EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Smith**

Respondent: **Network Rail Infrastructure Limited**

Heard at: **London Central (remotely by CVP)**
On: 6 & 7 May 2021

Before: **Employment Judge Heath**

Representation
Claimant: Ms Naomi Ling (Counsel)
Respondent: Mr Tim Welch (Counsel)

RESERVED JUDGMENT

1. The claimant is permitted to amend his ET1 to include claims for unauthorised deductions from wages which post-date the presentation of his ET1, up to 31 December 2020.

2. Clause 10 of the claimant's contract of employment bears the meaning that the claimant contends, in that: -

    a. He is entitled to be paid subsistence allowance for seven nights when he has completed his rostered shifts for the week.

    b. It is not necessary for the claimant actually to have stayed away and incurred nightly accommodation expenses in order to be paid seven nights subsistence allowance for a week.

    c. The respondent did not vary the claimant's contract of employment.

REASONS

Introduction

1. The claimant brings claims of unlawful deductions from wages relating to alleged under-payment of subsistence allowance under his contract of employment. It became clear at what had been listed as the final hearing in this matter that construction of the contractual provisions relating to this subsistence allowance is essentially the point at issue between the parties, and that the parties are highly likely to be able to agree between them the financial consequences of any decision I make on this construction point. For the reasons below, I treated this final hearing as a preliminary hearing to consider the construction of the contractual terms relating to subsistence allowance as a preliminary issue.

Procedure

2. The case did not proceed in the manner the parties or the tribunal initially envisaged, so I will set out the procedure in more depth than I would normally.

3. The claimant presented an ET1 on 1 May 2020, having been issued an ACAS Early Conciliation Certificate on 3 April 2020. His Grounds of Claim set out alleged underpayments in tax years 2016/2017, 2018/2019 2019/2020, and 2020/2021. The claimant sought "*payment of the outstanding subsistence payments for the periods from 2016 until 2020, on an ongoing basis until subsistence payments are reinstated*".

4. The respondent denied the claimant's claims by their ET3.

5. A Preliminary Hearing was held before Employment Judge Khan on 3 February 2021. Unfortunately, the parties' legal representatives were unable to clarify the factual and legal issues at this hearing, and there was a lack of particularisation of the dates and amounts of each of the alleged unauthorised deductions. A potential jurisdictional issue was raised concerning the two-year "backstop" provisions set out in sections 23 (4A) and (4B) Employment Rights Act 1996 ("ERA").

6. Employment Judge Khan made a number of standard case management orders, including that the parties must prepare an agreed list of factual and legal issues to be determined by the tribunal by 3 March 2021, which must include the dates and amounts of each alleged unauthorised deduction. The claimant was also ordered to indicate the basis on which he sought to claim in relation to deductions made more than two years before the date when the ET1 was presented.

7. The respondent provided an Amended Grounds of Resistance on 29 March 2021.

8. The matter was listed for a final hearing on 6 and 7 May 2021 when it came before me.

9. I raised with Counsel at the outset of the hearing that it seemed to me that the list of issues which the parties had prepared [42v] merely set out the legal framework of the claim, rather than listing the issues I needed to consider in order to determine the complaint under Part II of the ERA. Counsel were able to indicate that certain of the issues set out in the list of

issues were not, or no longer in issue. I was also told that the parties were extremely close on what sums would be due to the claimant, were I to find in his favour, but that the real issue between the parties was one of construction of the clauses relating to subsistence allowance in the contract of employment.

10. I considered that it would be the best use of the tribunal's and the parties' time if the parties could explore whether they could find some common ground on these points, and to produce an agreed list of issues while I read into the case on the first morning.

11. Following a discussion about time estimates and timetabling, I sent the parties away and took the rest of the morning as a reading time.

