78.	1400395/2022	Mr Steve Thornton
79.	1400396/2022	Mr Raymond Tonkins
80.	1400397/2022	Mr Daniel Towns
81.	1400398/2022	Miss Fay Tremayne
82.	1400399/2022	Mrs Susan Vincent
83.	1400400/2022	Mr Aidy Walmsley
84.	1400401/2022	Mrs Sharon Watkins-Field
85.	1400402/2022	Miss Hannah Watson
86.	1400403/2022	Miss Cindy Webb
87.	1400404/2022	Mr Rodney White
88.	1400405/2022	Mr Paul Whyton
89.	1400406/2022	Mr Richard Williams
90.	1400407/2022	Miss Carol Williams
91.	1400408/2022	Mrs Kimberley Williams
92.	1400409/2022	Mrs Susan Wright