



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondents**

Mr Milton Raul Olmedo Cevallos

Chequers Contract Services Limited

**Heard at:** London Central Employment Tribunal

**On:** 9 June 2023

**Before:** Employment Judge Adkin (sitting alone)

## Representations

**For the Claimant:** Mr Julio Major, union representative

**For the Respondent:** Mr Roman Scuplak, consultant

**Interpreter:** Ms Tatiana Crespo Hale

# JUDGMENT

(1) Claim for unlawful deduction from wages is brought out of time and is dismissed.

# REASONS

## The Claim

1. The Claimant presented his claim of unlawful deduction from wages (arrears of pay) on 13 April 2023.
2. I had the benefit of an agreed bundle of 72 pages. A further document was sent at my request following the end of the hearing.

3. As to witness evidence I heard from the Claimant himself who submitted a signed but undated statement from Dominique Debert, who did not attend to give evidence.
4. Following on from the hearing I received a letter dated 20 January 2023, which I requested as the seemed to a document referred to the documents I received which did not appear in the agreed bundle.

## Findings of fact

### Background history

5. On 1 September 2017 the commenced employment as a cleaner. He says that he was never provided with a copy of his employment contract and that he asked for one repeatedly.
6. In the period 2019-2021 the Claimant was earning £9.50 per hour.
7. The Claimant has produced an undated witness statement from Dominique Debert which says:

“I confirm that when I worked until June 2019 as a cleaner for buildings located in the Kensington SW5 9QT area, I was paid 4 hours per week, to go in and take out garbage cans.”

### Period of claim

8. On **1 July 2019** the Claimant says he was instructed to begin emptying and collecting bins in Kensington – specifically 94 Latham Court SW5 9QT; 88 Correlli Court SW5 9QT, 84 Arrow Court SW5 9QT, 76 Longshott Court SW5 9QT, and 62-64 West Cromwell SW5 9WT. This date represents the beginning of the period for which he is claiming unpaid wages. The end point of this period is **7 May 2021**. The Respondent disputes that the Claimant was given this instruction and says that in fact these duties were carried out by a caretaker employee of Peabody not the Claimant himself.
9. Peabody is a housing association which operated residential housing estates and which was the Respondent’s client. In the hearing the Claimant did not recognise Peabody as his employer’s client. He simply did not seem to understand what Peabody was. It is clear however from his payslips that most if not all of the duties that he carried out work were for Peabody sites.

### Sick absence

10. On 7 May 2021 the Claimant had an accident in which he tore a meniscus and ligament in his right leg, as a result of which he did not work from 10 May 2021 and his responsibilities were carried out by someone else.

### Variation in Peabody hours

11. While the Claimant was off sick in the period April to August 2022 there was an email exchange between Geovanny Puruncajas an account manager at the

Respondent and Toni Argyle at Peabody the client. There was some discussion about some additional hours required to take out the bins and whether this should come from the caretaking budget. Ultimately the conclusion of this email exchange, confirmed in an email from Mr Puruncajas at the Respondent dated 3 August 2022 is that an additional six hours a week would be charged as “variations”, presumably a variation in the contract between the two organisations, to take out and taking the bins.

Claimant’s return to work

12. On 7 November 2022, the Claimant returned to work. He says that upon return to work he was told by his manager or supervisor Geovany Puruncajas that the person covering the position in his absence had been compensated for the 4 extra hours. There appeared to be conflicting evidence as to when this conversation took place. It may have been 4, 7 or 8 November 2022.

Change in payment to Claimant

13. From November 2022 onward the Claimant was paid “extra” hours per week.
14. In his claim form he says that this was an additional 4 hours a week.

Claimant’s pay query submitted to employer & investigated

15. On 30 December 2022 the Claimant sent an email to the Respondent explaining that he was claiming for a payment of 4 weekly hours from 1 July 2019 to 7 May 2021. He alleged that when he returned to his job the person who had been covering for him had been receiving 4 extra hours for taking out some garbage containers. He also complained about a lack of a uniform and for accrued but unused annual leave for 2022.
16. That was responded to in a letter somewhat anonymously signed “Employee Relations for and on behalf of the company” dated 20 January 2023. This letter was not in the original agreed bundle, but was supplied following the close of submissions by email at my request.
17. In respect of the annual leave payment, it was confirmed to the Claimant that he was owed 28 days’ accrued but unused annual leave from 2022 and that this would be paid to him. He was given contact details to sort out the missing uniform. As regards the alleged underpayment for 1 July 2019 – 7 May 2021 the outcome was:

“I can advise that this has already been discussed with you previously and can confirm that the work you refer to, namely the taking out and placing of garbage containers, was part of your job description and would not incur any additional payments to you, for this task.”

Respondent’s further investigation and follow up letter

18. On 31 March 2023 in a follow up letter, Mark Reay, an Employment Relations Manager of the Respondent wrote to the Claimant. In that letter it was

explained that following an investigation carried out and in a letter sent to the Claimant on 31 March 2023, in August 2022 the client (i.e. Peabody) requested additional duties to commence following the retirement of the caretaker previously completing them. This was said to be 6 hours per week.

