# EMPLOYMENT TRIBUNALS

**Claimant:** **Respondent:**

**Mr A Pachowka** **Tesco Stores Ltd**

**v**

**Heard at:** Reading **On: 4 December 2017**

**Before:** Employment Judge Milner-Moore

**Appearances**
**For the Claimant:** In Person
**For the Respondent:** Mr Anderson (Counsel)

## JUDGMENT

1. The claim of unlawful deduction from wages fails and is dismissed.

## REASONS

1. The claimant brought a claim of unlawful deduction from wages. Following a case management hearing before Employment Judge Gumbiti-Zimuto it was identified that the following issues arose for determination in respect of that claim:
   1.1. Was the claim presented within the statutory time limit under section 23 of the Employment Rights Act 1996?
   1.2. Did the respondent pay less than the amount properly due to the claimant on any occasion?
      1.2.1. Did the respondent fail to pay the claimant correctly in relation to the Sunday premium throughout his employment?
      1.2.2. Did the respondent deduct pay for rest breaks at an incorrect rate – deducting them at premium rate when the claimant's rest breaks were taken outside the period of premium pay?
      1.2.3. Did the respondent fail to pay the claimant correctly in relation to his March 2016 bonus, the deduction complained of is £18.99?
      1.2.4. Did the respondent fail to pay correct amounts of sick pay/statutory sick pay in or around March /April 2017?

2. Employment Judge Gumbiti-Zimuto ordered the respondent to provide a schedule of the payments due to the claimant and the payments made during his employment, with an explanation of how those payments were calculated. The respondent does not, it appears have a separate record of the hours worked by the claimant. Accordingly, in preparing the schedule the respondent has relied on the hours of work reported by the claimant. Having prepared its schedule, the respondent had initially calculated that it had made an overpayment to the claim of £706.35. The claimant was required to provide a response indicating where the schedule was disputed by the claimant. After considering that response, the respondent adjusted the spreadsheet but continued to maintain that the claimant had been overpaid, though by a lower figure £298.52.

3. In calculating the claimant's pay on this adjusted spreadsheet, the respondent has applied the following principles:

   3.1. The unpaid 90-minute rest breaks taken by the claimant are treated as having occurred between 00:00 and 06:00 am (the period during which the higher rate night time premium was paid)
   3.2. The Sunday premium (time and a half) was applied to base pay only (i.e. the night premium /location pay was not added before the Sunday premium multiplier took effect). The deduction of location pay represented a change of position on the respondent's part as location pay had been included in the Sunday premium calculation in the first spreadsheet.
   3.3. The Sunday premium was applicable to hours worked during Sunday only (i.e. it did not continue past midnight on Sunday in to Monday morning).

4. The claimant disputes these principles and maintains that he is owed £3,928.95 by the Respondent because the respondent has erred in calculating his pay in the following respects:
   4.1. He maintains that his breaks should have been deducted at the rate applicable to the time at which the break was taken and that some of his break was taken before midnight;
   4.2. He maintains that the Sunday premium multiplier should have been applied to his pay after Night time premium rates had been added should be included in the relevant figure;
   4.3. He considered that Sunday premium should have been payable for all hours worked during a shift which included Sunday. So, for a shift beginning at 21:00 on Sunday and ending at 06:00 on Monday morning he should have received Sunday premium not only for the hours between 21:00 and 24:00 on Sunday but also for the hours worked from 00:00 to 06:00 on Monday).

**Preliminary issues during the hearing**

5. On reviewing the claims and issues with the claimant at the start of the hearing it became apparent that the claimant was also pursuing a claim

that he had been underpaid holiday pay. I considered whether an application for leave to amend was necessary but concluded that it was not. The form Et1 submitted by the claimant made a reference to holiday pay being underpaid, though the amount in question was not specified. Although holiday pay was not identified in the list of issues drafted by EJ Gumbiti Zimuto there was nothing in the order to indicate that the claimant had withdrawn or abandoned this aspect of his complaint. I bore in mind that the claimant was a litigant in person and that English was not his first language. I also noted that the claimant's witness statement indicated that he considered that he had been due 8 days holiday in March 2016 but had been paid only for 4 days. The respondent was therefore on notice of the complaint being advanced regarding holiday pay. Mr Anderson accepted that it was a matter that Mr Devereux would be in a position to address in evidence.

