



# EMPLOYMENT TRIBUNALS

1600637 /2019

**Claimant:** Mr A Davies

**Respondent:** Network Rail Infrastructure Ltd

**Heard at:** Cardiff

**On:** 26 November 2020

**Before:** Employment Judge Pearl

## Representation

**Claimant:** In person

**Respondent:** Ms J Connolly (Counsel)

This was a hearing conducted fully by CVP video conference, to which the parties consented. The documentary bundle before the tribunal ran to 176 pages.

## JUDGMENT

1 There is no jurisdiction to entertain the claim of unauthorised deductions from wages.

2 In the alternative, had jurisdiction been established, the claim is not well-founded and is dismissed.

## REASONS

1 This was a hearing of a claim for unauthorised deductions from wages received on 16 May 2019. It is the culmination of a long-standing issue between the Claimant and his employer. He is a principal Technical Officer and his employment commenced in September 2011. He states concisely in the ET1: “As part of our terms and conditions of service we are entitled to a scale rate meal allowance which according to the T&C’s are payable as non-taxable when working at a distance greater than 5 miles from our home station, currently Network Rail are paying these scale rate meal allowances as taxable.” He

believes that the amounts deducted for tax and national insurance are unlawful deductions.

2 The defence is two-fold. First, that section 27(2)(b) ERA 1996 applies, namely that these are payments “in respect of expenses incurred by the worker in carrying out his employment.” The consequence, if correct, is that the payments fall outside the statutory definition of wages and the tribunal would have no jurisdiction to entertain the claim. Second, and if there were to be jurisdiction, it is said that these are not properly classified as scale rate allowances; and under the law and Revenue guidance they fall to be taxed at source.

3 I heard evidence from the Claimant; and from Mr Fisher, called as an expert accountant, and Mr Lee. I studied the bundle referred to above. The video hearing was satisfactory for the taking of evidence, but during submissions, we reverted to audio only and Ms Connolly had to reconnect via telephone.

4 The Claimant worked for Network Rail between 2003 and 2006. After a 5 year gap he rejoined in 2011. I have no reason to doubt that during the earlier 3 years, the meal allowances were paid gross to the Claimant. Whether that was correct or not is an issue I do not have to decide. It was not, however, at that time paid in that way as a matter of contract. Ms Connolly took the Claimant through the relevant documents and collective agreements. The relevant union is TSSA. Back in 1984, and thereafter, the British Rail ‘Blue Book’ applied. The Claimant agrees that the Blue Book is silent on the tax treatment of the meal allowance. As to the document that TSSA in 1994 produced for members, (extracts at pp. 31-47) there are, at page 45, notes on taxation that suggest the allowance is not subject to tax or national deductions. “... these allowances can be paid tax-free only if ... [the qualifying conditions are met.]” The union plainly took that view, but it is only something that was in the guidance at that time and could not be binding on the employer. Mr Davies agreed that it was advice to members.

5 The Claimant's 2011 contract of employment starts at page 55. Clause 6 details salary and is augmented by annex B which details “other principal component elements of pay.” The Claimant accepts that the meal allowance is not listed as one such component.

6 The meal allowance is paid regardless of whether or not the employee uses it on food, indeed s/he does not have to spend it at all. This is central to the second issue I must determine. The Claimant's evidence was, initially, consistent with his ET1: he maintained that the allowance is a scale rate allowance. After being taken to HMRC Guidance Notes, including No 05100, he accepted that it is a round sum allowance. EIM 05100 gives guidance on s62 of ITEPA 2003, which defines earnings and includes “incidental benefit of any kind.”: “A round sum expenses allowance is an allowance which is paid to an employee irrespective of whether he or she spends it or not in a particular way, It is to be contrasted with a reimbursement of expenditure actually incurred by an employee and with a scale rate payment intended to reimburse such expenditure ...” As is clear also from EIM 05200 the meal allowance will not be accepted by HMRC as a scale rate payment (because it does not reimburse expenditure incurred by employees.). As the Note makes clear, in the case of such scale rate payments, employers must have procedures in place that ensure that the payment is only

paid when the employee has incurred an allowable expense. Indeed, this note explicitly says that a scale rate payment paid "irrespective of whether the employee has incurred an allowable expense is simply a payment of earnings within section 62 ITEPA 2003."

7 Mr Fisher is Director of Employer Solutions at Grant Thornton. The tribunal must take the decisions in this case, but I have been assisted by Mr Fisher's evidence and I can see no flaw in his logic. He reviews the evidence and he refers to an old but much cited decision, Fergusson v Noble (1919). He traces the statutory provisions and comes to the conclusion that, in the case of round sum payments, the employer is obliged to deduct PAYE and national insurance. In evidence he said he was not aware of any legislative provision where an unreceipted payment, or one not checked by the employer, would be allowed without deduction of tax.

8 I am grateful for the submissions of the Claimant and counsel.

### Conclusions

#### *Jurisdiction*

9 The statutory exception for expenses payments, taking them outside the definition of wages, is wide. In LB Southwark v O'Brien [1996] IRLR 420 Mummery J made the point, in paragraph 22, that the words 'in respect of' in s27(2)(b) "means 'referring to' or 'relating to' or concerning in a general way ...". He cited Barrie v Rochdale MBC (1994, EAT) in support. These authorities remain good law. I agree with Ms Connolly that precise reimbursement is not necessary for a payment to be regarded as one in respect of expenses. I consider that there is only one answer on the jurisdictional point. These meal allowance payments were clearly in respect of expenses and I see no answer to the Respondent's defence under this head. The Claimant has not established any contractual right of the sort he has asserted, in terms of the tax treatment of the payments. In closing, he confirmed that his case rested on the fact that, in the past, the payments were made with no tax deducted. However, this is not a material factor on the jurisdictional point. It may have been an error or there may be some other reason for the way payments were made in the past. I have to deal with the position that has obtained for a number of years. If, as I hold, the payments were in respect of expenses, there is no jurisdiction to entertain the claim.

#### *The alternative decision,*

10 The Claimant's argument in contract cannot succeed. There was no agreement that the Respondent was obliged to make the meal allowance payments gross. As is apparent from my findings, and my endorsement of Mr Fisher's analysis, I conclude that the Respondent was obliged to deduct tax and NI. Therefore, were there to be jurisdiction, the Claimant's case would necessarily fail.

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Employment Judge Pearl

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Date 27 November 2020

REASONS SENT TO THE PARTIES ON 1 December 2020

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FOR THE TRIBUNAL OFFICE