12. In the afternoon of the first day I was supplied with an "almost agreed" list of issues. I was told that there was no agreement between the parties on the period in which the tribunal could consider claims for unlawful deduction from wages. Mr Welch contended that the tribunal could only consider claims from 1 May 2018, two years prior to the presentation of the ET1, whereas the claimant was claiming from 19 March 2018. Additionally, Ms Ling indicated that she sought permission to amend the ET1 to claim for deductions which post-dated the presentation of the ET1, running to 31 December 2020. She indicated that the Presidential Guidance on Calculation of Unpaid Holiday Pay appeared to allow for claims that post-dated the presentation of claims, albeit for claims for holiday pay.

13. I considered that, given the difference between the parties merely related to the time period over which loss was claimed and not its calculation, and given that Mr Welch had had no notice whatsoever of this application to amend, and given Ms Ling did not have the legal source of the proposition she was relying on, I proposed that this application be delayed to a later stage of the hearing, possibly even closing submissions.

14. There was an agreed bundle of 891 pages. The claimant provided a witness statement, as did Mr Thomas and Mr Weeks for the respondent. The claimant gave evidence for the whole of the afternoon of the first day, Mr Thomas gave evidence on the second day of the hearing, and Ms Ling indicated that she did not wish to cross examine Mr Weeks, whose witness statement was produced and considered by me. Both counsel provided helpful skeleton arguments prior to the hearing.

15. Overnight, after the first day of the hearing, I looked again at the list of issues the parties had almost agreed, and also looked at the schedule of loss and the counter schedule of loss provided by the parties. On the morning of the second day of the hearing I raised with the parties that I was concerned that the case was being presented in a way which did not allow me to determine whether the total amount of wages paid on <u>any occasion</u> by the respondent was less than the total amount of wages properly payable to him <u>on that occasion</u>. It appeared that amounts were being claimed, and agreed subject to entitlement, on the broad basis of tax years rather than on in the relevant monthly pay periods.

16. There was considerable discussion with counsel on this point, but to put things succinctly, after taking instructions during a short break, both parties were agreed in their wish for me to make a preliminary ruling on the construction of the terms of the claimant's contract of employment relating to subsistence pay. Mr Welch described this as the "key issue on which everything hangs". Both counsel seemed very confident that following a decision on the construction of the contract the parties would be in a position to agree the figures. It was proposed that I should decide this issue and for there to be half day put in the diary at a future date, to be vacated in the very likely event of the parties reaching an agreement on those figures.

17. Mr Welch was also able to indicate that the respondent did not object to the claimant amending his claim to include deductions post-dating the presentation of the ET1 running to 31 December 2020. The case of ***Prakash v Wolverhampton City Council*** **UKEAT/0140/06** allows for this.

18. I decided that it was fair and just to take the approach agreed by the parties, having regard to the over-riding objective as a whole, and in particular the need to avoid delay, to save expense and seek flexibility in the proceedings.

19. I then heard evidence from Mr Thomas and closing submissions from the parties. Ms Ling was able in her submissions to confirm that the claimant claimed for deductions from wages beginning 1 May 2018. I reserved my decision.

20. After closing submissions, Ms Ling asked whether I considered the hearing to be a final hearing or a preliminary hearing. I expressed the view that the hearing could still be considered to be the final hearing that it was originally listed, as under rule 57 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") there could be different final hearings for different issues. However, after the hearing, and on reflection, it seemed that by making a determination on the contractual issue I was not "determin[ing] the claim". I consider that it is more appropriate to treat the hearing as a preliminary hearing at which I have determined a preliminary issue under rule 53(1)(b). I have the power under rule 48 ET Rules to order that a final hearing be treated as a preliminary hearing if I consider that the tribunal was properly constituted and that neither party is materially prejudiced. I do consider this to be the case, notwithstanding the fact that I am converting the final hearing to a preliminary hearing in the absence of argument from the parties, and contrary to my earlier expressed view on the issue.

21. Accordingly, the final hearing listed for 6 and 7 May 2021 is treated as a preliminary hearing to determine as a preliminary issue the proper construction of clause 10 of the claimant's contract of employment.

