



EMPLOYMENT TRIBUNALS

Claimant:
Mr P J Lipinski

v

Respondent:
Maritime Transport Limited

Heard at: Reading (by CVP)

On: 26 April &
7 May 2021 (in chambers)

Before: Employment Judge Anstis
Mr C Juden
Ms F Tankard

Appearances

For the Claimant: In person

For the Respondent: Mr M Wakelin (solicitor)

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

INTRODUCTION

1. In the period to which these claims relate the claimant was employed by the respondent as a HGV driver. He worked on the respondent's contract providing services to Tesco, and his work base was the Tesco distribution centre on the edge of Reading.
2. We understand that since the events to which the claim relates the claimant's employment with the respondent has come to an end, but that is not a point at issue in these claims.
3. The claimant submitted two claims in quick succession in September 2018. It appears that the points that were the original foundation of those claims were resolved between the parties, but the claimant subsequently applied to amend his claims. The application to amend was considered by Employment Judge Milner-Moore at a preliminary hearing on 24 June 2019, following which she defined the claimant's claims as follows:

- “(i) *A complaint of unlawful deductions from wages under section 13 Employment Rights Act 1996 and/or under section 16(1) of the Working Time Regulations 1998 regarding unpaid holiday due in respect of the year ending December 2017. The respondent contends that such a claim is out of time and that time should not be extended.*
- (ii) *A claim of direct discrimination on grounds of nationality in relation to the deduction of a bonus in December 2018, after the claimant was held responsible for damage to a vehicle he had been driving.*
- (iii) *A claim of direct discrimination on grounds of nationality in relation to the failure in December 2018 to collect the claimant after his vehicle broke down.*
- (iv) *A claim of direct discrimination on grounds of nationality in relation to the failure in December 2018 to make payment to the claimant of a sum due to him for time spent waiting for the vehicle to be fixed.”*
4. In respect of the claims of race discrimination, the claimant describes himself as being of Polish nationality.
5. The hearing proceeded via CVP on 26 April 2021, during which full evidence and submissions were heard. We heard oral evidence from the claimant, and for the respondent from Simon Chapple (Operations Manager at the Reading depot) and Shaun McConnell (HR General Manager). A Polish interpreter translated from Polish to English, and English to Polish. While we would normally expect to be able to give a decision in a case such as this on the day of the hearing, we were left with insufficient time for deliberation at the end of the day so had to reconvene for a chambers meeting on 7 May 2021.
6. The claimant’s claims relate to three distinct matters, which we will address separately, as set out below.

THE HOLIDAY PAY CLAIM

7. The claimant’s first claim is a claim for holiday pay due in respect of the holiday year up to December 2017. In discussions at the start of the hearing he identified this as being two days’ holiday pay. We can deal with this very briefly. The claimant’s witness statement refers to difficulties with holidays in 2018 (which is not part of his claim) but makes only brief mention of any issues in 2017. He says:
- “in 2017 I had 4 days weekend included into my holiday Employee Schedule and not payed for as well. It means they include 01.07-02.07.2017 Saturday and Sunday, 08.07-09,07.2017.”*
8. We explored this in further detail with the claimant during the course of his evidence, but despite this could not understand what the basis of his claim for holiday pay in 2017 was.

9. Apart from these difficulties, any holiday pay due for 2017 would have been payable at the latest in early 2018. The claimant commenced early conciliation in respect of his claims in August 2018 and submitted his claims in September 2018. Any claim for holiday pay should be brought (subject to early conciliation) within three months of falling due, and time could only be extended if it was not reasonably practicable to bring the claim within time and it was brought a reasonable time after the end of the normal time limit. We heard nothing from the claimant as to why he had not been able to bring this claim within the normal time limit, and in those circumstances it is inevitable that we would dismiss this claim.

