



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Santos Tarrío

**Respondent:** Transport UK East Midlands Limited

**Heard at:** London Central (by video)      **On:** 3 May 2024

**Before:** Employment Judge Annand

## **Representation**

**Claimant:** Mr Santos Tarrío

**Respondent:** Mr Leake, Solicitor

# RESERVED JUDGMENT

1. The Claimant's claim of unauthorised deductions from wages is not well founded and is dismissed.

# REASONS

## **Introduction**

1. On 3 May 2024 a final hearing was held to determine the Claimant's claim for unauthorised deductions from wages. The key issue in this case was whether the Claimant was entitled to a pay rise that was negotiated and agreed after he had left the Respondent's employment. The hearing was listed for two hours and was heard by video. I was able to read the papers in advance of the hearing. At the hearing, I heard evidence from the Respondent's Head of HR for the Customer Service & Commercial functions of the business, Ms Wendy Harvey, and heard the parties' submissions. I reserved my judgment.
2. At the start of the hearing, it was agreed that the correct name for the Respondent is Transport UK East Midlands Limited and therefore I agreed to order that the Respondent's name be amended to reflect this.

## **Findings of fact**

3. The facts in this case were not in dispute. The Claimant was employed as a Customer Service Officer based at London St Pancras station. He was employed from 2 February 2016 until his employment terminated on 1 September 2023. The Claimant had a period of long-term sickness absence from work. A medical report obtained in June 2023 concluded the Claimant was permanently unfit for work. The Claimant attended a final capability hearing on 14 July 2023. On 17 July 2023, the Claimant was sent a letter informing him that he was to be dismissed on grounds of ill health and that his final day would be 1 September 2023.
4. The Claimant was employed under a contract of employment that was subject to collective bargaining. His contract stated at clause 22: "With the exception of individual salary review, your contract of employment is subject to such terms and conditions as may be settled from time to time, in relation to employees of the Company in your grade or category, under the agreed collective bargaining procedures established with recognised trade unions or other organisation. In the event of any conflict between this contract document and any other current document or trade union agreement this contract will prevail." The Respondent recognises four trade unions, namely Unite, RMT, TSSA and ASLEF.
5. Ms Harvey's evidence to the Tribunal was that Customer Service grade's salaries and benefits are collectively negotiated and have always been subject to annual (or other agreed period) collective bargaining with RMT and TSSA. She also explained that since the start of the Covid 19 pandemic there had been a large reduction in travel and therefore a significant amount of public funds had been used for financial support. The rail industry at large had become subject to an Enabling Framework Agreement, whereby pay negotiations are subject to industry wide bargaining between the relevant Trade Unions and the Rail Delivery Group, an organisation that represents the various train operating companies, including the Respondent.
6. There were various rail industry wide pay talks through the Enabling Framework Agreement mechanism regarding pay awards for rail staff for 2022/2023. Collective agreements were reached towards the end of 2023 for some grades, including the Customer Service grade.
7. On 4 December 2023, an agreement was reached between the Respondent, RMT and TSSA. It was agreed that Customer Service grades at the Respondent would receive a 5% pay rise or a raise of £1,750 per year, whichever was greater. It was agreed that the pay rise would be back dated to 1 April 2022. The Agreement stated: "it is agreed that a 2022 pay award of 5% or £1,750 (whichever is greater and subject to pro rata where applicable) is made to all eligible colleagues in EMR's Customer Services Collective Bargaining Units and who are in EMR's employment at 30 November 2023." It was agreed the back dated pay would be paid in the salary payments made on 8 December 2023. The Agreement was signed by the Respondent's Customer Services Director and Full Time Officers for RMT and TSSA.
8. On 11 December 2023, the Claimant wrote to the Respondent. He understandably felt very strongly that he should be entitled to the pay rise and back pay from 1 April 2022. He noted he had been let go on health grounds rather than having been sacked or left voluntarily. He emailed

again on 15 December 2023 asking if there was any news regarding his previous email.

