



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103907/2023

Held in Glasgow via Cloud Video Platform (CVP) on 16 January 2024

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Employment Judge J Hendry

Mr Robert Faulds

Claimant
Represented by:
Ms L Lindsay -
Solicitor

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Department for Work and Pensions

Respondent
Represented by:
Mr R Ashmore -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim for unlawful deductions not being well founded is dismissed.

REASONS

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1. The claimant in his ET1 sought findings that the respondent had made unlawful deductions from his wages under section 13 of the Employment Rights Act 1996. In short, his position was that he had been promoted and on return to his substantive post, that promotion had not been recognised. He had been paid at the rate applicable to his earlier lower paid role and accordingly underpaid. The respondent denied the claim, arguing that the claimant had no contractual right to the enhanced salary which he claimed and that on return to his substantive post from the loan arrangement he revertr4ed to his "old" salary and had been properly paid.

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Evidence

2. The Tribunal heard evidence from the claimant on his own behalf. It also considered the documents contained in the inventories of productions lodged by the claimant and respondent.

Issues

- 5 3. The issues revolved around the claimant working for DVSA for a period on loan from his employers the DWP. The list of issues was put in this way:
 - a. Was the claimant entitled to any ongoing entitlement at the executive officer (“EO”) grade when he returned to the respondent in his Administrative Officer post (AO)?
 - 10 b. Did the claimant fail to pass the relevant test at the DVSA during the period of his loan?
 - c. Did the claimant miss out on the exercise of the executive officer grades becoming permanent with the respondent?
 - d. Was the claimant paid backdated arrears from the respondent from 1
15 April 2022 to 10 May 2022 to cover the initial external appointment period?
4. The parties prepared a draft statement of agreed facts. These have been incorporated these into the findings in fact.

Findings of fact

- 20 5. The claimant has been employed by the civil service from 1 May 1997. He worked as an AO with the DWP. His employment is continuing.
6. The Civil Service departments can loan staff to other departments on a temporary basis. They have policies governing such arrangements which are available for staff such as the claimant to consult.
- 25 7. In 2021, the claimant applied for two EO roles via the external civil service jobs website. The first role was as a Jobcentre Workplace coach with the respondent on a 12 month fixed term appointment. He was appointed to this post. He was also successful in a second application to work as a Driving Test

Examiner with the Driver Vehicle Standards Agency (DVSA). This was a two year fixed term appointment at EO grade. The EO grade is one grade above AO. The claimant had begun his role in the Jobcentre before discovering that his application for the temporary post with the DVSA had been successful. He moved from Jobcentre role to a post with DVSA. It was envisaged that on the expiry of either appointments, the claimant would revert to his substantive post with the respondent unless in the case of the DVSA he obtained a permanent post with them.

8. The claimant was moved from the DWP to the DVSA through what the Civil Service call a loan agreement. This is a common process that allows the Civil Service to move employees as and when needed to other departments.

9. On 5 September 2021, a loan agreement document between the DWP and the DVSA was executed in relation to the claimant. It stated that he was to be loaned to the DVSA between 20 September 2021 and 19 September 2023.

10. Clause 1.2 of the Loan Agreement (R13) stated that:

“1.1 ...as loan arrangements are temporary, the employees will continue to be employed by the home department through s/he (the) loan, though s (he) will be managed on a day to day basis by the host department.

1.2 At the end of the loan (including any agreed extension), the employee will return to the home department. The home department will do its best to place the employee on either the same post or another post at the same grade as s/he was in before the loan started, but it cannot guarantee that any post would be available. See clause 11 for details of what will happen if the employee was promoted when s/he went on loan or during the loan.

1.3 On returning to the home department any terms of the employee’s contract which were varied because of the loan will revert back to their original state. There will be two exceptions to this, which could apply if the employee went on loan on permanent promotion or was permanently promoted during the loan:...”

