



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos 4103624/2023 & 4103625/2023

Held in Glasgow on 21 & 22 February 2024

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Employment Judge S MacLean

Mr Ian Anderson

**First Claimant
In Person**

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Mr Andrew Wilson

**Second Claimant
Represented by:
Mr I Anderson -
First Claimant**

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Scottish Fire & Rescue Service

**Respondent
Represented by:
Ms L McSparran -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claims under section 23 of the Employment Rights Act 1996 are dismissed.

REASONS

Introduction

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1. The claimants complain that the respondent has refused to pay back pay representing a pay rise in the period they were employed by the respondent. The respondent says that there is no contractual provision entitling the claimants to the sums sought. The claimants do not point to a contractual provision. They maintain that the Fire and Rescue division in which they were originally employed (legacy Dumfries and Galloway) made payment to those that had left the service when the pay increase was agreed and back dated for the period when the former employee was employed with them. That was custom and practice.

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2. This was a final hearing on liability only. The first claimant represented the second claimant. They gave evidence on their own account. John McKenzie, Scottish regional secretary of the FBU, gave evidence remotely on their behalf. George Lindsay, people manager (reward) gave evidence for the respondent.
3. The witnesses referred to documents in a joint file. The parties also prepared outline written submissions on which they addressed the Tribunal orally when the evidence concluded.
4. The Tribunal has set out facts as agreed and found that are essential to the Tribunal's reasons and to form an understanding of the important parts of the evidence. The Tribunal considered the submissions during its deliberations and has dealt with the points made when setting out the facts, law and application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored, because the facts or submissions is not part of the reasons in the way it was presented to the Tribunal by a party.

The issues

5. It was agreed that the issue to be determined was: Is there was a contractual or other legal basis on which the claimants, as former employees of the respondent, were entitled to the benefit of back pay after their employment had ended?
6. The claimants clarified that the statutory basis of the claims was that the respondent had made an unauthorised deduction under section 13 of the Employment Rights Act 1996. The claimants said that it was a payment that was not given rather than there being any deduction from wages as such. The respondent was not arguing time bar.

Findings in fact

7. The first claimant began employment with the legacy Dumfries and Galloway on 2 October 1995 until its merger with other services to form the respondent in 2013. He retired from the respondent on 25 November 2022. His salary at that date was £45,861, plus CPD payments and 20 percent flexi duty officer

payment.

8. The second claimant began employment with the legacy Dumfries and Galloway on 6 November 1998 until its merger with other services to form the respondent in 2013. The second claimant retired from the respondent on 29 November 2022. His salary at that date was £45,861, plus CPD payment and 20 percent flexi duty officer payment.
9. Legacy Dumfries and Galloway, a department of Dumfries and Galloway Council, issued the first claimant and the second claimant with identical statements of terms and conditions on 2 October 2010 and 25 June 2012 respectively (the Legacy T&Cs). The Legacy T&Cs provided that general terms and conditions of employment were as set out in the National Joint Council (NJC) for Local Authority Fire and Rescue Services Scheme of Conditions of Service, Sixth Edition (the Grey Book). This provides a 'floor' of terms and conditions across the UK, but individual fire and rescue services can agree further terms to enhance or amend these or in relation to matters upon which the Grey Book is silent.
10. Annual pay awards for uniformed staff are negotiated and agreed through the NJC which constitute a collective agreement that changes terms and conditions of employment. Once agreed the increase pay rates are deemed to apply from usually July of the relevant year and, if agreement is reached later than July, backdated payment is made to employees.
11. The Grey Book contains no provision as to what happens where an employee has retired before the date agreement is reached on an annual pay increase but after the normal effective date for such pay increases: 1 July. There is also no express provision about this in the Legacy T&Cs.
12. The respondent was formed in 2013 by the Police and Fire Reform (Scotland) Act 2012, which merged eight previous fire and rescue services across Scotland into one single service for the whole of Scotland. The employees transferred on their existing terms and conditions. All eight services previously had their own terms and conditions for employees which differed in many respects.

