EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Hewitt	**v**	**Department for Work and Pensions**

Heard at: London Central (by video) **On**: 10 December 2020

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: in person

For the Respondent: Ms S. Cummings (of counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 10 December 2020 and reasons having been requested by the claimant, in accordance with Rule 62(3) of the Rules of Procedure 2013.

The claimant requested written reasons by email he sent to the tribunal shortly after the hearing. Unfortunately, due to London Central Tribunal's closure on 18 December 2020 for COVID safety reasons and resulting restrictions on the staff and judiciary accessing the paper files and the tribunal's case management IT system, his request was not picked up and passed on to me until 11 February 2021. I apologise for the delay in dealing with the claimant's request.

REASONS

Background

1. By a claim form presented on 20 July 2020 the claimant brought a complaint of unauthorised deduction from wages.

2. The claimant claims that the respondent has been making unauthorised deductions from his wages by deducting from his salary sums of money in respect of the claimant's expenses, which the claimant had incurred and claimed in the normal way. The total value of the expense claim in question is £1,296.02 ("**Expense Claim**").

3. On 9 May 2019, the respondent paid the Expense Claim. However, it later discovered that the Expense Claim should not have been authorised because it had been submitted late under the terms of the respondent's updated expense policy ("**Updated Policy**"), and therefore it should have been rejected. Consequently, starting from 29 February 2020, the respondent commenced deducting from the claimant's monthly salary a sum of £108.01 to recover the "overpayment". By the time of the hearing, the total sum of £1080.10 had been deducted from the claimant's wages.

4. The respondent case is that that the Tribunal does not have jurisdiction to hear the claimant's claim, because section 13 of the Employment Rights Act 1996 ("ERA") does not apply to any deduction by an employer from a worker's wages where the purpose of the deduction is the reimbursement of an overpayment in respect of expenses incurred by the worker (section 14(1)(b), ERA 1996) and that the exception applies to an overpayment regardless of the reason for the overpayment.

5. In the alternative, the respondent pleads that if the claimant's claim were for breach of contract, the Tribunal would still lack jurisdiction to hear it, because the claimant remains employed by the respondent, and to bring a claim of breach of contract, the claim must arise or be outstanding on the termination of the employment of the employee, pursuant to section 3(2), Employment Tribunals Act 1996 and Article 3, Extension of Jurisdiction Order 1994. At the hearing, the claimant accepted that his claim was not for breach of contract.

6. The respondent sought to strike out the claim on the grounds that it had no reasonable prospects of success.

7. On 4 November 2020, Employment Judge E Burns refused the respondent's strike out application and the case proceeded to the final hearing by video on 10 December 2020.

8. The claimant appeared in person. The respondent was represented by Ms S Cummings (of counsel)

9. The claimant gave sworn evidence, and the respondent called sworn evidence of Mr Darren Rowley, the respondent's Policy Expert in the Business Travel and Expenses Team.

10. I was referred to various documents included in the bundle of documents of 232 pages, which the parties introduced in evidence.

Issues for the Tribunal to decide

11. At the start of the hearing, I discussed with the parties the issues I needed to determine.

12. The central issue to be decided in the case is whether the payment to the claimant of the sum £1,296.02 in respect of his Expense Claim was an "overpayment" within the meaning of section 14(1)(b) of ERA 1996.

13. If it were, section 13 of ERA 1996 (*Right not to suffer unauthorised deduction*) would not apply, and therefore the Tribunal would not have jurisdiction to hear the claimant's claim for unauthorised deduction from wages.

14. If it were not, and consequently section 13 of ERA 1996 would be engaged, the Tribunal would have jurisdiction. The respondent accepts that in such case, it did not have any other grounds permitted under section 13 of ERA 1996 to make the deductions, and therefore the deductions would be unauthorised and contrary to section 13 of ERA 1996.

15. As a sub-question to the central issue, I needed to determine whether the old expense policy ("**Old Policy**") or the Updated Policy applied to the Expense Claim. The key difference between the two policies concerns exceptional circumstances when late expense claims could be authorised.

16. Both policies require expense claims to be submitted within one month of them being incurred. The Old Policy gave authorising managers the option to approve late expense claims if they considered the reason for the late submission reasonable. It provided two non-exhaustive examples when a late submission would be so considered: absence due to sick leave or annual leave, and staff being unable to access systems.

17. The Updated Policy, however, while still requiring expense claims to be submitted within one month, says that if an expense claim is submitted more than three months after the expense being incurred, it can only be accepted if the authorising manager considers that one of the following five exceptions applies:

    i. an unplanned career break,
    ii. unplanned carers leave,
    iii. short notice maternity/paternity leave,
    iv. long term sick leave, and
    v. unplanned adoption leave.

    If none of them apply a late expense claim must be rejected.

18. It was common ground that the Updated Policy became effective on 29 April 2019 and the Expense Claim was submitted on 6 May 2019.

19. The disputed question is whether the Updated Policy applies to all expense claims submitted on or after 29 April 2019, irrespective when the expense has been incurred (the respondent's position), or only to expense claims for expenses incurred on or after that date, and for those incurred before, the Old Policy rules still apply (the claimant's position).

20. The respondent accepts that all expenses claimed in the Expense Claim have been legitimately incurred by the claimant, and if the Expense Claim had been submitted in time, it would not have had any legitimate reasons not to pay it.

Findings of fact

21. The claimant commenced work with the respondent on 29 June 2009. On 18 November 2018 he was promoted to and currently holds the position of Deputy Director.

22. During the periods of time relevant for the purposes of this claim, the claimant was required to travel extensively on the respondent's business. He spent most of his time visiting different offices of the respondent across the country. On average he was spending three nights a week away from home. It appears his role is very demanding and does not leave him much free time.

23. Due to his expensive business travel, he was incurring significant travel and subsistence expenses. The process of claiming expenses requires the claimant to submit via the respondent's online portal ("SOP") an individual claim for each expense item, providing details of the expense. This is time consuming, and due to his busy travel schedule the claimant used to submit his expenses once approximately every six to twelve months.

24. The rules on incurring and submitting expenses are set out in the respondent's expense policy. The relevant provisions of the Old Policy read (***my emphasis***):

> ***Manager's actions***
>
> *10. Where expenses are not submitted within one month of being incurred, the* ***authorising manager should consider the reason for the late claim****.* ***If the authorising manager does not consider the reason to be acceptable, they must reject the claim****.*
>
> *11 The manager must check the claim before authorising it to ensure it:*
> *is made in accordance with the Meal Subsistence Policy,*
> *has been made on the correct template*
> ***has been made within one month of being incurred***
> *has been restricted to the appropriate limit according to the length of absence*
> *has been reduced to cover any meal vouchers received as part of travel tickets*
> *is supported by receipts, or where receipts are not available (for example vending machines) the reason and amount are acceptable*

25. It appears that before 29 April 2019 the Old Policy was updated to provide two examples of acceptable reasons for late submissions (***my emphasis***):

> ***Manager's actions***

> *10. Where expenses are not submitted within one month of being incurred,* ***the authorising manager should consider the reason for the late claim. If the authorising manager does not consider the reason to be acceptable, they must reject the claim****. Late claims should only be considered in exceptional circumstances.* *As all DWP employees have a personal responsibility to be aware of policies and guidance, not being aware of the business travel and expenses policies and procedures is not a valid reason for late claims.* ***Whilst not an exhaustive list, the following are examples of where late claims may be considered reasonable****:*
>
> - Absence due to sick leave or annual leave
> - ***Staff unable to access systems***

26. It is not clear when exactly these changes have been made to the Old Policy. However, it is common ground between the parties that the additional wording was in the expense policy before the changes effective 29 April 2019 were introduced. In this judgment, when I refer to the Old Policy, I refer to the version with this additional wording.

27. Although the Old Policy required expenses to be submitted within one month of them being incurred, until the Expense Claim the claimant's late submissions had always been accepted by the authorising manager, as falling within one of the two exceptions, namely ("unable to access the system"). That was because of the claimant's extensive travels and busy work schedule.

28. A peculiar feature of the respondent's expense authorisation process is that because of the claimant's senior position in the organisation, his expense claims get approved automatically upon their submission. SOP then generates an email notification to his manager that an expense claim has been submitted and approved. The manager can review the expense claim and intervene if he considers necessary. An email is also sent to the claimant showing that his expense claim has been approved by the manager.

