EMPLOYMENT TRIBUNALS

Claimant **Respondents**
Mr Ahmed Mohammed Mossa **v** **First Greater Western Limited**
Mr Adam Field

PRELIMINARY HEARING

Heard at: **London Central (in person)**

On: **9th, 10th, 11th & 12th May 2023**

Before: **Employment Judge Gidney with members, Mr Alleyne and Mr Harrington-Roberts**

Appearances
For the Claimant: **Mr Betchley, Counsel**
For the Respondents: **Mr Cook, Counsel**

JUDGMENT AND FULL REASONS

The Judgment of the Tribunal is that:

1. **The Claimant's claims of victimisation and detriment for making public interest disclosures against First Greater Western Limited and Mr Adam Field are dismissed on withdrawal by the Claimant.**

2. **The Claimant's claim of unlawful deduction of wages against First Greater Western Limited is not well founded and is dismissed.**

Introduction

3. In this matter, the Claimant was represented by Mr Betchley of Counsel and the Respondent by Mr Cook of Counsel. The Tribunal sat with members Mr Harrington-Roberts and Mr Alleyne. The Tribunal is grateful to both Counsel for the presentation of their cases.

4. By a claim form presented on 3rd of March 2022 the Claimant, Mr Mossa, presented claims of:

    4.1. Victimisation, contrary to s27 **Equality Act 2010** ('the **EqA**') following a complaint of race discrimination and discrimination on the grounds of religion and belief;
    4.2. Detriments on the Grounds making protected interest disclosure contrary to s47B **Employment Rights Act 1996** ('the **ERA**');
    4.3. Unlawful deduction of wages, contrary to s13 **ERA**.

5. The claim form named three Respondents, (i) his employer, First Greater Western Limited (ii) Mr Graham Hurst and (iii) Mr Adam Field.

6. Mr Mossa remains employed by the 1st Respondent. He has been signed off work since September 2021 due to his long term illness, which we understand is psychosis, anxiety and depression.

7. There is a long history of litigation between the parties, this being the 4th Claim Form presented, with two other Claims presented in 2013 and one in 2018.

Preliminary Matters

8. This hearing was originally listed for five days, but was reduced to 4 days, on account of the King's Coronation bank holiday. We were provided with an

agreed bundle running to 795 pages. The Claimant provided 2 witness statements, the first contained within the bundle at **[767]**[1] and a second statement. The Respondent provided witness statements on behalf of Graham Burston and Adam Field.

9. This matter was case managed by Employment Judge Bezade on the 30th May 2022. At that hearing, the case against Mr Hurst was withdrawn and he was removed from this claim.

10. On the 1st morning of the case, during the preliminary housekeeping session, Mr Betchley, the Claimant's Counsel stated that the Claimant intended to withdraw his claims for victimisation and detriment for making public interest disclosures. As I explained the consequences of this, the Claimant himself indicated that he did not wish to withdraw those claims.

11. Mr Benchley then made an application to the Tribunal to make an adjustment to its normal sitting times by restricting the Tribunal's sitting times to the mornings only. This was on account of the Claimant's medication, Olanzapine, which had to be taken at 2:00pm and had the effect of causing drowsiness or sleep such that the Claimant would be at a substantial disadvantage if the Tribunal set in the afternoon. The Claimant did not produce any medical evidence to support the application, although he did have his medication with him. Mr Cook, on behalf of the Respondent, did not oppose the application, subject to the case still being completed within the existing trial window. The Tribunal expressed some concern about the lateness of such an application, particularly given the significant impact it would have on the hearing time. We asked the parties to confirm and agree the List of Issues given the withdrawn / not withdrawn status of the victimisation and public interest disclosure claims. At that point Mr Betchley asked for a short adjournment to take instructions, which we granted.

[1] Pages refer to pages within the Agreed Bundle of Documents.

12. Upon his return, Mr Benchley confirmed after discussion with his client, that the Claimant did indeed wish to withdraw his victimisation and public interest disclosure claims. The Tribunal took a moment to ensure that this was Mr Mossa's wish and that he understood the consequences of withdrawing those claims. The Claimant and his Counsel then both confirmed the withdrawal of those claims. The Tribunal then gave a short judgement dismissing the claims of victimisation and detriment for making a public interest disclosure on withdrawal by the Claimant. As Mr Field was only a named party in that claim, the individual claim against Mr Field was also dismissed. What remained was one claim of unlawful deductions of pay against the 1st Respondent only.

