



EMPLOYMENT TRIBUNALS

Claimant: Mr J Tuohy

Respondent: Swissport GB Ltd

Heard at: Bristol Employment Tribunal via Video hearing
On: 14 July 2023

Before: Employment Judge Youngs

Representation

Claimant: In person

Respondent: Mr L Millington, solicitor

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deductions from wages succeeds. Accordingly, the Respondent is ordered to pay to the Claimant the net sum of £823.25.
2. The Claimant's claim for a statutory redundancy payment fails and is dismissed.

REASONS

Claims and parties

- 1) By a Claim Form dated 26 September 2022, the Claimant brings a claim for unlawful deduction from wages, relating to a reduction in pay that took effect from 1 January 2022 and redundancy pay. The Respondent responded on 1 November 2022, resisting the Claim.

Procedure, documents and evidence heard

- 2) The hearing was held by video hearing.
- 3) The Claimant represented himself and he gave evidence on his own behalf. The Respondent was represented by Mr Millington, solicitor. Evidence was given by Ms S Furlong, Associate Human Resources Business Partner. I had a Bundle of Documents, which I was referred to by both parties.
- 4) Each witness had a written statement that stood as their evidence in chief.

- 5) I took into account the evidence and the oral submissions of both parties.

The issues

- 6) The issues to be determined at this hearing were discussed with the parties at the start of the hearing and agreed as follows:

A. Wages:

- a. What wages were properly due to the Claimant in the period 1 January 2022 to 21 April 2022?
- b. Were the wages paid to the Claimant in that period less than the wages he should have been paid?
- c. If so, it is agreed that there was an unlawful deduction from wages. How much is the Claimant owed?

B. Redundancy pay

- a. Was the Claimant dismissed?
- b. If so, was his dismissal by reason of redundancy?
- c. If so, it is agreed that a redundancy payment is due.

Findings of fact

- 7) The Claimant was employed by the Respondent (and predecessor employers) to work at Bristol Airport in various roles from 23 May 2005 until his employment terminated on 21 April 2022.
- 8) It is not disputed that from 1 April 2016 to 31 October 2020, the Claimant worked for the Respondent as a Service Delivery Manager.
- 9) In or around October 2020 the Claimant was told by the Station Manager at Bristol Airport, Mr Muldoon, that the Claimant's role as a Service Delivery Manager was at risk of redundancy. A temporary role as Airport Team Manager, covering another employee's maternity leave, was available. The Claimant applied for, interviewed for and was offered this role. He commenced the Airport Team Manager role on 3 November 2020.
- 10) The appointment was confirmed to the Claimant in a letter dated 22 December 2020, which amended the Claimant's existing terms and conditions. This letter does not refer to the role being temporary or fixed term, although it is not disputed that it was intended to be a temporary role and the Claimant anticipated that it would come to an end. The Claimant's salary in this role was £33,584.62, the same as it has been in the role of Service Delivery Manager.
- 11) The Claimant suggested to the Tribunal that the role of Service Delivery Manager remained at risk of redundancy because he had not been told that the role had been made redundant. However, I find that once the Claimant commenced in post as Airport Team Manager, he was no longer employed in the position of Service Delivery Manager. The Claimant was clear that he was not in a position to accept redundancy (he needed a job) and although the Airport Team Manager role was temporary, he discussed with Mr Muldoon that other roles could become available,

and he accepted the new role as an alternative to redundancy on that basis, hoping for something permanent to come along. His previous role was not preserved for him and on the basis that he had discussed and was hopeful that another role would become available in the future, he had no expectation of returning to the Service Delivery Manager role at that time. Further, solicitors on his behalf wrote to the Respondent on 25 May 2022 (after the Claimant resigned). In this letter the Claimant's solicitors state "We are instructed that the Claimant was made redundant from this [the Service Delivery Manager] position on 31 October 2020, during the Covid-19 Pandemic". That same letter refers to the Claimant expecting a redundancy meeting when his Station Planner role (referred to below) came to an end.