13. The merger involved significant rationalisation of control room, human resources and training. In addition, there was a need to harmonise terms and conditions of employment. Negotiations to create a single standardised terms and conditions for the respondent took place over several years. Initially the focus was on support staff as, unlike uniformed staff, they were on different rates of pay and job evaluation was undertaken.
14. The respondent and those trade unions that it recognises for negotiation and/or consultation endeavour under the Working Together Framework to work in partnership and aspire to resolve issues co-operatively.
15. The respondent appointed Mr Lindsay as a technical adviser to work on all-encompassing terms and conditions for its uniformed staff. He was aware that the legacy fire and rescue services had different policies and procedures. He was involved in detailed discussions with local HR advisers, managers and finance function about how they interpreted the Grey Book and ascertaining individual local terms and whether these terms were in writing or were “word or mouth”.
16. Mr Lindsay considered that for the size of legacy Dumfries and Galloway it was extremely well organised and had a comprehensive function. The HR manager and HR assistant of legacy Dumfries and Galloway transfer to and continued to work in the respondent’s HR team.
17. The respondent recognises the Fire Brigades Union (the FBU) for collective bargaining. Terms and conditions of employment for uniformed staff are generally negotiated with the FBU and incorporated by way of collective agreement. Negotiations with the recognised trade unions as the sole vehicle for contractual change is expressed within all of the respondent’s contracts of employment and consequently is an agreed term of employment of all the respondent’s employees.
18. The scoping of the negotiations in 2015 with the FBU was to agree all-encompassing T&Cs for the uniformed staff with the exception of those terms and conditions exclusive to retained firefighters and the operation of duty

systems. The negotiations did not involve rates of pay for uniformed staff as this is set by the NJC and subject to negotiation at national level.

19. By 2017, the negotiations were lock jammed and were paused for a few months. The respondent decided that going forward the remuneration, appointments and nominations subcommittee (RANSC) of the board would negotiate for the respondent. Mr Lindsay continued as the technical adviser. Mr McKenzie, a member of the Scottish regional committee of the FBU for east of Scotland was also involved in the negotiations. He had an in depth knowledge about the local terms and conditions for the three areas he represented (Central, Fife and Lothian and Borders). There was no discussion during the negotiations about back pay for uniformed colleagues retiring after the NJC had agreed the annual rate of pay.
20. In 2017/18, the NCJ agreed an increase rate of pay in December 2017 with effect from 1 July 2017. HR received a query from a retired employee that any pay award for uniform staff for the year 2017/18 be retrospectively paid to the retired employee for the period between the anticipated implementation date (July 2017) and the date of retirement. This request was made on the perception that retrospective application was a practice with the retired employee's legacy service.
21. HR undertook a full review of NJC terms and associated guidance which confirmed that NJC did not require or advise the respondent to retrospectively apply pay awards and other benefits to ex-employees. This issue had not previously arisen in relation to uniform staff pay awards but had arisen in relation to support staff where the respondent had refuse to make payment on the grounds that there was no legal obligation where the support employee had left the service before a date a pay agreement was reached. The recommendation to RANSC was that any pay awards or changes to contractual terms and conditions agreed after the termination of the employee's contract of employment would not be applied retrospectively. RANSC agreed in December 2017 to adopt a consistent position for uniform staff leavers with that applied to support staff.

22. On 8 January 2018, the west area organiser of FBU emailed the respondent for confirmation that the agreed pay award was only backdated for employees that were in employment on 7 December 2017. On 12 February 2018 the respondent replied to the FBU confirming the position. The respondent said
5 that the terms of the 2017/18 pay settlement and any future pay awards would only apply to those employed by the respondent at the date of the agreement. Following this exchange there was no suggestion that the respondent was in breach of any legal obligation or that this issue should now fall within the scope of the ongoing negotiations.
- 10 23. In June 2018, following collective bargaining and formal negotiations with recognised uniform trade unions, the respondent wrote to uniformed staff, including the claimants enclosing revised terms and conditions that were issued to the respondent's uniform staff (the June T&Cs).
- 15 24. The claimants' terms and conditions of employment remained in accordance with the conditions laid out in the Grey Book. All other terms and conditions were in accordance with the June T&Cs. Salary and terms and conditions of employment would be in accordance with any future collective agreements. This replaced and superseded the claimants' existing individual and collective terms and conditions with legacy Dumfries and Galloway.
- 20 25. The June T&Cs contain no express entitlement to back pay following a pay increase agreed after termination of employment. The June T&Cs do state that, "Employees leaving the Service do so under the terms and conditions of their contract extant at the date of their termination of employment".
- 25 26. In November 2019, there was a meeting of the Partnership Advisory Group (PAG) which is part of the inhouse conciliation process. The issue of a retiree not being entitled to a pay award if the employee retired before the pay award is agreed was raised. The HR director advised that this was not common practice and RANSC had already considered it. The FBU asked if further evidence was provided RANSC would reconsider its position. The FBU was
30 advised that only substantially difference evidence from that provided in

December 2017 would be considered and legal aspects may still take precedence. No further evidence was provided.

