



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Ms M Timmins

DHU Health Care CIC

HELD AT Birmingham

ON

9 May 2024

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: Mr J Timmins (the claimant's son)

For the respondent: Mr M Cameron (Consultant)

JUDGMENT

The claimant's claim for arrears of pay and holiday pay fails and is dismissed.

REASONS

Background

1. Following a period of Early Conciliation commencing on 20 April 2023 and ending on 1 June 2023, the Claimant issued a claim for holiday pay, arrears of pay and other payments which was received by the Employment Tribunal on 5 June 2023.

2. The respondent is a Community Interest Company and health care provider based in Derby.
3. I began the hearing by clarifying the claimant's claims. I was advised that the claim for holiday pay related to an agreement that West Midlands Ambulance Service (WMAS) had previously had with its employees that employees would forego some holiday entitlement in return for more move. The Claimant indicated that she had been informed that this reduction in holiday should not have applied to her as the Claimant's employment had transferred from WMAS to the Respondent. Notwithstanding the assurance the Claimant says that she was given, she has had 55 hours holiday pay removed from her entitlement. The claim for arrears of pay related to the Respondent failing to continue to implement pay increments in accordance with the Agenda for Change agreement. I was advised that the claim for other payments related to an alleged failure to inform and consult under Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations").
4. I explained to the Claimant that there was nothing in her Claim Form to suggest that she wanted to bring a claim for failure to inform and consult under the TUPE Regulations. Indeed, even her witness statement only contained a fleeting reference to an alleged failure to consult and even that reference was in the context of changes to her terms and conditions and not so as to suggest that she was intending to bring a free standing claim for failure to inform and consult on a TUPE transfer.
5. Mr Cameron objected to the Claimant's inclusion of a claim for failure to inform and consult. His position was that this was not a part of the Claimant's claim, nor identified in her witness statement. As such, he was not prepared to deal with such claim and felt that the Respondent was being ambushed at the hearing.
6. I indicated to the Claimant that I was not satisfied that the Claim Form contained a claim for failure to inform and consult. As such, if she would have to make an application to amend her claim if she wished to pursue this cause of action. At present I was not minded to grant any such application if it were made given the prejudice to the Respondent of such an application being made at such a late stage of the proceedings.
7. The Claimant accepted this and indicated that she was happy to proceed with her claims for holiday pay and arrears only which related to the Respondent's alleged failure to implement pay increments in accordance with the Agenda for Change agreement and in relation to the removal of 55 hours holiday from her entitlement. The Respondent was happy to proceed on this basis.

Evidence and documents

8. I was also presented with a bundle of some 133 pages. At the commencement of the hearing I sought confirmation from the parties as to whether the bundle was agreed. This was confirmed to me.
9. I also heard evidence from the Claimant and from Zahra Leggatt, the Respondent's Director of People and Organisational Development.

Issues

10. I set out below the list of issues which the Tribunal needed to consider and which were agreed with the parties.
11. The issues are:

Unlawful deduction of wages

- 11.1 were the pay increments under the Agenda for Change properly payable to the Claimant from 2019 to date?
- 11.2 If so, how much is the Claimant owed?

Holiday Pay

- 11.3 Were 55 hours holiday unlawfully deducted from the Claimant's entitlement?

Facts

12. I make the following findings of fact :
 - 12.1 The Respondent is a Community Interest Company and health care provider based in Derby.
 - 12.2 The Claimant has indicated in her Claim Form that her continuity of employment commenced on 2 June 2014. The Respondent disputes this and indicates that the Claimant's employment commenced on 9 September 2014. I note that the bundle contained an offer letter to the Claimant dated 21 August 2014 which indicated that as the Claimant had worked for 12 weeks as an agency worker and she was made an unconditional offer by West Midlands Ambulance Service (WMAS) of permanent employment with a likely start date of 8 September 2014. Her subsequent contract also refers to a start date of 8 September 2014. As such, I am satisfied that the Claimant's continuity of employment commenced on 9 September 2014.
 - 12.3 The Claimant was engaged as a Health Advisor taking 111 for the ambulance service.