13. From hereon in we shall refer to the 1st Respondent simply as the Respondent. This matter had been listed with Non-Legal Members to determine the detriment claims. We decided to continue as a Tribunal of three even though the detriment claims had fallen away as the case had begun and we had all read into the papers. We also granted the Claimant's application to sit in morning sessions only, as an adjustment to the Tribunal's normal sitting times to accommodate the Claimant and the effects upon him of his lunchtime medication. This was made possible by the reduction of the claims to unlawful deduction of wages only, as we felt that the reduced number of claims could still be accommodated within the existing listing.

The List of Issues

14. The list of issues relevant to the remaining claim was identified by Employment Judge Beyzade on the 30th May 2022 in his Case Management Order **[58]**. Those issues are:

    14.1. Has the claimant suffered any deductions from the wages properly payable to him by the 1st Respondent on any occasion?

14.2. If so, were any such deductions authorised? The Claimant will be required to specify the basis upon which he claims to have a legal entitlement to receive higher renumeration than was in fact paid.

14.3. Does the Tribunal have jurisdiction to consider this claim, or any part thereof, in light of the applicable time limits?

Reasons

15. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

Findings of Fact

16. The Claimant commenced employment with the Respondent on 15th May 2006, pursuant to a letter of appointment dated 18th April 2006 **[84]** and a Statement of Terms of Conditions dated 18th April 2006. Those terms contain the following clauses **[86]**:

> *'[4] Place of work. Your place of work is Ealing Broadway, although the Company may from time to time require you to work at other locations in accordance with its business / operational requirements.*
>
> *[7] Remuneration. Basic salary for this position is £17,988. For the purposes of the Employment Rights Act 1996, you authorise the company to deduct from your pay any sums due to the company, including without limitation any other payments, loans or advances made to you by the company'.*

17. The Claimant was appointed to the role of Gate Operative at Ealing Broadway. His role comprised of a number of elements, such as ensuring passengers got through the gate safely, revenue protection and dispatching trains safely. We accept the Claimant's evidence that whilst he was working as a Gate Operative at Ealing he sold tickets and issued penalty fines, having the statutory authority to issue fines pursuant to his badge number. The Claimant issued paper tickets and fines. We note the finding of fact made by Employment Judge Davidson at a prior hearing that he had received awards and public acknowledgment for his performance. He told us he'd won awards for issuing tickets. We find on the balance of probabilities that the Claimant's Gate Operative role at Ealing Broadway was equivalent to a Gate Assistant GO2 role at Paddington. The only difference was that at Ealing Broadway the Claimant issued papers tickets and fines. At Paddington the process had been moved onto a hand held machine, known as Advantix, for which training was required.

18. Ealing Broadway Station did not have two grades of Gate Operative. The Advantix hand held tickets machines were not in use at Ealing Broadway, so training for them was not required at Ealing. The Claimant worked at Ealing Broadway with Redouane Assad or 'Red'. Red was a fellow Gate Operative. We accept the Claimant's evidence that at the time, at Ealing Broadway, Red had not been trained to issue tickets or fines and did not do so.

19. We heard evidence from Graham Burston and we accept his evidence. He joined First Greater Western Railway at Paddington on 7th January 2008 as a Gateline Assistant GO1 Grade. This indicates to us that Paddington had two grades, GO1 and GO2, for its Gateline Assistants from at least 2013 and possibly as early as 2008. At Paddington a GO1 Gateline Assistant's role consisted of overseeing and managing commuters passing through the gate line exit and entry points. A GO2 Gateline Assistant had been trained in the use of the Avantix handheld mobile ticketing machine and, in addition to GO1 Gateline Assistant duties, they could also sell tickets and issue penalty fares

on that system. On 3rd March 2013 Graham Burston became a GO2 Gateline Assistant. He moved onto the GO2 Gateline Assistant roster.

20. In May 2013, the Claimant, still based at Ealing Broadway, was dismissed by the Respondent following allegations of bullying and harassment. The Claimant appealed against that dismissal and an appeal hearing was convened in late February or early March 2014, which was conducted by Mark Hefferman. The appeal hearing was adjourned and then reconvened on the 6th March 2014. At the hearing, the Claimant told Mr Hefferman '*excess fares and penalty fares, Moses is the one with the most*' **[144]**. This supports our view that the Claimant at Ealing Broadway was doing a compatible role to the Gateline Assistant GO2 Paddington albeit without the Avantix machine and without the training required for its use at Paddington.