27. In 2022/2023, negotiations on the annual pay increase became protracted. Agreement was reached on 6 March 2023, after the claimants' retirement. The
5 agreed pay increase was set out in Circular/NJC/1/23. The pay increase was backdated to 1 July 2022 for employees who remained employed by the respondent at the date of the agreement.
28. On 28 March 2023, Mr McKenzie wrote to the head of people and organisational development advising that in the FBU's view members who
10 had retired before the pay increase was agreed should be remunerated at the same level as their colleagues. He considered that the delay in reaching agreement meant that there was a significantly increased number of recently retired members and the situation was exacerbated by the cost of living crisis. Mr McKenzie ask RANSC to revisit the matter at its next meeting.
- 15 29. On 11 April 2023 the first claimant wrote to the chief officer regarding the unfairness of the respondent's position on back pay for firefighters who had left the service before 6 March 2023. He referred to the entitlement that other public sector employees have in this respect. The first claimant became aware of the respondent's position on 3 April 2023. He said that others were
20 also unaware of this. The decision was never communicated to uniformed employees and it is only when employees retired that this becomes known. Mr Lindsay replied for the chief officer on 1 May 2023.
30. The second claimant became aware of the respondent's position around 3 April 2023. He had expected to receive backpay notwithstanding that his
25 employment had terminated before agreement on the pay increase had been reached.

Observations on witnesses and conflict of evidence

31. The Tribunal considered that the claimants gave their evidence honestly and candidly. The Tribunal accepted that the claimants believed that they were

entitled to backpay and were surprised and disappointed to be informed of the respondent's position in April 2023.

- 5 32. Mr McKenzie's evidence was focussed on his involvement in the negotiations culminating in the June T&Cs. From all that he said, the Tribunal did not doubt Mr McKenzie's pursuit of securing the best possible terms for FBU members. The Tribunal appreciated that in 2017 he was not the regional FBU representative for legacy Dumfries and Galloway. However, in relation to the issues that the Tribunal was determining, he provided no evidence of a custom and practice of any legacy fire and rescue service paying backdated pay awards to employees who had left the service before the pay award was agreed.
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- 15 33. Mr Lindsay was in the Tribunal's view a credible and reliable witness. He has 45 years of service most of which was as uniformed staff and latterly as an HR adviser. Mr Lindsay has a comprehensive knowledge of how the various legacy terms and conditions of both uniform and support staff operated before the transfer of the legacy services to the respondent. He was actively involved in understanding the legacy terms and conditions and framing the scope for negotiations of the June T&Cs.
- 20 34. There was little conflicting evidence about the material facts. However the Tribunal considered that it was appropriate to make the following observations.
- 25 35. The claimants asserted that there was a contractual right to back pay on retirement under the Legacy T&Cs and this was implied by custom and practice. The claimants gave evidence that this was their understanding until December 2017. While the Tribunal did not doubt the claimants' belief there was no evidence before the Tribunal of any uniform colleagues in legacy Dumfries and Galloway who had received back pay agreed after they had retired. If anything, the evidence was to the contrary.
- 30 36. The Tribunal appreciated that the potential number of employees to who would fall within the category would be small, but from Mr Lindsay's evidence, which the Tribunal accepted, people did fall within the category. Mr Lindsay

made enquiries about the Legacy T&Cs in 2015 and the custom and practice was not mentioned. Legacy HR and payroll were unaware of it. The Tribunal did not understand the retired employees who raised issues in 2017 and 2019 worked in Legacy Dumfries and Galloway.