THE BONUS PAYMENT

10. The respondent provides the opportunity for its drivers to earn a small quarterly bonus, based at least in part on good driving. It was not in dispute that that bonus could be reduced by 30% if the driver was considered to be at fault for an accident or damage to their vehicle in the relevant quarter. In the fourth quarter of the bonus year 2018, the claimant had been on target to be paid a bonus of £11, but this was reduced by 30% (£3.30) on account of damage to his wing mirror on 28 November 2018 that was said by the respondent to have been his fault.
11. As we understand it, the problem was that the glass had fallen out of his wing mirror. The claimant said that this was the result of a problem with the vehicle door, which meant it had to be slammed shut, and this in turn had dislodged the mirror. Mr Chapple concluded that "*the damage to the mirror unit was consistent with the mirror unit having been hit*". He also said that any damage caused prior to the claimant's shift should have been spotted by the claimant on his vehicle checks and that any door problem that required the door to be slammed in such a manner as to dislodge the mirror would itself count as a safety defect that should have been identified by the claimant and would have led to the vehicle being taken off the road.
12. In those circumstances we do not see anything wrong with Mr Chapple's conclusion that the damage to the mirror was more likely to have been the fault of the claimant rather than being pre-existing damage or caused through the door being defective.
13. In any event, the claimant's claim on this point can only succeed if he shows it was a matter of race discrimination. We accept the unchallenged evidence of Mr McConnell that in this period ten drivers at the Reading depot had their bonuses cut because of an "at fault accident". Of these, six were British, one (the claimant) was Polish, and the others were Slovakian, Czech and Slovenian. In those circumstances we do not see any reason to consider that this is a matter of race discrimination.

BEING STRANDED IN THURROCK

14. The claimant says this about the events of 18/19 December 2018:

“On Tuesday 18th December 2018, I started at 20:00 and been waiting for 2 hours for a lorry, because there was an issue with the lorry. My shift was almost cancelled, but in the last minute I was given Scania lorry ... to drive to Bicester, Purfleet, LDH and back Reading. I was assured that everything was fine.

I arrived at Bicester at 23:00 and left around midnight. While driving, the vehicle started to fail. I was in constant contact with the depot. All stressed out and tired, I arrived at Scania’s Thurrock workshop and left the vehicle to be repaired. I was not prepared for this circumstance. I didn’t have food, change of clothes. As well as I couldn’t stay in the vehicle or use the bed because it was being repaired. I was tired, hungry and exhausted.

When I’ve called the company around 3 am they knew that the lorry will need to be fixed, my working time would finish at 11 am. So, from 3 am till 11 am there was plenty of time to arrange a pickup or any kind of help.

Maritime is a huge company with many lorries driving around the country. Any of my co-workers could just pick me up on the way back to the depot. Considering that the day before 17.12.2018 I was picked up from the road when my driving time was over.

During phone conversations with Simon Chapple I agreed to stay and was assured that I would get paid day out plus an extra 50 pounds.”

15. Mr Chapple says:

“On Tuesday 18th December 2017 [we think this should be 2018] Pawel was instructed to drive to Bicester to collect a load for Tesco in Purfleet and then to drive to collect a load from “LDH” and drive to Reading. Our records show that Pawel started work at 20:00 and was given a Scania lorry ... to drive ... the vehicle was a little over 3 years old and had been regularly serviced.

Our records show that he arrived at Bicester at 23:00 and departed at 23:45. He subsequently arrived at Thurrock at 02:00 and departed at 03:30.

I arrived for work for 06:00 and had the handover with [the night manager. He] informed me that [the claimant’s vehicle] had broken down and had gone into ‘limp’ mode and was currently sat in Scania’s Thurrock workshop. I can’t remember the timings of things exactly but made contact with Pawel and asked for an update, which he didn’t have as the unit was being assessed by Scania. I therefore asked him to let me know as soon as he knew something.

Again, some time passed, I not sure how long, but I made contact with Pawel again and asked for another update. Pawel replied that the lorry unit was “VOR” (vehicle off road) and required attention before being

allowed back on the road and that Scania couldn't repair it until later on as they needed a spare part.

Pawel and I had an exchange of texts about the possibility of him being recovered which I said I couldn't do. I explained that I didn't have a spare driver who was available to take a unit over to collect him from Thurrock and I didn't have anyone in the office to man it whilst I went over in my company car to collect him.

Unfortunately, I don't have the texts on my phone any more as the messages don't go that far back.

Pawel and I then had a telephone discussion and I explained to Pawel that I would have another member of staff in at 09:00 and that it would be another 2 1/2 hours before I was over with him and another 2 1/2 hours before we got back to Reading. This would mean that he wouldn't get home until 1400 at the earliest. Therefore, he agreed that would be easier to take his 9 hours rest period and afterwards, when his lorry had been fixed, carry on with his run to "LDH" in Felixstowe and bring the load back.

Also, I was mindful of the fact that we are not permitted to collect drivers from broken down vehicles if this would mean them going over their maximum duty time of 15 hours or, interrupting their 9-hour rest break. This is because when a driver is travelling as a passenger in a vehicle in the course of their work, this amounts to a "Period of Availability" for the purposes of the Road Transport (Working Time) Regulations ... since Pawel had started work at 20:00, he had to start his 9-hour rest period no later than 11:00.