29. In or around February 2019, the respondent decided to make changes to the expense policy. It appears that the main reason for the changes was the discovery by the respondent's Financial Assurance and Control Team that there were many high value old expense claims (some going back more than 6 years) submitted and approved via SOP. It was also discovered that, in approving late submissions, authorising managers applied inconsistent interpretations of the "exceptional circumstances" exceptions, resulting in many complaints to the respondent's top management and HR, and that was taking up significant time and resources to deal with.

30. The essence of the proposed changes was that although the one-month's submission rule would continue to apply, there would be another three months' cut off point for submitting expenses. If an expense is not submitted within three months of being incurred, it will not be paid, unless the reason for the late submission falls with the five exceptions.

31. On 12 February 2019, the proposal for the changes was presented to Ms Tara Smith, the respondent's Finance Director. She was told that there would be a

two months' grace period from the date of the announcement to allow staff to submit old expense claims, and that there was no need to consult about the changes because they were only "clarifying and not introducing something new". On 14 February 2019 she approved the changes.

32. On 7 March 2019, the respondent issued via an email communication to its staff ("DWP Connect") an announcement that: "*With effect from 29 April, the policy regarding the time limit for submitting business travel and expenses claims has been clarified*."

33. The announcement went on to say: "*This affects the amount of time you have to submit a claim after the date of travel, and the reasons why a claim will be rejected if it's late and does not meet one of the agreed exceptions.*"

34. The Updated Policy says: (**my emphasis**):

> **Manager's actions**
>
> 10. *Where expenses are not submitted within one month of being incurred, the authorising manager should consider the reason for the late claim. If the authorising manager does not consider the reason to be acceptable, they must reject the claim. Late claims should only be considered in exceptional circumstances. As all DWP employees have a personal responsibility to be aware of policies and guidance, not being aware of the business travel and expenses policies and procedures is not a valid reason for late claims. Whilst not an exhaustive list, the following are examples of where late claims may be considered reasonable:*
> - *Absence due to sick leave or annual leave*
> - *Staff unable to access systems.*
>
> *11.* ***With effect from 29 April 2019***
>
> *Business Travel and Expenses (BT&E)* ***claims should be submitted within one month of the expense being incurred****.*
> ***BT&E claims not submitted within one month of the expense being incurred must be submitted within three months of the expense being incurred****. Where BT&E claims are not submitted within three months of the expense being incurred,* ***the authorising manager is to consider the reason for the late claim****.*
> *BT&E claims that are not submitted within three months of the expense being incurred* ***will only be accepted and paid if they are an agreed exception****:*
> - *Unplanned Career Break*
> - *Unplanned Carers Leave*
> - *Short notice Maternity/Paternity Leave*
> - *Long Term Sick Leave*
> - *Unplanned Adoption Leave*
>
> *As all DWP employees have a personal responsibility to be aware of policies and guidance, not being aware of the BT&E policies and procedures is not a valid reason for late claims.*

> *Any BT&E claims that are not submitted within three months of the expense being incurred and that do not meet the exception criteria will not be paid.* ***The expenses claim must be rejected by the authorising manager****.*
> ***Any BT&E claims submitted outside the three-month time limit from when the expense was incurred, that are approved by the authorising manager, and paid to the individual, which are then subsequently found to be non-compliant as part of compliance checking will be recovered in line with the overpayment of expenses policy****.*
>
> *12.* ***The manager must check the claim before authorising it to ensure it****:*
> *is made in accordance with the Meal Subsistence Policy,*
> *has been made on the correct template*
> ***has been made within one month, or a maximum of three months, of being incurred***
> *has been restricted to the appropriate limit according to the length of absence*
> *has been reduced to cover any meal vouchers received as part of travel tickets*
> *is supported by receipts, or where receipts are not available (for example vending machines) the reason and amount are acceptable*

35. Paragraphs 10, 11 and 12 are in the section, which deals with meal subsistence expenses. There are identical provisions further down in the Updated Policy (paragraphs 38-41) dealing with travel expenses. Later in the judgment I will be referring to paragraphs 10 and 11, however, what I say there equally applies to paragraphs 39 and 40 (respectively).

