EMPLOYMENT TRIBUNALS

Claimants: Mr S Howlett
Mr L Gartland

Respondent: The Home Office

Heard at: Manchester (remotely, by CVP) **On:** 29 and 30 November 2021 14 January 2022 and 12 August 2022(in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

First Claimant: Mr Bromage, Counsel
Second Claimant: In person
Respondent: Mr P Smith, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimants' claims of unlawful deduction of wages fail and are dismissed.

REASONS

Introduction

1. The claimants bring claims relating to their pay on their transfer from the Prison Service to Border Force. The claimants expected to maintain, when they moved to work for Border Force, what they say were integral shift allowances which were included in their salary with the Prison Service, however this was extracted from their pay on transfer.

2. The respondent says that that the claimants made an assumption about this and this was incorrect. Their entitlement is simply to salary as determined by the Border force. The respondent also argues that the claimants had both affirmed the change in any event by continuing to work for a considerable period of time without resigning.

The Issues

3. The issues for the Tribunal to decide were as follows:

   (1) What were the claimants' legal entitlement to wages upon the commencement of their employment with UK Border Agency:

      (a) For Mr Gartland, as an Asylum Caseworker from 5 September 2016; and

      (b) For Mr Howlett, upon commencement of his employment with Border Force as an Immigration Customs Officer on 25 March 2019

   (2) Is there a difference between what sums in wages were properly payable and what was actually paid?

   (3) Has there been a series of deductions?

   (4) Were these deductions required to be made by virtue of a statutory provision or a relevant provision or a relevant provision of the claimants' contract, or had the claimants previously signified in writing their agreement or consent to the making of the deduction?

   (5) Have the claimants agreed and affirmed the change in their salaries by continuing to work, albeit possibly at times under protest, for a considerable period of time?

   (6) If there has been an unauthorised deduction or series, what sum should the respondent be ordered to pay to the claimants?

4. It was agreed at the hearing that these issues could be summed up as:

   (1) What were the claimants' contractual terms at the point of transfer?

   (2) Was there an affirmation or agreement to any variation?

Witnesses and Evidence

5. I heard from Mr Howlett (claimant) and Mr Gartland (claimant). For the respondent I heard from John Forrest, HR Business Partner, Border Force; Shane Newton, Deputy Head of Reward, Home Office.

Findings of Fact

6. The Tribunal's findings of fact are as follows.

<u>Mr Stephen Howlett</u>

7. The claimant's employment with the Prison Service began on 10 June 2002. He was employed as a Prison Officer. On 25 March 2019 he transferred to the respondent, The Home Office, and he was employed as a Border Force Officer. His salary in his first job was £18,658 plus local pay allowance of £3,500 when he first started. By the time he transferred to the respondent it was £32,519 gross per

annum. When his employment transferred to the respondent, he was deducted two hours a week from his wages as his contractual hours reduced from 39 hours to 37 hours, and he understood that that would occur. However, the respondent also deducted 17% of his previous pay which was embedded in his pay as a result of an earlier shift allowance. His new salary was £26,567 gross. The claimant claims that he believes that the deduction representing the shift allowance was unlawful. He did receive overtime payments etc separately if and when he worked the relevant time.

8. In May 2019 Mr Howlett contacted a Mark Mawdsley, Border Force Higher Officer, and Miss Julie Hughes, who he understood would look into whether his pay was correct. There is no real explanation for why there was a delay before Mr Howlette took the matter up.

9. As a result of this a third party, who provide payroll service to the respondent, on 31 May 2019 advised that his staff data form was completed incorrectly, and the wrong grade had been inputted into the system. There was advice that the previous department must have put down the wrong information on the transfer staff data form as the "service request" has all the correct information on it.

10. This email was described on 29 May 2019 by Mr Howlett as:

> "I've spoken to SSCL (Ministry of Justice). They have stated the staff data form was completed correctly by them. After she investigated it was still correct. When the Home Office sent it to GRS, which the lady stated that the form was incorrectly inputted by GRS, she stated the wrong grade was inputted into the system."

This was a red herring, but the correspondence continued before this was clarified.

11. However, it was later said that it was correct and the claimant disputed this, sending an email to his Branch Secretary dated 24 June 2019 which stated as follows:

> "I was informed during the recruitment process I would be on about £27,000 and all I would lose is the 17% shift allowance which I expected. I transferred over with an officer AO grade who is on a higher pay scale than me. I cannot work out their calculation. I really don't know how to take this further and I would really appreciate your assistance in resolving the matter. I have been informed by staff that they have been in BF for years and that I would be on the top of the scale."

