EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Freeman	**- V -**	Network Rail Infrastructure Ltd

Heard at: London Central **On**: 12 April 2019

Before: Employment Judge Baty

Representation:

For the Claimant: Mr C Adjei (counsel)
For the Respondents: Mr B Uduje (counsel)

JUDGMENT

1. The claimant's complaint of unlawful deduction from wages succeeds.

2. An award of £4,685.60 (subject to tax and national insurance contributions) is made, payable by the respondent to the claimant.

REASONS

The Complaint

1. By a claim form presented to the employment tribunal on 17 October 2018, the claimant brought a complaint of unlawful deduction from wages. The respondent defended the complaint.

2. At the start of this hearing, Mr Adjei confirmed that there was no complaint of breach of contract, the claimant still being an employee of the respondent.

The Issues

3. I discussed the issues of the claim with the representatives at the start of the hearing. The representatives agreed that essentially the case was about the interpretation of a particular clause (clause 19) in the claimant's employment contract and, therefore, whether or not she was entitled to be paid a payment under that clause in relation to her secondment within the respondent starting September 2017, which involved a relocation. If such a payment was due, there was a secondary issue about which rate of salary applied in the calculation of that payment. Right at the start of the hearing, the representatives were able to agree the figures which would apply, whichever of these eventualities I found applied. The issues agreed between the representatives and me at the start of the hearing were therefore as follows:

> 1. Did the claimant's secondment to the PA role at Eversholt Street starting in September 2017 fall within the provisions regarding relocation and displacement at paragraph 19 of her 2003 contract of employment, thereby entitling her to a payment of 30% of her salary?
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> 2. If so, on the basis of what rate of salary should the 30% payment be calculated?
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> 3. On the claimant's case, the salary which should apply is £37,842 (being her salary at 12 July 2018); this would mean that, if a payment was due, the payment to be ordered by the tribunal would be £5,111 (subject to tax and national insurance contributions).
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> 4. On the respondent's case, the salary which should apply is £36,422 (being the claimant's salary at 18 September 2017); this would mean that, if a payment was due, the payment to be ordered by the tribunal would be £4,685.60 (subject to tax and national insurance contributions).

The Evidence

4. Witness evidence was heard from the following:

> For the claimant, the claimant herself;
>
> For the respondent, Ms Mary Doody-Jenkins, the respondent's Head of Human Resources - Infrastructure Projects.

5. An agreed bundle, numbered pages 1-449, was produced to the hearing.

6. I read in advance the witness statements and any documents in the bundle to which the witness statements referred.

7. A timetable for cross-examination and submissions was agreed between the representatives and me at the start of the hearing and was adhered to.

8. Mr Uduje produced brief written submissions. Both parties then made oral submissions.

9. I gave judgment with reasons orally on the day. The claimant then requested written reasons.

The Law

Unlawful deduction from wages

10. Part II of the ERA sets out the circumstances where it is unlawful for an employer to make deductions from an employee's wages. If wages are "properly payable" then, except in relation to certain exemptions, none of which are applicable to this case, an employer may not make deductions from those wages. There is no dispute that, if a payment under clause 19 of the claimant's contract was contractually due, it would be "properly payable" and any failure to pay it would be an unlawful deduction from wages.

Interpretation of express terms

11. The issue before me is therefore a matter of interpreting the express term in the claimant's contract.

12. In relation to this, Mr Uduje in his written submissions referred me to the case of Spectrum Agencies v Benjamin EAT 0220/09 (quoting Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1) [1998] 1 WLR 896, HL. The contract should be interpreted not according to the subjective view of either party, but in line with the meaning it would convey to "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This means that if a contract is badly drafted and its literal interpretation would lead to a result that had clearly never been intended by the parties, it should be interpreted by taking into account the context and commercial background behind it.

