

# Can a right to pay during suspension be implied into the contract of a bank worker where that contract is silent?

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No, held the EAT in *Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust EA-2020-000413-VP*, concluding there was no basis upon which to imply such a term. The judgment was handed down by HHJ Auerbach on 24 September 2021.

## Summary of facts

1. The Claimant was part of a 'bank' of workers for the Respondent and was only paid for the assignments he undertook. He was suspended from the bank whilst he was investigated for misconduct between 22 January 2018 and 9 May 2018. The effect of this suspension was that he was not eligible for assignments during this period.
2. He brought a claim for unlawful deduction from wages during the suspension period. He contended that there was an implied term that he should be paid average wages during his suspension, so long as he could work.

## First instance decision

3. Employment Judge Hyams determined that there was no such implied term and, as such, the claim for unlawful deduction from wages failed.
4. The Claimant argued that where there was no express term in a contract, it is custom and practice that a worker should be paid whilst suspended, relying upon the reasoning in *North West Anglia NHS Foundation Trust v Gregg* [2019] ICCR 1279 at [54]. EJ Hyams distinguished *Gregg* on the basis that the terms of his contract were clear that he was entitled to be paid during suspension, whereas the Claimant's contract only allowed him to be paid for time fulfilling engagements.

5. Whilst EJ Hyams recognised that the case of *Rice Shack Limited v Obi* UKEAT/0240/17 was similar on its facts to the Claimant's case, he noted that in *Obi* it was conceded that the Claimant was entitled to be paid during suspension. Therefore, it did not assist in determining the Claimant's claim.

## Grounds of appeal

6. The Claimant appealed against the finding of the Employment Tribunal on the basis that it erred in finding that the Claimant, with the status of a bank worker, had no contractual entitlement to an average wage despite there being no provision in his contract to that effect.
7. The Claimant's position was in effect that it is an implied term in all workers contracts (including zero hours and casual workers) that they are entitled to pay whilst suspended, as long as work would otherwise have been available to them.

## Claimant's arguments on appeal

8. The Claimant emphasised that there was no express term addressing the period of suspension in the contract.
9. In looking at whether a term should be implied, it considered that the implied term was of the second type described in *Societe Generale London Branch v Geys* [2013] ICR 117, namely one that was a necessary incident of the relationship concerned. The Claimant suggested that read with *Crossley v Faithful & Gould Holdings Limited* [2004] ICR 1615, it could be concluded that such a term need not be implied simply out of necessity but there was a wider test considering reasonableness, fairness and policy. The Claimant submitted that the proposed implied term surmounted this test.
10. The Claimant submitted that the cases of *Kent County Council v Knowles* UKEAT/0547/11 and *North West Anglia NHS Foundation Trust v Gregg* [2019] ICCR 1279 were illustrations of the proposed implied term in operation, both cases concluding that employees could not have their pay deducted whilst suspended.
11. *Uber v Aslam* [2021] ICR 657 was also relied upon. It was argued that the contract of employment should be interpreted as far as possible to give statutory purpose and protect

vulnerable workers. Therefore, the Claimant's contract should be interpreted to imply a term of payment during suspension.

### **The Respondent's arguments on appeal**

12. The Respondent emphasised the need for there to be legal entitlement to wages properly payable under **s13(3) of the Employment Rights Act 1996**.
13. The Respondent distinguished suspending work for full time employees from denying the opportunity to work for period of time. It contended that it could not be right that the Respondent who was contractually free to decline to offer work, was obliged to pay wages during suspension.
14. It submitted that the case of **Rice Shack Limited v Obi UKEAT/0240/17** gave rise to no binding authority, as the question of whether a right to payment on suspension was implied was conceded.
15. It distinguished **Kent County Council v Knowles UKEAT/0547/11** and **North West Anglia NHS Foundation Trust v Gregg [2019] ICCR 1279** on the basis that they both involved permanent salaried employees. In respect of **Gregg**, it was argued that it did not suggest implying a term but simply indicated where a pay deduction during suspension is not addressed in a contract, then this should not result in a deduction of pay
16. With regard to **Societe Generale London Branch v Geys [2013] ICR 117**, the Respondent contended that the test of necessity was maintained, and the case of **Crossley v Faithful & Gould Holdings Limited [2004] ICR 1615** did not lower this bar.
17. The Respondent submitted that it was neither necessary to read the implied term of payment during suspension into the contract based on the implicit nature of the contract (pursuant to **Liverpool CC v Irwin [1977] AC 230**) nor was it a necessary incident of every employment contract for payment to be made during suspension.
18. With regard to **Uber v Aslam [2021] ICR 657**, it was contended that this was not authority for the proposition that a term for payment during suspension should be implied into all workers' contracts.

