



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111700/2019

Held in Inverness on 25 February 2020

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Employment Judge J Hendry

Mr Greig Paterson

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**Claimant
Represented by
Ms A Bowman,
Solicitor**

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SSE Contracting Limited

**Respondent
Represented by
Ms L Finlayson,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for a finding that his former employers were in breach of contract by paying him travel expenses in terms of the Scottish Joint Industry Board (SJIB) Agreement rather than under the Joint Negotiating Committee Agreement does not succeed and is dismissed.

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REASONS

1. The claimant in his ET1 sought a finding that his employers were in breach of his employment contract and that he should properly have been paid his travel expenses in terms of those set out and agreed in a Joint Negotiating

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Committee Agreement (JNC) entered into by his employers and Trades Unions acting on behalf of staff.

2. The respondent's position was that the claimant had been correctly paid and that both his wage rates and travel were paid in accordance with the terms of the Scottish Joint Industry Board Agreement (SJIB).

Issues

3. The issues of the Tribunal were to determine what the claimant's proper contractual relationship was with the respondent and how travel payments should be paid. There was no material factual dispute between the parties other than around the application of the two agreements.

Evidence

4. The Tribunal heard evidence from the claimant in relation to his understanding of his contractual position. The respondent led evidence from Ms Sarah Anderson an HR Business Partner and from Scott Carey Head of Projects Scotland.

Facts

5. The claimant worked with the respondent from 27 July 2009 until 14 June 2019. He was employed to work as an electrician in the contracting side of the respondent's business.
6. The respondent's contracting division carries out non-lighting services involving installation of electrical wiring and equipment in both domestic and commercial premises.
7. The claimant worked initially in Glasgow as a trainee but relocated to Inverness for the latter part of his employment. As part of his employment he was involved in travelling throughout the Highlands to various sites. He submitted travelling claims weekly and was paid travelling expenses.

Contractual background

8. The claimant completed a six months fixed term contract as an electrician and was given a permanent role from 1 June 2014 based at Inverness

(JBp31). He was given a Statement of Employment Particulars (JBp32-39) which he signed and returned to the respondent on or about 19 September 2014.

9. The Statement of Employment Particulars stated at the outset:

5 “The following details your terms and conditions of employment with
SSE Contracting Limited (part of the SSE Group) (“the Company”).
This is an important document and you should read it carefully before
signing it. This is an abridged version of the Collective Agreement
known as the SSE Contracting Direct Staff (Non-Lighting Services)
10 Joint Negotiating Committee Agreement ...”

10. The company had negotiated the terms of the agreement with recognised Trade Unions.

11. The statement at the foot of each page made reference to “JNC Non-LS March 2014”.

15 12. The statement set out the claimant’s pay (Clause 4) and also “travelling and other expenses”. The contract provided:

“Travelling and other expenses in accordance with and subject to the following provisions will be paid to an employee travelling in the performance of Company’s duties

- 20 i. Travelling Time Allowance – Company Provided Vehicle
ii. Employees who have transport provided by the Company and are required to start and finish at the normal starting and finishing time on a job, shall receive the appropriate travelling time allowance as set out in the appendices.”

25 13. The claimant during his period of employment would be expected to start work on site at 8:00 am. He was provided with transport by the company.

14. When the claimant began work with the respondent he did not see a copy of the full JNC agreement and was unaware of its detailed terms.

30 15. The JNC agreement of August 2017, amended June 2018, was produced (JBp40-89) .It explains that the JNCA covers the principal activities for SSE

Contracting Limited for direct staff (non-lighting services). It does not cover support staff and employees on personal service contracts. It states that the joint negotiating consulted committee consists of representatives of the company and the recognised Unions.

- 5 16. Appendix I of the agreement sets out pay rates and contains the following wording (JBp64):-

“It is noted that the national wage rates in Scotland will be applied in line with the related electrical industry agreement.”

This refers to the “SJIB” agreement.

