



EMPLOYMENT TRIBUNALS

Claimant

Mr D Johnson

Respondent

London Underground Ltd

AND

HEARD AT:

Watford Tribunal Centre

ON: 27 January 2021

BEFORE:

Tribunal Judge Douse (Sitting alone)

Representation:

For Claimant: In person

For Respondent: Ms I Ferber, Counsel

RESERVED JUDGMENT

1. The wages claimed by the claimant were not properly payable. His claim of unlawful deductions of wages therefore fails and is dismissed.
2. The remedy hearing on 6 April 2021 is cancelled.

REASONS

Claims and issues

1. In a claim form dated 30 August 2020, after a period of Acas early conciliation from 4 July 2020 to 4 August 2020, the claimant brought a claim for unlawful deduction of wages. The respondent defended the claims in a response dated 22 October 2020.

2. The issues to be determined were as follows:

2.1 Were the wages claimed 'properly payable' to the claimant?

2.2 Which pay policy or framework applied to the claimant:

2.2.1 The respondent's PRP Framework, that was implemented in 2017 (and subsequent 2019 update) (the respondent's case); or

2.2.2 The respondent's policy that was in place prior to the 2017 PRP Framework (and subsequent 2019 update) (the claimant's case)

Procedure, documents, and evidence heard

3. The case was listed for a one-hour hearing, and was converted to a hearing via CVP due to the current pandemic.
4. At the start of the hearing, I asked the claimant to clarify his reason for indicating in the ET1 that his case was one of multiple cases. The claimant said that he was aware of other people with similar complaints whom he believed would be bringing claims to the Tribunal, but did not know of any current ones. I asked the respondent if they were aware of any other claims – they confirmed that to their knowledge no claims had been brought.
5. In light of this, I determined that the claimant's case could go ahead without any further consideration of the provisions related to 'lead cases' in Rule 36 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations.
6. There was an agreed bundle of 103-pages. Page references in this judgment are to the agreed bundle.
7. The tribunal heard evidence from the claimant on his own behalf and from Ms Rebecca Shah, Head of HR Business Partnering – London Underground Limited.

Findings of fact

8. The claimant was employed by the respondent from 13 May 1996.
9. At the time of his retirement on 8 April 2020 the Claimant was working as a Service Manager.

10. The claimant's 'Statement of main terms and conditions of employment' for Service Manager - Level 2 (31-34) is described as "*a summary of your Main Terms and Conditions of Employment*". It includes information about salary and pay for overtime, but does not contain any reference to pay increases.
11. The terms and conditions state: "*any changes to these terms and conditions will be notified to you either directly or other appropriate means.*"
12. The terms and conditions refer to Appendices at various points, but these were not included in the hearing bundle, and there was no suggestion that further information related to pay is contained within an Appendix.
13. The respondent regularly negotiated with recognised Trade Unions regarding the pay award and increases. The claimant was a member of the TSSA union.
14. The details of any collective agreement relating to pay between the respondent and recognised trade unions, are not contained within the claimant's terms and conditions.
15. The details of the collective agreement were not in the hearing bundle. However, it is accepted that implementation of the negotiated pay award is not part of the negotiations and agreement with the unions.
16. The respondent says these principles:

"are not subject to collective bargaining as they apply to the operation of a pay framework rather than the amount of any pay increase" (83).
17. The screenshots of WhatsApp messages (87 – 88) provided by the claimant suggest to me that the union has accepted that this is the position, but:

"going forward in future pay deal negotiations m [sic] we will be very cautious and make sure we cover all these types of issues ie who gets paid and when."
18. Implementation of the pay award is covered by the respondent's pay policies and procedures.
19. The respondent has a number of pay frameworks – the relevant one is dictated by an employee's grade.

20. In 2017 the respondent implemented a new pay policy - The Performance Related Pay Principles and Guidelines 2017 ("PRP Framework") (36 - 46) for certain employee grades. The general position is that this Framework applies to more senior employees.
21. An Appendix to the PRP Framework includes a list of employee grades. The claimant's position – SMC2 - was one of the grades included within this policy (46).
22. The new framework was placed on the respondent's intranet - where it was available to all employees - but was not directly communicated to the respondent's staff generally, or specifically to the claimant.
23. The PRP Framework was updated in 2019 (Version 1.2) (47 – 59). It was placed on the respondent's intranet - where it was available to all employees - but was not directly communicated to the respondent's staff generally, or specifically to the claimant.
24. The Appendix to the updated PRP Framework also included the claimant's employee grade (59).
25. The claimant would have expected to be informed about the changes, because on a number of previous occasions, the claimant has had to sign documentation to confirm a policy or rule change had been implemented. The claimant was not asked to do this for the PRP Framework.

26. The relevant provisions of the PRP Framework for this claim, relating to leavers, are at 6.10. They state (54):

"6.10.2. Employees leaving employment after 31 March (or after 30 June for AP JNP employees with a review date of 1 July) but before the payment date of the award will not be eligible to receive a base pay increase."

