



EMPLOYMENT TRIBUNALS

Claimant: Mr Aled Lloyd Owen

Respondent: Home Office

Heard at: London Central ET by CVP
On: 15 and 16 June 2023

Before: EJ Brady

Representation

Claimant: In person

Respondent: Ms K Loraine (Counsel)

JUDGMENT having been sent to the parties on 16 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Decision: Claimant's claim is not well founded. I do not find that there was an unauthorised deduction of wages in this case.

Introduction

1. The claimant has been employed by the respondent since 1 September 2016. He was loaned to the Test and Trace Service which later became the UK Health security Agency (UKHSA) between January and December 2021.
2. The claimant took part in early conciliation between 3 and 7 November 2022. He lodged a claim for unlawful deduction from wages on 11 November 2022 in respect of sums that he says ought to have been paid to him by way of overtime during the period of the secondment.

Claims and Issues

3. While the Claimant was on loan to the Test and Trace Service he worked overtime hours in order to assist with establishing the test and trace service during the Covid pandemic. As he was on loan to the Test and Trace Service, he remained employed by the Home Office.

4. The Claimant says that he could not claim for the overtime hours between January and November 2021 as the Home Office had not processed his promotion on their system and so were not paying his correct salary, and therefore an overtime claim could not be submitted.
5. The claim was therefore submitted as a bulk claim covering all the overtime worked from January 2021 until he returned to the Home Office in to the Home Office in June 2022. The Claimant stated that the hours were agreed between the Home Office and UKHSA in June 2022, he was then advised in November 2022 that UKHSA was delaying accepting responsibility to pay the overtime, He was then told by his line manager from the Home Office, in November 2022 that UKHSA were no longer willing to authorise the payment if it was to be recharged to them.
6. The Respondent states that under the terms of his contract, the claimant was not able to claim overtime unless a “discretionary pay” has been authorised where formal, advance agreement from the head of unit of a Grade 6 employee was given to work exceptionally long hours (in limited specific circumstances). The Respondent says that there is and was no entitlement to any such payments even where those conditions were/are met: discretionary payments are at the Respondent’s absolute discretion and are non-contractual.
7. The respondent says that the claimant never sought and did not receive any advance agreement from his head of unit at the Home Office in relation to working additional hours and the Respondent has never exercised its discretion to agree to pay the Claimant any discretionary payment.
8. Therefore the Respondent says there has never been any contractual or legal entitlement to payment of any sums for hours worked (beyond his entitlement to the salary which has been paid) and therefore the complaint does not relate to wages properly due and the tribunal has no jurisdiction to consider the claims.

The Issues

9. The issues were agreed at the case management hearing and confirmed at the start of the Final Hearing as follows:
 - 9.1 Does the sum claimed by the Claimant fall within the definition of wages in section 27 of the ERA 1996.
 - 9.2 What sums were properly payable on each occasion that the Claimant says that the deductions were made?
 - 9.3 Was there a series of deductions? If so when was the last deduction in the series?
 - 9.4 Has the Respondent made an actual unauthorised deduction from the claimant’s wages pursuant to s 13 ERA 1996.

Jurisdiction:

9.5 Does the Tribunal have jurisdiction to hear the Claimant's allegations in respect of deductions that took place more than 3 months before his ET1 was presented?

9.6 Was it or was it not reasonably practicable for the Claimant to have presented his case in time?

9.7 Has the Claimant provided a good reason for the Tribunal to exercise its discretion to extend time section 23(4) ERA 1996.

Remedy:

9.8 If the Claimant is successful in his claim to what compensation is he entitled?

Finding of Facts:

10. The Claimant joined the Respondent on 01 September 2016 as a Grade 7/Assistant Director. He is still employed at Salary Grade 6.

11. In January 2021, the Claimant was loaned to the Department of Health and Social Care (DHSC) as part of the Test and Trace service, on a six-month loan in response to the Covid-19 pandemic on promotion as a substantive Grade 6.

12. The email correspondence between Mr Will Jones and the Test and Trace department in the bundle (page 71) does not detail any conditions of employment, although the email dated 06 January 2021 says that he will move on a substantive Grade 6 and that a 12 month loan has been agreed.

13. The usual practice for a secondment to another department is to be transferred to the other departments' pay and conditions after 6 months, however if there is going to be a 12 month secondment the employee would be transferred immediately. There was some delay in moving the Claimant's grade from level 7 to level 6 which meant that his terms and conditions could not be transferred to Test and Trace.