21. Mr Hefferman made the decision to reinstate the Claimant to be based at Paddington. When the Claimant questioned why he could not be re-instated to Ealing Broadway, Mr Hefferman said:

> *'I have decided that the decision to dismiss you was too severe based on the interpretation of the facts and I will reinstate you into First Greater Western employment. I've decided that you will be moved from Ealing Broadway to Paddington. I have made this decision in the best interests of you and for the business.*
>
> *I'll be blunt. I've made my decision. It is not subject to negotiation. I spent a significant amount of time reading all this evidence and there was a charge to answer and I also think that there are a number of things that need to change. You have played a role in some of these events and you have been reinstated and you have the opportunity to start afresh at Paddington. I think this is the best decision for you'.*

22. On 6th of March 2014, Mr Hefferman sent the Claimant the disciplinary appeal outcome reinstating him with a written warning **[146]**. The letter confirmed that the Claimant would be relocated from Ealing Broadway to Paddington. He was told that his role would be that of a Gateline Operative. Finally, the letter told the Claimant that he will take on the Paddington terms and conditions for this role.

23. On the same day, 6th March 2014, the Respondent's Retail Manager, Matthew Lee, completed a Payroll Employee Change form for the Claimant **[98]**. The reason given for the change stated that Mr Mossa had been reinstated as a GO1 Gateline Assistant at Paddington and that his new reduced salary will be £20,244.00. Whilst Mr Hefferman had told Mr Mossa that he would be reinstated on Paddington terms and conditions, he did not say to which grade or that there would be any reduction in his pay. Mr Mossa question this and in an emailed response dated 31st March 2014 **[158]** Mr Hofferman stated, '*the sanction of moving your location of work through this process does not affect your continuous employment. You will, however, be expected to take the terms and conditions of the new post. I will ensure that the HR team provides you with this detail*'.

24. We find as a fact that the Respondent never sent out a new contract to the Claimant for a Gateline Assistant GO1 Grade at Paddington. No contract was sent at all. The Claimant was never sent or asked to sign a contract which reflected the GO1 grade or level of pay. We reached this conclusion on the grounds that no such contract has been disclosed or provided and the Claimant denied every receiving one. On 10th April 2014 Mr Singh, the Claimant's then solicitor, had to ask if his pay was affected, changed or modified by the move **[159]**. The Respondent replied on the same day and relied on clause 4 of the original contract (quoted above) to justify a change in location **[161]**. It did not address the issue of a reduction in pay.

25. As such, we find the Claimant was moved from Ealing Broadway, which had one Gateline Operative role, to Paddington, which had two grades of Gateline Assistant, on to the lower grade, which involved a reduction in pay. This happened (the move to lower pay) without explanation or notice and was not set out in writing or agreed by Mr Mossa at the time. We also note that Mr Hefferman did not, either in the appeal minutes or in the appeal outcome letter or in his e-mail in which he referred to the disciplinary sanction of a move **[158]** explicitly impose the sanction of a reduction in pay as part of the disciplinary process.

26. In the circumstances, we found that the Claimant moved to Paddington with a disciplinary warning onto Paddington terms and conditions to undertake the role of Gateline Assistant G01. Whilst the information given to the Claimant did not identify the grade of Assistant, we find that was the grade that the Claimant was moved onto. We find as a fact that at Ealing Broadway at that time the Claimant's gross salary inclusive of London allowance was £24,712.00. This was the sum that was properly payable to the Claimant under his contract.

27. The Claimant commenced his role at Paddington and received his first pay slip on the 5th April 2014. This stated his Gross annual salary to be £20,244.00 **[302]**. This statement excluded his London allowance, which would need to be factored back in. The Respondent asserts that the difference in pay is the difference between the salaries of the GO1 and a GO2 Gateline Assistant. The parties agreed this figure by reference to the actual pay slips in the sum of £1,808.74 per annum. We have accepted this figure as the difference between the Ealing Broadway salary and the reduced Paddington salary as at 5th April 2014.

