



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Baillieul

**Respondents:** Tesco Stores Limited

**Heard at:** East London Hearing Centre

**On:** 13 March 2024

**Before:** Employment Judge F Allen

## **Representation**

**Claimant:** In person and unrepresented

**Respondent:** Ms Laura Redman, Counsel instructed by Pinsent  
Masons LLP

**JUDGMENT** having been sent to the parties on 22 March 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. The claimant is employed by the respondent as a Warehouse Operative at the respondent's Thurrock Distribution Centre. The claimant was transferred, with other colleagues, to the respondent's employment in or around June 2005. Early conciliation started on 23 September 2023 and ended on 4 November 2023. The claimant submitted his claim to the Employment Tribunal on 6 November 2023.

## **Hearing**

2. The hearing was held in person at East London Hearing Centre. The documents were checked at the beginning of the hearing. I had a bundle of 83 pages and statement from Mr. Mark Taylor who is employed by the respondent as a Warehouse Service Shift Manager. Mr. Taylor did not attend the hearing to give oral evidence.
3. The claimant attended to give evidence together with a witness Mr. Shaun Doran. I also had a statement dated 27 January 2024 from Steve Jones

Pease (Union Representative) who attended the hearing but did not give oral evidence.

4. Mr. Doran drafted a short-handwritten statement dated 13 March 2024 on the morning of the hearing. I gave Ms. Redman time to consider the statement and take instructions before the hearing started.
5. Having considered the statement Ms. Redman confirmed that she was ready to proceed.
6. During the hearing further documentation was provided by the claimant. Mr. Doran showed a pay slip dated February 2024 and the claimant provided a document titled Site Agreement Thurrock Distribution Centre 2022. Both documents emanated originally from the respondent. I gave Ms. Redman time to consider these documents and take instructions. Having been given this time Ms. Redman confirmed that she was ready to proceed and that she was not disputing the contents of the Site Agreement Thurrock Distribution Centre 2022.

### **Issues**

7. The issues were discussed with both parties at the beginning of the hearing. The claimant confirmed that he was not claiming that he had been paid a different amount because of gender or that he had been treated unfairly because of any protected characteristic.
8. The claimant's claim is that the respondent has made an unlawful deduction from his wages. The claimant says that since 2010 he is entitled to have been paid a shift premium of £60.48. The claimant says that other colleagues who were transferred by way of TUPE at the same time as the claimant in 2005 receive £60.48 every 4 weeks.
9. The respondent accepts that the claimant is entitled to be paid a shift premium but says that the claimant is being paid the correct amount as shown on his pay slip of £33.36 every 4 weeks.

### **Legal Framework**

10. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction of wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction of wages pursuant to Section 23 ERA.
11. The definition of wages in section 27 is widely defined and includes at section 27 (1) of the ERA 1996 "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract

or otherwise” but excludes any payment in respect of expenses incurred by the worker in carrying out his employment (section 27(2)).

12. Paragraph 4A of the Employment Rights Act 1996 states:

“An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

### **Evidence and submissions**

13. I heard sworn evidence from the claimant who relied on his statement at pages 77-78 of the bundle and Mr. Doran who relied on his statement dated 13 March 2024.

14. Both Ms. Redman and the claimant made submissions which I considered with care.

### **Findings of Fact**

15. The relevant findings of fact are as follows. Where I have had to resolve any conflict of evidence, I have indicated how I have done so at the material point.

16. The claimant began work at Thurrock Distribution Centre as a Warehouse Operative on 19 August 2002 and was moved over on to a Tesco employment contract in or around June 2005. The claimant is paid an hourly rate.

17. The claimant’s claim is that when he was TUPE’d over in 2005 it was agreed that he and others would be paid premium shift payments. The claimant has provided two pay slips on pages 80-81 of the bundle showing this amount as SHIFTPRM. The dates of these pay slips cannot be seen but the claimant says that they are 2008 and I have no reason to doubt his evidence. At that time the payment for premium shifts was £120.96.

