



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Niouman  
**Respondent:** Barts Health NHS Trust  
**Heard at:** East London Hearing Centre (via Cloud Video Platform)  
**On:** 31 January 2023  
**Before:** Employment Judge Brewer

## Representation

**Claimant:** Ms L Simak, Counsel  
**Respondent:** Ms D van den Berg. Counsel

# JUDGMENT

**The claimant's claims for unauthorised deductions from wages fail and are dismissed.**

# REASONS

## Introduction

1. This hearing was listed for one day to consider the claimants claims for unauthorised deductions from wages. This case has been ongoing since 2020 and has been the subject of several previous preliminary hearings relating to matters which are no longer in issue between the parties.
2. Both parties were represented by counsel, and I am grateful to them for their assistance. I had written witness statements from and heard oral evidence from the claimant and on behalf of the respondent from Ms Paula Moriarty. I had an agreed bundle of documents running to 202 pages and accepted eight more pages which were delivered this morning from the claimant's representative.

3. At the end of submissions Ms Simak indicated that the claimant would want full written reasons but rather than simply reserve judgement and provide written reasons I agreed, given how long this case has been ongoing, to provide an oral judgement and detailed version reasons later.

### Issues

4. The claimant claims unauthorised deductions from wages and the issues are therefore as follows:
  - 4.1. did the respondent make unauthorised deductions from the claimant's wages by failing to pay him the London Weighting Allowance (LWA),
  - 4.2. did the respondent make unauthorised deductions from the claimant's wages by failing to pay him time and a half for overtime,
  - 4.3. did the respondent make unauthorised deductions from the claimant's wages by failing to pay him appropriate holiday pay, and
  - 4.4. if in any case there were unauthorised deductions, how much was deducted?

### Law

5. In relation to a claim for unauthorised deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

*'An employer shall not make a deduction from wages of a worker employed by him.'*

6. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

7. Section 27(1) ERA defines 'wages' as:

*'any sums payable to the worker in connection with his employment'*

8. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

9. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

10. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach

tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals 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.

### Findings of Fact

11. I make the following findings of fact. References are two pages in the agreed bundle.
12. The claimant started employment with a company called ERS Medical (ERS) on 1 June 2014 as a concierge. Part of the work of ERS was to provide patient transport services to the respondent until October 2017.
13. The claimant originally worked 42 hours over a five-day week, but during the course of his employment with ERS that changed so that he worked a compressed week of three days but maintaining his hours.
14. The claimant's contracts of employment with the ERS starts at [84]. For our purposes the material terms are those relating to hours of work, pay and holidays. There is no contractual term in relation to overtime pay.
15. At the time the contract was issued the original hours are set out and the claimant is said to have been in receipt of 20 days paid holiday per year plus eight public holidays.
16. Notwithstanding that there is no clause in relation to overtime pay, it would appear that at least for a short period, the claimant worked some overtime which was paid at time and half (sometimes referred to as a premium rate).
17. It is also material to note that there is a clause in the contract, at page [87], which is in the following terms  

*“The company reserves the right to make reasonable changes to any of your terms and conditions of employment including but not limited to your hours of work, place of work and duties. Your salary and all benefits may be amended as a result of any such changes...”*
18. Upon changing to compressed hours it appears that the claimant's holiday entitlement was reduced from 20 days plus eight bank holidays to 12 days plus eight bank holidays.
19. The claimant raised a grievance during his employment with ERS in which he raised, amongst other things, the issues of annual leave and overtime pay.
20. The claimant's grievance was not upheld, and he appealed. The appeal outcome is at [90 – 98].