Issues

22. I will set out the full list of issues that the parties "almost agreed" as above. However, given the conversion of the full hearing to a preliminary hearing to consider the proper construction of the contractual terms relating to subsistence pay, I will highlight the issues that I have determined as a preliminary issue:-

1. Did the Respondent make one or more unauthorised deductions from the Claimant's wages in the relevant period?

2. In particular:

2.1 To what payments by way of 'Subsistence Allowance' was the Claimant entitled pursuant to Clause 10 of his contract of employment as set out in the Statement of Terms and Conditions?

2.2 Did the Respondent succeed in varying Clause 10 of the claimant's contract as set out in the Statement of Terms and Conditions by letter dated 11 October 2016?

2.3 What was the total amount of wages (by way of Subsistence Allowance) properly payable on each occasion and/or in total in the relevant period?

2.4 What was the amount of wages (by way of Subsistence Allowance) actually paid on each occasion and/or in total in the relevant period?

2.5 What deductions, if any, were made on each occasion and/or in total in the relevant period?

3. It is asserted by the Claimant that he was entitled to Subsistence Allowance in relation to all nights where he was:

(a) Necessarily living away to perform his shifts for that week;

(b) Completed all of his rostered shifts for that week;

(c) Was not on sick leave for more than three days or not covered by a medical certificate;

(d) Was not on annual leave.

4. It is asserted by the Respondent that Subsistence Allowance was payable in relation to all nights where the Claimant actually stayed away and incurred nightly accommodation expenses because he was necessarily living away to perform his shifts for that week.

5. In relation to the 'relevant period' the Claimant applies to amend his ET1 to include periods after the presentation of that ET1. If this application is not successful, the relevant period is 19 March 2018/1 May 2018 to 1 May 2020. If the application is successful, the relevant period is 18 March 2018/1 May 2018 to 31 December 2020. The Claimant contends for 18 March 2018 and the Respondent contends for 1 May 2018.

Facts

23. The claimant commenced employment with GT Rail Maintenance Ltd ("GTRM") as an isolation operative on 5 November 2001. GTRM was in a partnership, or joint venture, with Balfour Beatty, WS Atkins and Railtrack (referred to variously as "the joint venture" or "GTBBJV") to upgrade the

overhead lines on the West Coast mainline. Broadly speaking, the claimant's work involved providing electrical isolations to protect other workers on the rail lines from the risk of high-voltage shock whilst those workers were renewing the old overhead line equipment. Mr Davy Thomas also worked on this joint venture at around this time, but he was employed by Balfour Beatty on different terms.

24. The claimant was presented with a Statement of Terms and Conditions of Employment which he signed on 6 November 2001. The parties to the contract were GTRM and the claimant. This document included the following provisions: –

3. PLACE OF WORK

As you are site-based you will be required to work throughout the UK.

5. HOURS OF WORK

You are required to work a normal working week which will be 39 hours. You may also be required to work overtime and any such requests must be in line with the restrictions imposed by the Working Time Regulations legislation in place at the time.

8. COMMITMENT PAYMENTS

In addition to your hourly rate of pay, you may be eligible to receive a noncontractual commitment payment when you complete all the shift patterns of duty you are rostered to work in any week. The amount of commitment payments you will receive will depend on the type of roster you are required to work.

The following payment schedule will apply:

Roster Pattern	*Payment*
1. Mid-week days…….	*£10*
2. Week including 1 weekend turn or 1 mid-week night turn…….	*£20*
3.Week including 2 weekend tans but no nights or 1 weekend turn and one or more nights……...	*£30*
4.Week including 2 weekend tans and 1 or more night turns……...	*£40*
5. Week including 2 weekend turns and 1 or more night turns…….	*£50*

A weekend is any time from 2000 Friday to 0600 Monday.