14. On 26 March 2021 a letter was sent to the government departments from Mr Rupert McNeil instructing them that all employees on loan to NHS Test and Trace remain on home departmental payrolls given the truly exceptional circumstances and that no recharging can take place between the departments as per the finance global design principles.

15. The effect of the letter meant that the Home office would not be able to recoup payment of the Claimant's salary for the time that he was loaned to Test and Trace and made it clear that the Home Office would remain responsible for the payment of the Claimant's salary. At the time neither the Claimant nor his Home Office line manager were aware of this letter.

16. As part of his employment with Test and Trace, the Claimant was required to work long hours in excess of his usual hours. He believed that he would be paid overtime for those hours.

17. Up until July 2021, the only way the Claimant could have gained access to his Home Office account and the "METIS" human resources programme would

have been to attend the office. At that time office attendance was sporadic and not always encouraged or permitted due to the Covid Pandemic.

18. After July 2021 and up until his return to the Home Office employment, the Claimant would not have had access to METIS as his account lay "Dormant". METIS is the Home Office computer system that is used for HR purposes. He therefore relied on Mr Jones to input his overtime hours.
19. The Claimant did not produce a contemporaneous record of the hours that he worked.
20. The Claimant calculated his overtime hours with reference to his Director's hours and submitted them for approval to Mr W Jones (line manager at the Home Office). Mr Jones asked the Claimant to confirm that those overtime hours were approved by the Test and Trace department (UKHSA).
21. Mr Tom Mottershead from Test and Trace UKHSA agreed the validity of the Claimant's overtime hours on 20 June 2022. Prior to this an email showed that he had stated that his department could not pay for the overtime claimed, but once the Claimant had referred him to the letter from Mr McNeil, Mr Mottershead said that he was happy to confirm the hours worked. When Mr Jones discussed this approval with Mr Mottershead in November 2022, Mr Mottershead said that he had believed those to be the total hours worked, and not just overtime hours worked. Although it is unclear how much scrutiny Mr Mottershead gave to the Claimant's claim for overtime hours, he did accept that there was a claim and confirmed the hours worked in an email to the Claimant on 20 June 2022. At no time did he indicate to Mr Jones that no overtime had been worked.
22. On 31 October 2022 Mr Jones emailed Mr Mottershead and asked for confirmation that UKHSA will cover the cost of the overtime, Mr Mottershead then replied that he had believed that the table included total hours worked and that only March breached the usual 150 hours expected to work in a month (150.5 hours). If this were the case then the Claimant would have worked fewer than the expected hours every month. Unfortunately Mr Mottershead was not a witness in the case today, so although this could not be challenged it does not appear to be a credible explanation.
23. As the Claimant's overtime was no longer verified, Mr Jones was unable to process the overtime payment request.
24. As the claimant was not transferred to Test and Trace (UKHSA) his terms and conditions of employment continued with the Home Office as they had been before the loan.
25. A Grade 6 employee's entitlement to overtime is discretionary.
26. The terms and conditions state as follows:
"Eligibility for discretionary payments, Grades 6 and 7"

Payment may be made for long hours worked where management is satisfied that the excess hours arise out of the exceptional demands of the job. There is no entitlement to discretionary payments.

The expectation for employees at this level to be flexible remains.

However, in exceptional circumstances, hours in addition to contracted hours paid at 1 x plain time may be paid if the following criteria are met:

- where the requirement to work additional hours arises from unexpected demands of the job, for example, this may relate to the management of crisis

where the hours cannot be taken as TOIL with flexi accrual and disposal the need to work additional hours must be agreed by Head of Unit in advance of them being worked

Discretionary payments are paid at the plain-time hourly rate.

Discretionary payments will be calculated on the basis of the total number of hours worked in excess of a normal working week (36 or 37 hours as appropriate)."

27. The Claimant says while he was working for "Test and Trace" he was mandated to work long hours and he believed he would be paid overtime for those hours. He has been unable to produce any emails to that effect, although the entitlement to some overtime does appear to have been accepted by both Mr T Mottershead and Mr W Jones as Mr Mottershead confirmed the hours in June 2022 and Mr W Jones used his best endeavours to submit the Claimant's claim for overtime on METIS.