12. However, I find it hard to accept the claimant's position as in this email he also says he was told his pay would be around £27,000 – which it was . in addition he says the 17% was a mistake and he meant to say 5% which he knew would be deducted for the fact he would be working 2 hours less. £27000 represents his salary at the Prison service less the 17% deduction, and is very close to the sum he was eventually paid.. Accordingly, his email is internally consistent and logically it appears that the claimant did mean the 17% and possibly was only concerned about the difference between his salary and the £27,000. If it was only 5% then the figure of £27,000 would be irrelevant. The claimant obviously knew of the possibility of a

17% deduction as otherwise he would not have mentioned it in his email even if it was a mistake (which I do not accept)

13. Mr Howlett also said that he had been told during the recruitment process that he would transfer on his basic salary but this email does not reflect this. Other emails also say he was told it was £27,000 or the top of the pay scales. The claimant is not making a claim that he should have been put at the top of the pay scales but that the 17% should not have been deducted.

14. Accordingly, I find that Mr Howlett did know before he began the job what his pay would be. I cannot explain why his position has shifted, that is a matter for Mr Howlett. Unfortunately the job advert is no longer available nor any record of what the claimant was promised as salary other than his own reporting at the time. It is far more likely on the balance of probabilities that what he reported at the time is more accurate that what he has subsequently contended.

15. Mr Mount took the matter up on the claimant's behalf to the PCS Home Office pay advice section. He was initially advised by SSCL of a calculation to calculate part-time hours, concentrating on the reduction to 37 hours. However, Mr Mount then pointed out to him that this would give a pro rata salary of £30,851.36. He asked on what basis they were applying a 1.224 reduction as that resulted in an 18.3 reduction in salary despite only 5.13 reduction in working hours.

16. A reply was received on 27 July 2019. Ms Klassa's email said:

> "The 1.224 calculation is because the salary also includes an unsocial element within it as well as an additional two hours. This is the calculation the MOJ/HMPPS use when a Prison Officer moves to a generalist role and is for closed grades (staff who chose not to opt into their fair and sustainable pay arrangements) which I assume was the case for this individual. The policy we have received for the MOJ is as follows: for the purposes of establishing base pay the salary for staff in closed grades, which is all inclusive of two additional hours and unsocial working, is divided by 1.224 to determine the 37 hours basic rate."

She goes on to say:

> "Therefore the base pay calculation applied by SSCL is correct. Stephen is also receiving AHA in addition to this."

This finally was the correct explanation.

17. On 8 October Mr Howlett then issued a complaint about his pay. He stated that:

> "At the time of my transfer I was a pre fair and sustainable (F&S) closed grade senior officer. My salary at the date I transferred on 25 March 2019 as a closed grade officer was £32,519. I was not subject to any F & S terms and conditions and I was not subject to a shift disturbance allowance as part of my gross annual salary. The unsocial element of F & S did not apply to me. Therefore I believe I should retain my Prison Officer salary in its entirety as part of a Civil Service level transfer or I should be placed on the nearest pay

> point to the salary I enjoyed without detriment. I am submitting this complaint because my new employer has mistakenly assumed I received an unsocial hours element as a senior officer F & S, which I did not because I was a closed grade."

At this point Mr Howlett was aware that the allowance could be removed and the staff data form was a vehicle for doing so, where allowances were specific add-ons. However, as this was not a specific add-on it was not reflected in the form. The position was that the payroll provider had been given instructions to in effect apply formula that reduced the pay to account for the 17% embedded shift allowance and the two hour reduction in hours.

18. There was a response the next day. The reply said:

> "Firstly, it would be appropriate to outline the roles and responsibilities of SSCL. SSCL are contracted as a third party to provide HR payroll services to the Home Office and its employees. SSCL processes are defined by this contract and Home Office policies and instructions. As we are a private company and act on the instructions of our clients we are unable to overturn any of their policies that are in place. Prison Officers work 39 hours net. The equivalent with the Home Office is 37 hours net. 42 hours is the gross working hours with the Home Office/BF, i.e. before lunch breaks are deducted. There is a specific calculation performed for Prison Officers moving over as instructed to us by the Home Office. The working instructions that had been provided by the Home Office to SSCL is that in order to assimilate a member of staff from a 39 hour week to a 37 hour week we must apply the formula 1.224 and your pay upon transferring to the Home Office has been calculated as follows……"

19. She went on to say that he needed to raise a complaint with the Home Office. However, yet again the calculation had been assumed to be entirely related to the reduction in hours when, as identified by Ms Klassa, it was not.

20. The claimant then filled in an official grievance notification form on 10 October. His grievance was as follows:

> "As a civil servant I accepted a level transfer from HMPPS to Border Force. At the time of the transfer I was a pre fair and sustainable closed grade senior officer. My salary at the date I transferred (25 March 2019) as a closed grade officer was £32,519. I was not subject to any F & S terms and conditions and I was not subject to a shift disturbance allowance as part of my gross annual salary. The unsocial hours element of F & S did not apply to me. I should retain my Prison Officer salary in its entirety as part of the Civil Service level transfer, or I should be placed on the nearest pay point to the salary I enjoyed without detriment. I am submitting this grievance because my new employer has mistakenly assumed I received an unsocial hours element as a senior officer, which I did not because I was a closed grade. To resolve the problem I have contacted Shared Services Home Office and explained why I believe my salary has been calculated. I have also contacted PCS union who agree that my salary is incorrect and who have been supporting me during this dispute. This response goes against the Home Office pay policy. Because

of the policy it has meant that I have suffered significant detriment both in my pay and my pension forecast as a result of a level transfer, and no marked time has been paid which goes against the principle that no detriment to my pay should be suffered."