**Issues after the hearing**

5.1. The claimant sent in further documents after the conclusion of the hearing. They had not been copied to the respondent and it was not clear why they were relevant and/or had not been produced during the hearing. I therefore directed that a letter be sent to the claimant advising that the documents would not be considered until he had explained why they were relevant, why the material could not have been adduced at the hearing and confirmed that he had taken steps to copy the material to the respondents. The claimant did not respond. I have not therefore considered the further materials

**Evidence**

6. I received a trial bundle of documents prepared by the respondent and a separate smaller bundle prepared by the claimant. The claimant gave evidence in support of his case with the assistance of an interpreter. Mr Devereux, who works as a wages clerk for the respondent, gave evidence for the respondent. The respondent also prepared an update to the schedule of pay entitlements/payments and some written submissions.

**Factual findings**

7. The claimant began working for the respondent on 26 May 2015 as a customer assistant working night shifts. His core contracted hours were 22.50 hours per week but he could be required to work up to 36.5 hours per week. The claimant signed a form on 26 May 2015 acknowledging receipt of the "Tesco Colleague Handbook" (p92) and recording as follows

"*I have received my copy of the Tesco colleague handbook. I understand that it is my responsibility to familiarise myself with the contents which form part of my terms and conditions of employment*"

8. The next day the claimant was sent a letter of appointment recording the key terms of his employment in an information sheet (pp93-94). The

information sheet recorded that his salary for his core contracted hours would be

"*Company base pay - £157.98*
*# Night Pay 1: - for hours worked between 10pm and midnight - £9.00*
*# Night Pay 2: - for hours worked between midnight and 6 am - £29.84*
*# Sunday premium: - £10.54*

*Gross Weekly Pay £207.36*
*(i.e. your weekly pay before deductions)*

*# These payments are made according to hours worked and the eligibility rules.*
*If you currently receive Location Pay you should be aware that this pay element is reviewed annually and may be removed with notice based on changing market conditions*

*Any flexible additional hours you work will be paid on top of the pay stated above. If any of these hours are classed as premium hours they will also attract the appropriate premium payment. Details of the premium hours will be found in your staff handbook.….*

*…..*
*Your salary will be paid four-weekly into your bank or approved building society account.*

*Your core contracted hours of work will be 22.50 per week.*
*Your core contracted hours of work will be:*

*SUNDAY 21:00 06:00*
*MONDAY 21:00 06:00*
*TUESDAY 21:00 06:00*"

9. The handbook states *"your offer letter and contract will refer you to this handbook for more details. That is because specific parts of the handbook make up your contract of employment".* The handbook contained a table setting out the rates of payment for working on Sundays, Bank Holidays, Overtime and the early and late Night Premium rates. The rates varied according to the date on which employment commenced. The provisions of the handbook explained the rates of pay as follows (p57):

| | |
|---|---|
| '***Sundays*** – | *Time and a half* |
| ***Night Premium payments -*** | |
| *For hours worked between 10pm - 12 midnight* | *£1.47 per hour* |
| *For hours worked between 12 midnight - 6 am* | *£2.18 per hour* |
| *(For hours worked Sunday midnight to 6 am the Sunday premium also applies.)"* | |

In fact, by the time the claimant began work in 2015, the rates for the Night premium were £1.50 and £2.21 respectively.

10. The handbook also explained that some staff also received "location pay" which was an additional hourly amount paid to reflect recruitment and retention difficulties in specific areas. The handbook noted that this payment was reviewed annually and could be added or removed each year depending on changing market conditions in the location. The claimant's pay included an element of location pay at £0.45 per hour (p56).

11. From the claimant's letter of appointment (read with the handbook) the following information regarding hourly rates of pay and the number of hours that attracted each rate of pay can be deduced.
    11.1. The claimant's hourly "base pay" was £7.02 (£157.98 divided by 22.5 hours). However, this letter did not specify the amount of location pay to be received by the claimant, although he received £0.45 an hour as location pay.
    11.2. The additional amount stated to be payable to the claimant each week by way of Sunday premium was £10.54 (i.e. his basic rate of £7.02 x a half x 3 hours). This was because only three of the claimant's core hours were worked on a Sunday (from 21.00-24.00).
    11.3. Six hours were paid at the early Night Time premium rate (2 hours per day x 3 days per week x £1.50 = £9.00)
    11.4. 13.5 hours were paid at the late Night Time premium (4.5 hours per day (i.e. 6 hours minus the 90-minute break) x 3 days per week x £2.21 = £29.84).