36. On 7 March 2019, the claimant became aware of the changes. He raised a query with Mr Rowley about the Updated Policy and how it "squares with the Limitation Act 1980". Mr Rowley respondent to the claimant on the same day saying the Limitation Act did not mean that the policy should allow employees six years to submit expenses, but it allowed six years to lodge money claims at the court, and that the policy complied with the Expenses Global Design principles mandated by Cabinet Office.

37. On 24 April 2019, the respondent issued a further all-staff communication about the Updated Policy. The communication said: (***my emphasis***):

> ***Business travel and expenses claims from 29 April***
>
> *Changes to the amount of time you have to submit a claim after the date you have travelled, and* ***the reasons why a claim will be rejected if it's late and does not meet one of the agreed exceptions, come into effect on 29 April****.*
>
> *Read the policy regarding the time limit for submitting business travel and expenses claims on the business travel intranet site.*

38. The claimant had a large number of old non submitted expenses. To assist him with submitting them, he was authorised to recruit a business manager, Ms Hannah Mitchell. Ms Mitchell started on 19 March 2019. On 25 March 2019, the claimant asked her to commence imputing his expenses into SOP. On his instructions she commenced with the most recent expenses and worked backwards.

39. On 6 May 2019, she submitted claims for the claimant's expenses incurred between 18 September 2018 and 17 January 2019 for the total amount of £1,296.02 ("Expense Claim"). The Expense Claim was auto-authorised, and on 9 May 2019 the full payment made to the claimant.

40. On 18 June 2019, Mr Cooper from the Tax/Expenses Compliance Team of Shared Services Connected Limited (the respondent's payroll services provider) wrote to the claimant saying that his Expense Claim had been identified as being over 90 days after the cost had been incurred and sought information as to why the claim had been submitted late. The claimant replied saying that under the policy it was only an "expectation" that expense claims were submitted within one month, however, legally they could be made at any time within the general six months' limitation period under the Limitation Act 1980, and if there were no lawful grounds for rejecting a claim it must be authorized if submitted within six years.

41. On 31 July 2019, after some internal communications, Mr J Bergin, the head of the respondent's Finance Assurance Control Team, wrote to the claimant explaining that the Limitation Act had no effect on the three months' rule in the Updated Policy, and saying that unless any of the five late submission exceptions applied to the Expense Claim, the respondent would commence recovery action. He asked the claimant to confirm by 13 August 2019 to Mr Copper if the Expense Claim met any of the late submission exceptions, failing which the respondent would commence recovery action.

42. On 22 August 2019, having not received a reply from the claimant, Mr Cooper wrote to the claimant again saying that unless the claimant notified Mr Copper by 23 August 2019 whether any of the exceptions applied, he would commence recovery action.

43. That started a protracted internal dispute, involving:

    - numerous correspondence between the claimant and various senior managers within the respondent's organization,
    - on 23 August 2019, the claimant making a request under the Freedom of Information Act 2000 (FOI) for the respondent to disclose the legal advice the respondent had received on that matter,
    - on 5 September 2019, the respondent suspending the recovery action,
    - the respondent preparing and obtaining legal advice and sign offs from the government officials for the FOI response,

- on 16 September 2019, the respondent responding to the claimant's FOI request refusing to disclose the legal advice,
- on 25 September 2019, Mr Rowley instructing Mr Copper to commence recovery, and then an hour later, suspending his instructions, because of the claimant's response contesting its legality,
- further discussions between Mr Rowley and the respondent's senior management,
- on 12 October 2019, the Treasury Solicitor, on instructions of Mr Rowley, writing to the claimant setting out the respondent's legal position with respect to the Limitation Act 1980 and recovery of the Expense Claim,
- on 14 October 2019, the claimant challenging the respondent's legal response,
- confusion arising from an overlapping recovery from the claimant of £21.68 for a "meal violation",
- On 15 October 2019, the respondent again putting the recovery action on hold, after the claimant writing to Mr Cooper saying that if deductions were made, he would seek redress through the courts against Mr Cooper's company;
- on 31 October 2019, the respondent deciding to review the recovery decision through the internal appeal route,
- various communications between senior management of the respondent in relation to the appeal, and
- finally, on 14 January 2020, the respondent rejecting the appeal and commencing the recovery of £1,296.02 over twelve months, by £108.01 monthly deductions from the claimant's salary.