- 12.4 The Claimant's offer letter indicated that after a 4 month training period she would be working on Agenda for Change Pay Band 3, Spine Point 6, earning £16,271 pro rata for part time working plus a 25% unsociable hours payment giving her a total salary of £20,338 per annum.
- 12.5 The Claimant's employment subsequently transferred from the West Midlands Ambulance Service NHS Trust to Vocare Limited, a provider of Out-of hours services to NHS England.
- 12.6 On 8 November 2016 the Claimant's employment transferred from Vocare Limited to Care UK Ltd ("Care UK") pursuant to TUPE. In its measures letter which was dated 14 September 2016, Care UK Ltd indicated that it intended to apply a static interpretation to transferring employees with Agenda for Change terms and conditions. This meant that all terms and conditions in place at the time of transfer would be protected but any subsequent contractual changes agreed by the National Negotiating Committee would not be implemented and, instead, transferring employees would have their annual pay review arrangements aligned with those of Care UK which took place on 1 October each year. However, increases for individuals progressing upwards through pay points within a pay band would be honoured as the payment of increase from pay point to pay point was a contractual entitlement (subject to existing terms and conditions).
- 12.7 Care UK also indicated in its measures letter that it did not recognise the trade unions for the purposes of collective consultation. As such, the current recognition agreements would cease to exist at the point of transfer.
- 12.8 Notwithstanding Care UK taking a static approach to the Claimant's terms and conditions of employment, it did, on a discretionary basis, provide the Claimant with pay increases roughly in line with what Agenda for Change would have done in 2017, 2018 and 2019.
- 12.9 On 21 September 2019, an employee of Care UK raised a collective grievance regarding the 2019 pay increase on the basis that it was not equivalent to the Agenda for Change pay increase. The grievance stated:

"On behalf of all employees on band 3 of the NHSD Agenda for Change Contract, I wish to raise a grievance relating to the rates of pay we have been receiving.

Those at the top of band 3 have all been receiving a salaried pay of £10.38 per hour, with enhancements calculated from this figure.

However, the actual figure for the top of band 3 is £20,795, which equates to £10.64 per hour (according to <https://www.nhsemployers.org/pay-penions-and-reward/agenda-for-change/pay-scales/hourly>).

We would like this to be investigated as a matter of urgency please and to know why this has happened, how long we have been underpaid and when we will be compensated with the shortfall”.

- 12.10 On 20 October 2019, it was confirmed that this collective grievance included the Claimant.
- 12.11 Around this time the Claimant’s employment transferred back from Care UK to WMAS.
- 12.12 The Respondent has not been able to find any clear records to indicate whether the collective grievance was progressed at this time or not. Ms Leggatt indicated in her evidence that there were no available records to suggest that the grievance was progressed.
- 12.13 On 25 November 2019 WMAS wrote to the Claimant to offer her the opportunity to move onto NHS terms and conditions of employment. The Claimant was offered the opportunity to transfer onto a permanent contract on NHS Terms and Conditions for the role of Call Assessor at Band 3. In its letter WMAS informed the Claimant that she would be assimilated onto the next nearest possible pay point within that band. In addition, the Claimant would receive all NHS terms and conditions including holiday, statutory holidays, unsocial hours enhancements, sickness pay entitlements, overtime enhancements and maternity and paternity leave and pay entitlements. These changes would be effective 1 December 2019 and would constitute a permanent change. The Claimant was advised that if she agreed to the change to her terms and conditions she was asked to confirm her acceptance by 13 December 2019. The Claimant neither accepted nor rejected the offer.
- 12.14 On 10 July 2020 WMAS wrote to the Claimant as its records show that she had not responded to its offer. The Claimant was provided with further information on its offer. The Claimant was informed that a number of staff who had previously been on a NHS contract felt that they did not need to sign a new contract. However, due to previous TUPE transfers, those staff were not currently paid the salary in line with current NHS pay rates due to the fact that Care UK had taken a static approach to NHS pay scales and continued to pay staff on these rates in addition to any Care UK pay awards. These salaries were lower than NHS salaries based on 2020/2021 pay rates. The Claimant was provided with 2020/2021 rates of pay. The Claimant was also advised that her current salary was £16,154.64 (hourly rate of £10.36) and that her new salary would be £16,913.60 (hourly rate of £10.81). In addition, the Claimant would be entitled to a unsociable hours payment.
- 12.15 The Claimant did not accept the NHS contract offered to her.
- 12.16 On 17 September 2020 the Claimant raised a query about her pay with WMAS. She indicated that her salary had increased as

