



EMPLOYMENT TRIBUNALS

Claimant: Mr T Benn
Respondent: MD Building Services Limited
Heard at: Bristol Employment Tribunal via Video hearing
On: 9 June 2023
Before: Employment Judge Youngs

Representation

Claimant: In person
Respondent: Mr N Darnley, Operations Manager of the Respondent

JUDGMENT

The Claimant's claim for unlawful deductions from wages fails and is dismissed.

REASONS

Claims and parties

- 1) By a Claim Form presented on 26 January 2023, the Claimant brings a claim for unlawful deductions from wages. He claims that he worked in excess of his contractual hours and should have been paid more overtime than he received. The Respondent responded on 6 April 2023, resisting the Claim. The Respondent relies on there being no guaranteed overtime and said that hours worked each month were checked prior to payroll and where additional hours were "confirmed as agreed", the Claimant had been paid.

Procedure, documents and evidence heard

- 2) The hearing was held by video hearing. The Claimant represented himself. The Respondent was represented by Mr Neil Darnley, Operations Manager of the Respondent.
- 3) At the start of the hearing I confirmed and agreed with the parties the issues that I would need to determine, and these are set out below.

- 4) I also confirmed with the parties what documentation the Tribunal had, namely the Claim Form, Response Form, a Bundle from the Respondent, a Bundle from the Claimant and the witness statements, and I confirmed that each party had the same documentation. The parties had each submitted their Bundles late. The Claimant said he felt “wrong footed” by the Respondent’s “considerable delay in providing information” to him. The Respondent confirmed that the Claimant had had their documentation for over two weeks and said that they had had insufficient detail from the Claimant prior to disclosure so could not have been expected to know what dates the Claimant’s claim related to and therefore what information was required. Given the dispute between the parties about timely disclosure, and the Claimant’s statement of feeling “wrong footed” I asked the Claimant whether he was ready to proceed or whether he was saying that it would be unfair to do so. The Claimant confirmed that he was happy to proceed with the hearing. The Respondent had not received the Claimant’s Bundle and therefore I sent it to the Respondent. After confirming that the Respondent had received the Claimant’s Bundle, there was a short adjournment so that the Respondent could review the Claimant’s Bundle. Following the adjournment, Mr Darnley confirmed that the Respondent was happy to proceed and did not require additional time to review the Claimant’s documents.
- 5) The Claimant gave evidence on his own behalf. The Respondent’s evidence was given by Mr Darnley and by Mr Nicholas Tyler, Contract Manager for the Respondent. A witness statement was also submitted by Ms Dawn Dean, the Respondent’s Head of HR. Ms Dean did not attend the hearing and therefore her statement was given little weight.
- 6) I allowed the hearing to run-over its allocated time in order that it not go part-heard. At the end of the hearing, I agreed with the parties that they could provide written submissions, if they chose to do so. The Respondent was given one week to provide their submissions, and the Claimant a further week after that. Both parties sent in submissions on time, and I have taken those submissions, along with the evidence before me, into account in making my decision.

The issues

- 7) The issues to be determined at this hearing were agreed at the start of the hearing as follows:
 - a) Is the Claimant entitled to be paid for overtime worked and/or travel time?
 - b) If so, were the wages paid to the Claimant (between September 2021 and August 2022) less than the wages he should have been paid?
 - c) If so, the Claimant has suffered an unlawful deduction from wages – there was no issue in this case as to whether any such deduction was authorised – therefore how much is the Claimant owed?

- 8) The Claimant confirmed in his witness statement and before me that if he had been paid more than the National Minimum Wage. Therefore the Claim was not brought as a claim for the National Minimum wage.

