



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Gee

v

Freightliner Heavy Haul Ltd

Heard at: Cambridge

On: 17 October 2017

Before: Employment Judge M Bloom

Representation

For the Claimant: Mr B Jones, Counsel.

For the Respondent: Mr T Coghlin, Counsel.

RESERVED JUDGMENT

1. The Claimant's claim of unlawful deduction of wages fails and is therefore dismissed.

REASONS

1. The Claimant brought before me a claim of unlawful deduction of wages. He was represented by Mr B Jones of counsel. The Respondent is still the Claimant's employer. They disputed the claim and were represented by Mr T Coghlin of counsel. I have heard evidence on oath from Mr David Wheatley who was employed by the Respondent and at the time of the relevant matters held the position of Production Director. The Claimant did not give evidence although I read his witness statement. I have considered two bundles of documents, one produced by the Claimant and the other by the Respondent.
2. The dispute between the parties is centered around the Claimant's contractual terms and conditions governing his pay. These were set out in a document dated sometime in August 2012 entitled "Driver's Terms and

Conditions". They were agreed between the Respondent and ASLEF the recognised trade union for train drivers. The Claimant is employed by the Respondent as a train driver and has been in their employment since November 2012.

3. Under these terms the basic hours required the claimant to work 1568 hours per annum. Even if a driver worked a lesser amount they were still paid in full for the equivalent of working 1568 hours. Hours worked in excess of 1568 were paid at enhanced rates and were banded based on the number of hours exceeding 1568 per annum. There were five bands of overtime rates, each band increasing in rate every 20 hours over the minimum requirement of 1568. Payments for any hours worked in excess of that figure were paid at the end of each year. In the event of a driver working any "rest day" but the number of hours worked by that driver still being less than 1568 the driver would not be paid any additional sum for working that rest day. Any rest day worked over and above the sum of 1568 hours would be paid in accordance with the appropriate overtime rates.
4. In 2014 the Respondent entered into a round of pay negotiations with ASLEF. I am satisfied that the outcome of those negotiations would determine the rate of the claimants pay thereafter. Central to these negotiations was a proposal that any driver would receive additional pay for any rest day worked regardless of whether they had achieved the required annual number of hours, namely 1568 or not. I am satisfied that the explanation given to me by Mr Wheatley as to the substance of the eventual agreement meant that every driver would receive a payment for a rest day worked in addition to their normal basic pay irrespective of how many hours they worked in a given year. Drivers would be paid a minimum of 1568 hours per year even if they worked less hours than that, and all hours worked on a rostered rest day would be ring fenced and the employee would be paid at the basic rate for those hours irrespective of whether or not they had achieved 1568. This is to the advantage of drivers including the claimant as it means there would be a duplication of pay for any rest hours worked below 1568 per annum. Only overtime worked in excess of 1568 hours would be paid at the enhanced overtime bandings rates. These negotiated changes which were agreed with the union meant that any driver, including the claimant, who did not achieve basic hours of 1568 would effectively receive double pay at the base rate for working rest a day.
5. The claimant was aggrieved because in his opinion for the relevant year (November 2015 - October 2016) he had been underpaid. I set out below the practical effect of his complaint. He raised a formal grievance about it. Formal grievance hearings took place on 10 April and 23 May 2017. They were rejected by the Respondent.

