EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms A Game & Others	**Securitas Security Services (UK) Ltd**
V	
Heard at: Watford	**On: 2 & 3 October 2023**

Before: Employment Judge G D Davison

Appearances:
For the Claimant: **Mr Grant Williams, Legal Officer Community Trade Union**
For the Respondent: **Mr David Gray-Jones, Counsel**

1. On 3 October 2023. The claims for unlawful deduction of wages were found to be well-founded and allowed. The parties had agreed the claimants length of service and service payment due.

2. Upon consideration of a joint application dated 13 October 2023, under Rule 71 of the Employment Tribunal Rules of Procedure, the Judgment was amended as it transpired the 'agreed' figures were in fact erroneous.

3. There was then a further application from the respondent dated 28 November 2023 to again revised the figures. The claimants appear not to have responded to this proposed revision. However, the request is to increase the length of service for two of the claimants by one year. I have again amended the Judgment below to reflect this change.

JUDGMENT

1. The claims for unlawful deduction of wages are found to be well-founded and are allowed.

2. The gross amounts payable to the claimants are as follows:

First Name	Surname	Length of Service	Service payment
Anna-Marie	Game	3 years	£180.00
Kevan	Shannon	16 years	£613.00
Derrick	Peart	8 years	£323.00
Imran	Qasim	5 years	£323.00
Syed Ali Jaffar	Zaidi	8 years	£323.00

REASONS

1. At the conclusion of submissions, the Tribunal delivered its judgment. Mr Grant Williams, representing the claimants, subsequently asked for written reasons. For the sake of clarity, I have combined the (revised) judgment with the reasons.

2. There are five claimants in this matter who are employed as security officers by the respondent. On 1 November 2020 were transferred to the respondent under Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The transferee was Johnson Matthey plc.

3. The claims relate to payment of a Service Allowance Payment (SAP). The claimants aver this was a contractual entitlement under their employment with Johnson Matthey which transferred under TUPE.

4. The respondent has not made any service allowance payments to the claimants since the transfer of their employment. The respondent's case is that the payments were not a contractual entitlement.

5. Two grievance meetings were held on 4 January 2021 and the 21 December 2021 before the claimants brought a claim for unauthorised deductions of wages under section 13 and 23 of the Employment Rights Act 1996.

6. The ET 1 was submitted on 16 October 2022.

7. The respondent resisted the claims in an ET 3 dated 16 January 2023.

8. Case management was conducted on 15 June 2023.

The evidence

9. The parties agreed that the relevant documents for consideration were the 3 witness statements, the bundle indexed to page 513 and the skeleton arguments (with attached authorities) that had been submitted.

10. I heard evidence from Mr Peart on behalf of the claimants and Mrs Kupny and Mr Slade for the respondent.

11. All of the documentary and oral evidence has been considered in this judgement.

The Issues

12. The parties agreed that the issue for consideration was narrow. It was accepted that there was no express written term conferring entitlement to the SAP. The claimants asserted that the term was incorporated from either i) collective bargaining or, if not, ii) it was implied by custom and practice. As stated the respondent's position was if any SAP was paid this was on a discretionary basis that did not transfer in TUPE process.

Findings

13. The claimants previous employer provided an email that stated the payment of SAP was discretionary (page 427). It is of course the claimant's position that it is contractual. I place little weight on either of the individual's views, the question for me to determine is objectively what the position of the SAP is contractually.

14. Two contracts of employment have been provided. Mr Peart's contract of 31 January 2014 is at page 78 of the bundle, this states under a heading 'collective agreements'; *"your terms and conditions of employment are covered by a collective agreement between the company and community union."*

15. Ms Games' contract, at page 108, signed in February 2019, again under a heading of collective agreements has the same clause.

16. Although limited information has been provided I find that Johnson Matthey had a long service payment in place from at least 2004. The documentation provided discloses that there was a wage dispute at Johnson Matthey and, in order to settle the same, various options were advanced. Option 2 was a 2% increase to the existing long service payments from June 2004. (See page 52 of the bundle.)