- 10 17. Appendix 3 sets out travel payments where a company vehicle is provided. It provides various bands or radii and the appropriate payment. There is no reference to the SJIB.

18. The SJIB is negotiated between the Unite Union and industry representatives in Scotland. The respondent is not party to the agreement.

- 15 19. The respondent decided at some point in or around 2007 that wage rates and travel expenses should be paid to appropriate employees in Scotland in terms of the SJIB rather than under the slightly lower rates provided in the JNC. This was done for business reasons in order to recruit and retain staff in Scotland. SJIB makes no specific reference to the respondent
20 company. Since around 2007 the Scottish employees have been paid wages, their hourly rate, and travel expenses determined by and in accordance with SJIB.

20. When the claimant began work with the respondent he would have to complete a weekly time sheet and travel expense form. The time sheets
25 provided to staff including the claimant who worked from premises in Evanton near Inverness is produced (JBp122-123). The form requires employees to provide details of the job, the customer and the travel allowance claimed. The back of the form had a map of the Highlands showing the various circular bands or radii and related expenses that could
30 be claimed. The form obtained the advice “refer to SJIB for journeys over 75 miles”.

21. In late 2016 the respondent became aware that there were changes to the pay and travel arrangements negotiated by the SJIB. As part of an agreement with Unite a four-year agreement was reached starting on 2 January 2017. It provided for yearly percentage pay increases. The agreement also radically altered the travel allowances. They would no longer be calculated on the basis of bands as previously but on a mileage rate after the first 15 miles.

22. In order to bring these changes to the employee's attention presentation was made to staff including the claimant (JBp131-139). The new time sheet was headed "SSE Contracting Time Sheet (SJIB and JIB)." The claimant attended the presentation (JBp140/141).

23. The new travel expenses regime was less financially advantageous to staff than the previous regime. The new arrangements were less advantageous in terms of travel allowance than the JNC which applied to similar staff in England. Staff were disgruntled with the changes which led to some staff contacting HR to query the position in 2017. Staff spoke to the local manager in Evanton, Barry Miller who agreed to raise the issue with the respondent. He e-mailed on 13 February 2018 (JBp142) on their behalf:

"We are currently paying our operatives 11p per mile for travelling to and from site. We used to work on a radius band mileage for travel payments.

I have just checked the JNC and this states personnel will be paid in accordance to the Radius Bands as per Appendix 3.

Can you please confirm why we changed from the radius band to the rate per mile as our guys are on the JNC contract as far as I can see. This has the potential to be a major issue if the wrong information has been cascaded."

24. The manager, Edward Fergus e-mailed Mr Miller on 14 March (JBp143).

"Contracts have never been changed. JNC should state that in Scotland we abide by the SJIB pay rates which includes travel times/allowances but excludes overnight allowance."

Mr Miller responded:

“Thanks Eddie. I’ve been getting no end of our contract says this and hasn’t been changed”

25. Mr Fergus sent Mr Miller a copy of the presentation that was rolled out in January 2017. Mr Miller e-mailed Mr Fergus on 14 March:

5 “Hi Eddie, can you help with the below? I have had questions lately from operatives regarding travel payments. We are currently paying the operatives 11p per mile to and from site.

They have questioned why they are not getting the JNC rate of payment for their travel. In the JNC Appendix I standard electrical rates (page 25) it notes the following:

10 *‘It is noted that the national wage rates of Scotland will be applied in line with the related electrical industry agreement’*

which is reference to the SJIB.

In Appendix 3: the Total Daily Travel Payments (page 27), there is no such reference to a local industry agreement to which has rightfully been questioned by the operatives.

15 Does this mean they should be getting radius bands on the nearest JIB allowance.”

26. On 8 March Mr Miller contacted the respondent’s HR Advice Service “Ask HR” and had spoken to an HR adviser there Amy Coburn. She had looked into the matter and responded:

“Hi Barry I have checked the details for the below and all are on JNC terms and conditions.