44. The claimant continued to protest the legality of the respondent's actions and ultimately on 20 July 2020 commenced these proceedings.

Submissions

45. The respondent submits that the recovery was a series of deductions of an overpayment in respect of expenses, and therefore they are excepted deductions under section 14(1)(b) of ERA 1996.

46. It says that the Updated Policy applies to all claims submitted from 29 April 2019, irrespective when the expense has been incurred, and that must be the correct interpretation of paragraph 11 of the Updated Policy. The relevant provision states, "*claims must be submitted within three months of the expense being incurred*" and does not make any distinction between expenses incurred before, on and after 29 April 2019. The respondent argues that if the intent were that the three months' rule applied only to expenses incurred on or after 29 April 2019, the Updated Policy would have said so, and it does not.

47. The last sentence in paragraph 11 makes it clear that any non-compliant expenses submitted outside the three months' time limit and paid would be recovered in line with the overpayment of expenses policy.

48. It was entirely reasonable for the claimant to submit the Expense Claim in time. He knew, as early as 7 March 2019, of the forthcoming changes in the expense submission rules. He was given a two months' grace period to submit his old expenses. If he had started submitting his old expenses from the oldest, the Expense Claim would have been submitted before 29 April 2019.

49. It further submits that, even if the Old Policy applied to the Expense Claim, the claimant failed to provide any reasonable justification for not submitting the Expense Claim within one months, and therefore the payment of the Expense Claim was still an "overpayment in respect of expenses" within the meaning of section 14(1)(b) of ERA 1996.

50. In reply the claimant submits that the respondent's recovery action is unlawful because:

    i. All expenses in the Expense Claim were legitimately incurred for the respondent's business, and it is incongruous for the respondent to ask the claimant to do his work, which necessities incurring expenses, and then, based on an arbitrary rule introduced without the claimant's agreement or consultation, to refuse to reimburse the incurred expenses.

    ii. The Expense Claim had been incurred before the Updated Policy came into effect. Nowhere in the Updated Policy or in any staff communications it is stated that the Updated Policy has retroactive application.

    iii. The Expense Claim was authorised for payment, and his manager, Mr Matthew Briggs, was notified of the claim. He never raised any concerns and agrees with the claimant that it was correct and proper to pay the Expense Claim.

    iv. On any reasonably interpretation of the Updated Policy the three months' rule should not apply to expenses incurred before the Updated Policy came into effect 29 April 2019, even when such claims are submitted after that date.

    v. The introduction of the Updated Policy was approved by the respondent's Finance Director, Ms Tara Smith, on the premise that: (i) it was only a "clarification and not introducing something new" and (ii) two months' grace period from the date of the announcement would be given to submit old claims. The Updated Policy made material changes to the expense approval rules to the claimant's detriment, and the grace period was shorter than two months. Therefore, the changes to the expense submission rules made in the Updated Policy are not effective. Further, if the full two months had been given, the claimant's Expense Claim would have fallen within the grace period.

    vi. He could not have reasonably submitted the Expense Claim earlier because of his workload, as evidenced by the respondent paying him in lieu of annual leave, and the fact that his assistant had only started to

work through his old expenses on 25 March 2019. Because he acted on the assumption that the three months' rule would not apply to expenses incurred prior to that date, he asked her to start from the newest and work backwards. If he were told that the Updated Policy would apply to old expenses, he would have instructed her to submit the oldest expenses first.

vii. The Expense Claim cannot be properly described to be "overpaid" when the expenses were properly incurred and the payment authorised.

51. The claimant also argued that the respondent's appeal had not been properly conducted under the ACAS Code of Practice on Disciplinary and Grievance Procedures. That is because it was heard by a person not more senior to the person who had taken the final decision to commence recovery. The claimant, however, accepted that this was not an issue argued at the hearing by the parties, and I did not need to deal with it in my judgment.

The Law and Conclusions

Which Policy terms apply to the Expense Claim?

52. I shall deal with this question first, although, in my judgement, it is not determinative to the central issue in the case.

