



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr R Simms
(2) Ms E Palmer

Respondent: E.ON Energy Solutions Limited

Heard at: Nottingham **On:** Friday 17 August 2018

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimants: In Person
Respondent: Akua Reindorf of Counsel

JUDGMENT

The Employment Judge gave judgment as follows: -

The Claimants claims for breach of contract and non payment of wages fail and are dismissed.

REASONS

Background and Issues

1. Robert Simms presented his claim to the Tribunal on 1 February 2018 and Emma Palmer presented hers on 20 March 2018. They were both employed by the Respondent. Mr Simms was an MI analyst and Ms Palmer a Customer Services Administrator.

2. The Claimants had resigned respectively on 22 September 2017 and 17 November 2017. Their claims are identical being in respect of arrears of pay they say they are due from 1 April 2017 to the dates of their respective resignations. They say that they are owed this money because other employees were subsequently awarded a pay increase which was backdated to 1 April 2017.

3. The Respondents say that the Claimants are not entitled to the pay increases. They cannot make a breach of contract claim because it was not outstanding or arising on termination of their employment. They are similarly not able to demonstrate any occasion when they were paid less than they were entitled to during their employment so there has been no unlawful deduction of wages.

Evidence

4. Each of the Claimants gave evidence and I also heard evidence from Stuart Parker who is employed by the Respondents as a Senior Specialist – Employee Relations. There was also an agreed bundle of documents and where I refer to page numbers it is from that bundle. There was no dispute on the facts of the case.

The Facts

5. Both employees were employed by the Respondents under written contracts of employment. Those contracts expressly incorporate the terms of the E.ON Energy Solutions collective agreement. The contracts both have the same provision (pages 206-7). It states:

“The E.ON Energy Solutions (EES) Collective Agreement as amended from time to time, forms part of your contract of employment and contains more detail about your terms and conditions. The company reserves the right to amend those terms of your contract which change as a result of agreement made through the collective bargaining arrangements. A copy of the EES Collective Agreement can be obtained from your Line Manager or Human Resources.”

6. The agreement sets out provisions that have been agreed between E.ON and Unison, Prospect, Unite and the GMB union. These are the only unions recognised by the Respondent. A copy of the agreement is at pages 90-187 of the bundle.

7. The agreement covers a range of areas including sick pay, family friendly rights, disciplinary procedures and salaries.

8. The agreement was valid with effect from 1 December 2011.

9. In the agreement there is a provision for consideration of salary progression, and detail of the mechanism by which this will be undertaken (pages 110-112). Section GS8.2 of the agreement (page 111) relates to the first Claimant's role.

10. This section provides that salary progression increases will be paid together with any annual pay review negotiated by the Respondent and the recognised trade unions.

11. The provision in the agreement that sets out the provision for pay reviews and the due date is within “grading and salaries” Section GS2.2 (page 100-101). This section applies to the second Claimant's role.

12. The Respondent awards its employees an annual cost of living increase. The amount of this is negotiated with the trade unions. It takes effect from 1 April each year.

13. In practice though the negotiated settlement is not always reached by 1 April. If it is reached later in the year a negotiated settlement is paid in arrears.

14. In the year 2017 the negotiated settlement was not agreed and processed until December. By this time Mr Simms and Ms Palmer had left the Respondent's employment and there was therefore no contractual relationship between them and the Respondent at the time that agreement was reached about the negotiated settlement.

15. The Respondent also awards certain employees performance related pay increases. This was referred to by Stuart Parker in his evidence as being "pay progression". This takes effect on 1 April each year and the amount is agreed with the unions. Clause GS8.2 in the collective agreement (page 109) provides:

"Salary increases resulting from the E.ON Energy Solutions performance management process will be effective from 1 April each year and will be paid together (i.e. as one single percentage increase) with any annual pay review negotiated by the company and the recognised trade union."

16. This pay progression is also paid in arrears if agreement between the Respondents and the unions has not been reached by 1 April. In 2017, agreement in respect of the pay progression increase was also achieved in December. This only affects Mr Simms who complains that he did not receive a backdated pay progression increase after the termination of his employment. This did not affect Ms Palmer.

17. I am satisfied that the Respondent's practice is to award neither the negotiated settlement nor the pay progression increase in the event that an employee has left the company due to resignation before the month in which the increase is processed. This practice has contractual force since it is set out in the pay progression toolkit associated with the collective agreement (page 199):

"Resignation:

Pay progression and/or negotiated settlement will only be paid to colleagues in post on 1 April, or the 1st of the month in which the payment is actually processed."

18. The Respondent's pay progression toolkit (pages 189-201) has been in use in the part of the business in which the Claimants were employed since 2013 and is also published on the company intranet. It has not at any time been challenged by the trade unions.

The Law

19. Ms Reindorf referred me, most ably, to the relevant law and this is set out in paragraphs 12 to 21 of her submissions.

Contract Claims

20. By Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (1623) (“the Extension of Jurisdiction Order”), proceedings may be brought before an Employment Tribunal for damages for breach of contract by a former employee provided the claim arises or is outstanding on the termination of the employee’s employment.

Unlawful Deductions from Wages

21. By Section 13 of the Employment Rights Act 1996 (“ERA”) an employer may not make a deduction from any wages for any worker employed by him or receive a payment from a worker unless it is required or authorised by virtue of a statutory provision, or part of the worker’s contract, or the worker has previously signified his consent to the deduction in writing.

22. “Wages” for the purpose of Section ERA is defined in Section 27(1) ERA as any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

23. By Section 13(3) ERA where the total amount of any wages that are paid on any occasion by an employer or are less than the total amount of the wages that are properly payable by the employer to the employee on that occasion the amount of the deficiency is to be treated as a deduction.

24. In order to be “properly payable” within Section 13(3) ERA the monies must be legally due to the employee.

25. Ms Reindorf dealt with the incorporation of contractual terms by referring me to the cases of: -

- **Kaur v MG Rover Group Limited** [2005] ICR 625
- **Hussain v Surry and Sussex NHS Trust** [2011] EXHC 1670 QB
- **Sparks v Department for Transport** [2016] ICR 695
- **Cavanagh v Secretary of State for Work and Pensions** [2016] ICR 826
- **Keeley v Fosroc International Limited** [2006] IRLR 961

My Conclusions

Breach of Contract Claim

26. I am satisfied that I do not have jurisdiction in respect of the breach of contract claim because the complaints were not outstanding on the termination of their employment and nor did any entitlement arise at that time.

27. At the date of termination of their employments the Claims were not quantifiable since the negotiations about pay had not been concluded. As Ms Reindorf says without a quantifiable sum there can be no claim for damages. I am therefore satisfied that the Tribunal does not have jurisdiction to determine the breach of contract complaint and that is dismissed.

Unlawful Deduction of Wages

28. The Claimants are unable to point to any occasion on which payment of wages made to them were less than was properly due to them within Section 13(3) ERA. At no time during their employment had the increases been negotiated. Employees were not entitled to the pay rises until they had been negotiated. As this occurred only after the Claimants were no longer receiving pay, their complaints for unlawful deduction of wages also fail and are dismissed.

Employment Judge Hutchinson

Date 23 November 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE