EMPLOYMENT TRIBUNALS

Claimant: Mr G Brough

Respondent: Miles Fox (Haulage) Limited

Heard at: (Liverpool) by CVP REMOTE **On:** 4 September 2023

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: In person
Respondent: Miss Scriven solicitor

JUDGMENT

1. The claimant's claim in respect of unauthorised deductions from wages by reason of failure to pay sums related to meal allowances is unsubstantiated, fails and is dismissed.
2. The claimant's claim in respect of unauthorised deductions from wages by reason of failure to pay "normal remuneration" to include calculations of payments for meal allowances succeeds to the extent that the amounts paid for meal allowances must be reflected in the calculation of average holiday pay for the relevant period, the respondent having accepted they were not.
3. The Tribunal gave oral ex tempore reasons on 4 September 2023, written reasons were requested by the respondent at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided in longer form.

REASONS

1. The issues were identified previously in the Case Management Order of Employment Judge Dunlop of 12 May 2023, page 60 of the bundle for today, in particular incorporated below :

2. "The claimant is a lorry driver. He brings claims of unauthorised deductions from wages. These claims stem from two disagreements between the parties.

3. Firstly, there is a disagreement about a meal allowance. The respondent says that this is only payable where the claimant works more than ten hours in a shift. The claimant says that it is payable every shift. His argument is that, as a salaried worker, he does not receive overtime if his shift extends to 12 or 13 hours. He says that the respondent has no right to pay him less on days where the shift is completed in under 10 hours. This dispute is likely to turn on the terms of the contract, and the proper interpretation of these. I have explained to the parties that terms can be written, agreed verbally, or implied by law. They will have to give evidence about what they say the relevant terms are and how they are included in the contract. I understand there is a written contract but its validity is in dispute, they will also have to give evidence about that."

4. "The second dispute relates to holiday pay. The claimant says that the amounts paid for meal allowance should be included in the average pay calculation used to determine holiday pay. The respondent says they should not be. The contractual basis of the allowance is likely to be relevant in resolving this dispute. The Tribunal will also consider the purpose of the allowance and the way in which it correlates to expenses actually incurred. There are legal authorities governing which components of pay are to be taken into account in calculating holiday pay – in particular the parties may wish to consider **British Airways plc v Williams [2012] ICR 847, Supreme Court and Hertel (UK) Ltd v Wood, Employment Appeal Tribunal, (reported alongside Bear Scotland v Fulton at [2015] ICR 221)."**

5. "Although the sums claims are relatively small, the resolution of these two disputes is important for the parties." The Tribunal was told this morning that the claimant does not remain in employment with the respondent, but the decision may affect other workers. There is some animosity between the claimant and the respondent but the parties remained civil over the CVP platform.

6. Employment Judge Dunlop helpfully analysed the issues which the parties agreed at the outset were as follows:-

   1. Under what circumstances was Mr Brough entitled to be paid a meal allowance? In particular, was he only entitled to be paid a meal allowance if his shift lasted longer than 10 hours?

   2. Was Mr Brough entitled to have his meal allowance taken into account in calculating the amount he should have received as holiday pay? Was it part of his 'normal pay'?

7. (The Tribunal may decide to give Judgment on these two issues, before considering the 'remedy' issues below, if necessary, but that will be a matter for the Judge at the final hearing).

   3. Having regard to the answers to Issues 1 and 2, what sum was 'properly payable' to Mr Brough on each of the occasions he received pay in the period covered by the further particulars?

4. What is the difference (if any) between the amount properly payable to Mr Brough and the amount he actually received on each of those occasions?

5. Does the Tribunal have jurisdiction to make any award in respect of any deductions which took place during or before February 2022, given the date on which the claim was presented? In particular, the Tribunal will consider whether deductions which occurred prior to the claimant's break in employment can properly be regarded as being part of a 'series of deductions' alongside those which took place after the claimant had re-joined the respondent in May 2022.

8. The Tribunal has today dealt with the first of the two issues above. As a consequence of the judgment the award to be considered by way of amount going forwards will only relate to **calculation of holiday pay** and the relevant period for the same.

9. So far as today's hearing is concerned, I have been presented with a bundle of documents which did not contain all relevant documents, (a letter relied upon by the respondent circulated in September 2021 to all employees in their pay packets was not included as it had not been shared with the respondent's own solicitor before today) and I have heard evidence on oath and read the written statement of evidence of the claimant and the written statement of evidence of Mr John Richard Fox, who is a Director of the respondent, and I have read the bundle of documents, and the authorities referred to above.