21. In relation to annual leave the outcome was that although some mistakes had been made in relation to the amount of holiday the claimant was entitled to, the correct position was that having moved to work three days per week, the claimant's holiday entitlement changed from 20 days plus bank holidays to 12 days plus bank holidays.
22. If the change to the holiday entitlement amounted to a change to the claimant's contract, then that would appear to me to have been allowed by the clause I have referred to at paragraph 18 above because to leave the claimant with 20 days holiday when he only worked three days a week would have in effect meant giving him 40% more holiday than anyone else who was working three days a week but who was in receipt of 12 days holiday. On a simple pro rata basis, the argument for 12 days holiday for working three days a week if the full time equivalent is 20 days holiday for a five day week, is entirely clear.
23. In respect of overtime, the grievance conceded that the claimant had previously been paid time and half for some of his overtime, but that in fact that was mistakenly done by an administrative assistant called Chris Phillips. It was explained to the claimant that the overtime rate had been adjusted to a flat rate although it was accepted that it was unclear whether that had been communicated properly. The appeal outcome letter states specifically:

*"I can confirm that the rate change was introduced to all employees consistently. It is my belief that the premium rate was paid in error and the company reserved the right to review and correct the rate after such a short period of time."*
24. If the payment of overtime at a flat rate amounted to a change to the claimant's contract, then that would appear to me to have been allowed by the clause I have referred to at paragraph 18 above.
25. In 2017 the respondent decided to bring the patient transport services in house and there was a transfer to the respondent of ERS employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). As part of that process the transferor, ERS, was required to provide Employee Liability Information and as part of that the respondent was told that the claimant was entitled to 12 days annual leave plus eight bank holidays.
26. During the process leading up to the transfer of staff from ERS to the respondent, the respondent sent what is usually called a measures letter to the transferor. The final version of that letter appears from page [99].
27. In relation to salary the measures letter states that salary is protected under TUPE and that the respondent proposed to uplift pay for anyone who was currently earning less than the then applicable London Living Wage, inclusive of any London allowance, to the current level of the London Living Wage.
28. In relation to annual leave, the measures letter says that there would be a consultation with staff on introducing annual leave entitlements equivalent to those applicable under the collective agreement applicable to most NHS staff called Agenda for Change.

29. The TUPE transfer took place on 1 October 2017.
30. On 5 December 2017, the claimant was asked to undertake some overtime by his line manager who states in his e-mail that if the claimant was available to cover some of the work:  

*“I will authorise time and a half payment”* [104].
31. It should be noted that the claimant's line manager at the time had also transferred from ERS to the respondent.
32. Not long after the transfer of his employment to the respondent the claimant began corresponding with the respondent in relation to overtime pay and holiday entitlement, as well as entitlement to the LWA. He was consistently advised that the respondent did not pay overtime at a premium rate, that he was not entitled to 20 days holiday plus eight bank holidays per year and that he was not entitled to the LWA.
33. Those matters were not resolved and on 10 December 2020 the claimant presented a claim form in which he claimed, amongst other things, unauthorised deductions from wages.

### **Discussion and conclusions**

34. I shall deal with each of the claims in turn.

### **Holiday pay**

35. I shall turn first to holiday pay because that is the simplest matter for me to deal with.
36. Having read the papers in this case it became clear that the claimant was not in fact suggesting that he had not been properly paid for his holidays and that his claim really was for more holiday. That as I said to him a number of times during the hearing is not a claim for unauthorised deductions from wages. Indeed, in her submissions to me Ms Simak accepted that this was the weakest of the claims which I consider to be something of an understatement.
37. During cross examination the claimant was taken through various of his pay slips showing that he had been paid the correct sum on each occasion and he conceded readily that he had suffered no deductions from his pay and in particular no deductions in respect of holiday pay.
38. Furthermore, it was one of the clear outcomes of the claimant's grievance when he was employed by ERS that his holiday entitlement was 12 days plus 8 bank holidays. That outcome was given in 2016 so it remains entirely unclear why, in 2018 and subsequently, the claimant was suggesting to the respondent that his entitlement was something which his employer clearly found was not the case. In my judgment the claimant was being somewhat disingenuous in pursuing the point.

39. In my view this claim was entirely misconceived. It should have been clear to the claimant, who has had the benefit of legal advice throughout, that what he was seeking to claim was an entitlement to more holiday not that he had not received the correct pay on any occasion when he was in fact on holiday.
40. To put it in legal terms, on each occasion he was on holiday the claimant received the amount of pay which was properly payable to him on those occasions. He did not during his evidence suggest otherwise. I asked him expressly on at least two occasions to take me to any evidence in the bundle to show that his holiday pay was incorrect, and he could not, because of course it was not incorrect and that is something he either was or ought to have been aware of from, indeed prior to the inception of these proceedings.