28. The claimant has not been able to provide any evidence of specific authorisation for particular overtime hours worked at the time they were agreed.

The Law:

29. The case of Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188 EAT states that tribunals must decide on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

30. The case of New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA, the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of wages. Unless a worker can show some other legal entitlement to the non-contractual discretionary payment, the worker will be unable to bring a claim under S.13 in respect of that payment.

31. I have also referred myself to the case of Balfour Beatty Power Networks Ltd v Tucker and others EAT 182/01. Where the EAT held that since the employees did not have a legal entitlement to a discretionary payment in that case, it did not form part of the wages properly payable within the meaning of S.13(3) and, accordingly, there had been no unlawful deduction.

32. The case of Farrell Matthews and Weir v Hansen 2005, held that once the employer has exercised its discretion in favour of granting a bonus on certain

terms, there is then a legal obligation to pay it in accordance with those terms.

33. In the case of Tradition Securities and Futures SA v Mouradian 2009 EWCA Civ 60, CA, the Court of Appeal upheld an employment tribunal's decision that, once the bonus had been declared, there was a quantifiable sum which M was legally entitled to receive. It followed that M's claim could be heard by the employment tribunal under the deduction from wages provisions.

Conclusion:

34. Does the sum claimed by the Claimant fall within the definition of wages in section 27 of the ERA 1996? Overtime payments do fall within the definition of wages in section 27 of the ERA 1996.
35. Following the case of Greg May (Carpet Fitters and Contractors)Ltd v Dring 1990, I have examined the terms of the contract that have been provided. On the grade that the Claimant was on, there is no automatic entitlement to overtime, but it can be agreed in exceptional circumstances.
36. There is no doubt that the Covid 19 pandemic was an exceptional circumstances, but following the case of New Century Cleaning Co Ltd v Church 2000, I have to be satisfied that there is an actual legal entitlement to the payment and following the case of Farrell Matthews and Weir v Hansen, had the employer exercised his discretion in favour of granting the bonus so that there becomes a legal obligation to it?
37. What sums were properly payable on each occasion? The Claimant claims that he believed from the outset that he would be paid overtime for the excessive hours that he worked during the Covid pandemic when the Test and Trace structure was being set up.
38. Both Mr Jones and Mr Mottershead accepted that overtime payments were expected. However there is no evidence that the particular hours worked were documented at the time or agreed upon at the time that they were worked. To calculate his claim, the Claimant relied upon the hours that his Director had worked to then calculate the hours that he believed he worked and has then attempted to get them approved retrospectively by the Home Office.
39. I am not satisfied on the balance of probabilities that the overtime hours were ever formally verified by a manager who confirmed that they were either agreed or confirmed that they had been worked. In order for the Claimant to be entitled to such payments under his contract, the specific hours would have had to have been agreed before hand and confirmed afterwards and then approved by HR. I do not find that there was such an agreement.
40. I have not seen any evidence that either of those things were done. Although there is an implication that Mr Owen worked long hours, there is no evidence of an express or implied agreement as to what hours he worked and which

hours he would be able to claim for. Although I appreciate that it would have been very difficult for Mr Owen to submit the claim through METIS at the time he worked, he could have kept a written record or produced emails confirming that the hours had been agreed at the time that they were worked.

41. I have considered whether the emails between Mr Owen, Mr Mottershead and Mr Jones could amount to a “retrospective” approval of the overtime and an implied contract term that he would be paid for the overtime. In June 2022 Mr Mottershead accepted that overtime hours had been worked, but as the Claimant was still employed by the Respondent at that time, under his employment contract, the approval would have had to have been given by the Home Office. Until the claims were agreed upon and were submitted on METIS and approved, there was no formal approval of the overtime and therefore no “declaration” that overtime would be paid and no quantification of the amount owed.
42. In the circumstances therefore I do not find that the Respondent had agreed that there was a quantifiable sum which the Claimant was legally entitled to receive and therefore I do not find that there was an unauthorised deduction of wages in this case.
43. Jurisdiction issue – I have considered whether the claim was made in time, in view of the fact that both the claimant and respondent were in discussions trying to resolve the matter up until November 2022, it was not reasonably practicable for the Claimant to present this claim on time.

Employment Judge Brady

Date 21 July 2023

REASONS SENT TO THE PARTIES ON

28/07/2023

FOR THE TRIBUNAL OFFICE