EMPLOYMENT TRIBUNALS

Claimant: **Mr R Higgs**

Respondent: **Everest Limited**

Heard at: **Leicester** **On:** **Friday 20 July 2018**

Before: **Employment Judge P Britton (sitting alone)**

Representatives

Claimant: **In Person**
Respondent: **Mr N Flanagan, Legal Services Manager**

JUDGMENT

The claim for breach of contract (non payment of outstanding motoring expenses) succeeds. The Respondent will pay the Claimant damages of £727.56.

REASONS

Introduction

1. My task today is to determine whether in breach of contract the Claimant was not paid mileage expenses which he had incurred, the net sum outstanding being £727.56. I say breach of contract because expenses are not in the wages definition in the Employment Rights Act 1996. But the Claimant had when he ticked the boxes and in reference to his claim used the words in breach of contract. So insofar as the Tribunal codified this as a wages claim[1]this was an error. It is clearly a claim for breach of contract as to which the Tribunal has jurisdiction pursuant to the relevant provisions of the Employment Tribunals Act 1996. The Respondent has not today taken issue with this clarification and did not take a jurisdictional point viz WA in the ET3.

2. On the 18 January 2018 the parties were notified the matter would be heard today commencing at 11am with a one hour time estimate. On the 16 March at the direction of REJ Swann that time was extended to two hours. On the 17 March notice to that effect was sent to the parties making plain that the case would start at 10am. At that time today the Respondent was not in attendance. Having waited 15 minutes I commenced the hearing commencing with reading

[1] Ie WA signifying a claim pursuant to s23 of the Employment Rights Act 1996.

the bundle[2] brought by the Claimant and his witness statement. I was about to give judgment when Mr Flanagan was ushered in at 10.40. His explanation being that he had thought the hearing was at 11am. I then heard his initial submissions and by reference to my observations as to core issues apparent from the bundle and to which I will refer. I then called the Claimant under oath in order that he could be questioned if required by the Respondent. I then heard further submissions and gave my judgment.

The Issues

2. The Claimant presented his claim to the Tribunal (ET1) on 3 January 2018. He had been employed by the Respondent as a Territory Development Manager between 14 August 2017 and 4 October 2017. By the end of the employment he had in the course of his duties undertaken 2,021 miles using his private motor car. At the end of the employment he requested reimbursement of those mileage expenses at the rate of 45 pence per mile.

3. At that stage, and here I am referring to the bundle of documents before me as prepared by the Claimant, he was eventually informed by Rosie Irvine (see exhibit 10 in the bundle) that he would be

> *"…entitled to the advisory fuel rate[3] for your vehicle in business mileage expenses. This is currently 9 pence per mile. 2021 x 0,09 = £181.89."*

4. That sum was paid hence the balance of £727.56 in the claim. The reference to the AFR by the Respondent, the Claimant made plain at the time in the correspondence before me as being a reference as he understood it to the Government UK advice issued by HMRC on Advisory Fuel Rates (exhibit 11) and that he had never been previously informed that it applied to him. He made the point that the AFR did not in any event apply in that the GOV UK guidance (see exhibit 11) stated:

> *"The rates only apply when you either*
>
> - *reimburse employees for business travel in their company cars.*
> - *require employees to repay the costs used for private travel*
>
> ***You must not use these rates in any other circumstances."***[4]

5. Well of course in this case this isn't about private travel and everyone accepts that; this is about business travel but in the Claimant's own motor car. So he pointed out to the Respondent that therefore the other HMRC guidance applied (see exhibit 12) and which is headed:

> ***"Expenses and benefits: business travel mileage for employee's own vehicles.***

6. It made plain as set out therein that the rate per mile for the first 10.000 miles was 45p. He made this plain in his follow up e-mail of 4 November 2017 to the Respondent (exhibit 16). He then followed that up when silence now reined with a further e-mail on 22 November 2017 (exhibit 15), again he received no reply; hence the bringing of the claim to Tribunal.

[2] He refers to documents therein as exhibits and so I will use that prefix.
[3] AFR.
[4] My emphasis.

7. In its response (ET3) the Respondent was essentially pleading that the Claimant was only entitled to the 9 pence per mile relying in a somewhat complicated defence that there was an interface to the Respondent's car allowance fuel management plan (CAFMP) as to which see exhibit 9. Thus the Claimant had no contractual right to 45 pence per mile. Mr Flanagan forcefully argues that this is the position. Furthermore as per Paragraph 12 of the response that Everest consider the claim to be *"unreasonable, vexatious and has no reasonable prospect of success"* and that they would be claiming for full legal costs when as they predicted the case inevitably failed.

8. I remind myself that in this particular case for reasons which I shall come to that the maximum contra proferentem applies. This is because Everest relies inter alia on its interpretation of the CAFMP and which if correct would enable it to avoid payment at 45p per mile. I remind myself that side documents such as employee handbooks or in this case the CAFMP will be usually incorporated into contracts of employment. And as in this case the Respondent has in its ET3 relied inter alia on the provisions of the CAFMP clearly there is such an incorporation; to turn it round another way it is not contended to the contrary.

9. I have before me a statement prepared by the Claimant and which he has confirmed under oath. I have no statements for the Respondent. I remind myself that the limited directions provided by the tribunal, as this was a fast track case, on the 18 January 2018 inter alia stated:

> " *it is your responsibility to ensure that any relevant witnesses attend the hearing and that you bring sufficient copies of any documents."*

10. Mr Flanagan has brought a bundle which is essentially the same as that prepared by the Claimant but provided no witness statements or brought along any witnesses.