28. At some point prior to 2020 Ealing Broadway was transferred out of the Respondent's ownership and control to another rail franchise. We were provided with no information as to what level of pay the new controller of that station paid its Gateline Assistants, and even if we did, what a new provider pays now is not evidence of what the Respondent would have paid now had Ealing Broadway remained under its control throughout.

29. We find as the fact that from the date of the Claimant's transfer to Paddington in April 2014 until he began an extended period of sickness absence in September 2021 Mr Mossa was engaged as and continued in the role of GO1 Gateline Assistant. He never undertook or completed the training necessary to be a GO2 Gateline Assistant and never applied for that grade. He never qualified to operate the Advantix handheld ticket machine, unlike Mr Burston.

He never sold tickets or issued fines. He never moved onto the GO2 Gateline Assistant salary.

30. In February 2022, the Claimant accepted that he had not requested any training to become a grade GO2, however, he disputed that he had been offered training and refused it **[274]**. Contrary to the assertion made in February 2022, the Claimant told us in evidence that he had requested training but was not given it. We find it more likely that Mr Mossa did not request training as the email in February 2022 **[274]** suggests. In any event, the Claimant has not operated in Advantix ticketing machine in Paddington and has never progressed to grade GO2.

31. As stated, in September 2021 the Claimant commenced a period of sickness absence which is not yet returned. He remains the Respondent's employee. On 3rd March 2022 the Claimant presented the Claim Form which is the subject of this case. We are required to decide:

    31.1. What the total amount of wages properly payable to the Claimant are?

    31.2. At the point of reinstatement were the wages properly payable to the Claimant the Gateline Assistant GO1 grade onto which the Claimant was put on his transfer to Paddington?

    31.3. Were the wages properly payable the wages that the Claimant was on at Ealing Broadway before his disciplinary transfer?

    31.4. If the Claimant was paid less than the wages properly payable, were those deductions authorised?

    31.5. Do we have the statutory jurisdiction to hear the Claim in light of the time limits?

The Law and Submissions

32. 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 the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages. Section 13(1)(a)-(b) **ERA** states 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 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.*

33. For the purposes of claims under s13 and s23 **ERA**, 'wages' are defined by s27 **ERA** in the following terms:

> *'In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including— (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise …'*

34. Whether there has been a deduction for the purposes of s13(3) **ERA** depends upon whether the sums claimed were properly payable. To establish that wages are properly payable a Claimant must establish a legal entitlement to the payment in question (**New Century Cleaning Co Ltd v Church** [2000] IRLR 27, CA). Whilst a legal entitlement need not necessarily be contractual, a legal entitlement will be contractual in the vast majority of cases. In order to constitute wages properly payable within the meaning of **s.13(3)**, the loss must be capable of quantification (**Delaney v Staples (t/a De Montford Recruitment)** [1992] ICR 483, HL).

35. In **Coors Brewers Ltd v Adcock and ors** [2007] ICR 983 CA, Wall LJ said the following, which is of general application: *'Part II of the Employment Rights*

Act 1996, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure'. However, in **Lucy and ors v British Airways** UKEAT/0033/08 the EAT explained that just because quantification is difficult or disputed, that does not necessarily mean that the wages claimed are not capable of quantification. In **Agarwal v Cardiff University** [2019] ICR 433, the Court of Appeal confirmed, resolving a conflict in prior EAT authorities, that the ET does have the jurisdiction to construe the terms of a worker's contract, if necessary, in order to determine a statutory wages claim.

36. On the issue of construction of contracts, the Supreme Court in **Arnold v. Britton** [2015] AC 1619 at [16]-[18] stated that where the meaning of the words used in a written agreement is completely clear, particularly in a formally drafted legal document, there is no scope for purposive interpretation in pursuit of some commercial common sense result to which the parties might have agreed, but to which ex hypothesi they do not appear to have agreed by their words. Lord Neuberger PSC said that the Court was not justified in embarking on an exercise searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning of the words the parties have used.

37. Lord Clarke said in **Rainy Sky SA v. Kookmin Bank** [2011] 1 WLR 2900 at [23], that when the parties have used unambiguous language, the Court must apply it, even if this leads to the 'most improbable commercial result'. The correct approach is to consider first the words of the contract to arrive at an initial view of what the text required and whether it was ambiguous, before going on to consider whether there was any justification for departing from that construction on the basis of contextual considerations and commercial sense (**National Bank of Kazakhstan v Bank of New York Mellon** [2018] EWCA Civ 1390 at [39]-[72]. Hamblen LJ).