10. The claimant did not take issue with the respondent's contention that he was employed from 9 November 2021 until February 2022 as an 8- wheeler driver and when he returned to work for the respondent from 19 April 2022 he was employed as a class one driver. There is a different rate of pay depending on vehicle. The respondent offers haulage services in the north west region but does not open its yard on Sundays, so any date referred to as a date on which an underpayment was made on a Sunday must be an error as the claimant could not have worked then. In particular this was accepted for "4 December 2022."

11. The contract of employment within the bundle was a sample contract as the claimant did not sign a written contract for the latest period of employment. There was no written contract of employment with express terms.

The Law

12. So far as the law is concerned, I have considered section 13 Employment Rights Act 1996. Particularly s 13(3) specifically as follows:-

Section 13: Right not to suffer unauthorised deductions.

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

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

13. I have considered the authorities on the issue of holiday pay as stated above and I referred to the British Airways case in discussion in submissions with Miss Scriven. **British Airways plc v Williams [2012] ICR 847, Supreme Court and Hertel (UK) Ltd v Wood, Employment Appeal Tribunal, (reported alongside Bear Scotland v Fulton at [2015] ICR 221).** In particular paragraphs 112- 114 of the judgement seem pertinent.

14. I have asked myself questions in respect of the following matters:

(1) Where the terms of the contract are to be found relating to meal allowance, if at all?;

(2) What the terms of the contract relating to payment of meal allowance are?;

(3) What are the terms of the contract relating to payment of holiday pay?

(4) By means of what calculation do I consider the amount of holiday pay to be properly calculated?

Findings of Fact

15. So far as my findings of fact are concerned relevant to the issues, there was no signed written contract of employment between the claimant and the respondent at the relevant time. I was told by Miss Scriven when I queried the sample contract at page 69 in the bundle that this was not going to have relevance to assist me. The amounts of pay cited within that contract do not align with the amounts given in the evidence either, so I have to fall back on the verbal discussions between the parties which are somewhat opaque and also evidence of custom and practice in so far as it was described by them and any other documents which can assist.

16. The claimant gave no direct evidence about a conversation with Mr Fox regarding the payment of meal allowances until it arose as a dispute between them. There was no suggestion there was an express verbal agreement between the parties to pay the meal allowances to the claimant on every shift.

17. The evidence at page 142 shows an apology letter from the respondent to the claimant referencing a failure to pay the meal allowance on 2 specific dates – 11 May 2022 and 11 June 2022 and explaining it would be included in the next pay run. If there were an agreement to pay meal allowance on every shift then this letter runs contrary to that assertion.

18. I accept also that Mr Fox took advice from the accountant as to the meal allowance and that he did not agree to pay the £5 after 5 hour payment, which is part of HMRC guidance but only the £10 after 10 hour worked payment. This is set out in HMRC guidance as per "*HMRC's Employment Income Manual 'EIM66205 – Tax treatment of lorry drivers: employers' guidance: scale rate payments to drivers' the below payments can be made to drivers – tax free*." This is guidance not an obligation.

19. I accept that it was an implied term in the contract of employment as to pay that the rate of the Class one driver was at the relevant time £120 / day and a driver needed to complete 10 hours of work to receive the £10 tax free payment and the £10 taxable meal allowance on top. This was custom and practice for other drivers of "artics".- Class 1.

20. I do not accept as fact pay should be £140/ day. Even on the claimant's best evidence at page 47 the claimant asserts he had the "the impression of a salary rate of £140/ day". This is far from establishing an agreement to pay such a sum.

21. The respondent through Mr Fox raised in his evidence for the first time a letter dated 6 September 2021, he had not provided to his solicitor and which the claimant had not seen which referred directly to the basis of payments being on the basis of a recognised 10 hour working day and in line with HMRC guidelines - £10 being taxable and £10 non- taxable.

22. I accept and find Mr Fox presented this to employees in their pay packets. The claimant was not working for the respondent at that time. I accept his evidence he did not see it at that time, nor has he since.

23. This does though provide some oral evidence as to custom and practice regarding the applicability of the meal allowances and the intention of the respondent on the issue, for the remainder of the workforce ie it would not be paid unless 10 hours were worked.

24. I do not at this stage make findings on all the dates I was taken to within the bundle as samples, I do not think I need to, as on the responses of the claimant he accepted he did not work 10 hours he said he worked a "full day" where on the timings within the relevant work sheets he did not work 10 hours. Per the agreement as implied by custom and practice with the workforce, this would not be sufficient to trigger payment of the meal allowance on those particular days.

25. I accept that there was some complexity within the recordings taking into account the need to keep to the tachograph rules regarding driving a certain amount and not exceeding legal hours, which I accept leads the claimant to believe that the targets set by the respondent are unrealistic, but that does not help him establish an entitlement to greater payment.

