EMPLOYMENT TRIBUNALS

Claimants: 1. Mrs D Bogusiewicz
2. Mrs A Tomczyk

Respondent: The General Green Company

Heard at: Manchester **On:** 27 January 2020
21 February 2020
25 February 2020
(in Chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimants: Mr S Zubryzycki (representative)
Respondent: Mrs S Younis (representative)

JUDGMENT

The judgment of the Tribunal is that:

1. The first claimant's claim for breach of contract is unsuccessful and is dismissed.

2. The first claimant's claim for unlawful deduction from wages is successful and the claimant is awarded £2,931.58 gross.

3. The second claimant's claim for breach of contract is unsuccessful and is dismissed.

4. The second claimant's claim for unlawful deduction from wages is successful and the claimant is awarded £2,473.50 gross.

REASONS

Introduction

1. Both claimants brought their respective claims by way of claim forms dated 26 July 2019. Both claimants claimed that they had suffered a breach of contact for the non payment of expenses and unlawful deduction from wages as a result of not receiving an hourly wage for time spent collecting colleagues in order to travel to a customer and further, time spent travelling between customers' home addresses.

2. The claimants were cleaners for the respondent company and travelled from Wythenshawe to Cheshire each day to clean domestic properties.

3. The response forms were both dated 15 September 2019 and defended both sets of proceedings. The respondent contended that neither claimant was entitled to reimbursement of expenses nor an hourly wage for time incurred collecting colleagues for travel to work. It was conceded that the first claimant received an hourly wage for travel time spent between customers' houses for the period January 2019 to July 2019.

4. The first claimant also sought reimbursement of holiday pay that had been incorrectly calculated. By the time of the final hearing, the respondent had rectified the calculation and the first claimant withdrew this part of the claim.

Issues

5. It was agreed that the following were the issues for both claimants:

   (a) Whether their contract of employment provided compensation for expenses for mileage rate and maintenance costs of use of their own car;

   (b) Whether they were entitled to an hourly rate of pay for travel time between home, collecting colleagues and respondent's office; and

   (c) Whether they were entitled to an hourly rate of pay for travel time between customers' houses.

Evidence

6. The Tribunal was provided with a bundle of written evidence running to 113 pages. In addition, the Tribunal was also provided with a separate bundle containing handwritten notes said to be those of the respondent detailing the first claimant's travel time between customers. The final bundle of documents handed to the Tribunal related to the holiday pay claim which had been withdrawn.

7. During the course of the hearing the claimants' representative produced separate Excel spreadsheets detailing the losses for each claimant and a copy of Facebook advertisements placed by the respondent.

8. I heard evidence from both the first and the second claimants, although neither produced written witness statements as evidence in chief. It was both claimants' positions that they relied on the grievance document prepared by the first claimant on 30 May 2019 that formed the particulars of claim, as their evidence in chief.

9. The respondent witnesses were Anna Gronowska, the owner of the respondent company, and Alicja Mordak, a consultant HR Manager for the respondent company. Both provided witness statements as evidence in chief and gave live evidence. The respondent also sought to introduce a letter written by a Paulina Modrzejewska, a team leader at the respondent company, during the second part of the final hearing. This letter had not been served on the claimants and time was given for the claimants' representative to read through the letter before starting the cross examination of the respondent witnesses. This witness was not present at the Tribunal and did not give live evidence.

10. The Tribunal was assisted by an interpreter. The interpreter assisted the second claimant and the Anna Gronowska with their live evidence. The interpreter also assisted Anna Gronowska throughout the hearing.

Relevant Legal Principles

Unlawful Deduction from Wages

11. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

> "(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or
>
> (b) The worker has previously signified in writing his agreement or consent to the making of the deduction."

12. A relevant provision in the worker's contract is defined by section 13(2) as:

> "(a) One or more written contractual terms of which the employer has given the worker a copy of 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 the worker in writing on such an occasion."

13. A deduction is defined by section 13(3) as follows:

> "(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."

14. Section 27 defines wages, which includes:

"Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."

15. However, section 27(2) specifically excludes, "Any payment in respect of expenses incurred by the worker in carrying out his employment" from the statutory meaning of wages.

16. Section 23 provides that a worker can present a complaint to an Employment Tribunal if the employer has made a deduction from his wages in contravention of section 13, but such a complaint will not be considered by an Employment Tribunal unless "it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made".

17. Section 23(3) provides:

"Where a complaint is brought under this section in respect of (a) a series of deductions or payments…, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

18. Section 24 provides that:

"Where any complaint under section 23 is well-founded the Tribunal can make an order that the employer pay to the worker the amount of any deduction in contravention of section 13."

19. However, section 25 determines that:

"(3) An employer shall not under section 24 be ordered by a Tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, insofar as it appears to the Tribunal that he has already paid or repaid any such amount to the worker."