9. On 2 January 2024, the Claimant was sent an email by the Respondent's Payroll Operations Manager. The email stated that leavers before 30 November 2023 were not eligible for backdated pay.
10. On 3 January 2024, the Claimant contacted Acas for early conciliation purposes. The EC certificate was issued on 18 January 2024, and he submitted a Claim Form to the Tribunal on 22 January 2024. In the Claim Form, the Claimant set out he was seeking the pay increase for 2022, along with the hours of overtime worked at that new rate of pay, which the Respondent did not settle until December 2023.
11. On 21 March 2024, the Respondent submitted a Response form. In short, the Respondent set out that the agreement reached on 4 December 2023 contained an express provision that the pay award was only applicable to those employees who were employed by the Respondent as at 30 November 2023, and by this date, the Claimant was no longer employed by the Respondent.

### **The relevant law**

12. Section 13(1) of the Employment Rights Act 1996 (ERA 1996) states, "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."
13. Section 13(3) ERA 1996 states, "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."
14. In *Agarwal v Cardiff University and anor* [2019] ICR 433, CA, the Court of Appeal held that deciding whether wages are 'properly payable' will require employment tribunals to resolve any disputes as to the meaning of a contract, including questions of interpretation and implication. In *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714, CA, the Court of Appeal found that determining what wages are 'properly payable' requires consideration of all the relevant terms of the contract, including any implied terms.
15. Terms may be implied into employment contracts if they are regularly adopted by a particular employer. It will be assumed that the parties were aware of the custom and tacitly agreed that it should be part of their contract without any need to put it in writing (*Sagar v H Ridehalgh and Son Ltd* [1931] 1 Ch 310, CA). The custom in question must be reasonable, notorious and certain (*Devonald v Rosser and Sons* [1906] 2 KB 728, CA, and *Sagar v H Ridehalgh and Son Ltd*). This means that the custom must be fair (not arbitrary or capricious), must be generally established and well known, and

must be clear cut. However, express terms take precedence over implied terms. In *Johnson v Unisys Ltd* [2001] ICR 480, HL, the House of Lords held that implied terms can supplement the express terms of a contract, but cannot contradict them. Further, the Employment Appeal Tribunal has found that an express term can be subject to an implied term (*St Budeaux Royal British Legion Club Ltd v Cropper EAT 39/94*).

### **Reasons**

16. In order to decide the Claimant's claim for unauthorised deductions from wages, the starting point was to consider what amount was "properly payable" to him under the terms of his contract of employment.
17. The parties were agreed that, as at 1 September 2023 (the Claimant's effective date of termination), he had been correctly paid the amount owed under the terms of his contract of employment.
18. While a pay rise was agreed between the Unions and the Respondent on 4 December 2023, which was to be back dated to 1 April 2022, the agreement specifically stated that it applied to employees "who are in EMR's employment at 30 November 2023." The Claimant was not in the Respondent's employment at that date. Therefore, under the express terms of the agreement, the agreed pay rise did not apply to the Claimant.
19. In response to questions I asked Ms Harvey, she accepted that she was aware that on previous occasions some leavers had been paid backdated pay. However, she did not know the details as this had occurred before she had started working for the Respondent and so she was only aware of what she had been told by a colleague. She was not aware how many times it had happened previously. She believed this had happened pre-2020 as there had been no pay rises in 2020 and 2021.
20. I accepted the Respondent's argument that this fell far short of demonstrating an implied term, developed through custom and practice, that leavers would be paid backdated pay. I had not been presented with evidence of a generally established, well known, and clear cut custom or practice, from which I would have been able to conclude that there was an implied term of this type. In any event, it was the Respondent's position, which I also accepted, that the express wording of the agreement excluded leavers and that express terms take precedence over implied terms.
21. In these circumstances, I have concluded that under the terms of the Claimant's contract of employment, he was not entitled to the back dated pay. The express term of the pay rise agreement, which stated the pay rise and back dated pay applied to employees "who are in EMR's employment at 30 November 2023" excluded the Claimant and others who had already left the Respondent before that date. Therefore, I am of the view, the amount the Claimant claims were not wages that were "properly payable". For this reason, the Claimant's claim for unauthorised deductions from wages fails.

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Employment Judge Annand

21 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 May 2024

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FOR EMPLOYMENT TRIBUNALS

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