All of our lorry cabs are fitted with beds and all drivers are instructed to have a spare change of clothes and a wash kit with them at all times. I do try, where possible, to avoid drivers having to stay in cabs. I run a day and night model at Reading and it is something we look to avoid, but in certain instances, such as this one, there isn't a great deal I can do; the unit broke down and it wasn't a quick fix.

...

Whilst nothing was said at the time, or following Pawel's next pay day, I understand that Pawel has since written to the Employment Tribunal and claimed that he should have received a "night-out" payment for having to take his 9 hour "rest break" in his lorry cab. The "night-out" payment is a flat payment of £26.00 that is usually payable to "day drivers" who have been obliged to spend a night away from home because of unforeseen circumstances (such as driving time limits being reached due to adverse traffic conditions). Whilst referred to as a "night-out" payment, the allowance is also payable to "night drivers" who have been obliged to spend a day away from home because of unforeseen circumstances.

Having investigated Pawel's claim, I accepted that he should have been paid a "night-out" payment for the 9-hour rest break that he spent away from home between his shifts on 18 and 19 December 2018 and this payment was therefore paid into Pawel's bank account on 26th July 2019.

I believe that the failure to pay this money simply came about because I forgot to notify our payroll department and complete the necessary form. Contrary to what Pawel seems to be suggesting, this had nothing to do with Pawel's nationality; it was simply an oversight on my part.

I do not accept Pawel's claim that he should have received any extra money for waiting for his lorry to be fixed. This is not something that I agreed to and is not something I would have agreed to with anyone, regardless of their nationality. The lorry unit was VOR and that was something that was outside of my control.

I have checked our records and can see that Pawel started work at 20:00 on Tuesday 18 December 2018 and finished work at 08:20 on Wednesday 19 December. Pawel was paid in full for working his 12-hour shift and was paid an additional £26.00 "night-out" payment. This is the maximum that any driver would have been paid in such circumstances."

16. We find the following:

- 16.1. The claimant was stranded in Thurrock, and while his vehicle was in the garage he was not able to access it and could not (as would otherwise have been the case) take refuge in his cab. He spent an unpleasant night by the side of the road in the middle of winter. However, Mr Chapple was not told by the claimant that he could not access his cab and did not know that he was stranded by the roadside with no shelter.
- 16.2. There was no formal protocol for what was to happen in such situations, and if or how a driver could be rescued. A driver could be stranded either if their vehicle broke down or if (because of delays) they had reached the limit of their driving hours. Mr Chapple said (and we accept) that that this occurred less than ten times a year and that to be stranded overnight was very rare. It would be assumed that the driver had access to shelter in their cab. We accept that Mr Chapple had never come across a situation in which a driver was stranded without access to their cab, and did not know at the time that the claimant did not have access to his cab.
- 16.3. The only other example we have of someone being collected or not collected on being stranded was the claimant's own recollection of having been collected very recently to the Thurrock incident when he had had to stop on completing his maximum hours. The claimant said he had been in Wokingham when this happened, which would be only a few miles from the Reading depot.
- 16.4. It is Mr Chapple rather than anyone else who the claimant says discriminated against him, so the claimant's claim of discrimination in

respect of not being collected must start from when Mr Chapple started his working day at 06:00.

- 16.5. Both sides agree that text messages were exchanged between the claimant and Mr Chapple, but neither had those text messages any more.
- 16.6. If the claimant was to be rescued, there were two ways this could be done: he could be collected by another of the respondent's drivers in a truck that was on its way to or from a delivery, or Mr Chapple could have collected him in his company car.
- 16.7. Mr Chapple said that neither was possible on account of drivers' hours legislation, as travel even as a passenger in a vehicle owned or operated by the respondent would count as a "period of availability" towards the claimant's hours. The brief document referred to by Mr Chapple in support of this idea does not say that. The most it says is that "*you can take your daily rest period ... in your vehicle, provided the vehicle is stationary and is fitted with suitable sleeping facilities*". It does not say anything about resting while travelling as a passenger.
- 16.8. On being challenged on this point, Mr Chapple said that any employed driver travelling even as a passenger in a company truck would be required to insert their tachograph card in the truck's tachograph machine, and that the machines had dual slots for this to accommodate both driver and passenger. That is not supported by the official materials that Mr Chapple referred to, but it was not challenged by the claimant and we accept that it was his honest understanding of the rules. However, it does not address the question of why the claimant could not be collected by Mr Chapple in his vehicle, which had no tachograph.
- 16.9. Given our understanding of the respondent's site in Reading, we accept that there was a period of time from his arrival when Mr Chapple would have been alone on the site and so could not leave to collect the claimant. The earliest he could have left would be when his colleague arrived on site at 09:00. We also accept his estimate that it would have taken 2½ hours to drive from Reading to Thurrock to collect the claimant.
- 16.10. Mr Chapple told us that the same drivers' hours problem that prevented the claimant from travelling as a passenger in a truck prevented the claimant from being picked up by Mr Chapple in his car. He said that by the time he collected the claimant the claimant would have been 6-7 hours into his rest break (presumably starting around 03:30 when he had exited the vehicle) and he would then only have had a couple of hours at home before being back at work, whereas by remaining in Thurrock he could complete his rest break and (assuming the vehicle was fixed) go on to complete his journey to Felixstowe and back to Reading. That was, in fact, what happened. The truck was fixed and, having completed his rest period, the claimant went on to complete his scheduled journey during the day on Wednesday 19 December.