9. TRAVEL ALLOWANCE

…(ii)…..Travel Allowances will not be paid to Employees in receipt of subsistence…

10. SUBSISTENCE ALLOWANCE

(a) A Subsistence Allowance at the rate of £22.00 per night will be paid to an Employee necessarily living away from the place in which he

normally resides. This allowance to cover Accommodation and meal expenses.

(b) Subsistence Allowance shall not be paid in respect of any shift in which an Employee absents himself from work except where the absence is covered by medical certificate.

(c) Where a medical certificate is provided payment of subsistence allowance will be made for a period of three shifts. No subsistence will be paid for absence extending over three shifts.

(d) Where all shift patterns for the week are completed, subsistence allowance will be paid for 7 shifts.

(e) Subsistence allowance not be paid for any weekend where the Employee is not available for work. This rule also applies when an Employee is on periodic leave intervals.

(f) Subsistence allowance may be paid free of tax subject to the Employee producing evidence and documentation which clearly demonstrates that the individual concerned, as a result of working away from their normal place of residence is continuing commitments for maintaining dependents at their normal address.

11. ENHANCEMENTS

The Enhancements rates for overtime will be as follows:

Working Hours – Dayshift
the normal working hours for a dayshift will be:

Monday – Thursday	*8 hours per day*
Friday	*7 hours per day*
Total	*39 hours per week*

….

Working Hours Nightshift
The enhancement rates for all time worked including overtime and contingency is as follows: –
Time plus ½ - 2220 to 0600 Monday to Thursday
time + ¾ - 2000 to 0600 Friday to Monday…

23 HEALTH AND SAFETY

In order to comply with health and safety rules, you are required to take such steps as are reasonably practicable for your own health and safety and that of your working colleagues and those affected by your work. You must make use of all protective clothing and equipment and must cooperate with management in all respects for the full implementation of the company's policy.

26. CHANGES IN YOUR TERMS OF EMPLOYMENT

The company reserves the right to make reasonable changes to any of your terms and conditions of employment. Should your terms and

conditions of employment change in the future for any reason you will be notified accordingly.

25. As clause 3 of the contract indicated, the claimant was required to, and did, work at various locations throughout UK. His place of residence was in Yorkshire at all material times with his wife and children.

26. Four-week rosters would be drawn up for the workers on the joint venture, with shift patterns within each of the weeks. Depending on what the shift pattern was, the claimant might be working three, four, five or (very rarely) six days or nights in a week. Given the nature of the work, which would involve shutting down (or "isolating") sections of national rail lines, much of the claimant's work was carried out at night or at the weekend or during public holidays.

27. The four-week roster period would generally end with a long weekend off. During the roster period, each week might have a different shift pattern. The claimant might, for example, find himself working in the first week for four days followed by three days off. In the second week he might work five days followed by two days off. There may be days when he worked some nights, and others when he did not. Apart from during public holidays, the claimant rarely worked overtime. If one looks at the overtime provisions at clause 11 of the contract, it is spelled out that the normal working hours of eight hours per day (or seven hours on a Friday) make up a 39 hour week of day shifts. This would involve working for five days. It would seem that four nights would make up the 39 hour workweek (or rather 38) that is set out to be the normal working week at clause 5 of the contract.

28. As can be seen from clause 8 of the contract, commitment payments were payable to the claimant when he completed all shift patterns that he was rostered to work in any week. The idea behind this was to incentivise workers to complete all of their shifts. Originally different payments applied to different patterns of work. However, the payment for the pattern set out at number 3 (a week including 2 weekend turns but no nights or 1 weekend turn and 1 or more nights) became the standard commitment payment regardless of the roster pattern actually worked. The reason for this was that number 3 was the most common roster pattern, and it was administratively convenient for payroll to apply this across the board and not to have to determine the roster pattern actually worked by each employee and apply different payments.

