EMPLOYMENT TRIBUNALS

Claimant: Mr L Linton

Respondent: Amey Services Ltd

Heard at: Birmingham (in public), by video (CVP) **On:** 6 September 2023

Before: Employment Judge Cuthbert

Representation

Claimant: Mr Beckford (non-legal representative)
Respondent: Mr Taylor (solicitor)

JUDGMENT

The claimant's claim for unlawful deductions from wages fails and is dismissed.

REASONS

Introduction

1. This case was heard on 6 September 2023. Summary oral reasons were given for the judgment above, following which a request for written reasons was made by Mr Beckford, on behalf of the claimant, at the end of the hearing.

Procedure

2. The case was heard in public by CVP, listed for three hours. There were no material issues with the hearing proceeding by video, save that one of the respondent's witnesses, Mr Berry, had an intermittent internet connection and disconnected several times during his evidence. His evidence was nonetheless able to be completed.

3. I was provided with a 125-page hearing bundle and witness statements from the claimant and from three managers at the respondent.

Issues

4. I discussed the issues with the parties at the start of the hearing, which I had identified beforehand as follows:

    4.1. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? This gave rise to the following:

        4.1.1. Did the wages which were *'properly payable'* to the claimant include a 15% shift allowance? Or in other words, did the claimant have a legal entitlement to that allowance (including a contractual entitlement)?
        4.1.2. If not, the claimant's claim fails.
        4.1.3. If the claimant did have such a legal entitlement, were the total wages paid by the respondent to the claimant on any relevant occasion less than the net amount of the wages which were "properly payable" on that occasion?

5. The parties agreed that these were the relevant issues. I explained that some of the evidence I had read in the bundle and witness statements (before the start of the hearing) appeared to stray beyond the issues above. So, I explained that if questions were being asked during the oral evidence which were not going to assist me in deciding the issues above, I would be likely to move things on to relevant issues. This was in accordance with Rule 2 of the ET Rules and the overriding objective.

6. In order to assist the parties, and in view of the claimant not being legally represented, I explained that the issues to be decided were **not** about whether the claimant's pay was fair or just or whether it was the same as, or comparable to, that paid to his colleagues doing the same job. The issues were only about the pay to which he personally was legally entitled and whether he had received the correct amount of pay in light of that entitlement. I explained that this was likely to boil down to my interpretation of the claimant's contract of employment and what it said about his pay and in particular whether he was able to establish any contractual entitlement to the 15% shift allowance.

Legal framework – unlawful deductions from wages

7. Section 13 of the Employment Rights Act 1996 (ERA 1996) provides as follows (emphasis added):

    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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.*

8. Remedies for a breach of section 13 are set out in section 23 ERA 1996 and "wages" are defined in section 27.

9. In relation to implied contractual terms, whether a particular term should be implied into a contract is a question of law and a court will look at the presumed intention of the parties at the time that the contract was made (*Casson Beckman and Partners v Papi* [1991] BCC 68, CA). A term will only be implied if it is **necessary** to make the contract work (*Ali v Petroleum Co of Trinidad and Tobago* [2017] ICR 531). Necessity is not established by showing that the contract would be improved by the addition.

10. The traditional requirement for the implication of terms by 'custom and practice' is that the custom in question must be reasonable, notorious and certain (*Sagar v H Ridehalgh and Son Ltd* [1931] 1 Ch 310, CA). There must be sufficient evidence of the alleged custom and practice to allow the Tribunal to infer that both employer and employee would regard themselves as bound by the practice, notwithstanding the absence of any express provision to that effect in any individual employment contract.

Evidence and findings of fact

11. I heard oral evidence from the claimant, who was cross-examined by Mr Taylor on behalf of the respondent, and from Keith Berry a site manager, Jon Cartwright, a Facilities Manager, and John McInnes, a Regional Operational Manager, each of whom were cross-examined by Mr Beckett on behalf of the claimant.

12. My findings on the facts relevant to the issues above are set out below. I have not made findings on facts which I did not consider relevant.

