



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Lozaique

v

Tesco Stores Ltd

Heard at: Watford

On: 1 May 2018

Before: Employment Judge Skehan

Appearances

For the Claimant: In person

For the Respondent: Mr O Holloway, Counsel

JUDGMENT

1. The claimant's claim for unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

1. By claim form dated 12 June 2017, the claimant commenced proceedings for unauthorised deductions from his wages. The respondent lodged a response on 13 September, amended on 25 September defending the claim.
2. With the assistance of both parties, the issues to be determined by the employment tribunal were identified as:
 - 2.1 whether the USDAW collective agreement reducing overtime pay, in the claimant's case from 1.5 of the hourly rate to the normal hourly rate was an expressed, implied or inferred term of the claimant's contract of employment.
 - 2.2 If not, whether the claimant agreed to this change. The claimant says that there was no agreement on his part. The respondent says that the claimant affirmed the contract by continuing to work and accepting the payment of £4,272.00.

3. The relevant contractual law relating to breach of contract and the statutory provisions relating to unauthorised deduction from wages in section 13 of the Employment Rights Act 1996 were not in issue and are not repeated herein.
4. I was informed by counsel for the respondent that there had been a recent employment tribunal determination from Central London Employment Tribunal's relating to this collective agreement I was provided with a copy of the decision and reasons in the case of Jenkins and others v Tesco Stores Ltd (3325090/17). This judgment was produced by EJ Pearl after a 10-day hearing by a full tribunal and is dated 16/03/2018. It is not binding on me, but it considers the same circumstances in respect of the question of incorporation of this particular collective agreement.
5. I heard evidence from the claimant on his own behalf and from Ms Powell on behalf of the respondent. Both witnesses gave evidence under oath or affirmation, their statements were accepted as their evidence in chief and both were cross-examined.
6. The claimant's terms and conditions of employment are contained within the employment contract dated 31/12/2001. Within the employment contract there is a provision relating to joint agreements. It states that "Your terms and conditions include those contained in the Joint Agreements, Retail Division Parts 1 and 2 negotiated between Tesco Stores Ltd and USDAW. These apply whether or not you are a member of USDAW". The contract makes various references to the Staff Handbook and the staff Handbook is said to be expressly incorporated into the claimant's contract of employment. Within the handbook, I was referred to a partnership agreement between the respondent and USDAW (the 'Partnership Agreement').
7. The claimant was entitled to work is normal hours, guaranteed overtime and additional overtime. The claimant's entitlement to guaranteed overtime was unusual within the respondent organisation. Ms Powell confirmed that the claimant is the only employee within her section of approximately 7500 employees to have guaranteed overtime. I was referred to the previous Employment Tribunal Judgment from 2013 which states that the claimant was entitled to 20 hours a week of guaranteed overtime. The letter from the claimant to the respondent dated 26/10/2005 setting out this entitlement confirms that the pay for this guaranteed overtime was 1.5 of normal salary. The claimant's guaranteed overtime can be broken down into 8 hour Sunday shifts and 12 hours additional guaranteed overtime. Thereafter the claimant was entitled to accept or refuse any such additional overtime as may be offered to him by the respondent.
8. The claimant's Sunday overtime is not affected by the changes contained within the collective agreement. The collective agreement only purports to affect the claimant's 12 hours of non-Sunday guaranteed overtime each week. The claimant told me that he was entitled to guaranteed overtime.

He only knew about his own position. He considered that the respondent could not change his guaranteed entitlement to overtime or the hourly pay rate of 1.5 times salary. The claimant accepted that the union were entitled to negotiate overtime pay. He accepted that the agreement reached by the union applied to him to the extent that it related to and amended the pay rate for his additional voluntary overtime being any amount in excess of his 20 hours guaranteed overtime a week. The claimant did not accept that the union deal applied to his guaranteed overtime entitlement.

9. The claimant had a meeting with the respondent in June 2016 to discuss the changes to his contract that would be imposed by the USDAW agreement. I was referred to a generic copy of the booklet that was provided to the claimant by the respondent explaining the changes to his contract. This document sets out the respondent's changes to premiums. There was to be no change for the claimant in respect of Sunday and bank holiday premiums as all employees who worked on Sunday the bank holidays would be paid at time and a half (being the claimant's normal rate for Sundays). However, overtime premiums (excluding Sundays and bank holidays) would be paid at single time. This booklet also stated that if, after the changes have been applied, [the claimant] sees a net reduction in his take-home pay, based on last year's data he will be supported with a lump sum payment. It was recognised that the USDAW review was good news for many employees however some would be impacted negatively. The claimant was one of the respondent's employees who would be impacted negatively by the changes.
10. The claimant told me that he questioned the effect that this change would have on his guaranteed overtime however he received no response. The claimant was told that the respondent considered that his queries in respect of his guaranteed overtime were addressed within the booklet however the claimant did not consider that his guaranteed overtime was addressed within the booklet. The claimant believed that the booklet referred only to normal voluntary overtime and he accepted the respondent's position in respect of such voluntary overtime. The claimant considered that his questions raised in respect of the guaranteed overtime entitlement remained outstanding.
11. The claimant told me that at no time did he agree to the changes to his guaranteed overtime entitlement. He continued to work his overtime hours because he had a contractual obligation to do so. He followed the respondent's grievance procedure, raising the matter informally and thereafter raising a grievance on 18/10/2016 and an appeal on 17/12/2017. Ms Powell confirmed during her evidence that she considered that the claimant had properly followed the respondent's internal grievance procedure. At no time was the claimant requested to sign a new contract signifying his agreement to the new terms.
12. From 3 July, the claimant was paid for his 12 hours guaranteed overtime at his standard rate. He also received a lump sum from the respondent of £4272 that the respondent transferred directly into his account along with