29. Looking purely at the contract, and specifically clauses 5, 8 and 11, which set out the normal hours of work, the patterns of rosters, and how shifts are made up, it appears that it was very much contemplated by the parties that the claimant would be working four or five shifts each week to work his normal weekly 39 hours.

30. When the claimant worked nights he was likely to require accommodation a day before he commenced his shift and a day after.

31. Given the fact that the joint venture workers were working often unsociable hours many miles from home, both parties are agreed that some sort of fatigue management policy or standard would have been in place when

the claimant commenced employment. This would have been very similar to the "Management of fatigue: Control of working hours for staff undertaking safety critical work" standard in effect on 4 June 2011 [44a-44q].

32. From the start of his employment with GTRM, the claimant, together with all of his colleagues on the same terms, was always paid subsistence allowance (often referred to as "lodge") for seven shifts each week, regardless of how many shifts he actually worked in the week. As I have set out above, for the majority of the weeks the claimant worked he would have been working four or five days or nights.

33. In order to claim subsistence payments the claimant would have to provide proof of a home address in the form of a utility bill or mortgage or tenancy details, and would be required to submit a tax-free subsistence allowance form every year to comply with HMRC requirements [48].

34. While working for GTRM the claimant was paid the subsistence allowance for occasions when he was living in lodgings as a non-taxable sum, and for occasions when he was not living in lodgings as a taxable sum. This was clearly differentiated on his payslips [516]. It was therefore entirely clear that the claimant was notifying GTRM of nights each week when he was lodging away from home and nights when he was not, and that GTRM was paying him subsistence allowance for all seven days of the week and transparently differentiating between nights at home and nights away on his payslip.

35. This arrangement persisted over five or so years until the claimant's employment was transferred to the respondent under the applicable Transfer or Undertakings (Protection of Employment) Regulations ("TUPE") in 2006.

36. Thereafter, exactly the same arrangements persisted in respect of subsistence allowance whilst the claimant was employed by the respondent. One can see from his post-transfer payslips (for example [516a]) that exactly the same differentiation was being made in the claimant's payslips between taxable and non-taxable "lodging allowance". So, for example, in the claimant's payslip of 25 April 2014 [516a], he was paid four nights non-taxable lodging allowance, reflecting the four nights he lodged away from home, and three nights taxable lodging allowance reflecting the days he was not rostered to work and not lodging away. In other words, the respondent paid the claimant seven nights subsistence payments when he had worked four shifts where he was lodging away from home.

37. The subsistence allowance was payable at the rate of £22 per night in 2001 but the rate was increased regularly at intervals until 2012 when it was paid at the rate of £35.05. The rate did not increase after this time. The rate of subsistence allowance has never been sufficient completely to pay for accommodation and meals for the claimant.

38. The claimant went into some detail in his witness statement about trade union involvement in some of the matters raised in this case, but I will merely observe that this was a comparatively heavily unionised workplace

with significant involvement of various trade unions over the years in some of the issues under consideration by me, and other related matters, both before and after TUPE transfer.

39. On 7 October 2013 Ms Goddard from the Office for Road and Rail ("ORR") wrote to Mr Thomas, by then a Senior Construction Manager with the respondent, outlining discussions the ORR had had with Mr Thomas and Mr Alsop (Programme Manager, and Mr Thomas' line manager) about managing the risk of fatigue to employees. It was observed in this letter that Mr Thomas had raised in discussions with the ORR that employees who had transferred to the respondent under TUPE (which would include the claimant) were working on a contract where they were paid a flat rate allowance out of which they were expected to book their own accommodation and provide their own transport when working away from home. Mr Thomas had also raised that these employees "*regularly work at Chadwell Heath on a 3.5 week 5 day roster with one long weekend every fourth weekend*".