13. The claimant has been employed by the respondent since May 2016 as a carpenter/joiner, based at HMP Brinsford. His employment is ongoing. The claimant's offer letter from the respondent said nothing of direct relevance

to the issues in dispute, and it enclosed a copy of his contract of employment, signed by the claimant in May 2016, which contained the following relevant provisions, in the 'statement of terms and conditions':

> *Hours of work: You will work 39 hours per week, with a 60 minute unpaid lunch. You will be expected to be part of a rota which will be determined locally, this will include being on standby and being called to the establishment in the case of an operational emergency.*
>
> *Annual Salary: £27,500 per annum*
>
> *Overtime: As per Clause 7*
>
> *Allowances: As per Clause 7*

14. There were various clauses following on. The relevant clauses were as follows:

> *6. HOURS OF WORK*
>
> *Your normal working hours are as set out on the front page of this Contract. However, you are required to work such hours as are necessary to complete your duties without additional pay (unless specifically agreed in advance in connection with any entitlement to overtime pay).*
>
> *…*
>
> *7. REMUNERATION*
>
> *SALARY*
>
> *The annual salary for this appointment shall accrue from day to day, payable by equal monthly instalments by credit transfer to your bank or building society on the 27th day of each month, after the necessary deductions for tax and National Insurance or any other authorized deductions have been made.*
>
> *…*
>
> *Your salary will be eligible for review in accordance with the collective bargaining negotiations in April each year commencing in April 2017.*
>
> *…*
>
> *OVERTIME*
>
> *Monday to Friday - basic rate until 2000 and then time and a half*
>
> *Saturday and Sunday - time and a half.*
>
> *ALLOWANCES*

> *If you carry out stand by you will receive an on call allowance of £95.00 per week.*

15. There were various payslips in the bundle which showed the claimant receiving pay in line with the terms above, including some overtime payments. The claimant accepted that he had received the correct pay in terms of his salary, overtime and standby allowance, but claimed that in addition he should have been paid a 15% shift allowance for working weekends. The claimant's salary had also been reviewed and increased annually. At the time of the hearing, it was £32,575.26

16. It was not in dispute that some other employees carrying out the same role as the claimant received a 15% shift allowance. The reasons for the different pay arrangements as between the claimant and some of his colleagues were as follows, as Mr Berry explained in his written evidence, which I fully accepted. There was no contradictory evidence before me and this evidence was not challenged. The respondent's salary guidelines at the time of the claimant's appointment were from £23,000 to a top range of £28,000. The claimant's starting salary of £27,500 was at the top end of the scale. The salary guidelines were updated in 2018, with a bracket between £24,150 - £29,150. Along with the new salary range, new starters received a basic salary for working Monday to Friday only and those working rostered weekends received a 15% allowance in addition to their basic salary for that specific day as worked (one rostered weekend a month). Mr Berry explained that the respondent did not amend the terms and conditions of its existing employees (including the claimant) as they had been employed on starting salaries at the higher end of the salary guidelines.

17. The bundle included a template version of the terms and conditions which were issued to these newer joiners and these included the following express terms, which were absent from the claimant's written contract:

> *Work Schedule: Your normal hours of work are 39 per week, with a 30/60 minute unpaid lunch. Your exact working pattern will be determined locally and will involve weekends on a rota basis. (IF THIS SHIFT PATTERN, EE RECEIVES 15% SHIFT ALLOWANCE)*
>
> *…*
>
> ***Allowances***
>
> *Standby: …*
>
> *Shift Allowance: When working a pattern involving weekends on a ROTA basis, you will receive a shift allowance of 15% of your basic salary which is subject to tax and National Insurance deductions. (REMOVE IF NOT ON ROTATING SHIFT PATTERN*

18. The claimant discovered in 2020 that some colleagues received the 15% weekend shift allowance. He said there are 12 colleagues in his team and 'several' were receiving the allowance.

19. The claimant raised his concerns about the difference in pay arrangements informally with the respondent at the time. He was told, correctly, that other employees had been employed with the shift allowance as part of their offer of employment. He did not pursue the matter further at that time.

20. In 2022, he raised the matter again, with his line manager, Mr Berry and then via a grievance, which was unsuccessful on 22 July 2022 (dealt with by Mr Cartwright), and an appeal, which was also unsuccessful on 13 October 2022 (dealt with by Mr McInnes). It was not clear why he raised the issue again after a two-year delay.