27. Both the 2017 PRP Framework, and the updated 2019 version, state:

"These Principles and Guidelines are subject to review and change at any time (including during or after the relevant performance year) at the discretion of TfL"

28. Prior to 2017 a different pay policy or framework was in place. This document was not included in the hearing bundle, but it is agreed that in relation to leavers, the old policy

was simply that if an employee was employed by the respondent at the date the pay award was agreed, they would receive the backdated pay award.

29. There was no additional provision in the old policy about employees who left between the agreement date and the payment date. Under the old policy the claimant would have been eligible to receive the backdated pay award.
30. The old policy appears to be in line with the principles contained in The General Increase Business Rules ('The General Rules') (60 – 65), which were implemented in 2020 for certain grades of employee. The relevant grades are included in an Appendix to the rules. The claimant's employee grade was not included in the appendix to The General Rules.
31. The General Business Rules state (63):

"4.2.1. Employees leaving employment on or after the agreement date but before the payment date of the award will receive a backdated base pay increase."

32. The pay negotiations in 2019 took a long time - by the end of 2019, when the claimant was planning his retirement, they were still ongoing.

33. In his witness statement, the claimant says that he contacted HR by telephone on December 2019 and spoke with an adviser about his retirement plans and the effect of this on the pay deal. He now says that the call must have been earlier than this as he sent the email about his retirement plans on 12 November 2019 (67). The respondent says that it is unable to find a record of the conversation having taken place, but the nature and extent of these enquiries they have made is not specified. It is also unknown whether or not a record would normally have been made of this sort of enquiry to HR.

34. The respondent says that because there is no evidence of the call, the claimant did not make a note of the adviser's name, and he gave different accounts about when the call took place, I should find that the call did not happen as described. The claimant says he made a mistake about the date. He knew it was towards the end of 2019, but when drafting his witness statement, he didn't have a copy of the retirement email he sent to refer to, because it was sent from his work email account.

35. I find, as a matter of fact, that the claimant did call HR at some point before he sent his retirement email on 12 November 2019, and he was simply mistaken about the date it happened.

36. The HR adviser told the claimant that he would get his backdated pay increase even if he left before the pay deal was agreed. The claimant was told that any salary due should be paid into his bank account, and that his final salary pension would be adjusted and paid separately. This was supposed to happen automatically, but if for some reason it didn't the claimant was advised to write in with his employment details so that the respondent could process this manually.
37. The advice given to the claimant was incorrect, as it was not based on the contents of the PRP Framework.
38. The claimant did not seek advice on the position if he left between the agreement date and implementation date, and was not given any advice on that scenario. However, the effect of the advice received extends to cover that scenario.
39. The claimant decided it was simplest to retire at the end of the 2019/20 financial year.
40. By an email dated 12 November 2019, the claimant gave the respondent notice that he wanted to retire on 8 April 2020. The respondent wrote to the claimant on 18 March 2020 to confirm that the claimant's last day of work would be 8 April 2020.

41. The pay deal was then agreed by TSSA union on 23 January 2020.
42. The pay deal was further agreed by all Unions on 25 March 2020 – this is the relevant 'Agreement Date'.
43. The agreed pay rise was 2.7% per annum for the year 2019 – 2020.
44. The claimant's last day of employment with the respondent was 8 April 2020.
45. The pay award was implemented on 1 July 2020.
46. The claimant expected to be automatically paid a backdated amount from the respondent on 1 July 2020, representing the increase to his wages from 2019 - 2020.
47. When this did not happen, on 2 July 2020 the claimant sent an email to the HR team (77).
48. The HR adviser initially replied saying (76):

"Pay deal effective 1 April 2019

Those employed at the agreement date (25 March 2020) will receive the backdated base pay increase consolidated.

*Those that left employment between 1 April 2019 and the **agreement date** will not receive the backdated pay increase with the exception of Death in Service and Early Voluntary Severance (EVS) / Voluntary Severance (VS) leavers.”*

49. When the claimant asked how he would be paid, the HR adviser said they had passed the claimant’s query to the payroll department to process (75).
50. Later the same day the HR adviser emailed again. She informed the claimant that the payroll department had clarified that the claimant wasn’t eligible for backdated pay because the relevant policy that applied to him was the PRP Framework. She advised that in line with this, the claimant needed to have been in service on 1 July 2020 when the backdated pay award was actually paid out.
51. On 23 July 2020, the respondent sent a bulletin to all staff which include the following under the heading ‘Pay implementation’ (81):

“Following conversations with our trade unions today, we want to provide clarity on the implementation of the pay agreement covering 1 April 2019 to 31 March 2022. To confirm, those leaving employment on or after the agreement date (25 March 2020) but before the payment date of the award will receive the backdated base pay increase for the first year of the multi-year deal. However, those who left before the agreement date will not. You can find more information here on the intranet.”