18. The claimant’s evidence, which I accept, is that there was a pay deal whereby the amount for premium shifts would be reduced by 25% each year and then after 50% was removed there would be a fixed payment of £60.48 every 4 weeks. The claimant says that the fixed payment of £60.48 started in 2010 but that he has been paid £33.36 every 4 weeks and not the £60.48 that he is entitled to.

19. It is accepted that there is no mention of any entitlement to premium shift payments in the Employment Contract, but payment of a premium shift payment does appear on the pay slips of the claimant. It is accepted by the respondent that this payment is not related to overtime or other premium payments so the question is What is this premium shift payment for? Mark Taylor says in his statement, at paragraph 7, that he and others attempted to

find the historic basis for such payments but were unable to and that it was not expressly outlined in any policy or procedure.

20. Mr. Taylor's statement continues at paragraph 18 to say that Tesco's Pay Policy confirms that hourly paid, distribution-based colleagues ought to consult the relevant site agreement for guidance on pay agreements and at paragraph 22 that "the understanding of entitlement to a 'shift premium' payment was not very clear due to the fact that it was most likely a historic protected payment and was not subsequently outlined in any policy or procedure". The Site Agreement put in the bundle titled Site Agreement Thurrock Distribution Centre 2021 makes no reference to premium shift payments, but a further Site Agreement Thurrock Distribution Centre 2022 relied on by the claimant refers at page 10/39 to TUPE Protection Payments which relates to colleagues joining pre-4 September 2005. This Site Agreement sets out that specific arrangements exist to compensate colleagues in employment prior to 4 September 2005.
21. I find that the historic basis for the premium shift payment on the claimant's pay slip is in section (e) of the Site Agreement for Thurrock Distribution Centre 2022 which sets out that there is a TUPE Protection Payment for colleagues joining pre-4th September 2005. It is accepted in the statement of Mark Taylor that the claimant did TUPE over in or around June 2005.
22. The relevant part of this Agreement says that there is a TUPE Protection Payment for colleagues joining pre-4th September 2005 made every four weeks of £60.48. The respondent says that the amount paid under this pay deal depends on an individual's circumstances and the claimant has not provided evidence that he is entitled to the full amount of £60.48. I find that the amount is fixed and there is reference to a single amount. I find that there is no reference in this section to payments differing depending on an individual's circumstances. It simply says that those colleagues to be compensated "are paid at £60.48 per 4 weeks." There is no reference to some people being paid different amounts and no reference to a payment of £33.36. This premium shift payment is not connected to overtime or any other premium payments it is a separate payment designed to compensate colleagues who were in employment prior to 4 September 2005 in recognition of various working hours which Tesco did not recognize.
23. Additionally, I have considered the evidence from Mr. Doran who is also a Warehouse Operative who TUPE'd over in 2005. I found Mr. Doran a credible witness who gave reliable evidence. Mr. Doran explained that originally, he was paid £120.96. This was reduced each year but since 2010 he is paid £60.48 which is a protected payment, and this shows on his pay slip as Shift Premium. This payment of £60.48 is not in his contract.

24. I was shown Mr. Doran's pay slip for February 2024 which shows a Shift premium payment of £60.48. I find that Mr. Doran's evidence supports the claimant's evidence that the shift premium payment on his pay slip relates to the TUPE Protection Payment referred to in the Site Agreement for Thurrock Distribution Centre 2022 and there is no suggestion from the respondent that it relates to anything else.

**Conclusion and Remedy**

25. I find on balance that the claimant has shown that the premium shift payment on his pay slip relates to the TUPE transfer in 2005 and that, in line with respondent's Site Agreement for Thurrock Distribution Centre 2022, the current amount that should be paid to the claimant is £60.48 every 4 weeks and not £33.36.

26. The annual amount that is owed to the claimant is agreed as £352.56 and I find applying paragraph 4A of the Employment Rights Act 1996 that the claimant is entitled to 2 years back payment of £705.00.

Employment Judge F Allen

13 May 2024