



EMPLOYMENT TRIBUNALS

Claimant: Ms O Ilene

Respondent: Home Office

Heard at: Cambridge (CVP) **On:** 27 & 28 November 2023

Before: Employment Judge Davey

Representation

Claimant: Mr Stephen Taylor (trade union representative)

Respondent: Ms Victoria Brown (counsel)

Judgment having been sent to the parties on **15 January 2024** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form presented on 8 November 2022, the claimant complained of unauthorised deductions from wages for the months of August, September and October 2022 and loss of a temporary promotion. The claimant claimed compensation for these matters in addition to compensation for 'pain and suffering' and expenses incurred because of the unauthorised deductions. The claimant also complained about the way the respondent handled her grievance about the same matters.
2. By a response form presented on 12 December 2022, the respondent provided an ET3 with a 'holding response' with an application for an extension. A fully pleaded response was provided on 23 December 2022, resisting these complaints. The extension of time was granted on 13 January 2023. Strictly speaking, the first response should have been accepted and the respondent should have applied for leave to amend which was granted by EJ George at the preliminary hearing on 4 July 2023. The respondent's case was that it had originally failed to pay the claimant the

correct wages due for the months of August, September and October 2022. However, it had paid all outstanding wages by 30 November 2022 and that consequently, no payments were outstanding.

3. There was a case management preliminary hearing by telephone on 4 July 2023 before EJ George. The issues in the case were confirmed, and case management orders were provided. The claimant was invited to withdraw her complaint of 'Loss of promotion' (attributable to unauthorized deductions) due to it having little reasonable prospect of success or alternatively to pay a deposit of £250. The claimant withdrew this part of her unauthorised deductions of wages claim which was acknowledged by the Tribunal on 17 October 2022.

Preliminaries

4. At the outset of the hearing, I confirmed the claimant's claim was limited to unauthorised deduction of wages (UDW) for the months of August 2022, September 2022 and October 2022. The claimant confirmed this was correct.
5. I confirmed, and the parties agreed, the issues were limited to those agreed at the case management hearing on 4 July 2023, minus the issue of loss of a promotion.

The issues

6. The agreed issues were:

1. Unauthorised deductions

- 1.1 Were the wages paid to the claimant in August, September, October 2022 less than the wages she should have been paid?
- 1.2 What amount, if any, does the Tribunal consider appropriate in all the circumstances to order the respondent to pay under s.24(2) ERA to compensate the claimant for any financial loss which was attributable to any deductions?
- 1.3 Has the respondent made any subsequent payments in satisfaction or part satisfaction of any deductions?
- 1.4 Taking into account the above, how much is the claimant owed?
- 1.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 1.6 Did the respondent or the claimant unreasonably fail to comply with

it?

- 1.7 Is it just and equitable to increase or decrease any award payable to the claimant?
- 1.8 By what proportion, up to 25%?

The hearing

7. The original timetable was to complete oral evidence and submissions on day one with an oral judgment at the end of day one (time permitting) or the beginning of day two. The proceedings were delayed as the claimant did not have an electronic (or paper) bundle. This was due to security issues with her work laptop. These matters were eventually resolved, and the claimant was ready to give oral evidence at 2pm on day one. There were also delays due to IT issues experienced by the claimant's representative, Mr Stephen Taylor, these were recurrent throughout the day as Mr Taylor kept dropping out of the hearing. This resulted in a few short adjournments. Despite this, Mr Taylor was able to finish cross examination of Mr Hendy by the end of day one. I thank the parties for their flexible approach and patience which made it possible for the hearing to proceed.
8. The parties made submissions in the morning of day two. This was followed by oral judgment.

Evidence

9. I heard oral evidence from Ms Obiageli Ilene (the claimant) and Mr Martin Hendy (presently, Deputy Director Border Force Heathrow at the respondent), both of whom provided written witness statements. There was also an electronic bundle before me totaling 606 pages.

Findings of fact

10. The relevant facts are set out below. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. Most of the factual issues were not disputed.
11. The Claimant was employed by the Respondent as an Executive Officer (EO) in Border Force based at Heathrow Airport from 23 April 2001. Border Force is part of the Home Office. In January 2021, the claimant was transferred on loan to the Department for Levelling Up, Housing and Communities (DLUHC), as a Higher Executive Officer (HEO). Following the expiry of the loan agreement in January 2023, the claimant was to return to Border Force as a permanent HEO.
12. The claimant curtailed her secondment at DLUHC in June 2022, because she secured a six month secondment at Senior Executive Officer (SEO)

grade with the respondent.