12. The claimant's pay slips set out the elements of his pay separately. So, for example, his 5th June 2015 pay slip details that he was being paid as follows for his usual 3-day shift pattern plus one day of over time. (This amounts to 30 hours paid work and 6 hours unpaid breaks):

| | |
|---|---|
| "*Basic Pay -* | *£210.64" (*£7.02 basic pay x 30 hours) |
| *Location pay -* | *£13.51*" (0.45 location pay x 30 hours) |
| *Early Night Prem 22:00- 00:00* | *£12:00"* (£1.50 early night premium x 8 hours |
| *Sunday Prem* | *£11.21"* (£7.47 [£7.02 plus £0.45 location pay] x 0.5 x3 hours) |
| *Late Night prem 00:00 – 06:00* | *£39.78" (18 hours [i.e. 6 hours-1.5 hours for unpaid breaks per day] x 4 days x £2.21)* |

13. The respondent has maintained, in preparing the revised schedule, that location pay should not be included in the base rate to which the Sunday premium was applied. However, that does not, in fact, seem to be borne out by the evidence given by the respondent's witness, Mr Devereux, at paragraph 13 of his statement (where he says that night premium is excluded but makes no mention of location pay as excluded) or at paragraph 16 and 19 of his statement, where he sets out specimen calculations of Sunday premiums in which location pay forms part of the

total rate to which the Sunday premium is applied. The claimant's pay slips also indicate that the Sunday premium was in fact applied to the basic rate plus location pay.

14. The respondent's spreadsheets showed that the claimant worked 558 hours on Sunday and that this element of his pay amounted to £2168.55 in total, if location pay is included, and £2042.98, if it is deducted; a difference of £125.

15. The claimant signed a further document headed "*Terms and Conditions of Employmen*t" and dated 14 January 2016 which reiterated that his core hours were 22.5 hours per week but recorded that his "*total rate of pay for core hours will be £234.96 per week*". (This amounts to £7.47 an hour (i.e. basic pay of £7.02 an hour plus location pay of £0.45 an hour). It went on "*Flexible additional hours will be paid at the hourly rate of £7.47 unless these hours are classed as premium hours" where you will be paid the appropriate premium payment. Details of premium hours are found in your staff handbook*". The terms and conditions also referred the claimant to the staff handbook for relevant provisions dealing with sick pay, holiday pay and grievances.

16. These rates of pay were subject to annual review. In February 2016, the claimant's basic pay increased to £7.39 (£7.84 including the location pay). In July 2016, the basic rate of pay increased to £7.62 (£8.07 including location pay). Also in 2016, the pay review resulted in various changes to pay arrangements which were summarised in a note to staff (pp106 to 110). The changes were agreed following negotiation with USDAW the recognised Trade Union. Not all of the changes affected the claimant but he was affected by a change to the way that the night premium was paid. The respondent withdrew the early night premium rate. From 3 July 2016, a single night time premium was payable at a rate of £2.21 per hour during the period of midnight to 06.00 am.

17. An information note (pp124-125) provided a further explanation of how the night time premium operated. Some transitional arrangements were adopted so that staff who were disadvantaged by the changes received a one-off lump sum equivalent to 18 months' worth of any drop in pay which resulted from the changes. The claimant received a one-off payment of £263.00 in his July 2016 pay to reflect these transitional arrangements. I do not understand the claimant to be complaining of unlawful deduction from wages in respect of the removal of the early night premium rate. However, it is evident that any loss that he suffered as a result of that change would have been fully compensated by the one-off payment, given that he left the respondent's employment on 23 March 2016, before the end of the 18-month period.