40. Ms Goddard went on:

> *"However, we identified weaknesses in the system operated by employees on the TUPE contract. There is no control to ensure that employees are booking suitable accommodation and travelling in good time to ensure they are fully rested when they arrive for work. There is a concern that some employees may be taking the flat rate allowance and either not booking accommodation at all and travelling long distances daily or travelling long distances on their rest days.*
>
> *You explained the situation with regard to the Union and the reluctance of some employees to move over to the IMO-17 contract whereby accommodation and transport are booked for them by Network Rail.*
>
> *I informed you that you need to exert greater control over those employees on the TUPE contract in receipt of the flat rate allowances to ensure that they are booking suitable accommodation and that they are not travelling long distances prior to the start of their shift.*
>
> *….*
>
> *You should formulate a time-bound action plan to improve your level of control with regard to employees who are required to travel long distances to their workplace and who should be booking accommodation to ensure they do not put themselves at risk of fatigue."*

41. Mr Davey replied to Ms Goddard's letter on 6 November 2013 [76]. In relation to her suggestion to formulate a time bound action plan he responded "*Ian Alsop (Programme manager) has written to UNITE union who have collective bargaining rights for this group of employees, outlining the concerns and the need to introduce a robust check*". He went on "*In addition to declaring the use of this allowance on their timesheet, I intend to get employees to submit a weekly declaration, to include location of lodgings with travelling time between there and their starting point, substantiated by receipts for accommodation booked*".

42. The respondent's management met with Unite trade union representatives in November 2013 to discuss issues relating to fatigue management, including the suggestion for providing receipts for subsistence allowance.

43. On 4 February 2014 [85 – 87] Mr Thomas wrote to the former joint-venture staff setting out requirements to address the ORR suggested action plan. They included: -

- *Any member of staff in receipt of subsistence allowance (commonly referred to as lodge) must clearly show on their weekly timesheet, the days of the week on which they are claiming this allowance.*

- *A monthly declaration must also be completed (example form attached) which records the location of your accommodation, the site on which you are working and the anticipated travelling time.*

- *Named receipts must also be provided monthly, which match the declaration*.

44. These requirements were largely ignored by staff. Further discussions took place with Unite. On 23 January 2013 the claimant wrote to the respondent's payroll department saying that he should be paid his subsistence allowance tax free irrespective of whether he had stayed in a hotel. This was escalated to Mr Alsop who responded: -

> *Jon, the company provides two cost codes, taxable and non-taxable for Subsistence Allowance (Clause 10) intended to reimburse you for costs of accommodation and food.*
>
> *Claiming a non-taxable allowance (running second residency) is a personal issue between you and the Inland Revenue. The company only provides the mechanism for you to claim any eligible tax free allowances if you believe you are entitled.*
>
> *If you believe part or the whole allowance provided by the company is tax deductible you should put the non-taxable code but I suggest you discuss this first with the Inland Revenue as the rules will be proscriptive .*
>
> *I assume you may need to provide at some point evidence that the non-taxable element was actually expended and if employees are found to have inadvertently claimed tax benefit incorrectly, they will almost certainly seek to recover the allowance.*

45. Mr Alsop here recognises the taxable and non-taxable elements of subsistence allowance, and specifically flags up that HMRC might need evidence that the worker has actually been put to expense in respect of the <u>non-taxable element</u> (i.e. the subsistence allowance paid when the worker lodges away from home). Nothing was said about the taxable element, paid for nights when workers have not lodged away from home.

46. On 21 June 2016 Mr Thomas wrote to the claimant in relation to verifying compliance with fatigue measures and ensuring that employees were not driving after long rostered shifts. He asked the claimant to evidence dates

between 2 to 7 April 2016 where he was listed as being in accommodation. Mr Thomas asked for receipts but indicated that he was not interested in the actual cost expended "*as you receive an allowance and not actual cost*" [187].

47. Staff were still not supplying receipts and on 29 June 2016 Mr Alsop wrote to Mr Davey and Mr Weeks (senior HR Business Partner) noting this fact, suggesting that this was heading towards becoming a disciplinary issue and putting forward a draft email to be sent to staff.