25 If there is nothing stating about SJIB for all other payments my interpretation is that payment would be in line with JNC.” (JBp147)

27. On 6 March Mr Miller had been approached by a number of employees about the basis on which travel was paid. He contacted HR to ascertain the position.

28. The claimant was aware of the controversy around the difference between JNC rates and SJIB rates. He read the JNC document in late 2018. The claimant was aware that some staff had contacted Mr Miller. A Stephen Thain was appointed by staff to be their spokesperson. On behalf of staff

including the claimant he contacted Buchanan Shaw Consulting Ltd who raised a collective grievance on their behalf on 5 December 2018 (JBp153). The letter stated:

“Collective Grievance

5 Please treat this collective grievance, submitted on behalf of the operatives within Evanton Depot.

Attempts to resolve the undernoted issues informally have been unsuccessful.

10 We have concerns the travel payments are not being paid at the correct rate and this amounts to an unlawful deduction from wages.

We are employed under terms and conditions which incorporate the ‘joint negotiating committee agreement direct staff (non-lighting services)’ (‘JNC agreement’). This was confirmed by Amy Coburn on behalf of Ask HR in an e-mail to Barry Miller dated 8 March 2018, in which she states

15 ‘..... All (operatives within Cost centre 83) are on JNC terms and conditions’.

The terms of the JNC agreement provide at clause C5 that Travel Payments are based on Bands up to 55 miles, will be paid as set out in Appendix 3. Appendix 3 sets out the Total Daily Travel Payments. The Total Travel Payments set out in Appendix 3 are not being paid and instead we receive 11p per mile.

20 This amounts to a breach of the terms of the JNC agreement.”

The claimant was a signatory to the grievance.

25 29. The grievance was passed to a senior manager Gary Hamilton. Mr Hamilton considered the grievance and wrote to Mr Thain on 20 June rejecting the grievance (JBp161-165). He recorded (JBp163):

“

- 30 • *Scotland area of contracting have always operated paying the SJIB pay and the SJIB travel rates, all other terms and conditions relate to the non-lighting JNC agreement.*
- *In 2016, as part of SJIB pay deal, it agreed and published a change to the travel payments and moved from the radius*

payments to pence per mile that is currently being used now (which was effective from Jan 2017).

- *Jan 2017 Scotland staff presentation by HR Manager Sarah Anderson, with input from the contracting business (Eddie Fergus and Donald MacKinnon at the time) gave information to the operatives, managers and admin staff of what the changes were, how to apply and the processing of these changes on time sheets, examples/models of the current SJIB travel scenarios which were radius bands at the time, and what the amounts would be on the new aligned SJIB mileage rates.*
- *New time sheets were issued detailing the SJIB change to pence per mile from radius per mile.*

The business confirms that employees have always been paid SJIB rates for mileage allowance, whether it be radius per mile prior to 2016 or pence per mile since January 2017.”

30. Mr Hamilton held that the advice given by Amy Coburn was incorrect. He recognised that the JNC agreement was not clear that travel allowance was paid under SJIB rates and that it should be changed to reflect this.

31. The decision was appealed by letter dated 20 June 2019 (JBp166-167). It highlighted there was no reference to SJIB rates in relation to travel in the JNC agreement and suggested that contracts of employment had not been changed.

32. The appeal was passed to Scott Carey Head of Large Projects. Mr Carey had some experience in dealing with grievances and was on a panel of managers prepared to carry out this activity. He considered the history and the various papers generated by the grievance and appeal. He met Mr Thain at Evanton on 17 July to hear his position. Mr Thain made reference to contact being made with the respondent's HR (2017) about change in travel payments. It was later discovered that HR did not keep logs going back as far as 2017 and there was no record of such calls. Mr Thain then argued that the presentation was insufficient to formally change the agreement and that as the JNC made no reference to SJIB rates applying to travel then they should be paid in terms of the JNC.

