



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Howarth

**Respondent:** The Home Office

## RECORD OF A HEARING

**Heard at:** London Central

**On:** 5 October 2023

**Before:** Employment Judge Joffe

### Appearances

For the claimant: Represented himself

For the respondent: Ms N Ling, counsel

## JUDGMENT

1. The claimant's claim for employer pension contributions or the benefit of those contributions is not upheld and is dismissed.
2. The claim in respect of employer pension contributions was presented outside the time limits in the Employment Rights Act 1996 and the Employment Tribunals Extension of Jurisdiction Order (England and Wales) 1994.
3. The claimant's claim for a redundancy payment is not upheld and is dismissed.
4. The respondent did not breach the claimant's contract by deducting tax and National Insurance from his severance payment.
5. The claim in respect of the severance payment was presented outside the time limits in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

## REASONS

## Issues

1. This was a full merits hearing to consider the following issues as discussed and agreed at a case management preliminary hearing in front of Employment Judge French on 21 June 2023:

### Pension Claim

- 1.1 What was the claimant's contractual entitlement to a pension?
- 1.2 Did this include an entitlement to employers' contributions?
- 1.3 Were these paid into the pension scheme?
- 1.4 If not, is the claimant entitled to these himself? On what basis is he entitled?
- 1.5 Does the Tribunal have jurisdiction in this regard?

### 2. Tax deduction

- 2.1 Was there a redundancy situation pursuant to s139 Employment Rights Act 1996?
- 2.2 Did a right to a redundancy payment arise as a result?
- 2.3 Alternatively, was it a contractual severance payment?
- 2.4 Was the respondent entitled to deduct tax and national insurance from the payment received?

### 3. Remedy

- 3.1 How much should the claimant be awarded?

## Findings

### The hearing

2. I was provided with a bundle running to 140 pages. I had witness statements from the claimant and Ms M Quignon-French for the respondent. Both gave live evidence. Ms Ling prepared a skeleton argument

### The facts

3. On 29 April 2022, the claimant received an offer letter for the role of special adviser to the Secretary of State for the Home Department, then Priti Patel.
4. The offer included the following relevant text:  

'You will have access to a range of fantastic employee benefits including the civil service pension scheme with a generous employer contribution rate based on your salary offer of 27.9% ... and competitive discounts at a wide range of retailers. Further details are provided at the end of this letter.'

...

As we discussed, the Model Contract for Special Advisers sets out the principal terms and conditions of your appointment . Together with the Code of Conduct for Special Advisers, the Civil Service Code and any contractual parts of the Cabinet Office intranet as amended from time to time, it constitutes your contract of employment with the Crown. Please do take the opportunity to familiarise yourself with them.'

5. The claimant was asked to sign and return the letter. He signed the letter on 1 June 2022.
6. Further details (in two separate pages of A4) provided with that letter gave more information about special adviser employee benefits.
7. The further information said that the claimant would be automatically enrolled in the Civil Service Alpha pension scheme and referred to the employer contributions being 'very generous', It went on to say: 'You are encouraged to visit the Civil Service Pension Scheme website for more details.'
8. It was clear that this document gave a broad description of particular categories of benefit rather than setting them out in detail.
9. On the same day he signed the offer letter, the claimant also signed a model contract which made it clear that it contained the principal terms and conditions of employment.
10. Clause 10 related to pensions and said inter alia:  

'If you are new to the Civil Service,... then your pension arrangements will be as set out in your letter of appointment.'

 Clause 10b referred the claimant to the Civil Service Pensions website for information about the pension arrangements.
11. As to notice and severance pay, clause 14a said that 'Because of the power of the Crown to dismiss at will you are not entitled to a period for notice terminating your employment' but that he would normally be given not less than 3 months' notice in writing terminating his employment. His employment would automatically terminate when Priti Patel ceased to hold the ministerial office in relation to which the claimant was appointed to advise her.
12. Where his employment terminated in those circumstances, the claimant was entitled in his first year of service to a severance payment of three months pay. There were clawback provisions which came into effect if a special adviser was reappointed within the three month period.
13. The claimant commenced employment on 13 June 2022. On 6 September 2022, the claimant ceased to be a special adviser when Priti Patel ceased to be Secretary of State for the Home Department.