Findings of fact

- 9) The Claimant was employed by the Respondent from 3 August 2021 to 30 August 2022 as a "Plumber / Multi Skilled Operative" pursuant to a contract of employment dated 16 July 2021.
- 10) The Claimant was a mobile worker and would travel from his home each day to various customer sites to provide work for the Respondent. On occasion he would be required to attend the Respondent's Exeter office.
- 11) It is not disputed that travel from the Claimant's home to the Claimant's first job of the day and travel from the Claimant's last job of the day back to his home could add a significant amount of time to the Claimant's day. All of this time, from leaving his home to returning to his home, was working time within the meaning of the Working Time Regulations 1998.
- 12) The Claimant's contract of employment included the following provisions:

8. Pay:

8.1 Your rate of pay is £27,500 per annum....

10. Hours of Work:

10.1 Your core hours of work on site are Monday to Friday from 8.00am to 5.00 pm. You agree to be at your first place of work / job by 8.00 am and leave the last at 5.00 pm.

10.2. You will be expected to keep your working hours flexible to a reasonable extent, depending on the needs of the business. At times, the needs of the business will require these hours to be modified and you will be expected to vary your hours of work accordingly.

10.3. It is a condition of your employment you must be available to work such additional hours in any week and on any day of the week including 24-hour emergency call-out, work rotas, weeing working or statutory bank holidays as the Company deems necessary for the proper performance of your duties (subject to statutory provision). Overtime working is not guaranteed and any additional payments other than normal basic salary will be paid in arrears.

- 13) The Claimant was not, therefore, paid an hourly rate or by reference to hours worked. He was paid an annual salary. His hours commitment to the

Respondent was not limited to 8.00 am to 5.00 pm Monday to Friday. He had to travel to and from the first and last customer site of each working day, as he was contractually required to be at the first customer site by 8.00 am and then on site (or travelling between sites) between 8.00 am to 5.00 pm.

- 14) The Claimant (and other employees) were therefore required to travel for as long as it took to get to and from the first and last customer sites each day.
- 15) The Respondent's Operations Manager, Mr N Darnley, considered that employees in his region were more likely to have to travel for longer to get to and from their homes to their first and last jobs, compared to employees in other regions. He therefore put in place a "local arrangement" to pay additional pay where travel time from home to the first job of the day and to home from the last job of the day was more than one hour.
- 16) The Respondent used tracker information (from the employees' vehicles and PDAs) to assess travel and working time. The Respondent would reconcile the various data it had, making an adjustment where the data was different from the different devices, and then pay additional time to staff based on additional travel time during the week approximately over and above two hours a day (an hour at the start and an hour at the end of the day). The Respondent exercised discretion as to what it considered to be payable.
- 17) Some staff were unsure as to when they would be paid this additional payment and when they would not. This was raised by an employee at a staff meeting on 15 June 2002, which was attended by the Claimant. At this meeting Mr Darnley loosely described the arrangement he had put in place as staff having to "give an hour" of travel time. There was no written policy and no definitive promise made as to the parameters for when such additional payments would be made. For example, it was not made clear whether the "give an hour" was half an hour each end of the day, a total of one hour even if travel one end of the day was less than half an hour, or an average over the course of a particular period.
- 18) The Claimant gave oral evidence that office workers at the Respondent have told the Claimant that he would be "paid on your tracker", which the Claimant took to mean that he would be paid for all hours recorded by the vehicle tracker from when he first turned on the ignition. I note that the Claimant's witness statement said that he was told that "operatives are paid upon their Satellite tracking devices" and the Claimant's submissions say that he was told that he would be paid on his "van tracker". I find that any such statement was simply "paid on your tracker". The Claimant repeated this emphatically in oral evidence and in cross examining the Respondent. He did not use the phrase "van tracker" in describing statements made to him until making his submissions (after the Respondent's evidence that both the vehicle and PDAs were used to calculate hours for the purposes of additional payments).
- 19) I find that the Respondent did make additional payments referable to travel

time. It calculated those additional payments based on data from both the vehicle trackers and the PDAs used by employees to track their jobs, with a further adjustment based on the employees "giving an hour". In other words, the Claimant thought that "tracker" referred only to his vehicle tracker, whereas the Respondent reconciled information from both the vehicle tracker and the PDA, and it exercised discretion over how that data was reconciled and how that was translated into pay. The PDA data was not before the Tribunal.