38. Where there has been no express agreement to a variation of contract, there may nevertheless have been an implied agreement to a variation as a result of the worker's conduct. Agreement by conduct is fact-sensitive, but will

typically occur in circumstances where a worker continues to work under the varied terms, and especially in circumstances where the worker does not indicate that they are working under protest. For a worker to be taken to have accepted a change by not objecting to it, the change must have an immediate practical application, such as a downward change in the rate of pay (**Jones v Associated Tunnelling Ltd** [1981] IRLR 477, EAT at para 22).

39. Elias P (as he then was) adopted a similar approach in the later case of **Solectron Scotland Ltd v Roper and ors** [2004] IRLR 4, EAT at §30: '*The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights*'.

40. Claims for unlawful deductions are limited by a two-year backstop. The **Deduction from Wages (Limitation) Regulations 2014** inserted **s.23(4A)** limiting all wages claims to a maximum two-year period immediately pre-dating the presentation of the claim. **Section 23(4A)** provides:

> *'An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint'.*

41. We have not recited all of the submissions of both Counsel herein, however we are very grateful to both Counsel for their written skeleton arguments and oral submissions for the insight and argument they provided.

42. In summary, Mr Bletchley, for the Claimant, made the following points in submissions:

42.1. The difference (not disputed by the Respondent) between the two salaries at the time of re-location was £1,808.74.

42.2. The Respondent does not rely upon a statutory provision as authorisation for the deductions;

42.3. There is no provision in the Claimant's contract (either before or after re-location) which authorised the Respondent to reduce his salary unilaterally **[85-95]**;

42.4. The Claimant did not signify in writing his agreement or consent to the making of the deductions.

42.5. The Respondent's defence of the claim ought to fail as it has not shown one or more of the permitted reasons for deducting the Claimant's wages under s13 **ERA**.

42.6. The legal effect of the Claimant's successful appeal against dismissal was that the dismissal had not occurred, and his employment continued on his existing terms and conditions.

42.7. It does not appear to have been the intention of the appeal officer to demote the Claimant **[146-147]**.

42.8. Whilst the Claimant was advised that terms and conditions at Paddington would apply when he relocated from Ealing to Paddington, no such terms were ever provided to him, specifically no new contract of employment or statement of terms was provided to him;

42.9. The reference to the Claimant taking on Paddington terms and conditions did not in itself create a new contractual position between employer and employee regarding salary, particularly when no such terms were ever provided to the Claimant;

42.10. The GO1/GO2 salary difference during the calculation period was £1,802.00 per year. On this basis, the Claimant's notional gross loss over the period 3 March 2020 to 3 March 2022 would be £3,604.00.

43. In summary, Mr Cook, for the Respondent made the following points in submissions:

43.1. The alleged deductions will only be properly payable so as to found a cause of action under s 13 **ERA** if the Claimant can establish that he had a contractual or other legal right to retain his Ealing base salary following his relocation to Paddington.

43.2. The express terms of the Claimant's contract of employment provide that the Respondent was entitled to require him to work at locations other than Ealing Broadway in accordance with business / operational requirements **[86]**.

43.3. The express terms of the Claimant's contract did not preclude the Respondent from varying the Claimant's base salary if he worked at a different location. As there is no express contractual term the Claimant can rely upon to establish an entitlement to Ealing Broadway base pay, the claim must fail.

43.4. If it is Claimant's argument that there was an express contractual variation whereby the Respondent agreed that he would retain his Ealing base salary upon his relocation to Paddington, he has adduced no documentary evidence of such an agreement.

43.5. Even if the Tribunal finds that the Respondent technically breached the Claimant's contract when he was relocated to Paddington, the Claimant nevertheless accepted the variation by his conduct.

43.6. Mr Hefferman clearly and consistently stated that the Claimant would be expected to work in accordance with Paddington terms and conditions as a result of his relocation and that this condition was non-negotiable (see **[145]**, **[146]**, **[157]-[158]**, **[163]**).

43.7. The Claimant understood that the substance of Mr Heffernan's decision was that he would be re-engaged at Paddington on Paddington terms and conditions. Consequently, when he relocated to work at Paddington, he did so in the full knowledge that he would do so under Paddington terms and by his conduct he accepted those terms.