- 12) The temporary Airport Team Manager role came to an end in or around late April 2021. There was a further discussion between Mr Muldoon and the Claimant around this time about redundancy. I do not need to decide whether the Claimant was in fact at risk of redundancy at this time (if the reason for the temporary role ending was that the substantive post-holder returned from maternity leave, that would not give rise to a redundancy situation) because the Claimant in any event accepted the temporary role of Station Planner, again covering a colleague's maternity leave, as an alternative to dismissal. The Claimant commenced in this role with effect from 1 May 2021. Again, the Claimant accepted this post because he wanted to stay employed.
- 13) There is a factual dispute between the parties as to whether the Claimant was sent and received a letter confirming his temporary appointment to the Station Planner role. A letter was included in the Bundle dated 14 May 2001. It is signed by Mr Muldoon. It includes the following details:
 - a) The role was temporary
 - b) The salary was £26,000
 - c) That the "secondment" may be ended sooner.
 - d) The "secondment" was from the Claimant's original role of Service Delivery Manager.
- 14) On the balance of probabilities and for the following reasons I find that the Claimant did not receive this letter:
 - a) The Respondent suggested that this letter was emailed to the Claimant. There is no covering email in the Bundle. No explanation was provided when I queried this.
 - b) The Claimant does not use the word "secondment" in his particulars of claim or his witness statement. Given that his case is for redundancy pay, and one point of evidence is that he had not been (expressly) told the Service Delivery Manager role was no longer being available for him, had the Claimant had in mind the word "secondment" it is likely he would also have used that word.
 - c) The writer of the letter was not available to give evidence as to whether the letter was sent, or to dispute the Claimant's assertion that he and the Claimant had discussed that it had not been sent.
 - d) The letter includes incorrect information about the Claimant being on secondment, which had not been suggested in previous correspondence.
 - e) The Respondent did not in fact reduce the Claimant's pay, indicating that it had not told him about a reduction in pay and did not intend one at the time.

- f) The Claimant asserts that Mr Muldoon told him that the letter about a salary change “seems to have been lost somewhere”. There is no evidence from Mr Muldoon to the contrary – he has since left the Respondent and did not give evidence in these proceedings.
- 15) There is no evidence, therefore, that the Claimant was told by the Respondent that the pay for the Planner role would reduce to £26,000 per annum and I find that there was no such discussion. Whilst the Respondent’s witness, Stephanie Furlong, Associate Human Resources Business Partner for the Respondent, says that the Claimant was told that the pay would be £26,000, she was not the person who had the conversation with the Claimant and does not know what was said or whether the letter was sent.
- 16) At some point after being offered the Planner role, the Claimant had a discussion with the substantive post holder and found out that her salary was lower than his salary. He did not raise this with the Respondent and his pay remained at the same level as previously: £33,584.62. I do not find that this is sufficient for the Claimant to be on notice that the Respondent had made a mistake about his pay (if in fact there was a mistake). His pay had remained the same on a previous change of roles, and in the absence of a discussion about pay, he was not required to assume that his pay would reduce. The role was for a fixed period during which the Claimant hoped to find another role.
- 17) The Planner role was due to end no later than 31 March 2022 (to take into account the potential early return of the substantive post-holder from maternity leave).
- 18) It is not disputed that the substantive post-holder returned to work. The return of the substantive post-holder meant that the Planner role ceased to be available (or was going to cease to be available) for the Claimant. The reason for the Claimant’s fixed term contract ending was therefore the return of the substantive post-holder. The number of employees required by the Respondent to undertake the Planner role was not proposed to reduce.
- 19) The Respondent decided that it would be able to create an additional Planner role, which meant that it could keep both the Claimant and the returning substantive post holder as Planners.
- 20) A permanent Planner position was therefore offered to the Claimant. The offer was confirmed to the Claimant in writing, with the letter being given to him on 14 February 2022. The Claimant was told that his fixed term role was due to end on 28 February 2022, and that his permanent role would commence on 1 March 2022 (the next working day). This letter confirmed that the salary would be £26,000 per annum.
- 21) There followed some confusion by the Respondent as to whether the Claimant was or was not at risk of redundancy as a result of the fixed term contract ending, but the Respondent ultimately told the Claimant that there was not a redundancy situation because he could continue in the same Planner role.