18. The staff of the respondent also received something called a "Turnaround Bonus". A set of Q and A (pp72-77) accompanying the announcement of the 2015/2016 bonus stated that the bonus was 5% of your "*eligible earnings*" in 2015/2016. Eligible earnings "*include your base pay and will include other payments e.g. overtime. There are some elements that are*

*excluded, one off payments e.g. structure changes, share payments, cash bonus payments etc."* The claimant received a Turnaround bonus for 2016 of £701.37 which was detailed on his payslip issued on 3 June 2016 (p115). This sum was calculated without including the location pay that the claimant received. If the claimant is correct in arguing that the location pay should have been included in his eligible earnings then his Turnaround bonus was £18.99 less than it should have been.

19. A policy on "Working Hours" set out the terms relating to rest breaks. Rest breaks were unpaid. A person working in one of the respondent's stores for a shift of 9 or more hours was entitled to a break of 90 minutes. Mr Devereux's evidence was that the respondent's system is set up to assume that those working 21.00 to 06:00 will take their break in the period 24.00 to 06:00 (on the basis that someone starting work at 21:00 is unlikely to want to take a break within a few hours of starting work). For that reason, the respondent has calculated the claimant's pay on the assumption that 90 minutes of the period between 00:00 and 06:000 was unpaid leave.

20. The claimant maintains that he took 45-minute break at 11.30 and then a second break later in the night. However, there is no evidence of this. The respondent's evidence is that it was open to the claimant to "clock in" in the event that he wished to have a precise record of his start and finish times and of the precise timings of the breaks that he took during his shift. Although the claimant disputes this, I accept the respondent's evidence that the claimant was told that he should use the clocking system to record his breaks if he wished the respondent not to follow its normal approach. The claimant did not, however, use the clocking system for this purpose.

21. The respondent's holiday year ran from 1 April until 31 March. The claimant maintains that a deduction from pay was made because in the holiday year ending on 31 March 2016 he was entitled to 8 days holiday but took only 4. Having reviewed the claimant's pay slips again Mr Devereux accepted that that the claimant was owed three days' annual leave for that year.

22. The claimant was entitled to receive contractual sick pay for periods of sickness absence, save that the first three days of each absence were unpaid. The contractual sick pay entitlement increased with length of service. A person with between one and two years' service was entitled to two weeks sick pay and thereafter to SSP for up to 28 weeks. The claimant was signed off as not fit to work between 1 February and 20 March 2017. The claimant resigned from his employment on 15 March 2017 and his last day of service was 23 March 2017.

23. The claimant says that he made informal complaints regarding his pay from the start of his employment but was told by his managers that it was correct. He said that they reacted with hostility to his raising concerns and suggested that he should resign. He was advised by a colleague to bring a grievance regarding is manager's response. However, he did not do so.

The claimant's evidence was that, as a result of his manager's hostility, he did not feel able to bring a Tribunal complaint.

24. Although the claimant remained dissatisfied with the response that he received but it was not until 2017 that he raised any complaint regarding his pay. On 18 February 2017 and 9 April 2017, the claimant submitted grievances alleging that his pay slips were unclear and that his pay had not been correctly calculated in various respects. It is not straightforward to discern what the claimant's complaints were but I understand him to have alleged that he had been underpaid because:

    24.1. it had been assumed that he had taken all of his rest breaks during the period of night premium when this was not in fact the case;
    24.2. that his night premium had not been counted when the Sunday premium was added to his pay;
    24.3. that he should have received Sunday premium for the hours between 00:00 and 06:00 on Monday morning
    24.4. his Turnaround bonus should have been £720 rather than the £701 he received;
    24.5. he had received less than the proper entitlement to Holiday pay due to him; and
    24.6. he had not received all the sick pay due to him

25. The respondent investigated those grievances and concluded that there had been errors in his sick pay. There had been an overpayment to the claimant in as he had should not have been paid at all for the first three days of sickness absence (3-5 February 2017) but had been paid his night time and Sunday premium payments for those days in error (this amounted to an overpayment of £122.25). Thereafter he had received two weeks company sick pay and then SSP. However, the respondent then failed to pay the claimant for his last three days of sickness absence (17-19 March 2017) because a fit note had gone missing and the absence had been characterised as unauthorised absence rather than sick leave. The respondent made a further payment to the claimant on 1 May 2017 to pay him for 17-19 March 2017 and calculated the amount due as £233.36. However, from that sum the respondent deducted the amount overpaid for the period 3-5 February 2017 (£122.25) so that the claimant received an additional payment of £111.11 (p171). In fact, when making this final payment, the respondent made a further payroll error, this time in the claimant's favour, as it paid sick pay at contractual sick pay rates and also included the relevant premiums. In fact, the claimant was only entitled to SSP rates because he had by that stage exceeded the contractual sick pay entitlement given his length of service.