53. I find the wording of the Updated Policy is ambiguous and can be read in different ways. "With effect from 29 April 2019" is the heading of paragraph 11 and does not appear as part of any sentence in the paragraph.

54. Therefore, reading the entire paragraph, it is possible to construe it to mean that from that date onwards all submissions of expense claims must be made within a maximum period of three months of the expense being incurred, irrespective of when (before, on or after that date) the claimed expense has been incurred.

55. However, an alternative, and in my judgment, equally reasonable interpretation, is that the "With effect from 29 April 2019" qualification applies not only to "claims submitted", but also to "the expenses being incurred".

56. I say that because Paragraph 11 introduces a new set of rules to replace those in paragraph 10, which until then applied. However, it does not say that the new rules will apply retrospectively to expenses incurred before the new rules came into force. There are simply no "transitional provisions" explaining how pre-29 April 2019 expenses will be treated when the new rules come into force.

57. Applying the alternative interpretation, paragraph 11 of the Updated Policy does not apply to expenses incurred prior to 29 April 2019.

58. Faced with these two competing interpretations, I remind myself that the respondent is a public authority, and as such, is bound by Article 6 (1) of the Human Rights Act 1998 ("HRA"), which states that: "*It is unlawful for a public*

authority to act in a way which is incompatible with a [the European] Convention [on Human Rights] right".

59. The Convention rights include the right of the peaceful enjoyment of possessions (*Article 1 of the First Protocol of HRA 1998*). "Possessions" can be either "existing possessions" or assets, including claims, in respect of which a person can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see, for example, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom [GC], § 61*).

60. It is clear in my view, and it was not argued otherwise by the respondent, that when the expenses in question had been incurred by the claimant, he had a legitimate expectation that they would be reimbursed to him in accordance with the then effective Old Policy rules.

61. Therefore, in interpreting paragraph 11 of the Updated Policy, I must have regard to Article 6(1) of HRA 1998 and give it the meaning, which in my judgment, allows the respondent to introduce the Updated Policy without such action being incompatible with the claimant's right of the peaceful enjoyment of his possessions.

62. It might be argued that the claimant's "legitimate expectation" should have ceased with the announcement of the forthcoming changes on 7 March 2019. However, the announcement itself was ambiguous and referred to the policy being "clarified". Therefore, I find, it was not unreasonable for the claimant to continue to maintain his legitimate expectations that his pre- 29 April 2019 expenses would be subject to the Old Policy rules. In any event, by the time of the announcement the expenses in question had already been incurred.

63. In my judgement, the respondent's announcement and paragraph 11 of the Updated Policy would have had to be much clear about the three months' rule applying to the already incurred expenses, for the claimant not to continue to maintain his legitimate and reasonable view that his already incurred expenses would not be impacted by the new rules.

64. Accordingly, I find that the Updated Policy must be interpreted as applying only to expenses incurred on or after 29 April 2019. It follows that the three months' rule in the Updated Policy does not apply to the Expense Claim.

Were recovery action "excepted deductions" under section 14(1)(b)?

65. If I am wrong in my conclusion on the correct interpretation of paragraph 11, I still find that the payment made by the respondent to the claimant for the Expense Claim was not an "overpayment in respect of expenses" within the meaning of section 14(1)(b) of ERA 1996, which states:

14.— Excepted deductions

Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or
(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

66. Section 13 of ERA 1996 prohibits unauthorised deductions from a worker's wages "*unless - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction*." The respondent accepts that neither of the two provisions applies in the present case.

67. The respondent argues that the deductions are for the purpose of reimbursing the respondent for an overpayment it has made to the claimant in respect of expenses and therefore they are excepted deductions under section 14(1)(b), and the reason why the overpayment was made is immaterial.

68. I disagree. I say that because for section 14(1)(b) to apply there must be "an overpayment in respect of expenses" at the time the payment in question was made.

69. Mr Justice Elias (the President of EAT, as he then was), in *Key Recruitment UK Ltd v Mr J C Lear*, said: "*In my judgment, to be an overpayment, the money would have had to have been wrongfully paid at the point when they were received by the claimant…*".