13. During the process of transferring the claimant back to the respondent, it became apparent that her transfer to the DLUHC had been erroneously treated as permanent and that she had been deleted from the respondent's systems, known as 'Metis' (which included payroll) due to this error. It was common ground that this error was entirely the fault of the respondent.
14. There were delays, on the part of the respondent, in reinstating the claimant back onto Metis as a permanent employee. Consequently, the claimant was unable to take up her role as an SEO and she was not paid wages due on 31 August 2022.
15. The respondent made an advance payment of £3763.19 to the claimant on 30 September 2022. No statutory or pension deductions were made from this payment. In evidence, the claimant initially disputed this sum to be correct stating she was paid £3369.51 but then confirmed, following a review of her witness statement at paragraph 'a' and the master spreadsheet (423), that she was paid £3763.19.
16. By a letter dated 24 October 2022 (260A), the respondent confirmed the claimant would return to Border Force, Heathrow Terminal 5, from 8 August 2022 as a HEO and that her salary was £36,000 per annum and the role was covered by the respondent's annualised hours agreement (AHA). The claimant told the Tribunal she had not seen this letter before. However, she did agree the contents, with reference to the day her role/grade (HEO) commenced, salary and AHA were all correct.
17. The claimant also confirmed that the AHA was paid at 30.99% of her basic salary of £36,000 per annum albeit she stated she could only confirm for the period 1 April 2023 as she did not receive a letter setting out the rate for the AHA in 2022 (267). She went on to say 'I agree it looks the same'. At the beginning of the hearing the parties had agreed it was common ground that the claimant's grade was as a HEO, at £36,000 and she was on an AHA of 30.99% at the material time. I accept this to be the case.
18. The claimant did not actually return to this role and took a period of 'special leave' on full pay (HEO rate with AHA) while the respondent attempted to find her an alternative temporary promotion.
19. On 31 October 2022, the respondent paid the claimant her salary at Executive Officer (EO) grade. This was due to further delays with the respondent processing the claimant's promotion to a HEO. The claimant was paid a total of £9,052.70 gross and £1426.63 net (260D).
- 19.1 The gross payment in the October payment was made up as follows:

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19.1.1 AHA payment	£772.01
19.1.2 AHA retroactive (backdated)	£1369.70
19.1.3 London Salary Zone	£2491.17
19.1.4 London Salary Zone retroactive (backdated)	£4419.82
19.1.5 Total	£9052.70

19.2 Deductions from the October payment were as follows:

19.2.1 PAYE	£2795.26
19.2.2 NI	£574.25
19.2.3 Pension contribution	£493.37
19.2.4 Advanced recovery	£3763.19
19.2.5 Total	£7626.07

19.3 This resulted in a total net payment of £1,426.63.

20. The claimant confirmed she received the net payment and it was common ground between the parties that the claimant was not paid at the correct HEO level in October 2022.

21. In November 2022, the respondent paid the claimant her salary at HEO level. The gross payment was £5778.75 and the net payment was £5681.76.

21.1 The gross payment in the November payment was made up as follows:

21.1.1 AHA payment	£929.70
21.1.2 AHA retroactive (backdated)	£437.46
21.1.3 London Salary Zone	£3000
21.1.4 London Salary Zone retroactive (backdated)	£1411.59
21.2.6 Total	£5778.75

20.2 Deductions from the November payment were as follows:

21.2.1 PAYE	+ £626.66
21.2.2 NI	£408.71
21.2.3 Pension contribution	£314.94
19.2.6 Total	£96.99

20.3 This resulted in a total net payment of £5681.76.

22. The claimant confirmed she received the net payment and this time she was paid at the correct HEO rate of £36000 per annum (plus 30.99% AHA).

23. The claimant's case is that she is still owed a total of £4245.73 net. Her calculations are for 4 x net payments between August and November of £2838.53 which is a total of £11,354.12 which the claimant says she should have been paid during this period. She then deducts the net payments for October (£1426.63) and November (£5681.76) which she was actually paid leaving £4245.73 outstanding (603).

24. The respondent's case is that following the November payment, all outstanding wages were paid.
25. The claimant submitted a grievance on 30th September 2022, (234-252) complaining about the respondent deleting her as an employee from the HO and the consequences, including the lost promotion and impact on health and pay. She acknowledged in evidence that much of her grievance was against Mr Mark Ogunjumo, an assistant director. The claimant received the decision not to investigate on 3 November 2022, despite meeting the threshold for an investigation. This was because management were still investigating the pay issue. The caveat was that should this matter be outstanding on 1 December 2022, it should be investigated. It set out several recommendations. Although this was initially disputed by Mr Hendy, he did eventually accept that the grievance did meet the threshold for investigation. I accept this to be the case.
26. The claimant remained unsatisfied with the outcome and I accept her evidence that she pursued this with other managers between December 2022 and with Mr Hendy's involvement from early 2023. The claimant acknowledged that 'when Martin came on board that is when [it] moved forward'. Mr Hendy's evidence was that it took a considerable amount of time to appoint an investigation and grievance manager due to the level of seniority of Mr Ogunjumo, policy dictating a more senior manager's involvement. There was an investigation report (362A) dated 6 October 2023 and a decision not to uphold the grievance dated 20 October 2023. At the time of this hearing, this was the subject of an appeal.