- 20) In relation to other overtime, the Claimant, in his written submissions, says that he was told at interview that he would be paid overtime. He does not allege that the basis of such payments was explained to him. This reference to his interview was not included in the Claimant's witness statement and was not put to the Respondent's witnesses. I therefore place no weight on this submission and make no finding that overtime was promised at interview. The contract of employment says that overtime is not guaranteed. There is nothing in the contract of employment that indicates that all hours worked on site over and above the required 8.00 am to 5.00 pm will be paid as additional hours.
- 21) Where overtime needed to be worked to finish a job (as opposed to being travel time), employees of the Respondent were required to seek permission to work late in order to be paid for that additional time. There was no evidence before me of the Claimant not being paid when overtime was approved, or indeed any evidence of overtime being approved.
- 22) It is clear that on occasion the Claimant stayed later on site to finish a job because he felt morally obliged to assist the customer, rather than leave the job to be finished in the morning. There is nothing in the Claimant's contract of employment entitling the Claimant to additional pay in these circumstances.
- 23) The Claimant was paid overtime at various times during his employment with the Respondent. He did not raise issues during the course of his employment with the Respondent about any error in payments relating to approved overtime.
- 24) To clarify, "overtime" in this Judgment refers to hours spent working by the Claimant on sites over beyond the hours of 8.00 am to 5.00 pm. Travel time is dealt with separately. For the avoidance of doubt, I find that travel time is distinct from overtime and treated differently by the Respondent.

The Law

Unlawful deductions

- 25) Section 13 of the Employment Rights Act 1996 ("ERA") provides:

"13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him...

...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

26)The effect is that if an employer pays a worker less than is properly payable under his contract that is deemed to be a "deduction".

27)Section 27 ERA defines wages as including any sums payable to a worker in connection with his employment or other emolument referable to his employment, whether payable under his contract or otherwise.

28)The question for the Tribunal is whether the 'wages' claimed were 'properly payable' which involves consideration of the Claimant's contractual entitlement. Agarwal v Cardiff University [2018] EWCA Civ 1434 confirms that a Tribunal can construe the terms of a contract of employment in determining whether an unlawful deduction from pay has occurred.

29)The burden of proof is on the Claimant to show wages were properly payable and he was entitled to those wages.

Construction of the contractual terms

30)In Investors Compensation Scheme v West Bromwich Building Society [1997] UK HL 28, Lord Hoffman stated:

"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even, as occasionally happens in ordinary life, to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

31)At paragraphs 15 – 17 of Arnold v Britton and others 2015 UKSC 36 Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms stating:

"When interpreting a written contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the

parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffman in *Chartbrook Limited v Persimmon Homes Ltd* [2009] AC 1101, para 14.”

32) Lord Neuberger went on to say that the meaning must be assessed in the light of:

- a) the actual ordinary meaning of the clause;
- b) any other relevant provisions of the contractual agreement;
- c) the overall purpose of the clause and the agreement;
- d) the facts and circumstances known or assumed by the parties at the time the document was executed; and,
- e) commercial common sense.

33) However, subjective evidence of any parties’ intentions should be disregarded.

34) Contracts can be varied either expressly (in writing or orally) or variation can be implied by the parties’ conduct. In *McConomy v ASE plc and another* [2017] EWHC 92 (Ch), the High Court concluded that in order for a contract to be varied, it is necessary to show “a clear and consistent pattern of behaviour” that is inconsistent with the terms of the original contract, and consistent only with the parties having agreed to vary those terms. At paragraph 62 Judge Davis stated that where a party:

“is unable to point to any clear express agreement to vary a particular term or terms, but instead is seeking to establish a variation by conduct it is more difficult in my view to establish that either or both of the parties intended, looking at the matter objectively, a permanent legally binding variation of the contract going forwards, especially in circumstances where it is not entirely clear what the precise terms of the variation are.”