70. In that case, the alleged overpayment was a sales commission (and therefore potentially falling with the excepted deductions under section 14(1)(a) of ERA 1996). However, I see no reason why the stated principle should not equally apply to the alleged overpayment in respect of expenses under section 14(1)(b) of ERA 1996.

71. I do not see how a payment in respect of expenses legitimately incurred, submitted and authorised for payment by the employer in accordance with the employer's expenses submission and authorisation process could be sensibly described as "*wrongfully paid at the point of when [it was] received by the claimant*".

72. The fact that the respondent's authorisation process is automated, so that the Expense Claim was approved automatically, in my judgment, does not make any difference. The respondent knew that SOP would automatically approve the claimant's late expense claims. It appears that with the introduction of the Updated Policy, it did not make any changes to SOP to stop such automatic authorisations and payments of late claims.

73. The respondent accepts that all expenses in the Expense Claim were legitimately incurred by the claimant. The claimant's manager, Mr M Briggs, was notified of the submission, he did not raise any objections. There was a three days' period between the submission and the payment for the respondent

to stop the payment if it considered that the money would be "wrongfully paid". It did not.

74. I accept the claimant's evidence that Mr Briggs was content for the Expense Claim to be paid and did not want the respondent to claw it back but was told to stay away from the matter. It is not suggested by the respondent that there was any impropriety in the claimant's submitting the Expense Claim or any collusion between him and Mr Briggs.

75. Paragraph 11 of the updated policy is addressed to managers (the heading reads: "Manager's actions"). It gives them instructions to reject claims more than three months old. It does not say that employees must not submit such claims. It simply tells them that they must be aware of the rules and warns them that their late claims will be rejected. Therefore, the claimant did not breach the Updated Policy (if, indeed, it applies to the Expense Claim) by submitting the Expense Claim outside the three months period.

76. Finally, I do not accept that the words "for any reason" in section 14(1) of ERA 1996 allow for a broader interpretation to the meaning of "overpayment", so that to include as a legitimate reason the circumstance when due to the respondent's oversight a legitimate expense claim, which could have been rejected as falling outside the three months' time limit, was paid.

77. Firstly, giving such broader interpretation, in my judgment, would be reading section 14(1) of ERA 1996 in a way incompatible with the Convention rights and therefore contrary to Article 3 of the HRA 1998.

> ***"3.— Interpretation of legislation.***
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*"

78. I have already expressed my views on the application of the Convention right of the peaceful enjoyment of possessions in the context of interpreting the Updated Policy. The same considerations are equally relevant for the interpretation of section 14(1)(b) of ERA 1996.

79. Secondly, the fact the claimant's legitimate expense claim might have been "time-barred" under the respondent's Updated Policy rules, does not mean that the claimant has lost his legal right to make the claim. By paying the claim, the respondent effectively waived its possible "out of time defence". Whether it did so deliberately or by an oversight is immaterial. This, however, does not mean that the payment itself was wrongfully made and therefore an overpayment.

80. For the same reasons I reject the respondent's argument that the Expense Claim payment was "an overpayment" under the Old Rules, because the claimant failed to submit it within one month of the expenses being incurred and provide a reasonable justification for the delay. If that were a true legal position, all previous late expense submissions by the claimant and other employees, which had been authorised and paid by the respondent, would become liable to being recovered by the respondent at any time by making deductions from

their wages. On the respondent's case, such deductions will not contravene section 13 of ERA 1996, thus leaving the affected employees to seek any possible redress through the civil courts. This cannot be right, bearing in mind the aim of this legislation, which is to protect workers from unauthorised deductions from their wages.

81. I, however, make no judgment on the question whether the respondent is entitled to rely on the three months' rule in the Updated Policy in refusing to pay late expense claims. This is not an issue I need to determine in these proceedings.

82. For these reasons, I find that the payment of the Expense Claim was not an overpayment in respect of expenses within the meaning of Article 14(1)(b) of ERA 1996. It follows, that the deductions made by the respondent from the claimant's wages were unauthorised deductions within the meaning of Article 13 of ERA 1996 and by making such deductions the respondent breached the claimant's right under that section.

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Employment Judge P Klimov
16 February 2021

Sent to the parties on:

19 February 2021

For the Tribunals Office

Public access to employment tribunal decisions

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