Findings of fact

11. Reverting to his evidence[5], the Claimant has confirmed to me that he received a contract of employment (exhibit 1) at the commencement of the employment. He is quite adamant that he signed the same, kept a copy and returned the signed document to the employer. Mr Flanagan says the employer never received it, thus seeking to argue as a first line of defence that there was in fact no contract of employment. Mr Flanagan has not really persisted with that argument and would be in great difficulty if he tried to for the following reasons self evident from the bundle and thence in terms of the basic principles of what constitutes a contract. I note that Mr Flanagan was not engaged in the issuing of the contract and cannot give direct evidence on this issue.

12. In any event the following is clear. The Claimant received an offer of employment, thence confirmed so to speak in the contract of employment. I have no doubt from his evidence, and I have nothing in the way of any evidence to the contrary from the Respondent, that he returned the same. And fundamental is that in any event he then performed that contract of employment by going about his duties for which he received consideration ie remuneration. Therefore of course a contract was created there being an offer; acceptance; and performance.

[5] I found the Claimant honest straightforward and meticulous in the way he dealt with the issues from the onset.

13. As to that contractual document, in terms of mileage remuneration the following provisions engage.

> ***5. Pay and Benefits***
>
> …
>
> *5.2 " In addition to his salary the Employee shall receive the following benefits:*
>
> *…*
>
> *5.2.2 A car allowance of £521.33 gross per month and payment for all business mileage.*

14. It did not provide a rate. However when sent the contract for signature he also received from the Respondent the CAFMP (exhibit 9) and also had confirmed to him, because it is something of a complicated document, by his Line Manager, Ron Robertson that he would be paid 45 pence per mile. But of course this in conflict with the reliance on 9p per mile as per Rosie Irvine, doubtless acting as agent for the employer as it had sought her advice as she works for in effect what is a payroll company namely Innovation.

15. So in terms of resolution, having already referred to Paragraph 5 of the contract of employment I now turn to the relevant provisions of the CAFMP. Cutting through the interface to the car allowance and HMRC tax treatment, as an Employment Judge with some 25 years of experience I am well aware that there is an increasing practice amongst employers to move away from the provision of company cars because inter alia of the expense to the employer of providing the same and also the tax complications that there are now for employees. So in accordance with HMRC's guidance regime many employers such as the Respondent now provide their employees with a car allowance. The employee therefore provides his own motor car for the performance of his duties ie as a salesman and the car allowance provides the means so to do. The car allowance is to some extent taxable. I am not a tax expert, but the CAFMP document having read it closely makes the distinction between the provision of the car allowance and that it will be paid monthly pro rata so to speak, part of it taxable, part of it not, and the payment of mileage expenses incurred working as to which see the third paragraph[6] in the mid-section of page 1 of said document. The next paragraph then deals with items one and two which is the car allowance and b/mile top up (tax and NIC free payment) based on mileage driven. But I am well aware as is clear from the HMRC guidance and which also fits with exhibit 12 that as long as the mileage covered is legitimate for the first 10,000 miles annually of the same, the rate payable tax free is 45 pence per mile. Over 10,000 the tax free element is 25 pence and the 20p balance is taxable. This in fact squares with exhibit 9. Furthermore if via Rosie the Respondent is correct in contending that the mileage rate was 9 pence per mile, then this document makes no such specific reference. Mr Flanagan says it is the custom and practice to so pay within Everest. But he produces no such evidence. And prima facie it flies in the face of business efficacy in that it would create the effect of an employee such as the Claimant without a company car paying more to fill up his car tank with fuel at prevailing rates than would be funded at 9 pence per mile. And it also flies in the face of the AFR HMRC guidance to which I have now referred.

16 But finally and which rules out any uncertainty in terms of the meaning and

[6] The documents is not paragraph numbered.

purport of the contract is the final paragraph:

> *"Finally please note that you will still receive 45 ppm even if you exceed 10,000 business miles in a year. For mileage over 10,000 (in a tax year) 20 ppm will be taxable but will remain NI free."*

17 So when the employer valiantly via Mr Flanagan says that there is no contractual commitment to pay 45 pence per mile it is of course seeking to escape the clear purport that I read into these documents and with no evidence deployed to show that applying the usual principles of construction they do not apply: Hence why the maxim contra proferentem applies. Thus it follows that I find for the Claimant.

Conclusion

18. The claim of breach of contract, non payment of outstanding mileage expenses, succeeds the Respondent will pay the Claimant damages of £727.56.

Observation

19. Paragraph 12 of the response alleged:

> *"The Claimant's claim is unreasonable, vexatious and has no reasonable prospect of success. Accordingly the claim is hereby put on notice that the Respondent will seek to recover the Respondent's full legal costs incurred at the conclusion of the Claimant's case."*

20. I understand that this clause and indeed the response had been drafted by Neil Ashley who is classed as Head of Legal and Customer Relations for Everest but I understand from Mr Flanagan to be a practicing barrister who provides Everest with employment consultancy. As is clear in this case there is nothing vexatious about the claim brought by the Claimant. He had a legitimate right to bring a claim and he conducted himself throughout and for example in terms of the e-mail correspondence with the Respondents in a civilised manner. He attempted to see if this matter could be resolved and I have dealt with that and eventually the Respondent simply went silent on him.

21. So I am wholly unimpressed with the part of that prayer at paragraph 12 suggesting that the Claimant has behaved unreasonably or vexatiously and with the threat of costs if he proceeds. I would urge the Respondent to think very carefully about using words like that in future in this type of case as it puts itself at risk of costs. However in this case after considerable reflection I have decided not to award preparation costs against the Respondent on the basis that there were triable issues.

Employment Judge P Britton

Date: 6 August 2018

JUDGMENT SENT TO THE PARTIES ON

11 August 2018

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FOR THE TRIBUNAL OFFICE