21. He then enclosed the answer to the complaint to SSCL.

22. On 24 October David Martin explained as follows, internally:

"The base pay for HMPPS closed world prison uniform grades (officer, senior officer and principal officer) is based on working a 39 hour week and has an inclusive element for unsocial working hours. To net the inclusive rate of base pay down for the purposes of the calculation of pay on transfer, promotion or a move to a lower band role, we divide the all-inclusive annual rate of base pay received in the closed world by 1.224 to give the actual rate of base pay to be taken into account when calculating pay on transfer/promotion/downgrade."

23. Mr Howlett was also advised that the unsocial hours embedded in his base pay was an amount of 17%. He stated his contract of employment made no mention of that. He was advised on 28 November 2019 that when the fair and sustainable policy was introduced he would have been told that his pay would be split into three separate elements, but this policy had never been applied to him as he was in a closed grade role and he did not sign up to fair and sustainable and therefore remained on his existing terms and conditions.

24. The claimant continued in correspondence and on 27 August 2020 Shane Newton, Senior Reward Manager, responded again to his complaint, and confirmed that dividing the salary by 1.224 applied whether or not the person was on a fair and sustainable contract. Mr Howlett asked for a copy of the policy proving that 17% of his wage had been consolidated but Mr Newton said he was not able to supply this. Mr Howlett believed that he knew three other employees who did not have the 17% deducted on transfer. However I did not see any evidence of that .

25. Neither was there any evidence from anyone from any of the relevant unions regarding their understanding of the situation on transfer,generally or specifically.

26. On 24 September 2020 Natassja McCarthy confirmed that the calculation was correct and the matter was closed.

Mr Gartland

27. Mr Gartland began working for Her Majesty's Prison Service on 17 January 2007 and was employed as a Prison Officer. However, on 5 September 2016 his role transferred to the respondent, the Home Office, and he was employed as Asylum Caseworker. He further transferred to Border Force in January 2019. He stated his wages before he transferred to the respondent were £29,219 gross. He refused to sign a contract because he did not accept the 17% deduction.

28. On 23 May 2016 the staff data transfer form (also known as the OGD pre-appointment reference request) was sent to the Home Office by HMP. This confirmed hours per week 39, basic salary per annum £29,219. There was no

indication that he was in receipt of a shift allowance, although this could have been added into the form if he had been. He was also deducted two hours from his wage as his contractual hours reduced to 37 hours. However, the respondent also decided to deduct 17% of his pay due to a shift allowance. In short he was in the same position as Mr Howlett.

29. Mr Gartland, had made a freedom of information request on 21 July 2016 under his wife's name asking for sight of documentation used to support the 17% deduction from wages. He obviously understood at that time that this deduction might or was being made.

30. In respect of the freedom of information request on 21 July 2016, Mr Gartland's request stated as follows:

> "In relation to the now closed grade of Prison Office (pre Prison Officer 2 and pre fair and sustainable) how many staff in the closed grades have had an unsocial hours element removed from their pay when moving from shift work to hours which would not qualify for the 17% unsocial hours allowance paid on top of the fair and sustainable basic pay? Can you confirm that this number is because closed Prison Officer grades have no defined percentage for unsocial hours worked in their basic pay due to the arrangements set in place by 'Fresh Start' in 1987 in which all Prison Officers received a basic salary exclusive of any additional allowances and therefore cannot have any pay removed? The definition of basic pay by the Oxford dictionary is as follows, 'a standard rate of pay before additional payments such as allowance and bonuses'."

31. The reply was:

> "I can confirm that the department holds the information you have asked for and I am pleased to provide this to you. There are no Prison Officers who remained on the closed World Pay structures who have had the unsocial workings element removed. The Closed World Prison Officer pay structures do not have a separate salaried allowance identified for working unsocial hours (shifts) but the rate of base pay they received has an inclusive element to remunerate them for having to work unsocial hours. As the unsocial element is included within the base pay, the rate paid to Closed World Prison Officers is significantly higher than the rate of base pay under fair and sustainable. Where a Closed World Prison Officer is moved from an operational shift working to a non operational non shift working post this is seen as a re-grade and the individual is assimilated across onto fair and sustainable and the inclusive element for unsocial working hours is stripped from their rate of base pay and lost upon taking up duty in the new role.
>
> However, if the move from the operational role is as a result of a reasonable adjustment for disability reasons…or is agreed as an alternative to being placed on the redeployment register…a fixed period of up to two years pay protection would be applied. The amount protected is offset by any increases in pay and will cease on the second anniversary…"