35) In *Wood v Capita* 2017 UKSC 24 the Supreme Court held that a court’s task is to ascertain the objective meaning of the language used in the contract. The court must consider the contract as a whole and depending on its nature, formality and quality of drafting give more or less weight to elements of the wider context. Where there are rival meanings the court can reach a view as to which construction is more consistent with business common sense.

Working time

36) In *Federacion de Servicios Privados del Sindicato Comision Obreras v Tyco Integrated Security SL and anor* [2015] IOCR 1159 the European Court of Justice (“ECJ”) considered the EU Working Time Directive (No. 2003/88) (“WTD”) and defined ‘working time’ as “any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice” (point 1 of Article 2). The ECJ held, in interpreting the WTD, that for workers with no fixed place of work, time spent by employees travelling between their homes and the premises of

the first and last customers constituted “working time” within the meaning of point 1 of article 2 of Directive 2003/88. However, the ECJ stated:

“...it suffices to point out that, even if, in the specific circumstances of the case at issue in the main proceedings, travelling time must be regarded as working time, Tyco remains free to determine the remuneration for the time spent travelling between home and customers.”

37)The EAT confirmed in *Thera East v Valentine [2017] IRLR 878* that the issues of working time and remuneration are separate issues and that the ECJ in Tyco had made it clear that the WTD is not generally concerned with questions of payment for working time. Where a court finds that a period of time constitutes “Working Time”, whether the employee is paid for that time is determined by the provisions of the contract of employment, subject to receipt of the National Minimum Wage.

Conclusions

38)In order to establish whether there had been an unlawful deduction from wages, the first questions to determine are whether the Claimant is entitled to be paid for overtime and/or travel time.

39)The Claimant indicated that he felt that his salary only covered the period from 8.00 am to 5.00 pm each day and he said in his evidence that he was rarely at home at 5.00 pm. It was put to the Claimant that he was paid to ensure that he arrived at his first site at 8.00 am. The Claimant said that there was no evidence of this. The Claimant said that as a mobile worker he should be paid from the minute he turns on the ignition to his vehicle each morning.

40)The Claimant relies on the statement in his contract of employment that “overtime ... will be paid in arrears”. However, this is a truncated version of the provision in the contract of employment. The full sentence says: “Overtime working is not guaranteed and any additional payments other than normal basic salary will be paid in arrears”. The Claimant was paid additional payments in arrears, but the contract does not set out an express right to receive any such payments.

41)The Respondent highlighted that the *Tyco* case is a decision on working time and is relevant therefore to the issue of rest breaks and maximum working time, and not relevant to the issue of what pay an employee should receive. The Respondent says that there is no right to be paid additional travel payments, and no right to overtime worked without the prior approval of the Respondent.

42)I conclude that, save for any rest breaks, all of the Claimant’s time each working day, from leaving his home, to working on site(s), to returning to his home, was working time within the meaning of the Working Time Regulations 1998. However, case law confirms that even where an employee’s ‘Travel

Time' is considered 'Working Time', this does not determine whether the employee has a right to be paid for that time. Whether an employee has a right to receive remuneration for that time is a contractual matter.