11. Clause 11 states:

11 Promotion

5 11.1 *If, whilst on loan, the employee accepts an offer of any permanent role with the host department, including permanent promotion, the loan arrangement is terminated and the employee transfers on a permanent basis.*

10 11.2 *If in the case of permanent promotion, transfer to the host is not possible, the loan will continue at the higher grade and the promotion will be honoured on return to the home department. This is on condition that:*

- *the promotion is through a formally advertised cross-government promotion exercise;*
- *the host department has discussed this with the home department in advance on the interview taking place, and*
- 15 • *a new loan agreement is put in place.*

11.3 *If the employee is promoted into the loan post, **they will return to the home department at the higher grade on the condition that the promotion is through a formally advertised cross government promotion exercise.***

20 11.4 *Departments will work together to resolve any potential difficulties in order to agree the promotion. Only in exceptional cases will the promotion not be honoured on return.*

25 11.5 *The employee has been permanently promoted on or during the loan, when they return, the home department will do its best to place the employee in a post at the grade to which they have been promoted, but can't guarantee that any post will be available.*

11.6 *See clause 1.3 for the terms of which a promoted employee will return to the home department."*

12. The claimant began work with the DVSA. He did not pass the necessary part of his training to become a driving instructor with them and accordingly was told he would be returned to the DWP on 1 November 2021. In November 2021, the claimant informed his line manager that his contract with the DVSA was ending and that he would be returned to the DWP. The claimant was paid until March 2022 by DVSA. The claimant returned to the DWP on 1 April 2022.
13. The claimant submitted a grievance about his loan period with DVSA and subsequent return to the DWP at an AO grade. An outcome to this grievance was provided on 3 February 2023 (Cp102-103).
14. It was decided that when the claimant accepted the DVSA post he relinquished his DWP EO position. She decided that he had moved to the DVSA role as an AO and that this remained his substantive grade.
15. The outcome letter further stated that the decision maker sought clarification from a document about *“policy regarding clause 11.3 and noted the following points:*
- *you were promoted by your “loan department” on the condition that the promotion was through a formally advertised cross government promotion exercise and this is agreed with your home department, and*
 - *the host department discussed this with the home department in advance of the interview taking place and this is agreed between the host department and the home department in writing. This was not discussed.*
 - *there had been no performance issues during the term of the loan.*
 - *the employee completes the entire term of the loan. Only in exceptional circumstances might the department honour the promotion on the term if the term of the loan is not completed.”*

16. The claimant appealed the decision and his appeal was partially upheld. As a consequence, the claimant had pay (backdated from 1 April 2022 to 10 May 2022) made up to HE level.

17. The respondent's loans advice policy document. R10 stated (Rp39):

5 **1 What is the difference between a loan and a secondment?**

A loan takes place when a civil service employee moves to another government department for an agreed period of time usually to meet a development need or to show their skills, in order to build business capability across departments.

10 *A secondment is similar but the move is to an organisation outside the civil service.*

.....

6 How is a promotion whilst on loan treated on return?

15 *If the promotion is through a formally advertised exercise the employee will usually transfer permanently the host department.*

7 What if the promotion whilst on loan cannot be made permanent in the host department?

20 *Some departments operate a workforce strategy that lies on the use of loans and does not always enable posts to be offered on a permanent basis. In this instance, the loan should be renegotiated at a higher grade and a new agreement put in place. This agreement should include the assumption that the promotion will be honoured on return to the home department.*

8 What if the promotion whilst on loan cannot be honoured on return to the home department?

25 *The expectation is that the two departments work together to find a solution in support of the wider aim to build civil service capability. This may involve reconsideration of a permanent transfer to the host department or renegotiation of the length of the loan period to allow the home department to*

tie the return into any other workforce issues. Only in exceptional circumstances would the loan not be honoured on return.

9 Why does the home department have to honour a promotion made using another department's process?

5 *The purpose of loans is to develop talent for the benefit of the wider civil service and to support employees career development. All departments are using a common civil service success profile framework for vacancy filling and recruitment. Therefore, all applicants are being assessed to the same standards. Any promotion achieved should therefore be a recognised civil*
10 *service promotion and is transferrable across departments in line with the civil service reform plan action to build capability.*

...

11 Can an employee who has been temporarily promoted into a loan post have the promotion honoured on return to their home department?

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No, as the promotion is temporary, the employee needs to be made aware at the outset that the promotion will only be for a temporary basis and will not be honoured on return to the home department.”

18. The claimant received a driver examiner candidate pack when joining the
20 DVSA (R11).

19. When the claimant moved to the role of Job Coach with the DWP, his payslips showed him being paid at a rate applicable to an AO with additional sums shown as a special duty allowance to make him to the salary of an EO. When the claimant moved from the DWP to the DVSA, there was no reference to an
25 additional payment in his payslips which simply showed that he was being paid as an EO (C6 p17).