- a result of her annual increment but was less than the NHS pay rate for her role. She also indicated that after 6 years' service her pay band should have gone up to band 4.
- 12.17 WMAS replied to the Claimant on 21 September 2020. The Claimant was advised that her pay was correct as Care UK implemented a static interpretations of NHS pay scales and continued to pay staff below the current NHS banding. This was the reason why WMAS was keen for staff to move to the WMAS NHS contract to enable their pay to be in line with the current NHS pay. The Claimant was again given the opportunity to move to the WMAS NHS contract.
- 12.18 On 22 October 2020 the Claimant raised a formal grievance that WMAS had made to terms and conditions to unsociable hours payments, changes to pay bands and annual increased.
- 12.19 On 23 October 2020 WMAS wrote to Unison trade union representative to indicate that staff that transferred under TUPE to WMAS as a part of the 111 contract in November 2019 were entitled to an unsocial hours payment which they had not received during periods of annual leave. The union was advised that the owed amounts would be calculated and paid to affected staff and that this would be backdated to 5 November 2019.
- 12.20 The Claimant's grievance was heard on 17 November 2020 as she was not a part of the union. The Claimant advised WMAS that Care UK had acted illegally when they had implemented a static interpretation of NHS pay when she had transferred from Vocare to Care UK in 2016, the Claimant also was unhappy that the 25% unsocial hours payment was dependent on the shifts that were worked and thought it should be paid irrespective of the shifts worked. Finally, the Claimant advised during the grievance that she did not believe she had received her annual increment.
- 12.21 WMAS wrote to the Claimant the next day to confirm that Care UK were legally entitled to take a static interpretation to employees transferring with Agenda for Change terms and conditions. The Claimant was also provided relevant annexes to the NHS terms and conditions which the 25% unsocial hours paid was only paid if an employee worked more than 21 unsocial hours otherwise it was paid on a sliding scale depending on the number of hours worked. It was acknowledged that the Claimant may have continued to received 25% unsocial hours payment when she originally transferred from WMAS but this was due to the subsequent providers lack of understanding as to how these payments were calculated and should be applied. Whilst entitlement to the unsocial hours payment was contractual, the level of payment was dependent on the shifts worked. Finally, it was confirmed to the Claimant that the annual incremental progression had been applied to applicable staff. However, the vast majority of this group had now reached the top point of the banding based on 2016/17 pay scales and therefore were not entitled to any further incremental progression. In the Claimant's

case her incremental uplift was applied on 8 September 2020. The Claimant was again offered the opportunity to move to WMAS NHS terms.

- 12.22 The Claimant appealed the outcome and a Stage 2 grievance meeting took place on 14 December 2020. The Claimant was advised of the outcome of her Stage 2 grievance by a letter dated 8 January 2021. The outcome of the grievance was that although Care UK had applied salary increases (of 1% in October 2017; 2% in October 2018 and 2% in October 2019), they were legally entitled to adopt a static interpretation of the collective agreement and therefore were not bound by any subsequent NHS collective arrangements.
- 12.23 In relation to the Unsociable Hours Payment, the Claimant was advised that the NHS Terms and Conditions provided that unsocial hours were calculated against the cycle of the roster. To attract and be paid an Unsociable Hours Payment individuals had to work the relevant hours to accrue the relevant percentages. The percentages ranges from 5%, 9%, 13%, 17%, 21% and 25% and to attract these payments an employee had to work a certain percentage of their working shift during unsociable hours. For the Claimant to attract the full 25% Unsociable Hours Payment more than 56% of the Claimant's working shifts over the cycle would have to be worked during unsociable hours. It was noted that although the Claimant's offer letter referred to a 25% Unsociable Hours Payment this was subject to the hours worked. Furthermore, the Claimant's contract would have clarified that that the payment was subject to Agenda to Change. I note that the Claimant's contract does indeed say this. Clause 7.1 of the Claimant's contract states: *"For Further details about pay bands, pay progression, annual increments, on call and unsocial hours pay please refer to Section 2 Agenda for Change"*. The Stage 2 grievance outcome accepted the decision of the Stage 1 panel that the fact the Claimant continued to be paid 25% was due to a lack of understanding of the NHS National Terms and Condition. Having considered the Claimant's contract I agree with this assessment of the Claimant's entitlement to an Unsociable Hours Payment. Although she has an contractual entitlement to an unsocial hours payment, the percentage paid is in line with the unsocial hours worked as per Section 2 of the NHS Terms.
- 12.24 The Claimant was again offered the opportunity to accept an NHS contract.
- 12.25 On 11 October 2021 the Claimant again wrote to the Head of Human Resources querying why she had not received an annual increment which she believed was due from September 2021. The Claimant received a response the same day. The Claimant was advised that as she had reached the highest pay point she was not entitled to any further incremental progression. Further, the Claimant was again reminded of the static approach taken by Care UK when her contract transferred under TUPE. In light

of this the Claimant was not entitled to any NHS cost of living awards and this was one of the primary reasons why WMAS had been offering the Claimant and other affected employees the opportunity to accept a NHS contract so that they could move on to the current NHS pay scales. The Claimant was informed that her current salary was £20,653 and if she chose to sign the NHS contract her salary would increase to £21,777. The Claimant was also advised that WMAS would be reviewing the Unsociable Hours Payment to ensure that going forwards it was paid to reflect the unsocial hours worked in accordance with her contract.