32. Mr Gartland raised this with Ms Suzanne Gooch (Head of Employee Relations, Home Office Pay and Reward) on 15 August 2016. On 16 August 2016 Ms Klassa again replied:

> "The NOMS Prison Officer grade pay includes a shift allowance and two extra working hours within the salary. The Home Office divides the salary by 1.224 to establish base pay (pay for 37 hours and without the shift element). This ensures the salary is calculated on a like for like position with other grades. The position is consistent with NOMS calculation. I have spoken to SSCL regarding your move and they have confirmed your salary on transfer and promotion to EO has been calculated as follows:
>
> - Prison Officer national salary = £29,219
> - £29,219 ÷ 1.224 = £23,871 (equivalent of 37 hour salary exclusive of shift element)
> - Plus 10% on promotion from AO equivalent to EO national = £26,258."

33. Mr Gartland replied on 16 August 2016:

> "I do not agree with what you have been told by SSCL and I will provide evidence to back this up. I am extremely frustrated I am once again having to explain this as it is not as simple as what you have explained. Firstly, my Basic pay has never had a shift allowance in it. I have a contract proving this and a copy of a newer contract detailing the separate allowance. It seems that SSCL are using the assimilation base pay calculation used when closed grades opt in to fair and sustainable (NOMS pay policy manual 2012 without having a real understanding of the legal ramifications of doing so. It does not apply legally outside of fair and sustainable. From 2009 new officers were recruited on a base pay plus 17% shift allowance as a separate element. When a new pay and grading structure was introduced in 2012 there was an opt in offered. This was a legal agreement between NOMS and the union POA that any officer opting into the new structure (called fair and sustainable) would assimilate over and their pay calculated by dividing by 1.224 taking out the shift element and moving to a 37 hour week. The shift element was then given back as a separate allowance. In 1987 the Prison Service brought in a new pay structure through a document called Bulletin 8 Fresh Start. An allowance called 'Shift Disturbance Allowance' was taken away and an all-inclusive wage was offered. This took into account various elements including the hours Prison Officers worked but was never defined as a set percentage. This is clarified after an agreement between NOMS and the POA in 2012 on POA Circular 123 2012. This (the fair and sustainable document) and the new NOMS pay policy manual confirm that the above calculation would only ever be used when opting into fair and sustainable pay grades. This I am not doing. Deducting 17% from my current wage is something that has never been agreed for OGD transfers and would involve a change to my terms and conditions ratified by a union and the Home Office: that has not happened. Your own recent correspondence to the Home Office staff on legacy shift allowance confirms you would not make changes to terms and conditions without the involvement of the unions, however it seems you are doing this

> without any agreement. Home Office pay policy as per Horizon and the pay awards in 2016 and 2015 show that what happens on transfer or promotion from other Government departments in that substantive pay plus ten milestones is the starting salary, which should be the case for me. There is nothing in the modernised terms and conditions allowing such a change as you have done. I accept the reduction to 37 hour week.
>
> You are in breach of your own pay policy by calculating my wage as you have done and have no legal basis or agreement in place to reduce by current substantive wage by 17%. This figure I again state was never defined in Bulletin 8 and in my contract from 2007."

34. Sadly, in 2017 Mr Gartland was diagnosed with cancer and was unable to pursue his complaint and was off work for a significant amount of time. He made it clear to HO Pay and Reward that he would not sign his contract and the dispute would remain open.

35. In summary, Mr Gartland was explaining that what had previously been a shift allowance had been incorporated into basic pay in agreement for more flexibility. Subsequently, new officers were recruited on basic pay which was different with a separate unsocial hours' agreement. At some point this metamorphosed into fair and sustainable, which everybody was given the option to join, whereby there was a basic pay rate plus different allowances. Mr Gartland maintains that his basic pay introduced in 1987 includes what previously were separate shift allowance payments to reflect that element of flexibility. There was no agreement that this was 17%. This was a calculation only used for any fair and sustainable opt-ins.

36. The claimant also gave evidence that he was on this base pay even when he worked in the Offender Management Unit where he did not work shifts or unsocial hours, and he did not suffer any deductions from his pay as his contract did not allow for that. He repeated that in relation to his freedom of information request a reply was given:

> "There are no Prison Officers who remain on the closed world pay structures who have had the unsocial working element removed. The closed world Prison Officer pay structures do not have a separate salaried allowance identified for working unsocial hours (shifts) but the rate of base pay they receive has an inclusive element to remunerate them for having to work unsocial hours. As the unsocial element is included within base pay the rate paid to closed world Prison Officers is significantly higher than the rate of base pay under fair and sustainable."