20. In **Poupart Limited v Hounsell & Others EAT 712/01** the Employment Appeal Tribunal dealt with the effect of an employer's repayment of some of the deductions on the three month time limit. It was the judgment of the Employment Appeal Tribunal that any unlawful deduction from wages claim is brought in respect of deductions rather than loss. This meant that a viable claim, one that is in time, can still be made even if the loss suffered following some of the deductions has been made good before the complaint was presented. The Employment Appeal Tribunal was of the view that this was supported by section 25(3) which provides that an employer will not be asked to repay that which has already been paid to the employee in any successful unlawful deduction from wages claim.

Breach of Contract

21. Section 3 of the Employment Tribunals Act 1996 provides that a "claim for damages for breach of a contract of employment or other contract connected with employment" can be brought before the Employment Tribunal.

22. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that any such claim is one that "arises or is outstanding on the termination of the employee's employment".

Relevant Findings of Fact

23. The first claimant was employed as a cleaner with the respondent from 1 September 2017 until 19 July 2019. The second claimant was employed as a cleaner with the respondent from 1 May 2018 until 28 April 2019.

24. Prior to commencing employment, both claimants were interviewed by Anna Gronowska at their homes. During that interview the terms and conditions of employment were discussed verbally. The claimants were offered positions as cleaners with the company, cleaning domestic homes in Cheshire.

25. The first claimant was asked if she had a car and driving licence and was asked to collect colleagues and take them to customer houses.

26. On 1 September 2017 the first claimant signed a contract of employment which detailed her hourly rate of pay as £7.50.

27. However, by 1 October 2017 the first claimant had signed a new contract which recorded her hourly rate of pay at £8.50.

28. On 1 May 2018 the second claimant signed a contract of employment which detailed her hourly rate of pay as £8.50.

29. On 1 February 2019, both claimants signed a new contract which detailed their hourly rate of pay as £8.50 for the second claimant and £9.00 for the first claimant.

30. On the same date, both claimants signed an induction procedure form which made reference to various policies and procedures, including an employee handbook.

31. The second claimant recalls that at her interview it was explained that she would receive an extra 50 pence per hour to cover her mileage expenses.

32. Between the years of 2016 to 2018 the respondent placed adverts on Facebook for cleaners with a car/driving licence. The rate of pay was detailed as £8.50 per hour.

33. If an employee could not collect a colleague and take them to a customer's house, the respondent would collect the colleague and take them to the house.

34. During 2018 both claimants raised issues with the respondent about the lack of payment for expenses and travel time. By December 2018, the respondent had sought the assistance of HR consultant, Alicja Mordak. Between December 2018 and February 2019 Ms Mordak assisted the respondent with drafting a new contract of employment, induction form and employee handbook.

35. In response to the first claimant's complaints about low pay, the respondent increased her hourly rate and this is reflected in the terms and conditions of 1 February 2019. In March 2019 the first claimant was informed that she would not receive a pay rise.

36. In addition, it was accepted by the respondent that the first claimant was entitled to an hourly rate for her travel time between customers' houses. A payment of £297.27 was paid to the first claimant in July 2019 to reflect the period of time from January 2019 to July 2019. No comparable payment was made to the second claimant.

37. On 28 April 2019 the second claimant resigned from her employment.

38. On 30 May 2019 the first claimant brought a grievance seeking reimbursement of travel expenses, and the correct hourly rate for travel time when collecting colleagues and travel between customers' houses.

39. On the same date, the second claimant raised a grievance and sought reimbursement of the cost of her expenses for mileage only.

40. On 11 June 2019., both claimants were informed by the respondent to contact the HMRC to claim the mileage payment and reimbursement of expenses.

41. On 12 June 2019, the first claimant attended a grievance meeting. At that meeting, the first claimant was also advised to contact HMRC to recover her mileage expenses. The conclusion of the grievance was that the first claimant was told she would be paid £297.27 to reimburse her for travel time between customers' houses, from January 2019 to June 2019.

42. The first claimant appealed this outcome and an appeal hearing took place on 6 July 2019.

43. The appeal was dismissed following an investigation. The first claimant was informed that the company did not pay mileage expenses but that she received an extra 50 pence per hour to cover car maintenance and cost of petrol. The first claimant's claim for travel time between picking up colleagues was refused on the grounds that the first claimant was not obliged to do this.

44. On 19 July 2019, the first claimant resigned from her position with the respondent company.

45. On 22 July 2019, the first claimant was paid £297.27 for travel time between customers houses from January to June 2019 and in addition, was correctly reimbursed for her accrued holiday.

Submissions

Respondent's Submissions

46. The respondent invited the Tribunal to dismiss the claims. It is the respondent's case that the claimants were advised at interview that their rate of pay would include travel time between customers and expenses for mileage.

47. The respondent asked the Tribunal to note that the second claimant had in fact admitted in evidence, that she knew her wage was higher in order to cover this position. The collection of colleagues and payment for the same was never agreed. The first claimant admitted in evidence that she did this because she was a good person. It is the respondent's case that the increase in hourly rate also covered travel time to customers houses. The respondent asserts that the claimants did not travel far to collect colleagues before travelling over to Cheshire.