20. The claimant believed that he had been promoted to EO grade when recruited/transferred to DVSA.

21. The job with DVSA was advertised. The claimant regarded it as a formally advertised cross-government promotion exercise. He did not go through any promotion exercise or process other than making his application. He was not interviewed. He believed that others who applied from outside the civil service would have been appointed at EO level after going through a recruitment exercise.

22. The respondents have a Loans Policy (at paragraph 6) (C3) which states:

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• *Employees on loan should move onto the payroll of the host department for the period of the loan, be covered by the host's pay award and counted as part of the host's department total employee numbers (headcount).*

• *Employees on loan are subject to the terms and conditions, policies and systems of the host department including performance management during the period of the loan.*

• *If, whilst on loan, an employee accepts an offer of any permanent role with the host department including permanent promotion, the loan arrangement is terminated and the employee transfers on a permanent basis.*

• *If in the case of permanent promotion, transfer to the host is not possible, the loan will continue at the higher grade and the promotion will be honoured on return to the home department. This is on condition that:*

○ *the promotion is to a formally advertised cross government promotion exercise;*

○ *the host department has discussed this with the home department in advance of the interview taking place, and*

○ *a new loan agreement is put in place.”*

Witnesses

23. The claimant was the sole witness. I formed the impression that he was an honest witness and reliable in his narrative of events. He saw matters very much from his own perspective and clearly felt aggrieved at the outcome of events. He was not an objective witness.

Submissions

24. Ms Lindsay reviewed the factual background stressing that there had been a change in which the claimant's pay had been dealt with which was indicative of the true position namely that the claimant had been promoted to EO when joining DVSA. During his first secondment his pay was shown as comprised of his AO pay plus a supplement whereas when he was with the DVSA his pay showed him being paid as an EO. She referred to the Appeal Outcome letter (Cp103) in which the decision maker accepted that earlier references by HR to TDA (Temporary Deployment Allowance) was not appropriate. The claimant had in effect accepted a promoted role. There had he says been a recruitment exercise that satisfied the requirements of the policy. He had received a Candidates Pack. There had been no reference to the temporary nature of the post. No contract of employment had been issued for the DVSA role and accordingly the Tribunal must look at the factual position to determine what his grade was. The Tribunal should take care when considering documents such as the Loans Advice are not incorporated into the Loan Agreement.

25. There was no reference to performance in the Loan Agreement and the fact that the claimant did not pass the requirements to be made a Driving Instructor did not undermine his promotion to EO grade. The solicitor then made reference to the Schedule of Loss (C7). The claimant accepted that the partly upheld grievance meant that his losses began on 9 May 2022. The Tribunal had a locus under Section 13 of the Employment Rights Act 1996 to determine this matter. She referred to the case of ***Weatherill v Cathay Pacific Airways Ltd UKEAT/0333/16/RN.***

26. In response Mr Ashmore summarised the respondent's position. The claims were made under Section 13 and the Tribunal had to decide what was properly due to the claimant. There was no dispute that he had not been paid at EO level until May and properly paid before this according to his substantive grade or temporary secondment grade. Loans Advice document sets out the general policy. At page 46 it mentions that at the end of the loan it is not always possible for an employee to return to their old role and that was the position here. The claimant reverted back to an AO role.
27. Turning to the evidence it was apparent that in both secondments the role was temporary. To get a permanent role with DVSA the claimant had to pass the appropriate tests which he did not. The temporary loan ended in March. Clause 1.3 of the Loan Agreement (p85) states: *"On returning to the home department any terms of the employee's contract which were varied because of the loan will revert back to their original state."* There were two exceptions which applied if the employee went on loan on permanent promotion or was promoted during the loan. Neither of these events occurred. He considered clause 11.3 and pointed to Clause 12 of the agreement which confirms that the employee is subject to *"the host's department policies and procedures during the loan"* It was clear he submitted that the claimant would have to prove he had been promoted and could not do so. There had, accordingly, been no requirement for the respondents to pay the claimant the enhanced salary applicable to the EO role on his return to an AO role but he had been paid at the enhanced rate to take account of the balance of the period of his first secondment which was effectively that at the EO salary grade rate. The claim for unlawful deduction must therefore be dismissed.

Discussion and decision

28. The right of the Tribunal to determine whether the claimant had been paid properly and whether or not there had been an unlawful deduction in wages in terms of Section 13 of the Employment Rights Act 1996 was not in dispute. However, it was for the claimant to demonstrate that he had been underpaid and to do so he had to show that he had in effect been wrongly graded on his return from loan to his home department with the DWP.