Findings of Fact

13. I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

14. The claimant has been employed by the respondent since 4 February 2002. She remains employed by the respondent.

15. The claimant is employed under the terms of an employment contract dated 20 August 2003. Since 2007, the respondent has not been employing its employees on employment contracts in this form. However, there is no dispute that this is the contract under which the claimant was employed and under which she continues to be employed.

16. Clause 19 of that employment contract states:

"19. RELOCATION & DISPLACEMENT

Network Rail may, from time to time, require you to transfer from one location to another. This may occur on promotion, for operational reasons, career development to broaden experience and develop individual potential, or because of displacement. You will be consulted in this process and, your views and wishes will, wherever possible, be taken into account.

If you are displaced you will be allowed reasonable time off to visit the locations of alternative posts which may be available. Reasonable expenses incurred will normally be reimbursed for you and your spouse. Where you subsequently decide to accept a post, which involves moving home, you will benefit from the relocation arrangements then in force.

If you are displaced and accept an alternative job you will be allowed a trial period in the new job of three months if you are in Band 1-4 or six months if you are in Band 5-8. If it is mutually agreed, during or at the end of these periods, that the new job is unsatisfactory, other options will be explored which may include leaving under redundancy terms.

…

BANDS 5-8

In the event that you are not required to relocate your home and are permitted to travel daily (subject to any additional travelling between your home and new work location being reasonable and practicable and normally no more than one half hour in each direction), you will receive a displacement payment on the following basis:

- Where total additional daily travelling time incurred between home and new work location is up to 30 minutes, a lump sum payment of 15% of basic salary

- Where total additional daily travelling time incurred between home and new location is more than 30 minutes, a lump sum payment of 30% of basic salary."

17. At all times material to this claim, the claimant was a Band 5 employee. Furthermore, there is no dispute that, if her September 2017 secondment fell within the earlier paragraphs of clause 19, the distance between her previous role (in Stratford, London) and the temporary role in Eversholt Street was such that she would fall within the second bullet point above, which triggered the 30% basic salary payment.

18. At all material times the claimant lived in Dover.

19. She had been based in Ashford. In or around 2008, she permanently relocated from Ashford to Faversham. She received a 30% payment under clause 19. It was paid to her about 3-4 months after the move.

20. A year later, she relocated from Faversham to Sittingbourne. This too was a permanent move. She received a payment under clause 19 (on this occasion of 15% basic salary because of the smaller travel distance between Faversham and Sittingbourne).

21. She then relocated from Sittingbourne to Stratford in 2013. This was for a temporary position lasting 12 months (when another employee was on maternity leave). In the end, that employee did not return from maternity leave and, after

11 months of this temporary position, the claimant took up the post on a permanent basis. She was paid a 30% payment under clause 19 in relation to the temporary move; she was not paid a further payment when that temporary post became permanent. The claimant's evidence was that this payment was paid in two parts due to administrative errors, the first of which was paid in 2013 after the temporary move, albeit the second of which was paid in 2014. At this tribunal, the respondent was not in a position to dispute that evidence, although Mr Uduje submitted that I should not accept it. However, in the same email trail from February 2018 which references the 2014 payment, the claimant also references having been paid what she refers to as "displacement money" "after being displaced from a re-org in Kent back in 2013". In the light of this contemporaneous evidence, and the claimant's own testimony, which I have no reason to doubt, and which was consistent and clear throughout her evidence, I accept that a clause 19 payment was made to her in 2013 in relation to her temporary move from Sittingbourne to Stratford.

22. I have seen a copy of the respondent's policy on secondments. This indicates that secondments are generally for a 6 or 12 month period.

23. The claimant's role at Stratford was connected with the Crossrail project. That project was coming to an end. The claimant was informed that her role in relation to Crossrail was due to end. At a meeting on 3 April 2017, she was told that her indicative transfer date ("ITD") was 23 December 2017. That would mean that, if nothing had been found prior to that, the claimant would on that date be transferred to another role, if possible, or, if there was no role, would be likely to be made redundant. The meeting was part of the process of considering what should happen next in relation to the claimant's employment in the light of the fact that her role on the Crossrail project was coming to an end.

24. At the meeting, there was discussion about her realistic commute from Dover. In addition, the claimant stated that she wanted a different challenge. Furthermore, the claimant confirmed that she was already making applications for new posts. She confirmed that she was looking for a Band 4 opportunity and a more challenging role. This was all part of the respondent's normal process. It was expected not only that the respondent would look for alternative roles within the organisation but that employees in this situation would also do that. What the claimant was doing by seeking alternative roles was, therefore, what was expected of her and was quite proper.

25. The claimant found a role working as a personal assistant working at the respondent's premises in Eversholt Street in London. She applied for this and was successful. The role was for a "temporary secondment". It started in September 2017 and was due to and did come to an end on 10 July 2018. The offer letter in relation to the role confirmed that there would be no change to the claimant's current terms and conditions during the period of the secondment.

26. At a meeting on 28 January 2018 with Mr David Ditchfield, a manager, which was part of the ongoing process in relation to the end of her permanent (Crossrail) role and her future employment at the respondent, the claimant raised the fact that she considered that she was contractually entitled, as a displaced

person, to a displacement payment of 30% of her salary in relation to the move from Stratford to Eversholt Street.

27. The respondent considered the request but turned it down, in short on the basis that the claimant's alternative role was a temporary one and not a permanent alternative role. This was communicated to the claimant by email of 6 March 2018.

28. On 19 March 2018, the claimant raised a grievance about this. In her grievance, the claimant requested:

"Payment equal to 30% of my salary to be paid to me on 6 April, (next available pay date) due to me relocating to Eversholt Street, for a secondment to broaden my experience and develop my potential in a different location, department and role. This has become of the operational change in that the Crossrail programme is coming to an end and my job is no longer required.…"

29. In the meantime, the respondent changed the claimant's ITD in relation to the Crossrail role from 23 December 2017 to 10 July 2018 (the end date of the claimant's secondment at Eversholt Street). This was confirmed to the claimant by letter of 3 April 2018. In evidence before the tribunal, Ms Doody-Jenkins explained that this was simply to align the date with the end of that secondment and did not reflect any change to whether or not there was still work to do for the claimant in the Crossrail role. This was, therefore, a paper exercise and, in the light of the earlier ITD, I find that, as the claimant maintains, there was no work for her on her Crossrail role after the original ITD of 23 December 2017.

30. Nevertheless, as well as arguing that clause 19 did not apply to the claimant's temporary secondment on the basis that it was temporary and not permanent, the respondent, in turning down the claimant's grievance, suggested that, presumably on the basis of the revised ITD, the claimant's substantive post (i.e. her Crossrail role) had not yet been displaced and that that was further reason why clause 19 had not taken effect. The claimant's grievance was not upheld and this was communicated to the claimant on 24 April 2018.

31. The claimant therefore appealed on 24 April 2018. The appeal was heard by Mr Brian Keetch. Mr Keetch spoke to HR, including Ms Doody-Jenkins, who informed him that the claimant was not entitled to the clause 19 payment. Nonetheless, Mr Keetch took the decision that she was entitled to the payment. He communicated this to the claimant by letter of 5 July 2018.

32. Nonetheless, the matter still remains an issue because of certain deductions that Mr Keetch advised should be made in relation to the payment. The details of those are not important for the purposes of determining this claim, as the figures for what would be payable if clause 19 applies in relation to the temporary secondment were agreed between the representatives at the start of this hearing (see above).

Conclusions on the issues

33. I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

34. As noted, this case turns on the interpretation of clause 19 of the claimant's contract of employment.

35. First, I reiterate that it is not in dispute that, because of the travel distance between Stratford and Eversholt Street, the claimant's transfer to Eversholt Street would fall within the second bullet point in clause 19 giving an entitlement to a payment of 30% of basic salary (assuming that the other conditions of the clause are met).

36. I turn first to an argument that first came up only as a one-liner in Mr Uduje's written submissions (at paragraph 12(a)). It was not set out in the response form; nor in Ms Doody-Jenkins' witness statement; nor were either of the witnesses cross-examined on it. Mr Uduje did not refer to it in his oral submissions until I specifically asked him to address me on it (as I had seen it in his written submissions); he did not give any further clarity beyond what was written in his written submissions. I also asked Mr Adjei to address me on the point; Mr Adjei initially looked a little surprised that the point was being raised by me (which is a further indication that this was not an area of dispute until the written submissions of Mr Uduje were submitted) but he duly addressed me on it. In the light of all that, there is an argument that this is not a point which can properly form part of the respondent's response to this claim anyway. Nevertheless, I address it anyway.

37. The point is that, as set out in Mr Uduje's submissions, "displacement and therefore displacement payment occurs at the instance of the employer and not at the request of the employee". Clause 19, in its opening line, makes reference to "Network Rail may, from time to time, require you to transfer from one location to another…". In other words, the clause is predicated on the employer "requiring" the employee to transfer from one location to another. In the claimant's situation, she had been informed by the respondent that the Crossrail role would be coming to an end but it was through our own efforts that she applied for and secured the Eversholt Street role; in that sense, could it be said that it was not the respondent which required her to do that role but rather her own decision?

38. However, I entirely accept Mr Adjei's submissions about the meaning of the word "require". It cannot be limited to the respondent specifically requiring the claimant to make that transfer to Eversholt Street. He gave an example of the employer seeking to promote an employee where there were a range of jobs elsewhere and the employee picked one of them; in that context the employer required the move even though the employee chose the specific job. Similarly, when the respondent notified the claimant that her Crossrail role was coming to an end and encouraged her to apply for other jobs, which she did, that must also come within the scope of the respondent "requiring" the claimant to change roles. There was an expectation on both parties that they would look for alternative employment and, in this instance, it was the claimant who (quite properly) looked for and obtained the alternative role. However, it all stemmed from the respondent's requirement that the claimant no longer work in the Crossrail role. Furthermore, to find otherwise would mean that there was a perverse

disincentive for employees to look for and apply for alternative roles if that meant that an employee employed under the claimant's contract consequently lost the right to a clause 19 payment; that cannot therefore have been the intention of the parties in relation to that clause. I therefore consider that the claimant's transfer to Eversholt Street did come within the scope of the respondent "requiring" her to transfer from one location to another.

39. I turn now to the main argument put forward by the respondent, which came up during the internal process, namely that clause 19 did not apply because the claimant was transferring to a temporary secondment and not to a permanent role. However, the clause does not say that; it does not distinguish between temporary or permanent roles. No policy of the respondent has been shown to me suggesting that the clause is limited to permanent moves only. Furthermore, in terms of the intentions of the parties at the time the contract was entered into, there is no reason why the parties should not have wished it to apply to both; both temporary and permanent moves require the significant relocation, which is what the payment is in respect of.

40. Furthermore, as I found, the claimant did transfer roles in 2013 to a temporary role and a clause 19 payment was made in respect of that (albeit in two parts); therefore, payments in the circumstances of temporary moves were paid for by the respondent; this further evidences that such payments were in contemplation and were within the scope of clause 19.

41. Mr Uduje submitted a "floodgates argument" that, if the clause applied to temporary secondments, employees could change jobs on a very frequent basis to take up roles located at a distance from their original positions in order to obtain multiple payouts under clause 19. However, no evidence has been presented to me that that was something that actually happened. Furthermore, I accept that the mechanics of applying for, obtaining, and relocating to new roles, which take time, are not something which facilitate employees doing this on a regular basis every month or two. Furthermore, the respondent's own policy is that secondments are for periods of 6 or 12 months, which further indicates that very short term transfers are neither contemplated nor taking place. I do not, therefore, accept Mr Uduje's "floodgates argument".

42. In summary, I accept that clause 19 applies to transfers to temporary roles, including secondments (such as the claimant's temporary secondment to Eversholt Street), just as it applies to permanent moves.

43. The respondent's next argument is that the claimant was not "displaced" and her temporary secondment was not therefore a "displacement", such that it did not fall within clause 19.

44. I note that no policy was provided to me containing a definition of "displaced" or "displacement". I therefore find that, whatever the subjective opinions of various of the respondent's managers may have been, there was nothing as a matter of contract to give clarity on the meaning of the terms in clause 19. Furthermore, I also note that as a matter of law in relation to

contractual construction, any ambiguity in terminology is construed against the party which drafted the contract, in this case the respondent.

45. In any case, in a potential redundancy situation, where consultations have been going on between the respondent and the claimant regarding the end of the Crossrail role, and the claimant has arranged to look for other jobs and has obtained one, I consider that on any ordinary meaning of the word "displacement", that situation must fall within it. As noted, the fact that the claimant's ITD changed has no bearing on this; there was no substantial job at Crossrail to come back to and there had not been one since 23 December 2017.

46. I also accept Mr Adjei's submission that, if displacement could not occur until the point at which the Crossrail role officially ended (23 December 2017), there would be a perverse disincentive on employees not to look for alternative roles well in advance of that (as the claimant did in this case), as obtaining such a role would rule out receiving a clause 19 payment, and that, rather, employees hoping to receive such a payment would be incentivised to wait right up until the ITD before taking action. As a matter of fact, that is not what the respondent expected employees to do; rather, it expected them to be proactive in looking for jobs (as the claimant duly was). This is therefore further evidence that, in terms of the intentions of the parties, the respondent could not have intended "displacement" to come about only at or shortly before the ITD.

47. I therefore find that the claimant was indeed displaced and therefore came within the clause.

48. In any event, even if she was not "displaced", the claimant came within clause 19 for other reasons too. I have referred to the references in the claimant's meeting of 3 April 2017 to the claimant wanting a different challenge and looking for a Band 4 opportunity with a more challenging role. The claimant was, therefore, clearly looking for "career development to broaden experience and develop individual potential", which is another reason which brings her transfer within the terms of clause 19. In addition, again as set out in my findings of fact above, this is spelt out in clear terms by the claimant in her grievance. The claimant therefore came within clause 19 for this reason too.

49. As noted, the claimant satisfied the other conditions of the clause. She is, therefore, entitled to the payment of 30% of basic salary.

50. I turn now to the issue of what rate of salary should apply in calculating this payment. I note that clause 19 and the rest of the claimant's contract of employment is silent on this and I have not been referred to any other policy which gives further clarity. This, I find, is hardly surprising. It seems obvious to me that, where a contract provides for a payment by reference to taking up a particular role, the salary which should apply is the salary that applied at the time when the individual actually took up that role; in this case the salary at September 2017. I can see no rational basis for concluding otherwise. The claimant has submitted that the salary which should apply is the one at July 2018; however, her only basis for this is that it took that long to get through her grievance and grievance appeal and come to an outcome in respect of that

appeal. Taking that argument to its logical conclusion, if a dispute about a payment went on for years and, in the interim, salary had increased very significantly, it would be absurd if the payment was calculated by reference to a completely different salary which did not apply at the time of the individual taking up the role, merely because of the effluxion of time.

51. The applicable salary is therefore the salary that applied in September 2017, being £36,422. The shortfall, and the amount therefore due to the claimant, is £4,685.60 (subject to deduction of tax and national insurance contributions).

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Employment Judge Baty

Dated: ……15 April 2019……..

Judgment and Reasons sent to the parties on:

…….....18 April 2019.....

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For the Tribunal Office