



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr A Woodcock

Respondent

AND Driver & Vehicle Standards Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY

ON

19 January 2024

By Cloud Video Platform (CVP)

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mr G Probert of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Andrew Woodcock brings a monetary claim for unlawful deduction from wages against his employer the Driver & Vehicle Standards Agency. The respondent denies the claims.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by CVP Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle provided by the parties, the contents of which I have recorded. The order made is described at the end of these reasons.
3. It became clear that there was a jurisdictional issue which needed to be determined, namely whether this Tribunal has jurisdiction to hear the claimant's claim for day subsistence payments, or whether the claim is excluded from the unlawful deduction from wages provisions.

4. The claimant had provided a detailed witness statement, as had Mr Nicholas Cassell for the respondent, and the parties had agreed a bundle of the relevant documents. I had read these in detail before the commencement of this hearing, and there was no real dispute as to the background facts. Whether the claimant was entitled to the day subsistence payments or not turns on the construction of the relevant pre-contract and contract documents. Having considered all of this evidence, I concluded that the relevant background in this case was as follows.
5. The Background:
6. The claimant Mr Andrew Woodcock is employed by the respondent as a Driving Examiner. He commenced employment under a temporary contract on 15 November 2021, which was subsequently upgraded to a permanent position with effect from 16 January 2023. He is in dispute with the respondent as to whether he is entitled to claim day subsistence expenses when travelling to other work within his home cluster. The respondent has paid the claimant the disputed sum of £77.55, but without admission of liability, and the claimant seeks a declaration as to his entitlement. The circumstances are as follows.
7. The claimant applied to become a Driving Examiner under a recruitment campaign in 2021. The respondent has a number of Test Delivery centres which are contained within different geographical "clusters". The relevant cluster in this case is Southampton, which includes four such Test Delivery Locations, namely Southampton LGV, Southampton Forest Hills, Southampton Maybush, and Winchester Driving Test Centre (DTC).
8. During this recruitment process, the claimant received from respondent a "Driving Examiner Candidate Pack". On page 12 this information stated: "We'll give you sufficient notice of any travel away from your home testing centre and you can claim expenses in line with our Travel and Expenses policy."
9. On 4 June 2021 the respondent emailed the claimant to this effect: "I am pleased to inform you that we are now able to make an offer of employment as a full-time driving examiner working within your chosen cluster with Southampton Maybush as your home test centre. You will be required to work from different test centres within reasonable daily travel to meet business and customer demand on the Fixed Term Appointment contract that is made subject to satisfactory completion of the appropriate pre-employment checks ..."
10. The claimant's initial appointment letter was dated 15 September 2021. It stated: "This letter, together with the attached Annexes, constitutes your contract of employment. Annex A incorporates the written statement of particulars of employment required under Part 1 of the Employment Rights Act 1996. Further terms and conditions can be found in the DfT Staff Handbook ... Further details of the pay arrangements are set out in the Annex to this letter and the Staff Handbook."
11. This Annex A is the claimant's written statement of particulars of employment. Clause 5 is headed Place of Work. It provides: "5.1.1B Your Cluster base is your normal place of work, however, you will be required to travel as required by the role. You will also occasionally be required to work at locations outside of your cluster, within reasonable travelling distance ... 5.3 you are expected to travel to workplaces within your agreed cluster to perform driving tests between the start/finish times scheduled. Travel to and from workplaces within the cluster and your home will be in your own time and at your own expense. Travel to and from workplaces outside of the cluster and your home will be paid time after 30 minutes travel ..."
12. The respondent has also published Travel and Subsistence Guidance. The section on subsistence provides: "This section contains employment terms and conditions. All of this section which applies to you and which is apt for incorporation will be incorporated into your contract of employment ... 20 - Subsistence is to meet the extra costs that you necessarily incur if you are away from your normal workplace(s) in the UK on official duty ... Subsistence is limited to 30 consecutive working days/nights ... Day Subsistence – 22 You are entitled to Day subsistence if you are away from your normal workplace(s) on official business and necessarily purchase a meal or meals (including snacks, soft drinks and beverages, but not alcohol). You cannot claim Day Subsistence if the place being visited on official business is 5 miles or less from your normal workplace(s)."