43.8. The Claimant continued to work on a revised base salary for many years between April 2014 and first raising concerns about his salary to Mr Field on 5 March 2021. Almost seven years elapsed between the

change in Claimant's base pay following his relocation and him raising a query about his pay.

43.9. Employment Judge Elliott made a finding of fact, which binds the Claimant, that the Claimant was aware from March 2015 that his salary had been reduced and that he did not complain about the reduction in his salary until March 2021 **[74]-[75]** and **[77]**.

43.10. It is now common ground that the Claimant cannot evade the two-year backstop in s23(4A) **ERA**, which prevents the Tribunal from considering any statutory wages claim in respect of deductions occurring more than two years prior to the date the ET1 was presented. This is a hard two-year limit. The ET1 was presented on 3 March 2022. Consequently, the Tribunal has no jurisdiction to consider any alleged deductions which occurred prior to 3 March 2020.

43.11. At Ealing Broadway there was only one grade for Gateline Operatives. In contrast, Paddington operated two grades for Gateline Operatives – GO1 and GO2. The Claimant was transferred to Paddington as a GO1, which was the equivalent to his position at Ealing, as he did not have the necessary Avantix electronic ticketing and penalty fare training required to be a GO2 **[148]**. The Claimant accepted on multiple occasions that he had not undertaken Avantix electronic ticketing training, which was necessary for him to be re-graded as GO2 and to be paid accordingly (see eg **[207], [274]**).

43.12. The Claimant faces the same 'agreement by conduct' hurdles on this way of putting his claim. He was appointed as a GO1 at Paddington in 2014, he worked as a GO1 and he did not issue tickets or penalty fares at all. He knew, on the evidence and EJ Elliott's factual findings, that his salary was lower post-relocation and he did not query this until 2021.

43.13. The parties agreed that the Claimant's gross salary in 2014 was approximately £1,808.74 lower following his relocation. However, the Tribunal will not be concerned with calculating the difference in salary in 2014 due to the operation of the two-year backstop. The relevant period for calculation purposes is the period 3 March 2020 to 3 March 2022 only.

43.14. There is no evidence before the Tribunal about salaries for gateline staff at Ealing in 2020-2022 and the extent of any changes in salary computation at Ealing between 2014 and 2022 relative to changes in salary computation at Paddington over the same period. The Respondent cannot assist with this issue given that the operation of Ealing Broadway station transferred to another operator before 2020.

43.15. If the Tribunal quantifies the claim on the basis that the Claimant was entitled to be paid at the GO2 rate rather than the GO1 rate in period March 2020 to March 2022 then the difference in salary on this basis is £1,802 per year, which would give a notional “loss” of £3,604 gross during the calculation period.

Conclusions

44. Our conclusions are as follows:

45. We find as a fact that Mr Hefferman did not impose a disciplinary sanction of a reduction in pay. No new statement of terms or conditions or statement of change was ever sent to the Claimant. In the absence of either, we find that the sums properly payable to the Claimant in 2014 was the sum recorded in his last Ealing payslip in the summer of £24,718.00 inclusive of London allowance.

46. We conclude that the Claimant should not have been treated as a GO2 grade Gateline Assistant or be paid as if he had that role. He has never applied for or undertaken the necessary training for that role.

47. However, this does not mean that the Respondent could reduce his pay from his Ealing Broadway pay to reflect the Paddington GO1 grade unless that was the sum properly payable to the Claimant which it wasn't. The reduced figure could not have become the ‘properly payable’ sum unless it was imposed as a disciplinary sanction in writing and the Claimant had accepted that sanction.

As a result, we conclude that the Claimant's salary should have stayed at the level of the last Ealing pay slip until one of two things happened:

47.1. The Claimant completed the training for a grade GO2 Gateline assistant; or,
47.2. The Paddington GO1 Gateline Assistant Salary rose to match the Claimant's old Ealing Broadway salary.

48. We are supported in our view of this because it is clear on the evidence that the Respondent had legacy GO1 staff on different levels of pay **[214]**. At least one other member of staff had redeployed to the Paddington GO1 role from another other station and had been allowed retain their old higher salary. Mr Field confirmed this in his written witness statement at **[AF20c]** where he stated:

> '*There were 20 GO1s. Contrary to what Mr Mossa had alleged during our meeting on the 18th of July 2021, all GO1s except one was on the same salary which was 23,705. The GO1 who was on a different salary had been redeployed and the salary had been negotiated with the company*'.