## Legal principles

26. Sections 13-27 Employment Rights Act 1996 ("ERA") set out the rights and remedies available where an unlawful deduction is made from an

employee's wages. An unlawful deduction is made whenever an employee receives less than the wages properly payable on any given occasion. The ERA provides that certain types of deduction are exempted and the recovery of sums in reimbursement of an employer who has made an overpayment of wages or expenses to an employee is one such exception.

27. In order to determine what wages that are "properly payable" it may be necessary for a Tribunal to determine disputed matters as to the proper construction of the employment contract in accordance with ordinary contractual principles. The approach to be adopted by a court when interpreting a contract is summarised by Lord Hoffman in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896

*"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

28. One of the established principles of contractual interpretation is that, where there is ambiguity, such ambiguity should be resolved against the interests of the drafter of the contract.

29. Section 23 ERA establishes that a complaint regarding an unlawful deduction from wages must be made within the statutory time limit which runs from the date on which the deduction was made or, where there has been a series of deductions, from the last such deduction. The statutory time limit is three months (though that period will be extended by operation of the statutory provisions relating to pre-claim ACAS conciliation). The decision in **Bear Scotland ltd v Fulton and Others**, to which I was referred by the respondent's representative, establishes that whether there has been a series of deductions is a factual question but a "series" will require sufficient factual similarity between the deductions and sufficient regularity. A gap of more than three months between deductions will break the series. The statutory time limit may be extended where an individual can satisfy a Tribunal that it was "*not reasonably practicable"* to bring a complaint within the time limit and that the complaint was brought within a reasonable period (section 23(4) ERA). The onus of demonstrating that it was not reasonably practicable to comply with the time limit falls on the claimant.

30. Section 25(3) ERA provides that an employer "*shall not under section 24 be ordered by a Tribunal to pay or repay to a worker any amount in respect of a deduction or overpayment, or in respect of any combination of deductions or payments in so far as it appears to the Tribunal that he has already paid or repaid any such amount to the worker*"

## Conclusions

**Did the respondent fail to pay the claimant correctly in relation to the Sunday premium throughout his employment?**

31. I have concluded that this aspect of the claim for unlawful deductions fails. The claimant is incorrect in asserting that Sunday premium should be paid for hours not falling on a Sunday. The natural and ordinary interpretation of the letter of appointment is that Sunday premium is just that, an additional payment applicable to hours worked on Sunday. There is no basis for the construction that the claimant argues for, that hours worked on a Monday morning should be included in the Sunday premium because the shift began on a Sunday. Such a construction is also inconsistent with the calculation contained in the letter of appointment which showed the calculation of the Sunday premium for the claimant's shift pattern and from which it can be deduced that the Sunday premium was paid only for the three hours worked which fell on Sunday.

32. The claimant relies on the following words of the handbook *"(For hours worked Sunday midnight to 6 am the Sunday premium also applies.)"*. These words are an explanatory gloss dealing with the payment of night time premium. Although the point could be more clearly put, I consider that viewed objectively, when read in the context of the letter of appointment, these words would not be understood by a reasonable person as indicating that a shift which straddles the hours of midnight on Sunday and ends at 6 on Monday morning would attract Sunday premium for the hours worked on Monday morning. Rather it is intended to indicate that the hours from 00:01 on Sunday (with Sunday midnight being used as a shorthand) until 6:00 am Sunday morning will receive both the Sunday premium and the night time premium rate.

33. The claimant is also incorrect in asserting that the Sunday premium should be calculated by reference to the basic rate of pay plus night premium. The calculation in the letter of appointment makes clear that the night premium is <u>not</u> included in the rate to which the Sunday premium multiplier is applied

    33.1. The claimant's hourly "base pay" was £7.02 (£157.98 divided by 22.5 hours).

    33.2. The additional amount to be payable to the claimant each week by way of Sunday premium was £10.54 (i.e. his basic rate of £7.02 x a half x 3 hours).