- 22) At some point in January 2022 the Claimant and Ms Furlong had a discussion about the Planner role becoming permanent and the Claimant indicated that he was still being paid at his previous rate of pay. He expressed that he did not want to take a reduction in pay. Whilst the Claimant knew that he was being paid more than the “going rate” for a Planner at the Respondent, and did not want to be paid less, he did not confirm or suggest that he had been offered the temporary Planner role at £26,000 a year.
- 23) Having found out that the Claimant was being paid more than the normal Planner pay rate, Ms Furlong raised this internally and the Claimant was informed that he had been overpaid since starting the Planner role on 1 May 2021. The Respondent reduced the Claimant’s pay to £26,000 per annum. The first salary payment at the lower rate of pay was the pay for January 2022 (the Respondent amended the Claimant’s pay in the January 2022 payroll run and backdated the amendment to 1 January 2022). The Claimant was paid the pro rata monthly equivalent of £26,000 per annum (£2,166.67 a month) from January 2022 to the termination of his employment. The Respondent proposed a repayment schedule in respect of the “overpayment”, but in the event did not enforce any repayments relating to the period 1 May 2021 to 31 December 2021.
- 24) In or around 14 February 2022, at a meeting with Mr Muldoon, the Claimant asked whether he could take redundancy instead of accepting the permanent Planner role. He was told that he could not, because the role was continuing.
- 25) The Claimant did not tell the Respondent that he did not want the permanent Planner role if the salary was reducing. He did say at the 14 February 2022 meeting that he would need to think about his position, but he did not tell the Respondent that he was rejecting the role or the change in pay.
- 26) The fixed term post came to an end on 28 February 2022. The Claimant stayed working in the Planner role following this, but did not sign and return the letter offering him the permanent role because he did not want to accept the reduced pay. The Claimant does not suggest that he communicated this to the Respondent.
- 27) The Claimant resigned on 24 March 2022, giving four weeks’ notice. His last day of employment was 21 April 2022.

The Law

Unlawful deductions

- 28) Section 13 of the Employment Rights Act 1996 (“ERA”) provides as follows:

“13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him...

...

(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."

- 29) The effect is that if an employer pays a worker less than is properly payable under his contract that is deemed to be a "deduction".
- 30) Section 14 sets out excepted deductions, that an employer can make without the deduction being unlawful. This includes an overpayment of wages.
- 31) The question for the Tribunal is whether the 'wages' claimed were 'properly payable' which involves consideration of the Claimant's contractual entitlement.
- 32) The burden of proof is on the Claimant to show wages were properly payable and he was entitled to those wages.
- 33) If an employee works under protest, they are not treated as accepting a contractual change by their conduct. In the case of *Abrahall V Nottingham City Council* [2018] EWCA Civ 796 the Court of Appeal held that where it is clear that changes are opposed by employees at the outset, their acceptance to the change cannot be deemed to have been accepted simply from silence over a period of time.

Redundancy

- 34) The provisions governing statutory redundancy payments are found in Part XI ERA 1996. Under section 135 ERA 1996 an employee is entitled to a redundancy payment if the employee is "dismissed by the employer by reason of redundancy."
- 35) The case of *East London NHS Foundation Trust v O'Connor* the EAT found that for there to be a dismissal, an employer must communicate to an employee that it is terminating the contract – and that it is doing so with effect on a date which is either expressly stated or unambiguously ascertainable from the communication. There cannot be a dismissal unless the employer communicates such a date. The EAT said "...whilst a dismissal may be effected by conduct, and the test is what the reasonable observer would understand by it, there can be no dismissal unless they would understand that the contract of employment has been unequivocally terminated."
- 36) In that case, Mr O'Connor was notified, and knew, that his role was being deleted, but the EAT found that there is no rule of law that notification of such a 'deletion' inevitably amounts to a notice of dismissal.
- 37) Dismissal for redundancy is defined, so far as relevant, by section 139(1) ERA 1996 as follows:

"139 Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

- (i) to carry on the business for the purposes of which the employee was employed by him, or
- (ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

- (i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”

Conclusions

What wages were properly payment to the Claimant in the period 1 January 2022 to 21 April 2022?