- 12.26 On 14 October 2021 the Claimant was advised that WMAS would be offering employees including those on static contracts a 3% salary increase. At the same time it would be undertaking a review of the employees' Unsociable Hours Payment.
- 12.27 On 7 September 2022 WMAS awarded all employees including those on a static contract a salary increase of £1,400.
- 12.28 Separate to these issues Unison had raised a grievance for call assessors who were on Agenda for Change terms and conditions to be moved to directly to band 4 when they reached the top of band 3 and the Tribunal were shown a newsletter issued by Unison in December 2022 indicating that they had been successful in their grievance.
- 12.29 The Claimant produced an incomplete and undated text exchange between herself and Susan Bunyan in which she asked whether she had been moved to pay band 4 as a senior call assessor. The response she received was "*You list defiantly are*" which does not make sense. But even if it means that the Claimant's name was on a list to benefit from a move to pay band four as suggested by the Claimant, there was no formal confirmation of this from the WMAS. Further the Claimant accepted that she was neither a member of Unison nor was she on Agenda for Change terms and conditions notwithstanding the fact that she had been offered several opportunities to revert back to a NHS contract. The Claimant also confirmed to the Tribunal that only union members were moved to band 4.
- 12.30 On 1 March 2023 the Claimant's employment transferred to the Respondent on the static contract she had worked under when she initially transferred from WMAS to Vocare.
- 12.31 The Claimant did not produce any evidence to demonstrate the 55 hours holiday pay which she said had been taken from her.

Applicable law

13. Section 13 of the Employment Rights Act 1996 provides:

"(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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) 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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

14. Regulation 4A of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 provides:

“4A.— Effect of relevant transfer on contracts of employment which incorporate provisions of collective agreements

(1) Where a contract of employment, which is transferred by [regulation 4\(1\)](#), incorporates provisions of collective agreements as may be agreed from time to time, [regulation 4\(2\)](#) does not transfer any rights, powers, duties and liabilities in relation to any provision of a collective agreement if the following conditions are met—

(a) the provision of the collective agreement is agreed after the date of the transfer; and

(b) the transferee is not a participant in the collective bargaining for that provision.

(2) For the purposes of [regulation 4\(1\)](#), the contract of employment has effect after the transfer as if it does not incorporate provisions of a collective agreement which meet the conditions in paragraph (1)”

Submissions

15. In his submissions Mr Cameron asserted that the Claimant was not entitled to Agenda for Change increments given that Vocare had adopted a static interpretation of the Agenda for Change terms and conditions and this was permitted by regulation 4A of TUPE. Furthermore, the movement to the band 4 pay only applied to those employees who were members of the union and who were on Agenda for Change terms and conditions and the Claimant was on neither. It was also submitted that there was no evidence to suggest any agreement that the Claimant would be moved to band 4 nor in support of her claim for 55 hours holiday. As such, the Claimant’s claims should be dismissed.
16. For the Claimant it was submitted that Susan Banyon was a figure of authority and she had suggested that the Claimant had been moved to band 4. It was accepted that the Claimant was not a member of the union but it was suggested that it was later agreed that the change would be applied to non-union members although no evidence to this effect was produced.

Conclusions

17. In reaching my conclusions I have considered all the evidence I have heard. I have also considered the bundle in its entirety as well as the oral submissions made by the parties' representatives.
18. I am satisfied on the evidence before me that there have been no unlawful deductions from the Claimant's wages and she is not entitled to any arrears of pay. The Claimant was not entitled to be moved to band 4 as a result of the Unison grievance as she was not a member of the union nor was she on an Agenda for Change contract although she had been given several opportunities to readopt an NHS contract. I am satisfied, notwithstanding the unintelligible text exchange with Susan Banyon, that the Claimant was not entitled to be moved to band 4. She was on a static contract which by virtue of Regulation 4A of TUPE was lawful and she was not on NHS terms. As such, the pay increments that were awarded to employees who were on NHS contracts were not properly payable to the Claimant. Whilst I can see that the Claimant feels aggrieved by this, she was afforded several opportunities to move to a NHS contract but deliberately choice not to do so. This was a conscious choice she made as she thought she would lose the 25% Unsociable Hours Payment. As such, she does not have the benefit of any NHS pay increases or increments. I have also seen no evidence to suggest that the Claimant has had 55 hours holiday pay taken from her.
19. As such, the Claimant's claim for arrears of pay and holiday pay fail and are dismissed.

Employment Judge Choudry

20 July 2024

Recording and Transcription

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>