Law

27. Part 2 of the Employment Rights Act 1996 (ERA) provides for the protection of wages. Section 13 provides the right for a worker not to suffer unauthorised deductions:

S13(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.

28. Section 13(3) ERA provides:

"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. A worker has a right to complain to an Employment Tribunal of an unauthorised deduction of wages pursuant to section 23 ERA.

30. Section 24(2) ERA provides:

“Where a tribunal makes a declaration under subsection (1) [i.e. a declaration that there has been an unauthorised deduction from wages], it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.”

31. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 allows for an Employment Tribunal to uplift or reduce compensation by up to 25% where an employer or employee has unreasonably refused to follow a relevant ACAS code.

Conclusions

32. The first issue for the Tribunal to decide is whether the wages paid to the claimant in August, September, October 2022 were less than the wages she should have been paid.

33. The claimant alleges the respondent made unauthorised deductions between August and October 2022. It is common ground that the claimant was a HEO, on a salary of £36,000, she had an AHA of 30.99% of her salary (£11,156.40 per annum) and that she returned to the respondent from a loan agreement (secondment) on 8 August 2022. It was also common ground that she was not paid in August; received an advance payment of £3763.19 in September; was paid a gross payment of £9,052.70, which due to deductions, resulted in a net payment of £1426.63 at EO rate in October and by November 2022, was correctly paid her salary for November at her HEO rate. The claimant acknowledges that in the November payment she was paid gross £5778.75, which following deductions, resulted in a net payment of £5681.76.

34. The claimant alleges she is owed a total of £4245.73 net. Her calculations are provided at paragraph 23 above. There are three problems with these calculations. The first is they are net which means it is hard to account for statutory deductions, tax codes and pension contributions. The second is that the advance payment of £3763.19 made in September is not accounted for. The third is that the August payment has the same value of £2838.53, as the September to November payments. This is despite the claimant returning to the respondent on 8 August and her acknowledgement, in evidence, that the contract variation letter citing this date was correct. I will return to this.

35. The first and most practical step – is to establish what the claimant should have been paid each month, working in gross amounts. The parties agree that the claimant's correct salary was £36,000 per annum plus 30.99%, this equates to £3000 basic salary per month and £929.70 AHA per month. This is a total of £3929.70 per month. Due to the undisputed fact the claimant returned to the respondent on 8 August 2022 – the August payment would be slightly less, by my calculation this is a reduction of 7 days so the total basic salary for August is £2309.59 plus AHA of £715.74. The gross payments are £3025.33 for August and £3929.70 for both September and October. This is a total of £10,884.73. This represents what the claimant should have been paid during the relevant period.
36. Turning to the deductions. The claimant was not paid any salary in August; was paid an advance payment of £3763.19 in September and a gross payment of £9052.70 (minus the advance payment of £3763.19) in October. Following from the amount the claimant should have been paid, which is £10,884.73, this is a shortfall of £1832.03.
37. Turning to November 2022, the claimant's wages were £3929.70 gross and she was paid £5,778.75, this being an additional £1,849.05 to reduce the underpayment. This reduced the shortfall to zero.
38. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction of £1832.03 from the claimant's wages between the period of 8 August 2022 and 31 October 2022.
39. The claimant confirmed in evidence she suffered no financial loss attributable to the deductions so no order is made for payment under section 24(2) ERA 1996.
40. The respondent subsequently paid the unauthorised deduction of £1832.03 in full on 30 November 2022. Therefore, no order for repayment is made.
41. The ACAS code of practice does apply and I find that the respondent did not follow its own policy (as confirmed by Mr Hendy in evidence). I accept Mr Hendy was proactive in his arrangements for identifying a grievance manager (as acknowledged by the claimant in evidence). However, delays prior to his involvement were unreasonable.
42. As there is no outstanding unauthorised deduction, there can be no uplift for breach of the ACAS code.

Employment Judge Davey

2 February 2024
Date _____

JUDGMENT SENT TO THE PARTIES ON
7 February 2024

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