33. Mr Carey considered the position. He applied to reject the appeal. He wrote to the staff on 12 August 2019 (JBp180-184) setting out his reasoning. He wrote

5 *“It has been recognised in your grievance outcome letter that the wording on the JNC requires updating. However, this is not in recognition that you should be paid travel payments in line with the JNC. This is in recognition of the fact that the wording on the JNC agreement is not transparent for those employees who are paid in line with the SJIB terms and conditions.*

10 *In your e-mail addressed to Craig Stewart, dated 5 July 2019 you provide a copy of a letter dated 24 April 2007 which is addressed from SEC to Colin Sutherland. This letter confirms that Colin had been transferred from SJIB to JNC terms and conditions effective from 1 August 2007. The travel payments outlined in the main variations*
15 *document you provided appear to be in line with the JNC, albeit these were based on the SJIB rates applicable at the time. Therefore, I accept and agree that applicable travel payments have not been clearly explained in the same way that this has been explained in Appendix I of the JNC (which relates to rates of basic pay). I agree that with the recommendation made in the grievance outcome letter*
20 *that the wording on the JNC should be reviewed.*

Nevertheless since 2007 operatives working under the terms and conditions of the JNC in Scotland have always been paid in line with SJIB rates which includes travel time/allowance but excludes
25 *overnight allowance. Therefore, even though (as stated as above) this has not been clearly communicated in your contract of employment, I do believe that there is evidence to suggest that there has been a clear acceptance from operatives in Scotland since as far back as 2007 that travel payments are paid in line with SJIB rates.”*

- 30 34. There is no reference in employee’s payslips such as those given to the claimant referring to SJIB simply a reference to “travel allowance”.

35. The full quantum in the case has been agreed at £13,608.70 if the claimant is successful.

Witnesses

36. I found the respondent's witnesses to be credible and reliable. Both Ms Anderson and Mr Carey gave their evidence in a clear and professional manner. I also found the claimant to be generally credible and reliable, however, I had some difficulty in accepting his reasons for delaying so long before raising a grievance or making a claim himself about the change in travel allowance in 2017/18. His position was that he was nervous about stepping out of line and it was only after his involvement in the collective grievance in December 2018 that he decided to act. I accepted his evidence that it wasn't until the end of 2018 that he was able to read the full JNC and understand from that there was no reference in it to SJIB rates in relation to travel allowances. However, given the informal and formal grievances and the claimant's knowledge of these I placed little weight on this fact as he had been aware of the controversy for some years.

15 Submissions

37. Both representatives helpfully provided the Tribunal with submissions.
38. Ms Bowman first of all set out the background with regards to the contractual documentation. It was clear that the JNC was expressly incorporated in the claimant's statement of particulars and she pointed out there was no reference to the SJIB in relation to travel and other expenses. She submitted that if it was the intention of parties that travel payments would be made with reference to the SJIB then it would be expressly referred to within Appendix 3 in the same way as wages are referred to in Appendix I. The SJIB was not in her view a contractual document, it was a negotiated agreement between Unite and "Select" a group of employers in Scotland. It accordingly regulated relations between those parties. The respondent was not party to that agreement.
39. Ms Bowman then considered whether the SJIB travel rates could be implied considering the various tests namely implied by conduct or custom. She referred to the officious bystander test and so forth. She made reference to the cases of *Deeley v British Rail Engineering Ltd [1980] IRLR 147* and to the case of *Duke v Reliant Systems [1982] IRLR 347*, and the comments of N Wilkinson LJ therein:

“A policy adopted by management unilaterally cannot become a term of the employee’s contracts on the grounds that as an established custom and practice unless it has at least shown the policy has been drawn to the attention of the employees or has been followed without exception over a substantial period.”