21. The respondent, in summary, maintained its position during the grievance process that the claimant was employed on different terms and conditions to some of his colleagues, who had been employed at a later date. He was told that he received a higher salary than they did; he had a different employment contract which did not include any entitlement to the 15% shift allowance; the contracts of the other employees did include such an entitlement. The respondent sought to reassure the claimant that his pay was fair overall in comparison to his colleagues, in view of him having been appointed near the top of the salary range and maintained a higher salary relative to colleagues on lower salaries who received the 15% shift allowance.

22. The claimant was evidently dissatisfied with the grievance outcome and the explanations he received from the respondent, as he subsequently started the present claim on 4 January 2023.

23. The claimant's own unchallenged evidence in his witness statement about the 15% allowance was that he had never received it and it had never been discussed with him (emphasis added):

> *4. I do not recall any discussion about salary nor Terms and Conditions prior to my commencement of employment. I was certainly not given any verbal offer or negotiation which I could accept or reject.* ***There was no specific discussion about options to include my weekend enhancements included in a higher basic salary****…*
>
> *5. My Statement of terms & conditions state that my annual salary is £27,500 per annum (paid monthly) & my hours of work are 39 hours per week. I am expected to be part of a rota which will be determined locally. This will include being on standby. Overtime & Allowances are 'as per Clause 7'.' Clause 7 merely states that overtime is paid at time & a half for Saturday & Sunday and that an allowance is paid for standby.* ***The 'terms & conditions' statement has no mention of appropriate enhancements for weekend working.***
>
> *6. My formal offer letter states that my role would be positioned within Band B of Amey's Career Path Framework. My salary is eligible for review in accordance with the collective bargaining negotiations in April each year. …****The signed statement of terms does not***

specify any arrangements for weekend working or it's remuneration.

24. Thus, the claimant fully and righty accepted in his evidence that there were no provisions in his written contract which gave rise to any entitlement to the 15% allowance, and nor was he suggesting that the prospect of him receiving such an allowance was discussed with him. The only evidence before me of the 15% allowance being discussed with the claimant was of him being told repeatedly by different members of the respondent's management, firstly in 2020 and then again in 2022, that it was not something to which he had any legal entitlement, as it was not part of his contract. It was clear from the tone of his witness statement and the fact that the claimant he had brought the claim that he felt that this situation was *unfair*.

25. At times during the oral evidence, I interjected during Mr Beckford's cross examination to maintain a focus on the relevant issues. For example, he asked Mr Berry for Mr Berry's recollection of a document or policy of the respondent, which was mentioned in the claimant's 2016 offer letter, which said *"This role is positioned within Band B of Arney's Career Path Framework"*. There was no copy of this 'framework' policy document in the bundle; there was no indication or suggestion that it had any bearing on whether the claimant was entitled to the weekend shift allowance as part of his contract of employment; and so having Mr Berry summarise it from memory in his oral evidence, as he started to do in response to the line of questioning from Mr Beckford, was not going to assist in determining the issues. I told Mr Beckford this, and he properly moved on.

26. The claimant also sought to rely upon a document in the bundle which was a notice to staff from the Ministry of Justice (MoJ) dated 18 July 2011. This included reference to rates of pay for various categories of MoJ staff and for two categories, this included reference to shift bonuses, of 15% and 30%. The MoJ notice referred to a 2011/12 pay offer and expressly stated that the notice expired on 17 July 2012, which was nearly four years before the claimant's employment with the respondent commenced. There was no evidence of any link whatsoever between the terms of the claimant's 2016 contract of employment with the respondent and the terms of the 2011 MoJ notice to its own staff.

Closing submissions

27. I heard oral closing submissions from both sides.

The respondent's closing submissions

28. Mr Taylor said:

    28.1. The case at its core is simplistic. The burden of proof rested on the claimant.

28.2. The core documents showed that nowhere does any contractual allowance exist. The claimant accepted this.
28.3. The claimant sought to rely on employees of the respondent employed on less beneficial terms. Those are not, however, the claimant's terms of employment.
28.4. The claimant also sought to rely upon the 2011 MoJ notice and pay agreement. Those were also not the terms of the claimant's contract of employment with the respondent. They applied long before the start of the claimant's employment and were only valid to 17 July 2012.
28.5. The claimant had received all of the payments to which he was entitled under his terms of employment – salary, overtime and standby allowance.
28.6. The claimant had been appropriately heard in his grievance and the appeals and each concluded the same thing.
28.7. The claimant had not evidenced any breach of the terms of his contract relating to pay.
28.8. I should dismiss the claim.