13. This dispute concerns whether the claimant is entitled to Day Subsistence when working at Winchester DTC, which is within the Southampton cluster. The claimant has submitted a claim for payment for lunch on 15 occasions between 14 May 2023 and 11 July 2023 totalling £77.55. The respondent declined to pay this amount because it is of the view that Winchester DTC is within the claimant's home cluster of Southampton, and he is not entitled to Day Subsistence when travelling within his home cluster. There is no dispute that this Day Subsistence would be payable if the claimant were required to travel to a different cluster. The claimant asserts that his home workplace is Southampton Maybush, and that he is entitled to this payment when he is required to travel away from his home base of Southampton Maybush.
14. By letter dated 16 June 2023 the claimant raised a formal complaint. He stated that he believed he was entitled to claim Day Subsistence when he was asked to work from locations other than his own test centre. He confirmed that he based his claim on four documents: (1) the driving Examiner Candidate Pack which was received during the recruitment process; (2) the email dated 4 June 2021 confirming that he had succeeded in the recruitment process and that Southampton Maybush was his home test centre; (3) the Travel and Subsistence policy which confirmed that subsistence was payable if he was required to work away from his normal workplace on official business; and (4) the contract of employment "which does not include any wording whatsoever that might preclude me from claiming Day Subsistence."
15. By email dated 29 June 2023 the respondent rejected that complaint. The reason was effectively that all of the test centres in the claimant's clusters were deemed to be his normal workplace (including Winchester DTC) and that Day Subsistence was only payable in circumstances where the claimant was away from the normal workplace on official business. The respondent concluded that all the test centres in the Southampton cluster were deemed to be the claimant's normal workplace and he was therefore not entitled even though he had travelled to Winchester.
16. The claimant remained dissatisfied, and the parties attended a dispute resolution meeting on 14 July 2023. Despite this meeting the claimant's complaint was still not upheld. The claimant then appealed against this decision on 21 July 2023. The scope of appeal went beyond the dispute about payment which is under consideration today. There was a subsequent appeal meeting on 19 September 2023. The appeal manager Mr Farrell wrote to confirm its decision by letter dated 1 October 2023. In paragraph 4 of his decision he confirmed: "I have considered this section of your complaint with regard to documents that noted your candidate Pack that states "you will be given sufficient notice of any travel away from your base testing centre and will be able to claim expenses in line with our Travelling Expenses policy". I recognise that your contract could state clearer on what is defined as your home Centre relating to all centres being home centres in your cluster. Upheld." On this basis he decided to reimburse the claimant lunch expenses to £77.55.
17. However, there are two versions of this letter. The second version dated 2 October 2023 repeats paragraph 4 and that element of the claimant's claim being upheld, but it has removed the suggestion that the claimant should be paid the £77.55.
18. The dispute between the parties has rumbled on. In order to avoid the time and costs of attending this hearing the respondent then paid the claimant the sum of £77.55, but without admission of liability. It invited the claimant to withdraw this claim. The claimant objected and insisted that the money was returned because he would not accept it without admission of liability.
19. In an email to the respondent dated 23 November 2023 the claimant stated: "I'm purely seeking judgment on the interpretation of clause 5.1.1B of my employment contract ... In conjunction with my offer of employment ... and how this relates to the DVSA's subsistence policy ... My position is simply that the wording of my contract defines the sole location of Southampton Maybush driving test centre as my normal place of work, and that I am entitled to receive subsistence whenever I am required to work elsewhere, regardless of whether or not such alternative work location is within my "cluster" of driving test centres."
20. That is the nub of the complaint which is before me today. The respondent's position quite simply is that (i) the claimant's claim for subsistence amounts to expenses which are

excluded from the unlawful deduction from wages provisions; and (ii) in any event, Winchester DTC is within the claimant's Southampton cluster and therefore his normal workplace, and day subsistence is not payable in connection with trips to the normal workplace.

21. The Law:

22. The claimant brings a claim in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996. He seeks a declaration to that effect pursuant to section 24(1) of the Act.

23. Section 27 defines "wages" for the purposes of these provisions. Section 27(1) provides that "wages" means "any sums payable to the worker in connection with his employment, including – (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise ... (b) to (j) ... but excluding any payments within subsection (2).

24. Section 27(2) provides that "Those payments are – (a) ... (b) any payment in respect of expenses incurred by the worker in carrying out his employment ..." This means that any payment in respect of expenses is excluded from the unlawful deduction from wages provisions. If the claimant's claim for day subsistence payments amounts to expenses, then this tribunal will not have jurisdiction to hear this claim.

25. I have considered the cases of Barry and Ors v Rochdale Metropolitan Borough Council EAT 224/94; Southwark London Borough Council v O'Brien [1996] IRLR 420 EAT; Qantas Cabin Crew (UK) Ltd v Lopez and Anor [2013] IRLR 4 EAT; Cooney and Ors v Southwark Citizens Advice Bureau Service ET 2303313/01; and Smith v Network Rail Infrastructure Ltd ET 2202630/2020.

26. Decision:

27. The claimant referred the Tribunal to the above decision of Smith v Network Rail Infrastructure Ltd which is a decision of Employment Judge Heath in the London Central Tribunal under reference 2202630/2020. The claimant suggests that the tribunal in that case determined that subsistence payments were not expenses which would otherwise be excluded from the unlawful deduction from wages provisions. I do not agree that this case is in any way persuasive. In the first place it is a decision at first instance, and it is not binding on this Tribunal. In any event the Reserved Judgment in that case addresses the correct construction of the claimant's contract, and it does not determine that a day subsistence payment of the disputed nature in this claim is (or is not) within the statutory scheme.

28. It seems clear to me from the statute and the above cases that a tribunal must determine whether the deduction in question was either wages within section 27(1) or "in respect of expenses" within section 27(2). The legal test which determines this is not the same as to whether the expenses are taxable. In addition, the exclusion applies to payments "in respect of expenses", and there is no need for them to amount to a precise reimbursement. In O'Brien payment of a mileage allowance did not cease to be "in respect of expenses" simply because it was generous. In Cooney the subsistence payments in question were set to cover the expenses of meals regardless of whether the employees spent more or less than the allowed fixed amount. The tribunal found that the subsistence allowances were paid to cover the employees' expenses in carrying out their employment. They were not wages within the meaning of section 27(1), and they were excluded from the statutory scheme.

29. In this case, the claimant always considered his claim to be one for expenses. In his first schedule of loss he explained that it was a claim for expenses and he attached the relevant receipts. His first complaint to the respondent was one for expenses. The day subsistence payments are not rolled up expenses which can amount to wages. The expenses claimed by the claimant are limited to the individual instances where the claimant was required to travel to Winchester within his cluster. There is no indication in the relevant contractual documents that this would ever form part of the wages otherwise payable to the claimant. It is clear to me that the day subsistence payments claimed by the claimant were payments "in respect of expenses" and were not wages.

30. That being the case the day subsistence payments claimed by the claimant are excluded from the unlawful deduction from wages provisions by reason of section 27(2) of the Act, and the claimant's claim is hereby dismissed.

Employment Judge N J Roper
Dated 19 January 2024

Judgment sent to Parties on

1st February 2024