### London Weighting Allowance

41. Turning into the second element of the claim, I confess to being equally perplexed as to the basis of this claim. The claimant says he has suffered unauthorised deductions from wages by not being paid the LWA.
42. I should stress that the reason for my own confusion is that on the claimant's own evidence he was never paid this allowance by ERS. He said so, in terms, in an e-mail to the respondent on 14 February 2018 [109]. The e-mail states
- “ERS did not pay me London waiting allowance but since we joined the trust I expect to get the same wages as other NHS staff”*
43. It is difficult to see how that amounts to a claim for unauthorised deductions from wages which, I stress again, means pay which is properly payable to the claimant. How can the claimant allege that this allowance was properly payable to him when he appears never to have been entitled to it?
44. His best argument, which he stated only during cross examination, it not being set out in his witness statement, was that at one consultation meeting before the TUPE transfer a member of ERS management said that staff would receive the allowance after the transfer. I do not accept the evidence of the claimant on this point for several reasons.
45. First, even if that was said it was a promise made not by the respondent but by a transferor who has no standing to bind a transferee.
46. Second, even if a promise was made, it created no contractual or other enforceable right. I stress the words of the Court of Appeal in **New Century Cleaners** which I have set out above, that an unauthorised deductions claim cannot stretch to sums to which the worker has no legal entitlement. The claimant has entirely failed to explain how he says anything which was said during a TUPE consultation meeting by the transferor, even if it was as clear as he suggests, and I do not believe him on this point, created an enforceable right against the respondent to be paid the LWA. There was no 'promise' by the respondent, and even had there been a promise, there was no consideration for that 'promise' moving from the claimant, it is not clear that there was any intention to create legal relations (and it is inherently unlikely that there was, given that it was not

the respondent who made the alleged promise) and, insofar as there was a promise which amounted to an offer, no evidence of acceptance by the claimant. So even accepting everything the claimant said in his evidence about this, there was no contract created nor an enforceable promise by the respondent to pay him the LWA.

47. Finally, and the key reason I do not accept the claimant's evidence on this point, is that had payment of the LWA to former employees of ERS, who had not previously been in receipt of it, was a matter which the respondent was considering, it would in my judgment have been set out in the measures letter, as for example was the matter relating to improving holiday entitlement, and it is not. I accept the respondent's evidence on this which is that there was never any discussion about the LWA being paid to any staff who were not already in receipt of it prior to the TUPE transfer.

### **Overtime pay**

48. The question of overtime pay was also dealt with extensively in the claimant's grievance against his former employer.
49. As I have set out in my findings of fact, the claimant's employer stated clearly that whatever had been previously agreed with the claimant about pay for specific episodes of overtime, the then current position was that overtime was paid at the flat rate not the premium rate.
50. The claimant says as evidence of his entitlement to a premium rate that he was promised the premium rate when asked to do overtime with the respondent. In my judgment that promise, even if the manager had the right to make it, and I accept the respondent's evidence that he did not, does not mean that an entitlement to a premium rate for all overtime worked by the claimant at whatever time he did it was created. The claimant has provided no evidence that he had an enforceable right against the respondent to be paid time and half for overtime. The most he can say is that he was paid it at one point in his previous employment and was promised it at one point with the respondent.
51. It is material to note that the individual who promised the claimant the premium rate with the respondent was a former ERS employee. I accept the respondent's evidence that this did not reflect the pre-transfer contractual position and there are a number of pay slips which show that when the claimant worked overtime with the respondent, he was paid at the flat rate which the respondent says, and I accept, is the applicable rate for them.
52. Furthermore, the fact that the claimant's line manager said he would "*authorise*" the claimant to be paid the premium rate for overtime strongly suggests, and I find, that this was an exceptional payment because otherwise, in the normal course of events, overtime would merely have been shown on the claimant's time sheets and paid at the flat rate which was most often what occurred.

53. For all of those reasons all of the claimant's claims fail and are dismissed.

**Employment Judge Brewer  
Date: 31 January 2023**