17. Evidence has therefore been provided to show that the SAP was in payment and on occasion reviewed.

18. At page 81 is an email from June 2014 enquiring about the service allowance figures. An email, at page 86, discusses the service allowance payments for 2017 and noted that pay negotiations with the union were still ongoing and so service allowance payments would be made against the 2016 rates. If any increases were agreed for 2017 any necessary adjustment would be made in the next payroll run.

19. The pay slips provided show that payment of the SAP was made on an annual basis usually in the month of June:

2016 - page 259 - £166 paid to Mr Peart
2017 – page 271 - £166 paid to Mr peart

2018 – page 283 - £175 paid to Mr Peart
2019 - page 295 - £323 - paid to Mr Peart
2020 -page 307 - £323 – paid to Mr Peart

20. On occasion the amount paid did not differ. I find in those years it was because there had been no renegotiation of the sums payable and it was simply paid in line with the boundaries previously agreed.

21. The 2020 payment boundaries are at page 182. If for example an employee had completed 10 to 14 years of completed service they would be paid £470 gross.

22. At page 431 is an email sent from a previous employee of Johnson Matthey to various representatives of the respondent. The respondent had been making enquiries about the grievance raised and the payment of service allowance. The email from the area security manager a Mr C Rienewerf stated as follows:

'*attached is a comms sent to all employees dating from 2008. A similar notice with updated figures has been issued every year since until about 3 years ago. This is the only documentation I can find on file……..'*

23. The respondent has stated that there is no policy or company handbook or any other such material about the SAP. I find it was quite a simple matter. The sums payable for various years of service were negotiated. Depending on a person's completed years of service they were then paid a sum of money according to the figures agreed. This payment was usually made in June of any given year.

24. All parties accept that there was no written agreement, even when contractual terms were considered in what has been referred to as the 'Brimsdown agreement' in 2013 there is no mention of the SAP.

25. The information relied upon by the claimants to establish a contractual entitlement has, in the main, come to light post the grievance procedure (save the wage slips evidencing payment).

26. The email referenced above from Mr C Rienewerf stated that the information regarding the scale of payments was circulated once a year for several years. Mr Peart, quite fairly, in his evidence stated he did not recall ever seeing this document or any similar one.

27. The burden of proving such a contractual entitlement exists is on the claimants and, on balance I find they have established the same.

28. The contracts provide that their terms and conditions of employment are covered by a collective agreement between the company and community union. The emails provided evidence that the SAP rates were negotiated

by collective bargaining and once the rates agreed the information was disseminated to employees.

29. Although cases are always fact specific I take note of *Chequepoint (UK) Ltd v Radwan, unreported 15.9.00, CA*, where the employer ran a discretionary bonus scheme and agreed to notify the employee of the terms of any such scheme. The Court of Appeal held that once the terms had been notified, the employee became contractually entitled to the bonus until such time as the employer gave notice that the scheme had been changed or withdrawn.

30. Furthermore, once an employer tells a worker that the worker is going to receive a bonus payment on certain terms, it is under a legal obligation to pay that bonus in accordance with those terms, at least until the terms are altered and notice of the alteration is given (*Farrell Matthews and Weir v Hansen 2005 ICR 509, EAT*.)

31. Here the terms of the scheme were agreed by collective bargaining and notified to the employees. Even if it was the past employer's intention to have a discretionary scheme (as indicated in the email) the wording of the contract of employment, the provision of the details of the scheme and the manner and amounts of its application I find made the employee contractually entitled to the SAP

32. If I were wrong in the above conclusion in the alternative I would need to consider whether the payment of SAP can be implied by custom and practice.

33. The term would have to be reasonable, notorious and certain (*Devonald v Rosser & Sons 1906 2 KB 728*). I find the payment to be reasonable. It rewards length of service after 2 years of completed service. It is understandable why an employer would seek to retain members of staff and incentivize them to remain.