14. On 29 September 2022 he received a letter setting out details of the termination of his appointment. There was reference in that letter to his pension entitlement.
15. The claimant's payslips showed employer pension contributions into the civil service scheme. This is a non funded scheme. I was told that payments on behalf of employees are made by relevant government departments but the monies are paid out to benefit existing pensioners.
16. In September 2022, the claimant was paid his severance payment. Tax and National Insurance were deducted from the payment and this was indicated on the payslip.
17. The claimant told me that during the period between September and December 2022 he was looking to negotiate a new role as a special adviser but ultimately that did not occur.
18. On 6 February 2023 the claimant emailed the respondent's HR department to ask about details of his pension contributions.
19. On 7 February 2023, the HR officer wrote back to say that the claimant's pension contributions had been refunded to him. The claimant wrote asking what had happened to the employer contributions that same day.
20. On 8 February 2023, the HR adviser confirmed that the employer contributions had been paid but said that if an employee left with under two years service these would not be returned to the employee.
21. The claimant continued to ask for the contributions to be paid to him.
22. On 9 February 2023 the HR adviser wrote to explain the scheme rules, in essence that if an employee had under 3 months service they would not be entitled to either repayment of the contributions nor would they be able to transfer benefits to another fund.
23. The claimant replied that same day to say he would be taking the matter to Acas and the Employment Tribunal unless it was resolved.
24. The claimant submitted his claim form on 24 March 2023, after an Early Conciliation period of 8 February to 7 March 2023.

## **Law**

### Unlawful deductions from wages

25. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus,

commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

26. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.
27. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900.
28. The task of a court or tribunal is to decide the objective meaning of the language in which the parties have chosen to record their agreement. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense: Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm).
29. The court or tribunal must place itself in the same 'factual matrix' the parties were in when concluding the contract: Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989.
30. Where there is ambiguity, a contract is also construed more strongly against the party who has made the contract: Borradaile v Hunter (1843) 5 M. & G. 639.

#### Redundancy payments

31. Section 191 of the Employment Rights Act 1996 provides for the provisions of the Act to have effect in relation to crown employees. Crown employment is defined at section 191(3) as 'employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.'
32. The right to a redundancy payment is conferred by section 135 in Part XI of the Act. Section 191 does not provide for Part XI to apply to crown employees.

#### Contractual jurisdiction of Employment Tribunals

33. The contractual jurisdiction of the Employment Tribunals is conferred by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Article 7 provides that claims for breach of contract must be presented within the period of three months commencing with the effective date of termination, subject to an extension for the early conciliation period. Article 7(c) provides that where the Tribunal is satisfied that it was not reasonably

practicable for the complaint to be presented in time, it must have been presented within such further period as the Tribunal considers reasonable.

### Pensions

34. By regulations 13 and 14 of the Public Service (Civil Service and Others) Pension Scheme Regulations 2014/1964 ('the Alpha Regulations'), individuals in 'scheme employment' are entitled to be members of the Alpha pension scheme. By regulation 19(2), those in scheme employment are automatically enrolled in the Alpha scheme.
35. Regulation 28 of the Alpha Regulations entitles individuals to become deferred members of the scheme after accruing two years' service. Under some circumstances an individual can become entitled under the Alpha Regulations to a refund of their own contributions but there is no provision in the Regulations for a refund of the employer's contributions.
36. The Pension Schemes Act 1993 provides mandatory minimum rights for members of occupational pension schemes. Chapter 2 of Part 4ZA makes provision for cash transfer sums and contributions refunds for early leavers who have three months' pensionable service within the scheme.

### Relevant tax law

37. Chapter 3 of Part of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') provides that tax is not payable on certain termination payments insofar as they do not exceed a threshold of £30,000. That threshold applies to a payment only if it is not otherwise chargeable to tax (section 410(3)).
38. Section 63 of ITEPA defines earnings (which are subject to tax) as including any 'emolument of the employment'.
39. In Tottenham Hotspur Ltd v Revenue and Customs Commissioners UKUT 453, the Upper Tribunal reviewed relevant case law. The essential distinction, they concluded, is between a sum paid on the termination of a contract of employment and in abrogation of the rights enjoyed under the contract and a sum of money paid under and in accordance with a contract of employment. The latter is an emolument and the former is not. The latter category includes cases where the contract provides for a payment on termination; the security that offers to the employee is part of the bargain in respect of which he or she offers to work.
40. Section 402B ITEPA provides for some termination payments not to benefit from the £30,000 threshold for taxation. Under sections 402C and 402D, where there is a termination award which is not a redundancy payment (or another type of payment not relevant for the present purposes) which is equivalent to

the basic pay which an individual would receive had he or she worked his notice period, that termination award will fall with Section 402B.