34. I also consider that the handbook terms indicate that the night premiums are not to be included in that base rate. The handbook says that work on a Sunday will be paid at "time and a half" but then goes on to state, following an explanation of the night premium rates that *"(For hours worked Sunday midnight to 6 am the Sunday premium also applies.)"*. I consider that viewed objectively the phrase "Time and a half" would be taken to mean "the ordinary base rate of pay plus a half". Furthermore, if the night time

premiums were intended to be included in the base rate to which the Sunday premium multiplier was applied (i.e. they were regarded as part of the standard "Time" rate which was to be multiplied by a half) the words "*For hours worked Sunday midnight to 6 am the Sunday premium also applies"* would be unnecessary. It would be sufficient simply to say that the Sunday premium was "Time and a half".

35. The respondent's change of position as to the relevance of location pay in calculating the Sunday premium is somewhat surprising. Mr Devereux's evidence was that location pay was included in the calculation of Sunday premium and that appears to be borne out by the claimant's pay slips. However, in preparing its revised schedule and in its submissions the respondent has taken the position that location pay should not have been included and that this element makes up part of the £298.52 said to have been overpaid to the claimant. In doing so the respondent relies on the fact that location pay is not referenced in the Sunday premium calculation contained in the letter of appointment. However, I do not consider that the respondent is correct in its stance. The letter made no mention of the claimant's location pay at all and so it is unsurprising that it was not included in the calculation of Sunday premium. It is evident from Mr Devereux's evidence and from the pay slips that the respondent did, in practice, treat location pay as included for the purpose of calculating the Sunday premium. Location pay also formed an essential part of pay for core hours. That much is evident from the terms and conditions document signed by the claimant on 14 January 2016 which stated that the "*total rate of pay for core hours will be £234.96 per week*" (This amounts to £7.47 an hour (i.e. basic pay of £7.02 an hour plus location pay of £0.45 an hour). "*Flexible additional hours will be paid at the hourly rate of £7.47 unless these hours are classed as premium hours" where you will be paid the appropriate premium payment. Details of premium hours are found in your staff handbook*". The natural interpretation of this document is that the location pays forms part of the "total rate" to which premium rates will be added/applied. I therefore consider that the respondent is incorrect to suggest that, in including location pay in the calculation of Sunday premiums, it made an overpayment to the claimant. I have calculated that the amount referable to the inclusion of location pay in the Sunday premium calculation amounts to £125 (558 hours x £0.45 x a half). Accordingly, the respondent is incorrect in having calculated that it has made an overpayment of £298.52. The correct figure is £298.52 -£125, i.e. £173.52.

**Did the respondent deduct pay for rest breaks at an incorrect rate – deducting them at premium rate when the claimant's rest breaks were taken outside the period of premium pay?**

36. I have concluded that this aspect of the claim for unlawful deductions fails. The respondent made an assumption that breaks would be taken during the period when the higher late-night time premium rate was payable. That assumption is evident from the calculation set out in the claimant's letter of appointment Although the claimant's three-day shift pattern covered 18

hours falling within the period when the late-night time premium was payable, the calculation showed that the claimant would receive the premium for only 13.5 hours (£29.84 / £2.21 = 13.5). This reflects the deduction of 4.5 hours for unpaid breaks (1.5 hours x 3 days per week).

37. The claimant was told during his employment that if he wished to have pay deducted to reflect the exact timings of his breaks he should use the clocking system. He did not do so. The respondent had no evidence to suggest that the claimant was not taking his break between midnight and 06:00 am. I consider that the respondent was reasonable in following its usual practice and that the claimant has not shown that the deduction for breaks was made at an incorrect rate.