37. In addition he quoted again from the 2016 freedom of information request about the same matter:

> "The HMPPS pay policy information provided evidences the fact that 17% value attached to unsocial hours working was based on a formula derived from a 2006 equal pay settlement (which predates F & S). The attachment also explains and set out the calculation for separating this and the additional two hours in excess of a standard 37 hour working week from the all-inclusive closed grade Prison Officer salary to arrive at a figure for 37 hour base pay

which is the comparator to the equal pay settlement. As you have recognised in your request, this calculation is used for all internal transfers and regrades for closed grade Prison Officers within HMPPS. The fact that other Government Departments are also applying the same approach is not a matter for HMPPS. OFDs have delegated authority for their own recruitment pay and reward in terms of inward transfers. Written or other authority for the MOJ HMPPS as the exporting department is not required and therefore cannot be provided."

This suggests that departments were autonomous and there was no requirement to maintain pay rates from other jobs in other department/agencies.

38. The claimant complained that he had been asking now for five years for the documentation to show that this deduction was allowable, but nothing had been provided.

39. In addition, Mr Gartland believed had he transferred to HMRC rather than to a Home Office department (which was privy to the history of the Prison History pay calculations), the 17% would not have been deducted. However, there was no documentary evidence of this and the respondent says that it is irrelevant as each department made their own arrangements.

Historical background to Prison Officer Pay

40. Some of the history to prison officers' pay is set out in the **Home Office vs Bailey and others CA (2005)** case. Mrs Bailey and others brought an equal pay claim against the respondent which was considered by the Court of Appeal in 2005. The respondent was The Home Office at the time and was referred to as "The Prison Service" (presumably having not amalgamated with the Probation Service at this point in time). In this it was said:

"The history leading to the present claim is helpfully set out…In summary in 1987 the Prison service implemented a programme negotiated with the recognised trade unions called 'Fresh Start' whereby prison officer, senior officers, principal officers and governors (the unified grades) received an enhanced rate of basic pay and had certain other benefits protected, notably pension benefits, in return for working a more flexible and efficient working pattern. In particular overtime working was phased out. OSGs were not included in Fresh Start but were later permitted to opt into a similar arrangement from 1 July 1996."

41. The claimants were in administrative grades so were not included in Fresh Start and were predominantly female. The unified grades and OSGs were overwhelmingly male.

42. Firstly, the evidence at the time was that prior to Fresh Start in 1987 those in prison officer grades were contractually obliged to work shifts and were paid 12.6% allowance on top of basic pay for the requirement to work shifts. On top of that they were paid a premia for unsocial hours worked at weekends and public and Bank Holidays. These premia were half plain time for every Saturday, plain time for

Sunday and double time for public and Bank Holidays. Post Fresh Start payment of the shift disturbance allowance and premia ceased but basic pay was increased so as to contain an element to reflect the requirement to work shifts as well as the requirement to work unsocial hours. The contractual obligation on prison officer grades to work shifts and unsocial hours remained.

43. There was also a document (modernised terms and conditions) for existing civil servants which had a column “Staff joining The Home Office on level transfer or promotion from an OGD on a permanent/voluntary basis in relation to adverts for posts issued on or after 31 August 2014”. There was no specific reference to pay in these columns, save right at the end there was an “NB” which said, “If you are moving on level transfer within the Home Office your terms and conditions will not be affected”, but the table itself concerned occupational sick pay, annual hours, mobility, etc., and there was no reference to pay.

44. It was clear from the union circulars provided that if an officer did not sign up to Fair and Sustainable they would retain the shift allowance which was embedded in their basic pay. If they moved to Fair and Sustainable they would have to qualify for the additional payments by actually working the shifts. In was clear on the union circulars that Fair and Sustainable payments for unsocial hours was 17%, describing as an unsocial hours working payment. It was said that:

> “As part of the changes to working practices in HM Prison Service all existing staff retain their terms and conditions whilst remaining at their establishment in the post/grade they currently hold. Staff will only assimilate onto new terms and conditions if they volunteer/agree to a change.”

This suggests virtually any move will result in the loss of the legacy terms.

45. In a further document described in the bundle index as “undated – starting pay” it was said that:

> “Pay on transfer from other Government Departments
>
> Starting pay on transfer to The Home Office from other Government Departments in all circumstances is limited to the maximum of the pay range for the grade with any differences held on a mark time basis.
>
> Level Transfer
>
> The existing base pay with the previous department will be honoured providing it is within The Home Office pay range or at the spot rate for AAs, AOs and equivalent…If total base pay is above the maximum for that grade within The Home Office the difference will be held on a mark time basis.
>
> Where an allowance was applied in the other Government Department for which there is no equivalent at The Home Office the allowance will be lost on transfer. If The Home Office recognises the allowance, either as a separate grade or specialist allowance of other Government Departments then this will either be retained at The Home Office rate or consolidated into pay.

In the case of any allowances in payment in the other Government Departments that do not apply to The Home Office post but which exist in The Home Office the normal portability arrangements for allowances will apply as set out in the relevant section."