48. It is submitted that the second claimant has no logs or notes of her mileage because she knew from the beginning of her employment that she would not be reimbursed. The respondent asserts that the first claimant left on good terms.

49. It is the respondent's case that everybody accepted the terms and conditions from the outset. The introduction of the HR consultant was to ensure all that had been agreed verbally was recorded in a written contract. The first time the matter was raised was in March 2019 when the first claimant sought an increase in her pay.

50. The respondent asserts that the first claimant's grievance was remedied by the payment for travel between customers house from January to June 2019 and the higher rate of pay from February 2019. The respondent did not pay the first claimant earlier than January 2019 because the higher rate of pay of £8.50 per hour, sufficiently compensated her for the extra time taken.

Claimants' Submissions

51. It is the claimants' collective case that the extra 50 pence per hour did not reflect the loss made by the claimants. The claimants deny that they were offered the use of a company car. The claimants also deny that they travelled in close proximity and believe that they travelled distances of up to 500-700 miles per week.

52. The claimants accept that the HR consultant improved issues, but they were vulnerable non English speaking employees with no knowledge of employment rights and were subject to underpayment.

53. The claimants asserted that they approached their employer to resolve the matter and were told if they did not like working there they could go somewhere else. It is the claimants' intention to report the matter to HMRC so that the respondent will be subject to an investigation.

Discussion and Conclusions

A. Breach of Contract Claim

54. Both claimants sought reimbursement of the mileage and maintenance cost incurred in using their cars to collect colleagues and travel between customers. The

sum claimed by the first claimant was £3,496 and the sum claimed by the second claimant was £3,257.59.

55. The evidence given by the respondent was that both claimants were reimbursed for this cost by an hourly rate higher than that paid to those who did not use their cars in their employment.

56. It is clear from the contractual evidence within the bundle that both claimants received more than the National Minimum Wage by way of hourly rate - £9.00 and £8.50 respectively. The evidence from the second claimant was that she knew she was paid a higher hourly rate than her colleagues because this was supposed to reimburse her for the mileage amount.

57. There is nothing in the contracts of employment that deals with the reimbursement of mileage incurred whilst working for the respondent. I was not provided with a copy of the employee handbook, but the respondent witnesses said that this too does not deal with reimbursement of mileage expenses. It is therefore right to say that there is nothing in the contract which provides a legal entitlement to the mileage expenses for either claimant.

58. The claimants both received a higher hourly rate than their colleagues and in excess of national minimum wage. I accept the evidence of the respondent that this higher rate was to compensate them for their mileage and associated maintenance costs. For this reason, their breach of contract claim is unsuccessful.

B. <u>Unpaid travel time collecting colleagues</u>

59. The respondent asserts that the contract of employment does not deal with the payment of travel time for collecting colleagues. In fact, it was the respondent's evidence that the claimants were never asked to collect their colleagues and that both did this because they were good people.

60. However, the claimants are of the view that they had no choice but to collect their colleagues and that when they were recruited the respondent specifically required them to have a driving licence and access to a car. There are certainly Facebook adverts placed by the respondent between 2016 and 2018 in which a licence/car is a requirement.

61. If the claimants did not pick up their colleagues, the respondent confirmed that she would have to do that and take them to the jobs. There was clearly a requirement to transport cleaners to the houses and the claimants did this for the respondent.

62. Whilst the contract is silent on whether the time spent doing this will be paid, I am of the view that these are wages that are properly payable to the claimants and were wages referable to their employment.

63. I therefore conclude that the claimants are successful with this part of their unlawful deduction from wages claim and entitled to compensation.

C. <u>Unpaid wages for travel time between customers houses</u>

64. The second part of the unlawful deduction from wages claim is the travel time between customers' houses. Again, this is not dealt with in the contract of employment but by at least the middle point of 2019, the respondent accepted that the first claimant should be paid for time incurred between January to June 2019.

65. I therefore conclude that it was the intention of the parties that the claimants had a legal entitlement to an hourly rate of pay for travel time between customers houses. The failure to pay the claimants for this time is an unlawful deduction.

66. The first claimant is not time barred from claiming the earlier part of the claim because although she was paid from January to June 2019 her claim was submitted as a series of deductions in July 2019 before that payment, and therefore the remainder of the claim remains in time in accordance with the EAT decision in **Poupart Limited v Hounsell & Others EAT 712/01.**

Remedy

67. The £297.27 paid to the first claimant falls short of what she calculated she was entitled to during that period for travel time between customers houses.

68. The first claimant is not entitled to recover the £297.27 already paid to her by the respondent, but she can recover the balance.

69. I accept the calculations put forward by the claimants and I therefore award the first claimant £2,931.58. I award the second claimant £2,473.50.

Employment Judge Ainscough

Date: 31 March 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 April 2020

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case numbers: **2410322/2019, 2410340/2019**

Name of cases: **Mrs D Bogusiewicz** v **General Green Company**
Mrs A Tomczyk

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **3 April 2020**

"the calculation day" is: **4 April 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office