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In her submission employees were only told in January 2017 following the presentation that this was the situation. Complaints were raised by employees namely Colin Sutherland (senior and junior) in 2017. Employees did not agree with the change. She then reviewed what had been communicated to employees in relation to the outcome of the grievance and appeal. She made reference to the case of **Garratt v Mirror Group Newspapers [2011] IRLR 591** and to **Park Cakes v Schumba [2013] IRLR 800**. Underhill LJ at page 34 in the latter wrote: “the essential object is to ascertain what the parties must have ... understood from each other’s conduct and works, applying ordinary contractual principles, the terminology of “custom and practice” should not be allowed to obscure that enquiry. No term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract.”

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40. In the case of **CSC Computer Sciences v McAlinden [2013] EWCA civ 1435** the court held that there should be less focus on the phrase custom and practice and what should be considered instead is the employee’s reasonable understanding of the employer’s conduct and words. In Ms Bowman’s view the employees had not acquiesced to the breach the employers could not in her view rely on the signing of the time sheets. The time sheets recorded hours (as well as travel) and wages were paid in line with the SJIB therefore the claimant and others assumed that was why SJIB was referred to on the document.

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41. Ms Finlayson in turn set out the basis of the contractual position as the employer saw it. The core question was whether the claimant had a contractual right to be paid travel allowance under the JNC rates. She accepted that Appendix 3 did not incorporate the SJIB but in her view the position could be implied into the agreement. The implied term was one which the parties must be taken to have agreed by either showing the parties have agreed or it being reasonable to suppose they did agree to it.

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The evidence, she suggested, pointed to the clear position that workers in Scotland were paid under the SJIB rates, time sheets had been completed during the entire period of the claimant's employment was is the same for all such Operatives in Scotland.

- 5 42. The presentation at page 131-139 made it quite clear that SJIB rates were being paid both prior to the change in rates in 2017 and afterwards. The claimant did not raise any concerns for 24 months. She then looked at how the contract was operated in practice. She made reference to the case of ***Devonald v Rosser & Sons [1906] 2 KB 728***. The practice was fair and
10 notorious, in the sense of being well-known and certain. She made reference to the case of ***Garratt v Mirror Group*** and the various factors that the Tribunal should consider such as the length of time, the frequency and extent to which a practice was followed, the understanding and knowledge of both employer and employees and what was in writing. In
15 deciding whether an employee has agreed to a variation the practical impact of that variation will be a relevant factor (***Jones v Associated Tunnelling Company Ltd [1981] IRLR 477 EAT***). In ***Selectron Scotland Ltd v Roper and others [2004] IRLR 4 EAT*** at page 30 Justice Elias wrote:

20 *“The fundamental question is this: is the employee’s conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those
25 circumstances it may be possible to infer that they have by their conduct over a period of time accepted the change in terms and conditions. If they reject the change they must refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights.”*

- 30 43. The claimant in his evidence acknowledged that he knew he had been paid the SJIB rates prior to 2017. He had been aware that from commencement of his employment in 2009 he was being paid SJIB rates. He confirmed that the SJIB handbook was “lying about the office”.

Discussion and Decision

- 5 44. The submissions made by parties were helpful in providing a legal framework for considering the facts of this case. From these facts emerge a relatively uncontested and straightforward, at least with regard to the facts, background.
- 10 45. It is unfortunate that there was no evidence or records provided about the genesis of the move from moving to the SJIB rates in 2007 and what staff were told. The understanding of witnesses was that it was a business decision to attract and keep staff in the business in Scotland no doubt recognising the pull of other industries particularly those in the oil industry. The changes were to the benefit of staff in Scotland. That was not disputed. They enjoyed higher rates and travel allowances which appear comparable with the allowances paid under the JNC.
- 15 46. Unfortunately for a company with, at least historically, the word Scottish in its title the necessary changes to contract documentation were only partially made in 2007 or whenever the change occurred to reflect the different position in Scotland. The JNC referred to the wage rates in Scotland being calculated with reference to the SJIB but the part of the document referring to travel was not amended. This appears to have been simply an error and one that was not spotted for some years. On the other hand there was no cause for staff or the employers to scrutinise the documentation as what happened in practice on a day to day basis was clear.
- 20 47. As noted earlier the evidence about what occurred at the time was rather vague and second hand and not buttressed by records. However, to be effective in retaining staff the change to the SJIB rates must have become widely known to the affected staff at the time. Whether the modest changes led to widespread rejoicing is not known to the Tribunal but the SJIB was thereafter the source of the wage rate and travel expenses. This was reflected in the format of the weekly timesheets used by staff including the claimant. On balance I do not accept the claimant's evidence that he was reasonably unaware that SJIB rates applied for both wages and travel as the forms he completed both reflected the higher wage rate and made direct reference to SJIB although, in fairness, there is also reference to the JNC
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on the front of the form. In accordance with the guidance contained in the **McAlinden** case it is the employee's reasonable understanding of the employer's conduct and words that should be focused on. Although, I am sure that in reality little real attention was paid to this issue at the time the new arrangement commenced but the evidence that SJIB rates for both travel and wages was referenced there was available for anyone who looked into the matter.