This would have been a helpful starting point if it was dated,; the claimants however did not say that they had looked at any similar docuemnts at the time and that they were worded differnetly.

46. Also relevant is a the letter of 21 July 2016 (as part of a later freedom of information request) where it was stated that:

"Where a closed world prison officer is moved from an operational shift working role to a non

operational non shift working post this is seen as a regrade and the individual is assimilated across onto Fair and Sustainable and the inclusive element for unsocial working hours is stripped from their rate of base pay and lost on taking up duty in the new role, unless it was as a result of a reasonable adjustment for disability in which case there would be pay protection for two years."

Again that is within the prison service and was a way probably of maximising the number of employees on fair and sustainable. Mr Gartland however has given evidence that he moved to role without an unsocial hours but did not have the unsocial hours payment removed nor was he placed on a fair and sustainable contract. It may have been an oversight, there was no information regarding that other than Mr Gartland's evidence which I accept, but I do not find it determinative in relation to a move to another agency.

Respondent's Evidence

47. For the respondent Mr Forrest (HR Business Partner for Border Force North) gave evidence. He was not directly involved in the claimants' transfers but advised that The Home Office had given specific instructions in relation to transfers by closed world Prison Officers that this calculation should be used to remove the unsociable hours payments and the two hours less work. He stated that the same calculation was used by HMPPS if a prison officer moved to a non allowance role (page 237). He pointed out that both individuals received payment for unsociable hours via The Home Office annualised hours working scheme in their new roles when appropriate, and that their basic salary was increased by a set percentage. Mr Howlett's was 36.69%, Mr Gartland's was 36.69% also.

48. Mr Shane Newton (Deputy Head of Reward) also gave evidence. He stated that, "Mr Howlett voluntarily level transferred from HMPPS into the HO on 25 March 2019 on Immigration Officer grade, Executive Officer equivalent using the national pay grade. In doing so Mr Howlett changed employer and was therefore no longer entitled to pre F and S terms and conditions".

49. He confirmed that the embedding of the unsocial hours' element was established through an equal pay settlement in 2006 (**Home Office v Bailey &**

Others) and that 17% is still reflected in F & S arrangements. He believed that had Mr Howlett moved to a different role within HMPPS his salary would have been calculated in the same way, and he believed any entitlement to the all-inclusive salary only remained for as long as Mr Howlett was in existing role in HMPPS – any move away would result in a recalculation (page 543). 2 by voluntarily moving to the Home Office a new employer Mr Howlett accepted new and different terms and conditions, referred to as modernised terms and conditions. There was no agreement his salary would be protected on transfer. He confirmed the situation was as set out in Ms Klassa's email to both claimants on 24 August 2016.

50. He accepted there was no references to handling pay on transfers at the time of Mr Gartland's transfer, in the Civil service management Code probably due to this being delegated to individual departments. He believed the same process would have been followed as with Mr Howlett.

The Law

Unlawful deductions of wages

51. The general prohibition and deductions are set out in section 13(1) of the Employment Rights Act 1996 ("the 1996 Act") which states that:

> "An employer shall not make a deduction from wages of a worker employed by him."

52. However, this does not include deductions authorised to be made by virtue of a statutory provision of contract or where the worker has previously agreed in writing to the making of the deductions (section 13(1)(a) and (b)).

53. Section 27(1) defines wages as "any sums payable to the worker in connection with his employment", and includes any fee, bonus, commission, holiday pay or other emolument referable to the employment. These may be payable under the contract or otherwise, as defined in the case of **New Century Cleaning Company Limited v Church [2000]** Court of Appeal as not extending beyond sums to which the worker has some legal but not necessarily contractual entitlement. A deduction is defined as:

> "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…as a deduction made by the employer from the worker's wages on that occasion." (Section 13(3))

54. In order to decide what is properly payable the Tribunal has to decide what the contractual agreement is between the claimant and the respondent, and the approach to determining this is the same approach as adopted by the Civil Courts in contractual claims (**Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] EAT**).

55. One example would be where a Tribunal determines that the amount of wages an employee is contractually entitled to has been varied by agreement or there is a flexibility clause in the contract giving the employer the right to do so. In

that situation the wages properly payable will be the reduced wages due under the varied contract or the flexibility clause, therefore when the reduced amount is paid there is no deduction, it having been contractually agreed that the wages would be reduced. Of course, it has to be established that that reduction was agreed. Section 13(1) states:

> "An employer must not make a deduction from the wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract."

56. In respect of this contractual authorisation, this is defined in section 13(2) as a provision contained in:

> (1) One or more written contractual terms of which the employer has given the worker a copy before the deduction is made; or
>
> (2) One or more contractual terms (whether express or implied, and if express whether oral or in writing) whose existence and effect (or combined) the employer has notified to the worker in writing before the deduction is made.