52. The Bulletin did not say if this information applied to all staff, or specific employees, but “*here on the intranet*” is a hyperlink to an intranet page with the options - “LU General Increase” and “LU Performance Related Pay (PRP)” (103).
53. No further pages are provided in the hearing bundle, but I find it highly likely that “LU General Increase” would link to the General Rules, and “LU Performance Related Pay (PRP)” would link to the PRP Framework.
54. The claimant was sent the Bulletin by someone who would have been an employee of the respondent at that time, but the claimant would not have been able to access the hyperlinked information because he this page was on the intranet which he no longer had access to.

55. Based on the Bulletin information, the claimant believed that the respondent had 'backtracked' on the policy about back pay for people who left before the implementation date, and so he should be eligible for backdate.
56. The respondent accepts "*that we must do a better job of raising awareness of these rules and helping our people understand how their specific pay framework operates.*" This is acknowledged in a draft letter to the unions on 5 August 2020 (84), where a number of actions are also identified to increase awareness and clarity moving forward.
57. Other employees of the respondent have reported having incorrect advice about their eligibility for the increased pay award, as referenced in Aslef communications on 4 May 2020 (71).
58. In relation to incorrect advice, in the 5 August 2020 letter the Respondent says "*The Reward team provide the guidance to our colleagues in HRS_[wc2] to answer queries from employees and managers and this would always be based on the latest rules.*"

The law

59. The general prohibition on deductions is set out in section 13(1) Employment Rights Act, which states that: 'An employer shall not make a deduction from wages of a worker employed by him.'
60. In *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA* the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question.

Conclusions

61. I applied the relevant legal tests to the findings of fact that I have made, to reach my conclusions on the issues for determination.
62. It was unfair of the respondent to change the policy regarding payment of the negotiated pay award to leavers in 2017, without notifying employees. It would certainly have been good practice to do this.
63. The respondent has accepted that their communications regarding rules, including the PRP Framework, lacked clarity. They have identified actions to rectify this.
64. I must consider the legal position of the PRP Framework.
65. Receipt of the negotiated pay award was not an express term or condition of the claimant's employment contract. All negotiations

66. As it is accepted that *implementation* of the negotiated pay award was not included within the remit of the collective agreement regarding the pay award between the unions and the respondent, I did not need to specifically consider whether the collective agreement was incorporated into the claimant's contract of employment.
67. There was no obligation on the respondent to:
- 67.1 consult with employees, or the unions, before making any changes to their pay policy or framework; or
 - 67.2 ask employees, or the unions, to agree to any proposed changes to their pay policy or framework; or
 - 67.3 inform employees, or the unions, about the introduction of a new pay policy or framework, but it would have been good practice to do this.
68. The respondent was entitled to change its policies and principles relating to implementation of the pay award without notice to employees.
69. Version 1.2 of the PRP Framework therefore applied to the claimant at the time his employment with the respondent ended.
70. The PRP Framework is very clear at 6.10.2 that:
- “Employees leaving employment after 31 March (or after 30 June for AP JNP employees with a review date of 1 July) but before the payment date of the award will not be eligible to receive a base pay increase.”*
71. The claimant's lack of awareness of the PRP Framework, does not mean it didn't apply to him.
72. I then went on to consider whether any of the advice the claimant received changed the general position as set out above.
73. It is unfortunate that the claimant received incorrect advice in the telephone call with HR at the end of 2019, before he notified the respondent that he wanted to retire. However, the advice received was not capable of amounting to an agreement between the respondent and the claimant to pay the claimant the negotiated pay award outside of the PRP Framework. The HR adviser was not in a position to make any such agreement on behalf of the respondent.

74. Therefore, their advice did not change the legal position that the PRP Framework applied to the claimant.
75. The claimant is understandably frustrated to receive further incorrect advice on 2 July 2020, although it was corrected within hours. As with the first advice, was not capable of amounting to an agreement between the respondent and the claimant to pay the claimant the negotiated pay award outside of the PRP Framework. The HR adviser was not in a position to make any such agreement on behalf of the respondent.
76. The two occasions of wrong advice being given to the claimant are indicative of the confusion about the application of the PRP Framework amongst those who are tasked with advising the respondent's workforce on HR issues. It is therefore not surprising that the claimant was also confused.
77. The Bulletin of 23 July 2020 was intended to clear up confusion. In fact, it made the situation less clear because it is not obvious that the text in the Bulletin that the information is intended to relate only to the General Rules. The information is capable of being interpreted as applying to all staff, as the claimant believed when he read it.
78. However, the hyperlink separate specific links to the General Rules and PRP Framework does then distinguish between the different rules. Whilst the initial text is ambiguous, it doesn't change the legal position of the PRP Framework.
79. As the PRP Framework applied to the claimant, he had no legal entitlement to receive a backdated pay increase for the 2019 – 2020 year.
80. The wages claimed by the claimant were not properly payable to him, so the respondent did not make unlawful deductions from wages.
81. Therefore, the claimant's claim for unlawful deductions from wages fails.

Tribunal Judge K Douse

Dated: 12 March 2021

Sent to the parties on:

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For the Tribunal Office