49. This employee, we conclude, is the only Grade GO1 employee whose salary has been redacted in the current Gateline Staff, Grade and Salary sheet **[214]**. The sheet described that employee's grade as a personal grade. We find that this establishes that the Respondent has agreed to maintain a transferring employee's salary at that higher level when they have moved to a Paddington GO1 roll, which is a ring fencing of salary that we would expect, absent anything else recorded in writing. The Respondent was quite capable of maintaining the Claimant's Ealing Broadway salary had it so wished. We find that to lawfully reduce it would have required the reduction in pay to be part of the Claimant's disciplinary sanction, which it was not. All that the Respondent did was tell the Claimant that he would move on Paddington terms and conditions, but in the case of the employee referred to in paragraph 20(c) of Mr Field's statement, that was on his old higher salary.

50. The document at **[214]** records the current salary of the GO1s without London allowance in the sum of £23,705.00 so it cannot fairly be compared with the Ealing Broadway payslip which is at £24,718.00 which does. As stated, we only have the statutory jurisdiction to consider the Claimant's claims in the period between 3rd March 2020 and 3rd March 2022. We cannot go behind section 23 (4A) **ERA**. So we have to ask what sum was properly payable to the Claimant on the 3rd March 2020 and then determine if he was paid less. We find the sum properly payable to the Claimant on 3rd March 2020 was the higher figure of either the Ealing Broadway payslip or what the GO1 grade gateline assistant was actually paid. The document at **[214]** does not assist us in this as the figures do not include the London allowance. However, the Claimant's P60 for the years ending April 2020 to April 2022, does contain his total gross pay inclusive of London allowance. In considering the P60 (to be found at **[343 to 345]**) we reject the Claimant's contention that the figures it contains are incorrect or false, as he had invited us to conclude. There is simply no evidential basis to sustain that submission. The figures contained in the P60 reveal the following:

50.1. Tax year to the 5th of April 2020: £24,891.89.
50.2. Tax year to the 5th of April 2020: £25,152.16.
50.3. Tax year to the 5th of April 2020: £25,165.83.

51. All of these sums exceed the Claimant's last Ealing Broadway payslip of £24,718.00. This was the sum properly payable to the Claimant when he transferred. For the period that we are allowed by statute to consider, the Claimant's pay exceeded that sum.

52. We have had some difficulty considering how to reflect in our assessment, the assertion that we are comparing the Ealing Broadway pay from 2014 with the GO1 Gateline Assistant pay from 2020. By 2020 it is possible that a Gateline Assistant at Ealing Broadway would be earning more than the £24,891.89 that the Claimant received at Paddington. However, being guided by the principle that in order to constitute wages properly payable within the meaning of **s.13(3)**, the loss must be capable of quantification (**Delaney v Staples (t/a De**

Montford Recruitment) [1992] ICR 483, HL) we have come to the conclusion that such a calculation can not fairly be quantified. This is because we have no evidence before us of the current pay of an Ealing Broadway Gateline Assistant, and even if we did it would not be fair to use it as the station is now under the control of a different train operator who may have an entirely different method of setting levels of pay.

53. As such we find that at the opening of the period over which we have jurisdiction, that the Claimant was being paid the sums properly payable to him. The fact is that the Claimant did delay for a period of eight years between the receipt of his salary at Paddington and issuing his claim. We do accept and find as a fact that he was aware of the underpayment as early as 2015 and it appears that he was alive to the possibility of an underpayment from as early as 2014. Section 23 (4A) **ERA** was introduced into law to stop very old and historic wages claims from proceeding, no doubt for the sound policy reason of avoiding the difficulties in calculation likely to be posed by very old claims. It is for this reason that we find the Claimant's unlawful deductions claim pre-dating 3rd March 2020 must be fail and that there is no evidence before us to conclude that the sums he was paid after that date were below the sums properly payable to him, as far as we can fairly calculate that figure. For that reason the Claimant's unlawful deduction claim is ill founded and is dismissed.

Oral reasons delivered on 12th May 2023

Written reasons dated 21st September 2023

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Employment Judge Gidney

Sent to the parties on:
06/10/2023
For the Tribunal: