EMPLOYMENT TRIBUNALS

Claimant: Mr A Ripley

Respondent: First West Yorkshire Limited

HELD AT: Leeds **ON:** 25 June 2019

BEFORE: Employment Judge T R Smith

REPRESENTATION:

Claimant: Mr Ripley in person
Respondent: Mr Bailey-Gibbs (Solicitor)

JUDGMENT

The Claimant's complaint of an unlawful deduction from wages and/or breach of contract is not well founded and is dismissed.

REASONS

Issues

1. Did the Respondent make an unlawful deduction from the Claimant's wages by failing to pay walking time to and from relief points at the start and end of a break, mid-shift.
2. Did the Respondent make an unlawful deduction from wages in imposing an unpaid break of up to 18 minutes during a shift.
3. If the Claimant succeeded had the Respondent failed to comply with the ACAS Code of Practice Discipline and Grievance Procedures (2015) and was that failure unreasonable. If that failure was unreasonable was it just and equitable in all the circumstances to increase any award by up to 25%. It was agreed between the

parties that the minimum wage as set out in the National Minimum Wage Act 1998 was not breached when the walking time and breaks were taken into account.

Documents and evidence

4. The Tribunal heard evidence from the Claimant and Mr Pearson, Head of Operations for the Respondent.
5. The Tribunal had before it a bundle of documents consisting of 134 pages. There was added to this agreed bundle a letter from the Respondent to the Claimant dated 17 September 2018 together with a disciplinary and grievance procedure dated 10 May 2013.
6. The Respondent is a large employer employing approximately 2,300 staff.
7. The Respondent operates a unionised workforce.
8. The recognised union is Unite.
9. The Claimant commenced employment with the Respondent as a bus driver. His employment started on 21 May 2017.
10. The Claimant was a member of Unite up until approximately August 2018.
11. The Claimant's statement of terms and conditions of employment were before the Tribunal (pages 11 to 17).
12. It is worth recording a number of matters that are contained in that statement.
13. Under the heading collective agreements the statements state *"your rate(s) of remuneration, including overtime and over premium rates, your standard hours of work, entitlement to holidays … and other terms and conditions of employment are in accordance with those agreed by management and trade union representatives"*
14. In relation to hours of work these are dealt with at paragraph 5.4 and 5.5 in the statement.
15. The contract refers to the fact that the Claimant was contracted to a minimum of 36.5 hours per week. As the Tribunal understands matters the Claimant will be paid for 36.5 hours per week even if it was not possible for the Respondents to schedule him for those full hours.
16. At paragraph 5.4 the Claimant was entitled to *"a minimum break of 40 minutes (unpaid) excluding any walking time required which will be shown but not paid and a maximum working day spread over of (sic) 16 hours".*
17. At paragraph 5.5 it then states: *"for all duties operated:*

    - *Duties may contain one or more breaks.*
    - *All breaks will be unpaid.*
    - *Five minutes will be paid at the beginning of the duty for signing on.*
    - *Ten minutes will be paid for undertaking pre-service vehicle checks.*
    - *Walking time will be paid at the beginning of the daily duty to the first relief point.*
    - *Walking time will be paid from the final relief point of the duty to the cash disposal point.*
    - *Five minutes paying in time will be paid."*

18. It is perhaps helpful just to briefly explain what is meant by walking time. This is an allowance of time between the depot and the bus pick up.

19. It will be noted that walking time is paid at the start of the shift and at the end of a shift. There may however be walking time during the shift and this is not paid.

20. The Tribunal's attention was taken a collective agreement (pages 1 to 10).

21. The Tribunal is satisfied that this is a collective agreement within the meaning of section 178 of the Trade Union Labour Relations (Consolidation) Act 1992. Indeed, it was not disputed that it was a collective agreement. The Tribunal is satisfied that it falls within the statutory definition as it deals with terms and conditions of employment. It specifically applies to bus drivers. It contains a myriad of provisions as regards working conditions including breaks, duties, rest day provision, overtime etc.

22. The Claimant says that the collective agreement was never drawn to his attention. The Tribunal accepts that. The Claimant is an honest man and the Tribunal judged that he told the truth on all matters in dispute, from his perspective. Although the Tribunal accepts the Claimant may not have seen the collective agreement, as a matter of law it was incorporated into his contract. The case of **Tocher v General Motors Scotland Limited** [1981] IRLR 55 makes it clear that a collective agreement is incorporated even if an employee may not approve it.

23. The Tribunal reminded itself that not every provision in a collective agreement is necessary contractual. The clauses must be apt for incorporation. See for example **Alexander v Standard Telephones and Cables Limited** [1991] IRLR 268.

24. The Tribunal is satisfied that the collective agreement contains clauses that are apt for incorporation given the nature of the agreement and its provisions.

25. There was an amendment to that collective agreement in a document signed by management and trade unions on 14 May 2018. It was to take effect from 29 April 2018. It principally concentrated on the issue of pay rises. There were to be two, 2% rises staged over two years. However, the unpaid element of meal breaks increased from 70 to 80 minutes but with a guarantee there would be a 2.5 hour cap on such breaks. Thus, up until the amendment the Claimant was not paid for breaks up to 70 minutes. After the amendment he was not paid for breaks up to 80 minutes.

26. The Tribunal understands from the evidence that, if for example, due to rostering difficulties, a person had a break of 100 minutes and the amendment was enforced then they would be paid for the excess over 80 minutes, namely 20 minutes.

27. The Claimant was unhappy with the amendment to the collective agreement and brought a grievance on 16 May 2018 (pages 43 to 44). He complained as regards the rest breaks and not been paid. It appears that he discussed matters with his union but they were either unable or unwilling to assist.

28. The Claimant mentioned that the amendment to the collective agreement had been voted upon by union members. The Tribunal does not find this to be a particularly unusual procedure to take place in a unionised workforce.

29. The Tribunal finds it frankly astonishing that the Respondent did not appear to have a clear and transparent grievance procedure. Mr Pearson, the Head of Operations didn't even know that there was only one appeal stage in the Respondent's grievance procedure.

30. Following the submission of the grievance on 16 May a meeting was held on 7 June 2018.

31. The Tribunal is satisfied having regard to paragraph 32 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) that delay was not, to use the statutory wording, unreasonable.

32. The above is a brief summary of the relevant factual issues.

The Claimant's case

33. It is perhaps important at this stage that the Tribunal sets out how the Claimant put his case as it helps to put in context the Tribunal's judgment.

34. The Claimant's case was that in essence he was entitled to be paid for all the time he was available to work and at the Respondent's disposal. Thus, he was available for work during rest breaks. He was also available for work when undertaking walking time. It will be remembered he wasn't paid for walking time during the course of his shift.

35. The Claimant's case is built on the provisions of the National Minimum Wage Act 1998.

36. The Claimant sought to transpose the concept of working time and the relevant case law into his personal circumstances. He particularly relied upon case law under the National Minimum Wage Act that dealt with issues such as travel time and stand by payments.

37. The Claimant contended that he was engaged on working time and therefore should have been paid, at the very minimum, in accordance with the National Minimum Wage Act but in the alternative and the case he pursued more forcefully, his contractual rate.

38. The Claimant contended that the clauses in his contract contravene the National Minimum Wage Act 1998. As his contract contravened the National Minimum Wage Act then those contractual clauses could not take effect and as a minimum the statutory protection applied.

39. It is fair to say the Claimant amplified further on his argument by reference to examples involving stand by drivers and the like but it is not something the Tribunal need address.

The Respondent's case

40. The Respondent's case is set out in written submissions. In essence, and the Tribunal mean no disrespect as regards those submissions, the Respondent's case was that they complied with the contractual obligations under both the collective agreement and of the Claimant's contract of employment.

41. The Claimant was paid all monies that were properly due to him under his contract and therefore there could be no unlawful deduction from wages within the meaning of section 13 of the Employment Rights Act 1996.

Discussion

42. The fundamental principle in English law is that the parties are free to contract as they wish. It is not for the Tribunal to tell a Respondent how to run its business. It is for the Respondent, for example if it wants to roster drivers over certain periods to make those arrangements. Provided it complies with the statutory requirements it is free to do as it wishes.

43. The Respondent has clear contractual provisions in relation to whether breaks are or aren't paid and whether walking time is or isn't paid. The Tribunal is satisfied that the Respondent has paid the Claimant in accordance with those contractual provisions. On the face of it therefore there cannot be an unlawful deduction under section 13 of the Employment Rights Act 1996.

44. The fact that some of the contractual clauses have been incorporated into the Claimant's contract by means of a collective agreement or amendment thereto and the Claimant's objects to them does not mean that there has been an unlawful deduction. An employee is entitled to negotiate with recognised trade unions and collective agreements allow an employer to do so particularly with a large and diverse workforce. Collective agreements may well produce benefits, because the staff can use their collective negotiating force but also it may produce disadvantages that impact on some or all employees. That is the difficulty with collective bargaining. There are winners and sometimes some losers. The Tribunal finds the Claimant was bound by the collective agreement and amendment as it was incorporated into his contract of employment

45. The issue in this case is whether the contractual arrangements contravene the National Minimum Wages Act 1998. Section 49 of the Act prohibits contracting out. The Tribunal's judgment is the Claimant's contract of employment together with the clauses incorporated by means of collective agreement do not contravene to the National Minimum Wages Act.

46. The concept of working time in the National Minimum Wages Act is used for a single purpose; to calculate where the sums paid by the employer to the employee comply with the statutory minimum, as varied from time to time.

47. An employer is entitled, once the wage threshold is met to decide what it wishes to do as regards payment. It is free to contract as it wishes. For example, an employer could agree to pay an employee a stand by payment below the national minimum wage rate but provided the employees total remuneration in accordance with the Act exceeded the statutory minimum then that would be perfectly lawful.

48. In this particular case it is accepted that the global package paid to the Claimant did comply with the National Minimum Wage Act having regard for the calculation formula set out therein.

49. In the circumstances therefore, although the Tribunal has no doubt that the Claimant feels genuinely aggrieved, the Respondent has paid in accordance with the contract and as he has been paid in accordance with the contract there can be no unlawful deduction from wages. In the circumstances therefore, and with some regret, the Tribunal must dismiss the complaints.

Employment Judge T R Smith

Date 3 July 2019