## Decision of the EAT

19. HHJ Auerbach confirmed that in order to amount to an unlawful deduction of wages, such wages must be properly payable pursuant to **s13(3) Employment Rights Act 1996**. In determining whether wages are properly payable, the source of such an entitlement can either be an express or implied term of contract.
20. In looking at the totality of the Claimant's bank contract, HHJ Auerbach concluded that his contractual terms were such that being willing and available to work would not be sufficient to trigger an entitlement to wages. Such an entitlement will only arise if the Respondent chooses the Claimant for an assignment and the Claimant chooses to accept. He held that there is therefore a fundamental difference between this type of contract and a 'conventional employment contract'.
21. HHJ Auerbach was not convinced that there was a gap in the express contractual provisions in regards to suspension when looking at the contract as a whole. However, noting that there is a possible gap for an implied term, he went on to consider the arguments in respect of implying a term for pay whilst suspended from bank work.
22. He concluded that case of **Rice Shack Limited v Obi UKEAT/0240/17** did not assist, as it was based on a concession and there was no reason for the EAT to have gone behind that concession.
23. In considering **Kent County Council v Knowles UKEAT/0547/11** he noted that the EAT did not hold that he was entitled to full pay by virtue of implied term but because he was ready, willing and able to work and his contract entitled him to be paid in those circumstances. In **North West Anglia NHS Foundation Trust v Gregg [2019] ICCR 1279** the question was also whether the employee was ready, willing and able to work. It was found that Dr Gregg was suspended from salaried employment where he would ordinarily have been paid. Under his contract he was automatically entitled to play unless there was an express or implied term otherwise. Therefore, these cases could be distinguished from the instant case and do not assist.
24. In **Societe Generale London Branch v Geys [2013] ICR 117**, it was found to be clear from Lady Hale's speech, following **Liverpool CC v Irwin [1977] AC 230**, that the test of implying a term is one of necessity not reasonableness. HHJ Auerbach found that **Crossley v Faithful & Gould Holdings Limited [2004] ICR 1615** had not lowered the

bar. In the instant case, implying such a term would go beyond necessary incident of worker relationships:

*“77. It seems to me that the creation of an implied term, as contended for in this case, would go significantly beyond that which could be rationalised as a necessary incident of all worker relationships, or even a reasonably necessary one, and hence it cannot be supported by the principles of implication that I take from authorities such as Irwin and Geys. It would be of a materially different kind from implied terms, such as the duty of trust and confidence, which reflect features that are inherent in all working relationships, or the term implied in a case such as Geys, which reflects the practically necessary incidents of a notice of termination of employment in every case. Nor do I think that common law principles support the implication of such a term into all worker contracts of the zero-hours or bank types. The introduction of such a term would materially alter the nature of contractual relationships of this type.”*

25. It was noted that **Uber v Aslam [2021] ICR 657** was concerned solely with the statutory concept of a worker and not with distinct question of what terms should be implied into contracts of workers.

26. Therefore, it was held none of the cases relied upon by the Claimant assisted and it would not be appropriate to imply a term that he was entitled to be paid average wages whilst he was suspended; the tribunal was therefore not wrong to conclude that no implied term existed. The appeal was dismissed.

## Conclusions

27. Ultimately, having considered a wealth of case law, the EAT concluded that it could not rationalise an implied term that entitled all workers to payment on suspension.

In essence, the EAT found that where worker’s contract requires something more than being ready, willing and able to work in order to receive wages, a term is not implied that the worker is entitled to be paid on suspension in absence of a contractual provision on the point. Circumstances where something ‘more’ is required are common in bank contract or zero hours contracts, where being offered and accepting an assignment is a prerequisite to wages being properly payable. Therefore, the determination in this case is likely to be found to be applicable across a range of non-conventional working relationships.

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