6. The basis of the claimant's grievance was that for the year November 2015 - October 2016 he had worked 2181 hours. That figure is not and never has been in dispute. This represents 613 hours more than the required number of basic hours namely 1568. For the relevant year the claimant had worked a total of 840 rest hours of which 613 took him over the basic number required.
7. Clause 1.4 of the new terms and conditions relating to pay (page 32 of the Claimant's bundle) sets out the hourly rates of pay for the five band of hours worked in excess of 1568.
8. The Respondent paid the Claimant his basic rate of pay for the 1568 minimum number of hours for that year but although, excluding rest days, he had only worked 1341 hours. On top of his basic pay he was paid an additional sum of £22,553 for the 840 rest hours even though 227 of those took him up to the basic number of 1568. He was paid at the overtime rate for all of those 840 hours. Under the old scheme the Claimant would have received his basic pay for 1568 hours and only the enhanced overtime pay for the hours worked over and above ie in this case 613 hours.
9. He was paid the basic rate for 1560 hours plus the overtime rate for all of the rest hours ie 848 hours not the 638 hours worked in excess of the minimum requirement. I therefore accept that under the new scheme the Claimant was better off than under the old scheme.
10. Under the old scheme he would have received a payment of £20,889.86 as opposed to the payment made to him under the new scheme of £22,553.12. In essence therefore he has been paid twice for the 227 rest hours worked below the minimum requirement as they have been paid at both the basic rate and at the overtime rate.
11. The claimant's case is that he should be paid not only at the overtime rate for all of the 840 rest hours worked but in addition he should receive a further sum representing the 613 rest hours worked over and above the basic minimum number of 1568. This would, say the Respondent, result in him being paid twice for the 227 rest hours worked below the minimum number of 1568 and an additional sum for the hours worked over and above at that figure namely the additional 613 rest hours.
12. The Respondent states this is not what the new terms and conditions state or were intended. To resolve this issue my attention was drawn to an important piece of correspondence namely a letter dated 12 June 2014 which sets out a written proposal with regard to the discussions that were

taking place with ASLEF before the final terms of pay were agreed. The relevant extract of that letter stated:-

“We recognise that rest days payment has been a contentious issue. Our proposal is for a new arrangement that works as follows:-

- Whenever you work a rest day we will ring fence that rest day and guarantee that you will be paid for those hours at your basic hourly rate regardless of what happens in the rest of your contract year.
- This rest day payment will be made at four weekly intervals.
- When you get to the end of your contract year we will calculate what your annual overtime payment would have been if you had remained on the original contract – this will include the enhanced overtime rates for hours over contract.
- If through the old contract you would have been paid more for the same amount of hours – FLHH will pay you this difference.”

13. I am satisfied that that correspondence accurately reflects the terms of the revised pay arrangements governing the Claimant’s pay for the year November 2015 – October 2016 namely that all rest days were paid in addition to normal basic pay notwithstanding how many hours were worked either above or below the minimum required of 1568. This resulted in the claimant being entitled to 1,568 hours at his basic rate; a further payment at the basic rate for 227 rest hours worked below the 1568 figure; and an enhanced overtime payment for rest hours worked over 1568 ie 613 hours. This represented the payment made to the claimant of £22,553.12. That was paid in addition to his basic pay. I am therefore satisfied that the claimant was not entitled to any further sum at any enhanced overtime rate for the 227 rest hours worked below the minimum of 1568 hours.

14. In reaching this conclusion I have considered the authority of the Court of Appeal judgment in HIH Casualty and General Insurance Limited v New Hampshire Insurance Co [2001] CLC 1480 with particular reference to paragraphs 83 and 84 of the judgment of Rix LJ. This authority was cited by Mr Coghlin in support of his submissions. In this regard I have given careful consideration to the old terms of payment and how that resulted in rest days and hours worked in excess of 1568 being paid and how those hours and payments were intended to apply in the new terms of pay applicable for the year November 2015 – October 2016. In my judgment it was never intended that the Claimant should be paid at the enhanced overtime rate for

any rest hours worked below the minimum required of 1568. He would be paid and was paid however twice for those hours both at the basic rate and in respect of the payment made for the 1568 basic minimum hours, thus representing a payment for twice the amount of the rest hours worked below the minimum required plus an enhanced payment for hours worked over and above the minimum of 1568. He was thus not entitled to be paid at the enhanced rate for the 227 rest hours as he claimed in addition to being paid for those hours twice at the basic rate.

15. Consequently I conclude that the Claimant was paid the sums due to him correctly. There was no unlawful deduction of the Claimant's wages. This claim therefore fails as is dismissed.

Employment Judge M Bloom

Date: 13 / 4 / 2018

Sent to the parties on:

.....
For the Tribunal Office