5 **Deliberations**

37. The claims are of unlawful deduction from wages under section 13 of the Employment Rights Act 1996 (the ERA). The definition of wages is set out in section 27(1) of the ERA and the excluded list of payments, which include any payment by way of pension, are set out in section 27(2).
- 10 38. From the submissions the claimants accepted that the Tribunal has no jurisdiction under section 13 to consider any payments in respect of pension. Accordingly, the Tribunal focussed on the “unpaid wages”: being the difference in pay between 1 July 2022 and the claimants’ dates of retirement had the salary increase been retrospectively applied to them and back pay for that period applied. The respondent accepted that this element of the
15 claims potentially falls within the definition of wages for the purposes of a section 13 claim.
39. It was undisputed that the claimants alleged that there was a legal entitlement which they did not receive rather than the respondent making a deduction
20 from their wages.
40. The question for the Tribunal was whether there was a contractual or other legal basis on which the claimants, as former employees of the respondent, were entitled to the benefit of back pay after their employment had ended?
41. This involved first considering what was properly payable, and required
25 consideration of the relevant terms of contract, including any implied terms. The claimants argued that entitlement to backpay following a pay increase after retirement was implied by custom and practice.
42. Terms may be implied into employment contract if they are regularly adopted in a particular trade or industry, in a particular locality, or by a particular

employer. The term need not be in writing but for it to be implied the custom must be reasonable, notorious and certain.

43. Ms McSparran referred to *Henry v London General Transport Services* [2002] EWCA Civ 488 that provided that strict proof is required of the custom and practice and that the burden of such proof is upon the party seeking to rely on the consequential incorporation of the term into the contract.
44. While the claimants referred to their submissions and the evidence the Tribunal was not satisfied that on a balance of probabilities that there was a custom and practice in Legacy Dumfries and Galloway of salary increases agreed after retirement being paid retrospectively to ex-employees.
45. The Tribunal's reasoning was there was a lack of evidence about back payments being made to retired uniformed staff. The claimants accepted that for several years there were no salary increases. It therefore could not be said that any practice was regular. There was no evidence of how ex-employees were paid backpay; whether it was paid only to those retiring or to those also leaving for any other reason; and were they employed on the date the pay increase was agreed albeit payment was made after they had left. Also those employees of the respondent who the Tribunal considered would have been aware of the practice: HR and payroll did not mention the practice to Mr Lindsay in 2015 when issues of this nature were discussed. Had such a practice existed there was no reason that they would not have known about it and mentioned it. The Tribunal considered that this was significant because it suggested that there was not a sufficiently widespread knowledge or understanding of the practice in legacy Dumfries and Galloway.
46. While the claimants were surprised that the respondent did not pay back pay in 2023, the Tribunal did not consider that the same could be said of the FBU.
47. Given Mr McKenzie's evidence about his in depth understanding of the legacy terms and condition of the areas he represented at the Scottish regional committee of the FBU, the Tribunal considered his colleague representing the claimants' area ought to have a similar knowledge but they did not give evidence to that effect or at all.

48. The FBU were on notice in early 2018 that a member had raised the issue of back pay for a pay increase agreed after retirement and RANSC had set out its position. The Tribunal felt that at that stage, had the FBU considered that there was a legal obligation on the respondent to pay back pay to this member, the FBU would have pursued the matter, and if appropriate, the scope of the negotiations for the June T&Cs would have been reviewed to include this. The fact that this did not happen suggested to the Tribunal that the FBU did not consider that it was a contractual term and/or chose not to change the scope.
49. The FBU were in no doubt from February 2018 that any future pay awards would only apply to those employed by the respondent at the date of the agreement. The June T&Cs were consistent with that position.
50. While the Tribunal accepted that the FBU asked the respondent to review its position at PAC in December 2019, there was no evidence produced then or subsequently that this was a contractual obligation nor was there any suggestion that it was an oversight that it was omitted from the scope of the negotiations for the June T&Cs.
51. The letter sent by Mr McKenzie in March 2023 again asked the respondent to revisit the issue. However, the focus was on the time that it had taken to reach agreement and the ongoing cost of living pressures. The content of this letter did not provide any evidence of their being any legal obligation to do so.
52. The Tribunal did not consider that, in either 2019 or 2023, the FBU was asserting that the respondent was in breach of contract or any other legal obligation. On both occasions RANSC was being asked to reconsider its position. RANSC did so and remained of the view that there was no legal obligation to make payments.
53. Having concluded that the burden of proof had not been discharged the Tribunal did not consider that there was a legal obligation to pay back pay to those employees who had retire before the pay increase was agreed.

54. As the respondent did not fail to pay a legal entitlement to the claimants in April 2023 there was no unlawful deduction of wages and the claims under section 23 of the ERA are dismissed.

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S MacLean
Employment Judge

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7 March 2024
Date

Date sent to parties

20 March 2024