- 16.11. The claimant was due a night-out allowance of £26. This was not paid to him until it was raised by him with the employment tribunal. We accept the unchallenged evidence of Mr Chapple that this was due to the claimant, should have been implemented by Mr Chapple but was not, and also that the claimant did not take this up with the respondent until it was mentioned in his tribunal claim.
- 16.12. The claimant was under the impression that he would be paid extra for the time he was stranded in Thurrock, although there are two points that make us doubt that this commitment was as specific as the claimant says it was. First, in the course of his evidence he could not be clear about exactly how much he was promised, and second, his case was that this was a payment for agreeing to stay in Thurrock, when according to the rest of the evidence he really had no alternative to staying in Thurrock, since he had no means of returning to Reading.
17. There are a number of matters arising from this that give us cause for concern.
18. First, even if this was a rare event we are concerned that such a large transport company has no set protocol for what is to occur in the event that a driver is stranded. We accept that in principle a driver would normally be able to take shelter in their cab, but there are bound to be circumstances in which this cannot happen – possibly because the cab is damaged or, as happened in this case, undergoing repairs. The respondent should have proper procedures for addressing such a situation, in order that its drivers know what to expect and are not dependent on the actions of individual managers such as Mr Chapple.
19. Second, the result of this was that the claimant was left by the side of the road for many hours on a winter night. While Mr Chapple did not know this, it is plainly something that the respondent should have contemplated may occur and Mr Chapple should have made positive efforts to ascertain the claimant's circumstances.
20. Third, Mr Chapple's explanation of why he could not have picked the claimant up in his company car did not make sense to us. We do not see any basis on which Mr Chapple could have thought that travelling as a passenger in a car (even one owned by the respondent) offended against driver's hours rules. If this was a policy adopted by the respondent as a precaution against drivers' hours infringement, it should have been documented as such, but no documents in support of this argument were cited to us, nor was there anything to suggest that this was a requirement of the drivers' hours regulations.
21. Fourth, whatever may have been said about an additional payment of £50, the claimant was clearly due the £26 day (or night) out fee. Mr Chapple says that he simply forgot to allocate this to the claimant, but this seems odd to us given that the incident would have been so unusual and must have been a cause for concern for Mr Chapple on the day it occurred.
22. We have given considerable thought to whether the second, third and fourth points of these amount to "*facts from which the court could decide ... that* [the respondent has committed acts of race discrimination]" (s136(2) of the Equality

Act 2010). However, we do not find in this case the “something more” that would lead us to conclude that the claimant’s treatment either in relation to not being rescued or in relation to the non-payment of the additional £50 amount to race discrimination.

23. We have considered the general evidence that the claimant submitted (particularly the witness statement of his former colleague Mr Dudek) as to the treatment of Polish workers by the respondent. However, the problem with this (apart from the fact that Mr Dudek did not attend to be questioned on his statement) is that it gives no examples of Polish employees being treated differently, or of any other nationality being treated better than Polish employees. When we look for such examples, we do not find any. Notably the only circumstance we were taken to in which anyone had been rescued from the side of the road is that of the claimant himself on a previous occasion. That does not suggest that this is a question of race discrimination.
24. Given our concerns about the way in which the respondent handled this incident, and the unsatisfactory explanation given, we have come close to concluding that this was race discrimination (under s136(2)). However, on full consideration of the matter we are unable to reach this conclusion, and the claimant’s claims of race discrimination in respect of being stranded at Thurrock and being not paid £50 are dismissed.

Employment Judge Anstis

Date: 7 May 2021

Sent to the parties on:
2 June 2021

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For the Tribunals Office

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