57. Finally, it has to be established that the factual basis for the deduction has been met i.e. if a deduction for poor workmanship has been agreed it then has to be established that there actually has been poor workmanship.

Working under protest/Affirmation of Contract: Law

58. The law in relation to affirmation of contract mainly arose in the context of constructive dismissal where it was established that where an employee waits too long after the employer's breach of contract before resigning he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. However, the issue is essentially one of conduct not simply passage of time (**Chindove v William Morrisons Supermarkets PLC EAT**), where Mr Justice Langstaff said that:

> "What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in the employment rather than resign."

59. In respect of an employee continuing to perform the employment contract under protest, as this situation might be described, will not be necessarily taken to have affirmed the contract. In **Cantor Fitzgerald International v Bird and others [2002]** the High Court held that three brokers had not affirmed their contracts by waiting more than two months before resigning with immediate effect. They had indicated their discontent with the employment and given clear signs of their intention to leave. It was said that "affirmation" is essentially "the legal embodiment of the everyday concept of letting bygones be bygones".

60. There comes a point, however, at which delay will indicate affirmation. In **W E Cox Toner (International) Ltd v Crook [1981] EAT** the claimant was accused of gross dereliction of duty on insubstantial grounds by his fellow directors and was threatened with dismissal. Six months of angry correspondence followed largely conducted through solicitors before the employer finally refused to withdraw its

accusations and threats. A month later the claimant tendered his resignation and claimed he had been unfairly constructively dismissed. The Tribunal considered the claimant could not be said to have affirmed the contract because he never accepted the position but protested vigorously. When it finally became clear the company would not withdraw the allegations it was not unreasonable for the claimant to take time to look around for another job before he resigned. On appeal the EAT decided the Tribunal had misdirected itself: mere delay by itself does not constitute an affirmation of contract, but if the delay went on for too long it could be very persuasive evidence of affirmation. The Tribunal should have referred to the fact that throughout the seven month period the claimant had continued to work and be paid under the contract. Even if it was arguable he was working under protest for six months, the delay for a further month was fatal to the claimant's claim that he had not affirmed the contract.

61. However in relation to unlawful deduction/contract claims where an employer attempts to make changes to a contract of employment without the agreement of the employee i.e. unilaterally (which is the claimants' position) this will amount to a breach of contract. If, however, a change is imposed unilaterally, and the employee makes no objection but continues to work under the contract, then he or she may be held to have impliedly agreed to the variation in terms. In these circumstances the employer may argue that it is not in breach of contract because the employee, by his or her actions, agreed to the change in terms and conditions. In deciding whether an employee has impliedly agreed to a variation the practical impact of that variation will be a relevant factor.

62. In **Jones v Associated Tunnelling Co Ltd [1981]** the EAT stated that:

> "If the variation relates to a matter which has immediately practical implications, for example the rate of pay, and the employee continues to work without objection after effect has been given to the variation then obviously he may well be taken to have impliedly agreed."

63. However, "affirmation" was not the case here, as the claimants did object to the change and bring their claims as an unlawful deduction of wages. An example is where an employee is faced with a pay cut so that if they turn up for work they are behaving in a way which is consistent with the continuing existence of the contract. However, they may continue to perform it under protest without necessarily being taken to have affirmed the contract (**Cantor Fitzgerald International v Bird and others [2002]**, for example) (see above). In addition, where the breach is continuing the employee could choose to rely on later breaches.

64. Another response for a unilateral variation of contract is that an employee can "stand and sue". Often this is done by way of a High Court or County Court action for breach of contract.

65. However, where pay is involved it is possible to bring a similar claim in the context of unlawful deductions, and that is the case here.

Submissions

Respondent's Submissions

66. The respondent submitted that there was no evidence on which the claimants could rely to establish that the wages they were paid were not the wages they were contractually entitled to. The respondent submitted that the claimants entered into new contracts of employment when they moved out of the Prison Service and they moved into independent agencies with delegated authority to set their own terms and conditions. The Home Office engaged with different unions and had a different landscape to the Prison Service.

Mr Gartland

67. Mr Gartland had done some research and he knew there would be a problem with his pay prior to commencing employment with the respondent. Nevertheless he accepted a job with them. It was argued that Mr Gartland turned up to work for so many years, albeit under protest, that he had affirmed the contract, and if that was not correct that he affirmed it when he took a second new role. Mr Gartland could establish no legal entitlement to his Prison Service salary when he left the Prison Service.

Mr Howlett

68. It is true that no contract was sent to Mr Howlett before starting. Mr Howlett said at one point he did not know until he started what he would be paid but then said that he was told during the recruitment process that it would be on the same salary. This is not plausible as he does not mention this in any of his correspondence and in fact in his email, he is concerned with the calculation but seems to accept that there would be new terms. It is unrealistic that there would not be new terms as it is a completely different role. Mr Howlett must have known he would on Home Office terms and conditions.