**Did the respondent fail to pay the claimant correctly in relation to his 2016 bonus?**

38. I consider that location pay should have been included in the calculation of the turnaround bonus. The published documents were ambiguous about which elements of pay were included and which were excluded for the purpose of calculating the 5% Turnaround Bonus. The announcement to staff stated that the calculation would "*include your base pay and will include other payments e.g. overtime. There are some elements that are excluded, one off payments e.g. structure changes, share payments, cash bonus payments etc.".*

39. I consider that an objective reader would understand the bonus to be calculated by reference to basic pay and any other payments that were part of the individual's regular pay, but to exclude payments that were one off or were not directly related to pay. On that basis, one would expect location pay to be included. It was not a one-off payment and it was not a payment that related to something other than pay. It formed a regular part pf the claimant's salary. The 14 January 2016 statement of terms and conditions signed by the claimant includes the location pay when describing his "*total rate of pay"* for his core hours. Although the Respondent may have reserved the right to review and withdraw location pay, I do not consider that this made it analogous with the types of "one off" payment listed as excluded for the purpose of calculating the turnaround bonus. After all the respondent could withdraw overtime working but overtime payments were included in the calculation of the turnaround bonus.

40. However, although I have concluded that location pay should have been included in the bonus calculation, this aspect of the claim for unlawful deductions fails nonetheless. First, the inclusion of location pay would only have increased the bonus by £18.99 and, given that the claimant has been over paid by £173.52, the claimant has not in fact suffered a deduction from wages. Second, this element of the claimant's complaint was presented out of time and I have concluded that the time limit should not be extended. The Turnaround bonus was paid to the claimant on 3 June 2016 (p115). Any complaint to the Tribunal should have been made

within three months of that date (subject to any extension of that period to allow for ACAS conciliation) so should have been made by 13 November 2016 at the latest. The claim form was presented in May 2017. For the reasons set out below in connection with the claimant's complaint regarding holiday pay, I consider that it would have been reasonably practicable for the claimant to have brought his complaint within statutory time limits and that he has not, in any event, brought his claim within such further period as was reasonable. Accordingly, there is no jurisdiction to hear this complaint.

**Did the respondent fail to pay correct amounts of sick pay/statutory sick pay in or around March /April 2017?**

41. I have concluded that this aspect of the claim for unlawful deductions fails. The respondent accepts that it made an error in failing to pay for the final three days of the claimant's service. However, that error was corrected and the claimant has since been paid for those days and, indeed, paid at a higher rate than was due to him. It is not possible to discern from the claimant's schedule or his witness statement what, if anything, he considers to be owed to him by way of sick pay. I therefore conclude that the claimant has failed to establish that there has been an unlawful deduction from wages in relation to sick pay.

**Holiday pay/Time limits**

42. The claimant's complaint regarding holiday pay relates to the holiday year 2015/2016 ending on 31 March 2016. There is no evidence to suggest that the claimant was prevented from taking holiday due to sickness or any other circumstance beyond his control. Nor is this a case where the failure to pay holiday pay can be regarded as forming part of a series of deductions because holiday pay has been paid at an incorrect rate. Accordingly, any unlawful deduction complaint in relation to the holiday pay owed should have been brought within three months of 31 March 2016 (again subject to extension to allow for ACAS conciliation). The claim was not presented until 31 May 2017. The claimant suggest that he was deterred from bringing a claim earlier due to the hostility that he experienced from his managers as a result of querying his pay. The question is whether it was reasonably feasible for the claimant to bring Tribunal proceedings despite his concerns about how this might be regarded by his managers and his concern that it might endanger his employment.

43. I have concluded that it was reasonably feasible for the claimant to have brought his complaint within the time limit and that he did not in any event bring his complaint within such further period as was reasonable. The Tribunal frequently hears claims from individuals who are bringing complaints against their current employers, despite concerns that this may cause resentment or endanger their position in the workplace. The fact that the claimant was concerned about management hostility did not mean that the bringing of a claim was not reasonably feasible. There is statutory protection for individuals who do bring ET proceedings to enforce their statutory rights. Furthermore, I note that the claimant felt able by February

2017, to submit a formal grievance regarding pay and, even if he had felt unable to do so previously, he could have commenced proceedings in February 2017 when he filed his first grievance. He did not do so and has not explained that failure. He has not therefore brought his complaint within such further period as was reasonable.

44. The claimant's claim for unpaid holiday was therefore lodged outside the statutory time limits and there is no jurisdiction to hear that complaint.

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Employment Judge Milner-Moore

Date: 28 February 2018

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office