- 38) I have found as a fact that the Claimant was not told that the pay for the Planner role would be £26,000 per annum when he accepted the role on a temporary basis. The role was accepted as an alternative to dismissal. The Claimant had previously been offered and accepted a different role as an alternative to dismissal, and his salary remained the same at that time. I conclude that he accepted the Planner role on the basis that he would be paid the equivalent of £33,584.62 per annum, for the duration of the fixed term. The fact that he knew what or approximately what another employee received in the role is not sufficient for the Claimant to be deemed to have accepted the role on lower pay, or for him to be on notice of a mistake by the Respondent. The Respondent did not send him an amendment to contract letter and he knew the position was temporary.
- 39) Accordingly, I conclude that the Claimant was entitled to be paid based on an annual salary of £33,584.62 for the period 1 May 2021 to 28 February 2022, when his fixed term contract the ended.
- 40) The Claimant was offered a permanent role to take effect from 1 March 2022. He did not inform the Respondent that he was rejecting this role or the pay for the role. He did not suggest that he told the Respondent that he was working under protest. The Respondent offered the Claimant that he could stay working as a Planner past 28 February 2022 on a salary of £26,000 per annum. The alternative was that his employment would terminate at the end of the fixed term. This is different from a situation where a permanent contract continues or is attempted to be changed. I conclude that from 1 March 2022 the correct pay due to the Claimant was £26,000 per annum (plus any pay increase).
- 41) In the period 1 January 2022 to 28 February 2022, therefore, the Claimant should therefore have been paid £5,597.44 gross (2 months at £2,798.72), which, based on the net figures in the Claimant's pay slips, is £4,628.30 net (without deduction for employee pension, and adding on the employer pension contribution).

Were the wages paid to the Claimant in that period less than the wages he should have been paid?

- 42) The Claimant was paid £4,463.34 gross during this period, which is £3,805.05 net (without deduction for employee pension, and adding on the employer pension contribution). He therefore suffered a deduction from his wages of £1,134.10 gross (£823.25 net).
- 43) A mistake by the employer in setting an employee's pay (if there was a mistake) is not the same as an overpayment. Therefore having found that the salary properly

payable to the Claimant in the relevant period was £33,584.62, there was no overpayment to recover.

How much is the Claimant owed in respect of deductions from wages?

44) It follows that the deduction of £1,134.10 gross (£823.25 net) was unlawful.

Redundancy pay

45) I have found as a fact that the Claimant ceased to be employed in the Service Delivery Manager role as of 31 October 2020.

46) He took up the role of Airport Team Manager, and ceased in that role prior to taking up a Planner role on 1 May 2021.

47) The fact that the Claimant agreed to take temporary posts as an alternative to dismissal does not mean that his previous permanent post subsisted: it did not. At the time of his resignation, he was a Planner, and it was a fixed term Planner role that had ended on 28 February 2022, not a secondment from any other role.

48) Whilst there is some confusion on the part of the Respondent as to the legal position regarding the potential termination of the Claimant's employment at various times, and notwithstanding that there was a discussion about termination of the Claimant's employment as a Planner because of redundancy in or around January / February 2022, there was not a redundancy situation within the meaning of s.139 of the Employment Rights Act 1996 because the Respondent did not require fewer employees to do the Planner role. Ultimately the Respondent proposed to increase the number of employees it required to do the Planner role.

49) It being the case that there was not a redundancy situation, the Claimant cannot be due redundancy pay.

Employment Judge Youngs
10 August 2023

Judgment sent to the Parties on 29 August 2023

For The Tribunal Office

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