The claimant's closing submissions

29. Mr Beckford, on behalf of the claimant, said:

29.1. He believed that the claimant's case simple and the respondent's case was confusing and contradictory.
29.2. The claimant argued that the statement of terms and conditions was one document, but that the law allowed for the terms of a contract to be decided on not only several documents, but also on practices and what happened, and on the roster. The claimant was not just relying on what was in the contract, he said, it was wider than that.
29.3. The respondent's practice was to pay other employees a salary. The claimant's salary did not reflect his weekend entitlement.
29.4. The respondent's case was confusing, he said. The respondent had told the claimant that he was not entitled to a weekend enhancement (i.e. the 15% shift allowance), as he was working 39 hours. Enhancement was common in industry and prevalent at the time and was part of the system of payment of the employer.
29.5. The respondent said that the claimant was not entitled to the enhancement because of the terms of his contract – it would have been easier for the statement of terms and conditions to have said that his annual salary included a weekend enhancement. It was a confusing approach to say that it was reflected in a higher salary.
29.6. That is the basis of the claimant's case, he said. He said that the documents reflected his argument and the claimant is entitled to refer to other practices as to what happened.

Discussion and conclusion

30. The claimant's claim was for unlawful deductions from wages pursuant to sections 13 and 23 of ERA 1996.

31. The key issue in the case was whether the wages which were **properly payable** to the claimant, within the meaning of section 13(3) included a 15% shift allowance for working weekends, in addition to his salary. Or in other words, did the claimant have a legal entitlement to such an allowance (including a contractual entitlement)?

32. It was clear and accepted that there was no express written term in the claimant's written contract which made any reference to additional pay for working a weekend/a weekend shift allowance. There was such an express term in the sample contract for some other employees, taken on at a later date to the claimant.

33. The claimant's unchallenged evidence was that there was no verbal discussion with him either about any such term or enhancement to his pay There was therefore no express oral agreement to any such enhancement being payable to him.

34. It was very clear from the written terms and conditions that the claimant's express contractual pay entitlements were to his salary, plus additional pay for overtime and additional pay for stand-by/on-call, all of which he accepted that he received. For the following reasons, I found that the wages which were properly payable to the claimant were based upon these express contractual elements of his pay, and upon nothing more.

35. It was not in dispute that some other employees carrying out the same role had different terms and conditions which included a 15% shift allowance in addition to their salary. That fact did not give rise to any contractual or other legal entitlement on the part of the claimant to the same allowance for the purposes of the present unlawful deduction of wages claim. In particular, the fact that other employees had express terms in their own contracts of employment entitling them to such an additional allowance does not give rise to any implied term to the same effect in the claimant's own contract, whether by custom or practice or otherwise. There was no basis whatsoever in fact or law to imply an equivalent term into the claimant's contract of employment.

36. The mere fact that the claimant worked some weekends, in accordance with working arrangements set out in his contract, which in turn were reflected in rotas drawn up by his managers, did not of itself entitle him to any additional payment on top of his salary (save for any overtime payments or on-call allowance which were due under the express terms of the contract, which were paid by the respondent when they did fall due).

37. This was an unlawful deduction from wages claim, and so the only focus was on what the claimant's legal entitlements to pay were. I was not concerned with whether or not the claimant's pay was fair or unfair in comparison to that of his colleagues and so I made no finding in that regard. I dd note that during the course of the grievance and appeal processes, the claimant's managers repeatedly attempted to explain to him why his pay arrangements were different to those of some of his colleagues, who did receive the additional allowance for working weekends. The respondent's view was that the claimant's pay arrangements were more favourable

overall – that was not something on which I needed to make any finding and I did not do so. The respondent's position during the grievance remained consistent that the claimant had no entitlement to any additional 15% shift allowance for working weekends and was only entitled to his salary under the terms of his contract of employment.

38. I concluded that the claimant had not established that he had any legal entitlement to any additional shift allowance for weekend working. He had received all of the wages which were properly payable to him under the terms of his contract of employment.

39. The claimant's claim for unlawful deductions from wages, in respect of the 15% shift allowance, failed and was accordingly dismissed.

Employment Judge Cuthbert

Date: 10 September 2023