29. To succeed he would need to establish that there was a change to his employment contract in short that he had been promoted when he joined the DVLA.
30. There was some discussion as to which documents the Tribunal should have regard to with the claimant's solicitor arguing that the question and answer document should not be considered. It is a feature of this case that there was no one document setting out what was to happen in the claimant's particular situation. This led to a degree of confusion and the partial upholding of the claimant's grievance that he should have been paid at the EO rate for a period after his return to reflect the initial loan to the Job Centre.
31. Parties did not make direct reference to the case of ***Autoclenz Ltd v Belcher (2011) UKSC 41 SC*** but they argued that the contractual position should be considered against the factual background and the document we have and whether they reflect parties' intentions. The case is authority for the proposition that to determine the actual legal obligations it will be necessary to examine all the relevant evidence including the written terms which should be read in the context of the whole agreement as well as the evidence of how the parties conducted themselves in practice and what their expectations of each other were.
32. It was not particularly clear what mechanism the claimant believed had operated to promote him to a higher grade although he argued that he had joined the DVLA at the same time as a recruitment exercise was being carried out and that new appointees were employed immediately at the higher EO rate. It was suggested that the promotion was a result of this express term relating to the policy, and in effect he was automatically promoted to this higher grade.
33. The starting point is the initial loan to the Job Centre. If that had run its course the claimant accepted that he would have returned as an AO to his department. He acknowledged that he was paid a supplement for acting up in an EO role which was shown on his payslips.

34. The claimant during the period of loan applied for the DVLA role and a loan agreement was entered into. He again acted up in an EO role but this time the additional salary was not shown on his payslip. It reflected an EO salary. When he transferred to DVLA he was being paid as an EO. This was how the payroll was operated and the payment was correct. To suggest that this shows he had been promoted is going too far. This was how the payslip was framed by the payroll department. For their purposes he was being paid as an EO.
35. The claimant was also given a Candidates Pack. He suggests that this shows he was a recruit in the same way as a member of the public who was successful in the recruitment process would have been. They would have joined at EO level. The fact that he receives this does not add to his case. It was no doubt convenient to give him the pack that had been prepared. It would have been pointless to prepare the same pack but to relabel it as a pack for Loanees. The information would have been the same.
36. The claimant could have progressed to an EO grade, and this is reflected in the loan agreement (Clause 11). In subclause 11.1 to get the higher grade the claimant must move permanently to the host department. In subclause 11.2 provision is made for promotion. The claimant's principal argument is that he was promoted into the post as an EO through a formally advertised cross government promotion exercise however the full conditions are:
- *the promotion is through a formally advertised cross-government promotion exercise;*
 - *the host department has discussed this with the home department in advance on the interview taking place, and*
 - *a new loan agreement is put in place.*
37. There is some ambiguity as to what is meant by a cross government promotion exercise. What the claimant described was advertising for people to join DVLA as trainee Driving Instructors. At the same time this opportunity was made available to existing civil service staff such as the claimant on a

loan basis. Perhaps unfortunately I heard no evidence from someone in management who could define this term, but it does not fit well with the process the claimant describes.

5 38. There was no evidence of the host department discussing such an exercise or of any interview and no new loan agreement was put in place. The existing agreement remained in place. The claimant was not promoted whilst working at DVLA. If this had occurred, he would have kept his grade on return to the respondent. As the loan advice document states: *“Any promotion achieved should therefore be a recognised civil service promotion and is transferrable across departments in line with the civil service reform plan action to build capability.”*

10 39. In summary I regret that I do not accept the claimant’s position on this matter. He has not demonstrated that he was in some way automatically promoted or that it could be implied from the circumstances. Being promoted was not envisaged at the time by parties and runs counter to the intentions of the loan agreement which specified particular circumstances in which he could be promoted, and that promotion recognised. He was aware of the system whereby he would be loaned (at his grade of AO) to other departments and that if this involved acting up to a higher EO grade he would be paid such additional wages as were required to bring him up the higher salary commensurate with the higher grade. He must have realised in my view that 15 20 unless he was successful in obtaining a permanent promoted post with DVLA, which would have occurred if he had passed their assessment, that he would otherwise return to his substantive post at AO grade. The claim is not well 25 founded and is dismissed.

J Hendry

Employment Judge

11 March 2024

Date

Date sent to parties

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