34. I find it to be notorious as the employees in the business would have been well aware of the scheme and payment thereunder. They were all expecting it to be paid in June 2021 post their transfer

35. In terms of whether the arrangement was certain I find payments have been made for many years but as noted in *Duke v Reliance Systems Ltd [1982] ICR 449***.**

> 'Where a benefit is discretionary, however, the fact that it had been granted for a number of years will not necessarily convert it into an implied term.'

36. I find from the email of Mr C Rienewerf that the notification of payments was communicated to the employees (*Albion Automotive Ltd v Walker [2002] EWCA Civ 946.)* He stated that a notification would be sent to all employees and this had been done so since 2008. As noted above the payment was an annual payment based on length of service. Depending on which bracket of service an employee fell into determined the rate of pay. This is not particularly complicated and so they would not need to be

extensive communication or handbooks to explain the effect of the same. I find that sending a yearly communication with the relevant pay brackets to be sufficiently clear.

37. Following the guidance in *Park Cakes Ltd v Shumba [2013] IRLR 800* I find that the employer by its conduct in making payment of the SAP has evidenced to the relevant employees/ claimants an intention that they should enjoy that benefit as of right.

38. Looking at the factors as summarised in paragraph 21 of the respondent's skeleton argument I find that the SAPs have been made over a long period of time certainly in excess of 10 years. The benefit amount has not always been the same as it depended on an employee's years of service and the rates set at collective bargaining but the operable scheme was the same. The rates were disseminated to the employees. Nothing is said expressly in the contract but the contract makes clear, as set out above, that matters such as payment of the SAP can be agreed by collective bargaining.

39. On equivocalness the burden is on the claimants. I find viewing the evidence objectively it is not possible to say that it is equally explicable that the payment could be seen as a matter of discretion rather than legal obligation. There is no indication in the payslips that this is a discretionary payment. From the payslips the sums are paid whether there has been a renegotiation of the categories of entitlement or not. This I find evidence's a contractual need to pay the sum as opposed to a discretionary one. The fact that on a yearly basis the information was sent to the employees concerning how much they could expect to receive also indicates the contractual nature of the payments.

40. The employers liability information (ELI) disclosed as part of the transfer process shows (at page 207) that the respondent was aware that SAP were made. There would therefore be no reason for the claimants to have raised this on their one-to-one TUPE meetings. It was a payment that they had received on an annual basis that they expected to continue. This claim was brought when the payments were not made.

41. Again whilst cases turn on their own facts I find the case of *Noble Enterprises Ltd v Lieberum EAT 67/98*: the EAT upheld an Employment Tribunal's finding that there was an implied term based on custom and practice that L would receive an annual bonus. NE Ltd provided services to BP on an oil rig. When BP paid incentive bonuses to NE Ltd, it was NE Ltd's practice to give its employees a bonus, but there was very little documentary evidence of any entitlement to this. The bonus was paid once a year but there was no set date. L left employment before the 1997 bonus became payable and NE Ltd refused to give him the bonus. The company claimed that, first, there was no contractual entitlement to a bonus; and secondly, if it was contractual, then entitlement was dependent on the employee in question being in employment at the date of payment. The tribunal held that there was an implied contractual bonus scheme established through custom and practice, the workings of which were well known to all employees.

42. Jurisdictional issue, finally and for completeness the respondent raised in the skeleton argument for the first time a jurisdictional matter and relied upon the case of *Coors Brewers Ltd v Adcock [2007] IRLR*. It is correctly stated that a claim for unauthorised deductions must be in respect of a quantifiable sum. I find the sums involved to be quantifiable the 2020 rates have been provided (again see page 182). The respondent would be aware of the years of service completed of any employee transferred. It is therefore straightforward to quantify the sums due and owing. I do not therefore accept that the claim is for an unidentifiable sum as alleged.

Conclusions

43. I find that the respondent has made an unlawful deduction of wages for each of the five claimants in the sums set out in the Judgment above. The sums are gross and so the relevant deductions will need to be made.

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Employment Judge G D Davison
14 January 2024

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Sent to the parties on

…….22 January 2024…….

For the Tribunal

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