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48. That then was the situation when there was a divergence in the method of calculating travel reimbursement between the JNC and the SJIB. The presentations that the respondents gave to staff, including the claimant, made the position clear that the wage rate and travel were regulated by the SJIB. This would have come as no surprise to those staff who were in employment in 2007 or who had looked carefully at the timesheets. Any satisfaction that staff had that they had been better paid under the SJIB rates seems to have been undermined by the more radical changes in travel. It can be assumed that the agreement reached with employers in Scotland, which group the respondent company did not belong to, traded agreed annual increases for a change in the method of reimbursement for travel which was less generous than before: in terms what the staff appear to have won on the swings they lost on the roundabout.

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49. Travel expenses is a particularly sharp issue for those who work in the Highland and other rural areas as staff often require to travel long distances to work and it was perfectly understandable that the position reflected in the JNC documentation was eventually scrutinised and it was found that it was silent in reference to SJIB regulating travel. In passing I would comment that I placed little weight on the fact that when the matter was referred to the respondent's general HR system that they indicated that the expenses would be regulated by the JAC. That was a reasonable interpretation for the HR Adviser to make but it was one made without reference to either the history of the matter in Scotland or the practice.

50. However, this raises a further difficulty for the respondents in that it was strongly argued that the agreement, that the SJIB regulated travel, was not sufficiently 'notorious' as even managers like Mr Miller or AskHR seemed to require correction on the issue (JBp128). What was significant is that

following the presentation in January 2017 the position should have been clear to staff. Even if a member of staff such as the claimant was genuinely unaware of the situation, and I did not accept that he reasonably could have been, he did not protest the manner in which his travel was being paid nor
5 take any steps to recover underpayments as he saw them. The unhappiness of staff continued and they looked for ways to return to the previous system of travel expenses but a formal grievance was only lodged almost two years later in December 2018 and meantime staff were, on the one hand accepting the pay rises provided for in the agreement and
10 submitting and receiving travel reimbursement without protest. The new timesheets clearly referred to the new regime of travel expenses and these were completed weekly.

51. The grievance was formally rejected in June 2019 and the appeal on the 12 August 2019 and proceedings raised by the claimant on the 16 October
15 2019 almost three years after the presentation. As was stated in the case of *Duke* (quoted above) the situation is that even if the term had been unilaterally imposed, the latest that could be was in January 2017, it was followed without exception since then.

52. It was accepted that the employers in this case should not have made the
20 initial error in the documentation which did not reflect the more beneficial arrangement and perhaps, could have dealt with the matter better but in the circumstances I have concluded that despite the initial error in documentation staff, such as the claimant, should have been aware before the changes in 2017 that the SJIB regulated travel expenses and even if
25 they did not, the presentation made the position clear. The claimant in addition, through his actions, cannot now argue that his contract was any different having accepted the benefits of the SJIB arrangement since his employment began in 2009.

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Employment Judge:
Date of Judgment:
Date sent to parties:

James Hendry
19 March 2020
23 March 2020