## **Submissions**

41. I had the benefit of detailed oral submissions from both parties and a written skeleton argument from Ms Ling. I considered all of the submissions carefully but refer to them below only insofar as is necessary to explain my conclusions.

## **Conclusions**

### Employer pension contributions

42. In relation to the claimant's claim for employer pension contributions or the benefit of those contributions, I found that the claimant had no contractual entitlement to receive employer contributions or the benefit of those contributions made during his employment after his employment terminated.
43. His terms and conditions of employment were contained in the model contract.
44. The contractual entitlement in the model contract was to be enrolled in the civil service pension scheme if the claimant wished be so enrolled. It was made clear that the detailed rules of the scheme were on the website to which the claimant was referred.
45. Even if, putting his case at its highest, the claimant had a right to have those contributions made on his behalf, the contract is silent as to what rights the claimant would have to those contributions on termination of the employment. In fact, under the pension scheme, those rights differed depending on the employee's length of service.
46. As to the interpretation of the contract, I concluded that a reasonable person having knowledge of the circumstances would have understood the parties to mean that the claimant had a right to join the civil service pension scheme and to employer contributions at the level described if he joined the scheme but with other rights and entitlements as governed by the scheme rules including as to any entitlement to pension benefit or repayment of contributions on termination of employment.
47. I was in any event, and insofar as is relevant, satisfied that the terms of the scheme did not themselves entitle the claimant to repayment of employer contributions or preservation of the benefit of those contributions. However I reminded myself that the Tribunal does not have jurisdiction to consider a claim for breach of statutory duty in relation to the relevant pension regulations.

48. If this is considered as an unlawful deduction from wages claim, it would additionally fail because pension contributions are not 'wages' within the meaning of section 27 Employment Rights Act 1996.
49. If it is considered as a breach of contract claim, it appears doubtful that it arose or was outstanding on termination of employment, so as to confer jurisdiction on the Tribunal, since the breach of contract would only have occurred after various administrative hoops had been gone through.
50. And finally I concluded that whether as a breach of contract claim or an unlawful deductions claim, it had been presented out of time. Even if it was not reasonably practicable to present the claim in time because, as the claimant said, he was not aware that the contributions had evaporated, I was not satisfied he had brought the claim within such further period as was reasonable, given the period of time he waited before making enquiries about the pension contributions and the period he waited after the end of the Early Conciliation period before presenting his claim.
51. I accordingly did not uphold this claim.

#### Tax deducted from severance payment

52. The claimant made a claim for the tax and National Insurance deducted from his severance payment. He would have a claim for breach of contract if those sums had not properly been withheld from the payment made to him.
53. The severance payment was not a redundancy payment. By virtue of section 191 Employment Rights Act 1996, the claimant as a crown employee was not entitled to a redundancy payment. In any event, he did not have the two years' service required for entitlement to a redundancy payment by section 155 Employment Rights Act 1996.
54. The severance payment therefore does not enjoy the tax treatment which applies to redundancy payments.
55. I concluded that the nature of the bargain between the claimant and the respondent was to compensate the claimant for the sudden loss of office involved in Priti Patel ceasing to be Secretary of State by paying him the sum he would have received in earnings had he been dismissed on notice. This was clearly a sum paid under and in accordance with the contract of employment and in my conclusion amounted to a taxable emolument under section 62 ITEPA.
56. Furthermore, if it were not an emolument, the payment in any event falls within section 402B ITEPA and does not benefit from the exemption from tax up to the £30,000 threshold. Tax and National Insurance were appropriately deducted and there was no breach of contract.



- 57. The claim was also presented out of time in circumstances where the claimant would have been aware from the date he received payment in September 2022 at the latest that tax and National Insurance had been deducted. The fact that the claimant may have been busy and concentrating on other matters does not mean it was not reasonably practicable for him to present his claim in time.
- 58. I accordingly dismissed this claim.

Employment Judge Joffe

16 August 2024

Sent to the parties on:

20 August 2024

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For the Tribunal Office:

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