26. I find the claimant disputes the concept of working a "full day', which the respondent defines as 10 hours to qualify for the meal allowance payments. The respondent did not agree to pay the claimant the meal allowances unless 10 hours were worked.

27. In relation to the issue of meal allowances being part of holiday pay, I find that the respondent on Mr Fox's own evidence omitted to include any payments of sums for meal allowances in the calculation of holiday pay. The amount of holiday pay should reflect "normal pay" and deductions should not be for sums which are properly payable: so on occasion the claimant was paid for the meal allowances within his normal pay. It seems to me the meal allowances were earnt after a long day(10 hours) and were therefore intrinsically about doing the work on such days. These sums must be included in the averages.

28. I accept that plainly the claimant did not receive the payments on every shift and per the earlier findings he was not so entitled on every shift, but the calculation of the allowances seems to be part of the remuneration when earnt and should be part of the full holiday pay calculation as it directly correlates with time spent at work.

29. I accept that they were paid on occasion because of 10 hours working a full day/ over 10 hours shift but if they are not included in the holiday pay calculation then it follows that the claimant could be worse off by taking holidays as he is not fully remunerated and that should not be the case.

Submissions

30. The parties made oral submissions to the Tribunal and in brief the respondent submitted that having taken the claimant through the documents for relevant days, he was not entitled to the meal allowance payment as the time worked on the relevant shifts did not exceed 10 hours, also he could not be paid for any time claimed as a Sunday as it was not a working day for the respondent, nor did the claimant work Saturdays save very occasionally. He was paid the allowance for over 10 hours as at payslip 8 page 109, so there were some days when it fell in and he was paid.

31. On the holiday pay issue the respondent contended the claimant was reimbursed for meal allowance when working a qualifying shift and considering **Williams** this should be regarded as an ancillary loss rather than part of contractual duties and therefore not form part of the holiday pay calculation.

32. So far as the claimant's submissions were concerned, he submitted that there was nothing in writing, he believed he was entitled to £140 / day and he queried this and was told about doing 10 hours. He said he "*did not see why I have to do 10 hours to get it, if standard working is 8/9 hours*." In reference to holiday pay having asserted he was entitled to a standard rate of £20 / day more he invited the Tribunal to apply this rate to the holiday pay calculation.

33. I do not seek to do justice to the extent of the submissions. I am merely summarising them to show that I have considered them.

Conclusions

34. There was no written agreement here between the claimant and the respondent so I have to fall back on any oral discussions and the conduct of the parties and the elements that have been brought to my attention particularly, in the end it would seem custom and practice. From Mr Fox's evidence on the issue only when 10 hours were worked were food/ meal allowances paid. There is no direct evidence of a contrary agreement and given the burden of proof is on the claimant it is not discharged.

35. I do not have the sense that the claimant really believes that the respondent agreed to pay him meal allowance for a shift which lasted less than 10 hours indeed the claimant said, "*I do not see why I have to do 10 hours to get it*" and it seemed more like a point of principle than something to which he was articulating an agreed term giving him an entitlement.

36. The evidence of "shift" timings that the claimant was systematically taken through by Miss Scriven seemed to bear out that the shifts were not of 10 hours longevity and the claimant was often left replying, "I worked a full day".

37. If the 10 hours were not worked then the meal allowances were not due to be paid. It follows that there was not a deduction from wages in these instances and only if the claimant could show he was not paid where he worked 10 hours would there be a deduction. On the analysis in cross examination there was not.

38. I accept that the holiday pay calculation may not be correct as the respondent did not include in any averaging the figure of the meal allowances which had been paid in the totals. That it was not included is conceded it was not accepted by the respondent that it should be.

39. The European jurisprudence has made clear that employees are not to be put off taking annual leave or holidays because to do so would leave them short within their pay packets. The meal allowance seems to me to be part of the normal remuneration when earnt and as such should form part of the overall calculation. If an employee worked a long shift of 10 hours he would receive the meal allowance why should he then lose it in the calculation of his overall holiday pay? It was part of his

remuneration for a longer day intrinsic to his performance of that longer day and should be reflected in the averages.

40. In my judgment there is a loose end on those calculations which I propose to seek to clarify by ordering in case management terms as follows:-.

1. The respondent shall re- submit its calculations of holiday pay due to the claimant to include the meal allowance element in the averages earnt, such calculations to be provided to the claimant and the Tribunal by 13 October 2023.
2. The parties shall write to the Tribunal by email by 1 November 2023 to confirm if any further sums are outstanding and agreed to be paid or to seek the listing of a further hearing by CVP ELH 3 hours if no agreement has been reached on the holiday pay element and the period for which it is due.

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Employment Judge Grundy

Date 11 September 2023

REASONS SENT TO THE PARTIES ON

20 September 2023

FOR THE TRIBUNAL OFFICE