19. The letter confirm that £570 was to be paid to the Claimant, representing 65 hours of work as a hourly rate of £9.50 an hour for the period 7 November 2022 and 19 March 2023.
20. The terms of the Claimant's employment were also confirmed with a start date of 2 October 2017 and contracted hours of 36 hours per week from Monday to Friday with an hourly rate of pay £9.50. That was an additional 6 hours per week for what were described as *ad hoc* duties going forward.
21. The position adopted by the Respondent in the letter of 31 March 2023 appears to be somewhat inconsistent with what had been said in the earlier letter sent in January, but the payment of £570 and the ongoing additional six hours a week was something of a concession, reflecting an acceptance that the Claimant was being asked to do and additional duties and that he should be paid for these duties.

#### Claim

22. On 2 January 2023 the Claimant notified ACAS of the dispute. ACAS issued a certificate on 16 March 2023.
23. On **13 April 2023** the claim form (ET1) was presented.

#### **Submissions**

24. The Claimant's position is that it was not reasonably practicable to present his claim in time and that he has suffered an unlawful deduction.
25. The Respondent's position is that the claim is significantly out of time. Further, there was no unlawful deduction, that the Claimant was an employee paid by the hour and different or additional duties would not increase his pay unless they increased his hours of work.

#### **CONCLUSIONS**

##### Statute

26. In relation to time and jurisdiction in claims of unlawful deductions from wages, section 23 of the Employment Rights Act 1996 provides:

23 Complaints to [employment tribunals]

(1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

### Jurisdiction/time

27. The last date that the Claimant seeks to recover for is **7 May 2021**. It follows that he should have presented a claim (or at least should have commenced the ACAS early conciliation process) by 6 August 2021. In fact he did not commence ACAS process until 2 January 2023 and the claim until 16 March 2023.
28. Was it “not reasonably practicable” for him to present at that time? The Claimant was unwell, although he has not suggested that this prevented him from presenting a claim. More importantly, on his case, the Claimant was not aware of a caretaker colleague being paid an extra sum until 4 November 2022. Due to this ignorance, I find it was not reasonably practicable for him to present a claim until that date.

29. He was already out of time at that stage, so he ought to have presented his claim in such further time as was reasonable. He did not present a claim until 13 April 2023. Was that reasonable?
30. It is submitted on the Claimant's behalf by his representative Mr Mayor that he was trying to resolve the matter internally. I accept that he was trying to do that. I have some sympathy with that approach, which seems reasonable. However, the decision of the Employment Appeal Tribunal in the case of **Bodha v Hampshire Area Health Authority** [1982] ICR 200 suggests that it is wrong for a Tribunal to conclude that it is not reasonable practicable to present a claim purely because there is an internal process ongoing. In that case it was suggested that Parliament might wish to revisit this question. Parliament did not.
31. Following Bodha, I conclude that although the reasons for the Claimant pursuing an internal process were understandable, it was reasonably practicable for him to present a claim from November 2022 onwards. He could have presented a claim in the second week of November 2022 and also pursue the internal process at the same time.
32. Even if I am wrong about that, the Claimant was provided with a pay query outcome letter on 20 January 2023. It is not clear to me from the documents provided that there was an ongoing internal process after that point. The Claimant could have presented a claim after he received the letter on 20 January 2023, but he did not.
33. Finally, the further investigation letter was provided to him on 31 March 2023. There is no explanation for the further delay of 13 days before presentation of the claim on 13 April 2023. Although that may seem like a short period of time given the overall timescale, the Claimant was now significantly out of time to present a claim and needed to do so without any further delay. I have had no explanation as to why there was further delay at this stage.
34. In conclusion therefore I find that the Claimant did not present the claim within such further period as was reasonable and therefore he is out of time, there is no extension, and **the claim is dismissed**.

Substantive claim

35. *In the alternative*, it may help the parties for me to consider what I would have decided had the claim had been in time, or if there had been an extension of time.
36. The letter dated 31 March 2023 represented an ongoing contractual change whereby the Claimant was paid an additional six hours per week.
37. If I go back to the material time of the claim, i.e. 1 July 2019 – 7 May 2021, the burden is on the Claimant to show that he was contractually entitled to be paid for taking out the bins at that time.

38. I am not satisfied, the burden being on the Claimant, either that there was an agreement that he should be paid to take the bins in out or alternatively that there were hours that he did at that time that he was not paid for. There is no evidence of him challenging his payslips for example. There is not cogent evidence of hours being worked by the Claimant that he did not get paid for.
39. On the contrary it seems most likely from the available evidence on the balance of probabilities that there was a caretaker employed by Peabody who was doing this work.
40. It follows that even if the claim had been in time or time had been extended I would not have found that the claim was made out.

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Employment Judge Adkin

Date 12.7.23

WRITTEN REASONS SENT TO THE PARTIES ON

12/07/2023

FOR THE TRIBUNAL OFFICE

Notes

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