- 43) I conclude, applying the relevant law in relation to interpretation of the contract, that the Claimant's contract of employment did not entitle him to receive additional payment for travel time at the start and end of his working day. This is clear from the contract of employment because:
- a) The Claimant was not hourly paid;
 - b) The Claimant's hours were to be flexible if required to meet the needs of the business;
 - c) The Claimant was required to be at his first site by 8.00 am and remain on sites until 5.00 pm, and for that he was paid a salary;
 - d) The effect of the contract of employment is that it requires the Claimant to adjust the time leaves home to ensure he arrives at the first customer site by 8.00 am, and does not guarantee a time by which the Claimant will return home. Any payment for travel to and from the first and last job of the day is covered by the Claimant's annual salary.
- 44) There is the issue of the "local agreement" and whether that entitles the Claimant to a contractual right to be paid for travel time. The Claimant said that he had no clear understanding of whether he would be paid for all of his travel time if, for example, he didn't get home from a job until 9.00 pm. He stated that there was never any clarity as to what would be paid by way of travel time, that his questions about over time were not definitively answered during his employment, that there was no paperwork confirming the position as regards payment for travel time, and that the position was not clear. The Respondent's evidence was that there was no contractual change, but merely an agreement by local management to pay for some travel time, where the Respondent calculated that an employee had spent more than an hour traveling at the start and end of each day. There was no promise to employees as to how this hour was to be calculated, and the Respondent carried out a reconciliation of hours which it says it applied consistently across staff at this site. There is no evidence to the contrary.
- 45) I remind myself of the legal principles set out above as regards amendments to contracts, because a contractual entitlement for the payment to be paid travel time would be a variation to the Claimant's contract of employment. In this case the Claimant is unable to point to any clear express agreement to vary the contractual terms in respect of travel time payments. He acknowledges that there was no such agreement. I conclude that:
- a) there was not a permanent legally binding variation of the Claimant's contract such that he is entitled to claim travel payments for all travel time from his home to his first job or from his last job of a day back home. This was never suggested to have been offered or agreed by the Respondent; and
 - b) taking into account that the terms of the discussions regarding the local agreement for travel time remain unclear, there was not a permanent

legally binding variation of the Claimant's contract such that he is entitled to claim travel payments for all travel time from his home to his first job or from his last job of a day back home less an hour's time each day. It is clear from the documentation reviewed that the Respondent exercises discretion as to what additional payments are made in respect of travel time, and there is no fixed right to be paid according to time recorded by the vehicle tracker information. It is not clear what the precise terms of any purported variation. Further, there was no verbal or other agreement by the Claimant in relation to the local agreement. The Claimant's case was and remains that he should be paid for all travel time and he did not accept or understand the Respondent's position regarding travel time. There was no contractual amendment.

- 46)The Claimant was not contractually entitled to additional overtime or travel payments as claimed.
- 47)In any event, if I am wrong in relation to my conclusion in paragraph 45(b) above, and if the Claimant's contract was varied to entitle him to be paid for some travel time each working day, where travel exceeded a minimum travel time of either half an hour at the start and half an hour at the end of the day or an hour in total at the start and end of each day, the Respondent retained a discretion as regards the calculation of that hour. It took into account data from both the vehicle trackers and the PDAs used by employees to track their jobs, with a further adjustment based on the employees "giving an hour", and made additional payments in accordance with the exercise of that discretion. That discretion being preserved, it follows, therefore, that the Claimant was paid in accordance with the local agreement put in place by the Respondent.
- 48)Whist the main aspect of the Claimant's Claim related to travel time, there was an additional element relating to overtime worked on site. As a matter of contract, payments for overtime worked on sites (as opposed to travel time) were not guaranteed. The contract of employment does not include an express contractual right to be paid for overtime.
- 49)The Claimant was not able to point to any occasion on which he was not paid for overtime (time at sites past 5.00 pm) that was approved and there is no evidence of specific approval in any event. The Claimant was, however, paid overtime payments at various times throughout his employment and did not raise any issues about these payments contemporaneously to suggest that he had not been paid for agreed overtime. On the balance of probabilities, the Claimant was paid for overtime when he was told he would be paid for it.
- 50)Therefore, there was no unlawful deduction from wages. The Claimant's Claim fails and is dismissed.

Employment Judge Youngs
Date: 07 July 2023

Judgment sent to the parties on 07 July 2023

For the Tribunal Office

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