his normal salary. During the hearing the respondent was unable to provide any breakdown of this lump sum. No breakdown of this figure has been provided to the claimant. The additional payment was calculated by reference to previous years' figures and is likely to contain payments in respect of both guaranteed overtime and additional voluntary overtime.

Determination

13. Guaranteed overtime simply means overtime that an employer is contractually obliged to offer to the employee and the employee is contractually obliged to work. It is different from 'normal' or 'voluntary' overtime, where the employer is under no obligation to offer the additional hours and the employee is under no obligation to work those extra hours. Guaranteed overtime is created by a contractual agreement between the parties and that contractual agreement can be changed in the same way as any other contractual agreement between the parties. Although the claimant in this case has an employment tribunal decision confirming his entitlement to guaranteed overtime, this does not confer any special or protected status on that contractual entitlement.
14. The first question on whether or not the claimant's terms and conditions incorporated the collective agreement. In considering this particular question, I refer to the judgment of EJ Pearl of 16 March 2018 in the case of Jenkins and others v Tesco Stores Ltd, that is attached at schedule 1 to this judgment. This is a fully reason judgment that was produced after a 10-day hearing by a full tribunal. It is not binding on me, but it considers the same circumstances in respect of the question of incorporation of this particular collective agreement. It has been helpful in deciding this issue as it clearly sets out the history between the respondent and the Union at paragraph 14 onwards. The Employment Tribunal's conclusion within the Jenkins judgement was that the partnership agreement between Tesco and USDAW has been incorporated into the employee's contract. The claimant accepts that the partnership agreement validly changes the overtime rate, in respect of his normal overtime, i.e. overtime in excess of his 20 hours guaranteed entitlement. For the same reasons as set out in paragraphs 49 to 54 of the Jenkins judgement, I find that the partnership agreement is incorporated within the claimant's terms and conditions of employment.
15. The pay review agreed between the respondent and USDAW, for reasons explained within the respondent's booklet, reduces overtime payments from the claimant's previously 1.5 entitlement to single normal salary. This effects the claimant's 12 hours of non-Sunday guaranteed overtime. There was no distinction within the USDAW agreement between different types of overtime. The agreement is said to apply to all overtime for the affected employees. There is nothing within the claimant's previous contractual arrangement for guaranteed overtime or the agreement that guaranteed overtime would be paid at 1.5 times his normal rate, that protects this contractual guaranteed overtime from the rate change as imposed by the collective agreement. The claimant is one of the unfortunate employees in the minority that is left worse off by the collective agreement. I am unable to

find any basis for the claimant's claims that the guaranteed element of his overtime should be protected from the USDAW collective agreement, reducing the rate for paid overtime.

16. As I have found that the collective agreement is incorporated into the claimant's terms and conditions there is no need for individual agreement and in my judgment the claimant's claim fails at this point. However, if I am wrong and the partnership agreement is not incorporated, I go on to consider whether or not there has been individual agreement or affirmation of the new contract on the part of the claimant.
17. I accept the claimant's evidence that he questioned the treatment of his guaranteed overtime at the initial meeting. There is confusion in respect of the exact timescale of some of the respondent's responses however, the respondent agrees that the claimant had followed the correct grievance process. The claimant issued proceedings on 12/06/2017 having followed the ACAS dispute resolution process. The claimant continued to work overtime, but considered that he had a contractual obligation to do so and I accept his oral evidence that he did so under protest. I note the payment was received by the claimant however, the respondent paid this alongside salary and even as of the date of the hearing, was unable to provide any breakdown in respect of the amount paid that is attributable to the claimant's guaranteed overtime hours.
18. There was no updated contract provided by the respondent to the claimant, unlike the Jenkins cases as heard within London Central Employment Tribunal. There was no express agreement on the part of the claimant. I conclude, that in these particular circumstances, the claimant protested against the deductions and there was no agreement on his part. I find there was no affirmation on his part. However, in light of my finding that the collective agreement has been incorporated, this finding of lack of individual agreement does not assist the claimant and for this reason the claimant's claim is dismissed.

Employment Judge Skehan

Date: 10/07/2018.

Sent to the parties on:

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For the Tribunal Office