69. The claimants could not point to anything stating they would be entitled to their pre-existing salaries on transfer to the Home Office. Both accepted that as they were working 37 hours two hours would be deducted from their previous salaries. Accordingly, that signifies that they knew there would be changes.

70. The respondent did not deny that there were some situations where there would be a transfer on the same pay, but this was one situation where they did not.

71. Both claimants knew that there was a rolled-up element for unsocial hours in their Prison Service pay. Mr Howlett said he never knew it was 17%. He said he understood it was 5%, but the documentation showed that "fair and sustainable" referred to it at 17% and Mr Gartland certainly knew that this was the case, if only for the purpose of "fair and sustainable".

Claimants' Submissions

Mr Howlett

72. The respondent is now aware that contrary to their initial defence no letter was sent to the claimant on 25 March 2019 stating what his terms and conditions (including salary) were. The respondent says there is a discretion to set pay and conditions and this should have been agreed before the claimant started but it was not. There was no notification to Mr Howlett before he started that his basic salary

would be reduced. There was no notification in advance that a deduction would be made from his salary with the Prison Service.

73. Accordingly, the claimant had an entitlement to £32,000 at point of transfer and it was for the respondent to communicate whether that was correct to the claimant before he accepted the job and to obtain his agreement to any reduction.

Mr Gartland

74. Mr Gartland adopted Mr Howlett's submissions, although there were some differences in his case. He was aware, due to his enquiries, that there may be an issue about the 17%, however as he thought this was incorrect he proceeded to accept the role, never signing his contract and working under protest. There was nothing in the recruitment process to say that salary would be reduced on transfer in relation to basic salary, and it just so happened in his case (and Mr Howlett's case) that the basic salary included this historic amount. The 17% was determined 20 years after the contractual change to embed the shift allowance payments was made and was totally inappropriate as it was a notional amount used for fair and sustainable purposes only.

Conclusions

(a) Affirmation

75. Here both claimants protested about their pay relatively immediately and continued to do so. There is a rather inexplicable gap in Mr Howlett's timeline as he delayed from March to October before complaining about his pay, however in the absence of him having received a contract this may be explicable. However, I am concerned about this, in the light of the email I have highlighted above, where he refers to the 17% etc., which I have found was a correct email, and I did not believe that at that point he was seeking a reinstatement of the 17%. However, on balance I find there is insufficient evidence to say that he affirmed the contract.

The issue in respect of Mr Gartland is that he did protest immediately, however his situation was different in that he was aware that the 17% would be removed beforehand. In my view that is relevant at a different point in time which I will be reflecting in conclusions.

(b) Base Salary

76. There was an astonishing lack of transparency in this case with no documentation available from the recruitment process, which is deeply concerning given the high amount of documentation usually involved in Civil Service positions. I also find it startling that the claimants moved roles without being aware or being told what their payments would be. Mr Howlett says he thought he was aware that he would be paid his basic pay with the embedded amount included, whereas Mr Gartland knew there might be an issue about this but thought the department was completely wrong and therefore proceeded to move roles.

77. There was some indication in the documentation that where somebody moved to a different department or autonomous agency on a higher salary than the salary for the grade in the agency they were moving to, they would be placed on marked

time and would retain that basic pay without any increase until it had caught up with the grade in which the new job had arisen. Many policy documents were produced in this case, however many were undated.

78. I have found that both claimants were aware the 17% was going to be deducted. Mr Gartland's view was he would argue it was unlawful when he got to the relevant point in time. I am not clear what Mr Howlett's position was as certainly for the first six months or so his issue did not seem to be that he should be on his full salary less two hours. His emails contradict his contentions in his claim, and I have not accepted his evidence that he made a mistake in his initial email by referring to 17% when he meant 5%.

79. Accordingly, as both claimants (I find) knew what the position was going to be before they moved, I cannot see how they can now argue that what they were paid was not contractually correct. The claimants also cannot point to anything which says that their basic pay in their previous job would be maintained per se. In the absence of any argument regarding custom and practice and with no evidence from any relevant union I find that there was nothing the claimants could rely on to say that their pay was contractually incorrect.

80. They were moving to a different agency and whilst there was no specific document there was an accumulation of documents which suggested if a person moves to a non-operational role or a role in which the allowances were not relevant that there would be an adjustment of basic salary.

81. Whilst there was an argument that there may be a red circling or marked time issue neither of the claimants pursued this.

82. I accept the respondent's position that each department/agency within the Civil Service can now autonomously offer their own conditions and this is what happened here. It was unfortunate that Mr Howlett did not receive a contract, however his understanding seemed to be in line with the contract and therefore I do not believe it made a difference in this case.

83. It is concerning that there is no clear documentation that the 17% deduction was going to happen, however both claimants were aware of this. It is to be hoped that in future this will absolutely crystal clear in any recruitment process.

Employment Judge Feeney
Date:22 August 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 23 AUGUST 2022

FOR THE TRIBUNAL OFFICE

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