48. Mr Thomas did not receive a response to the letter he had written to the claimant on 21 June 2016, so he wrote again on 11 July 2016 [193] referring to recent fatalities within the industry caused by fatigue, and stressing that formal investigation would follow unless the claimant could provide receipts. Further discussions were also held with Unite representatives.

49. On 5 October 2016 a presentation was given to the former joint-venture staff outlining a change that management had proposed [222 – 224]. The presentation highlighted safety concerns, observed that attempts to obtain receipts had failed and proposed the following change:-

> *"Any employee seeking "Subsistence Allowance" intended as a contribution towards accommodation and food in accordance with clause 10 of GTBBJV Contract of Employment will require evidence in the form of receipts in their name. When no evidence is supplied or the evidence is insufficient to validate the claim, Subsistence Allowance will be rejected & employees will be assumed to be travelling & reimbursed Travel Allowance".*

50. Mr Weeks met with claimant later that day and the claimant did not raise any objection to this change. On 11 October 2016 Mr Alsop wrote to the claimant [234] stating that from 21 October 2016 the respondent:-

> *"will no longer pay contribution to Subsistence "hotels and food" when no evidence "receipt" is supplied, or, any evidence supplied is insufficient to validate a claim. In the event of a claim is rejected, it will be assumed that the claimant is travelling and they will therefore be reimbursed with Travel (fuel)…As a result of this initiative, employees will either be reimbursed for Subsistence or Travel – not both, and Subsistence will only be paid in the event of valid receipts as evidence*".

51. In evidence Mr Davy confirmed that this letter did not expressly state that the way subsistence allowance was being calculated was being changed, although he said that this was discussed. He confirmed that this letter did not set out that the claimant's terms and conditions were being varied or amended.

52. From 21 October 2016, there was 100% compliance with the requirement to provide receipts, including from the claimant.

53. On 21 November 2016 another former joint-venture staff member, Mr Walker, whose terms and conditions with the same as the claimant's, raised a grievance claiming that he was still entitled to a full seven day's

subsistence payment regardless of the number of nights he stayed away in a week [250 – 251]. Mr Walker's grievance was heard by Mr Alsop on 12 December 2016.

54. On 26 December 2016 Mr Alsop wrote to Mr Roberts, a Unite representative, setting out the respondent's position on clause 10 of the contract [270-272]. In relation to clause 10(a), Mr Alsop stated "*A contribution will be provided towards accommodation and food costs whilst living away. The employee has to be living away to claim this allowance*". In relation to clause 10(d), Mr Alsop stated as follows: -

> "*Whilst working away 7 nights Subsistence allowance can be claimed irrespective of the roster pattern. This is only applicable if working away for the full week. Where employees only live away for part of a week, a combination of subsistence allowance and Travel allowance can be claimed. The rationale behind reimbursing 7 days Subsistence allowance irrespective of shift pattern is that whilst living away, accommodation is required for the whole week*".

55. On 9 January 2017 the claimant raised a grievance about his subsistence payments [274]. It was decided, as this covered similar ground to Mr Walker's grievance, to dispose of both grievances. Mr Walker was given the outcome of his grievance on 10 January 2017, namely that it was not upheld [275 – 278]. He appealed the decision and that was heard by Mr Harper [283].

56. Mr Harper dismissed Mr Walker's appeal by letter of 20 February 2017 [293]. Mr Harper observed that Mr Walker's appeal was based on his understanding that clause 10(d) meant that he was entitled to subsistence allowance seven days a week if he met his rostered shift pattern. Mr Harper rejected this on the basis that:-

> *"you did not take into account clause 10(a) that subsistence allowance of £24.78 is paid for necessarily living away from the normal place of residence to cover accommodation and expenses. Clause 10(d) is to provide a subsistence allowance whilst working away for the seventh night when working six shifts per week. Additionally, that by being paid seven nights per week, when at home all weekend off, would breach clause 10(e)".*

57. Thereafter it appeared that no issues were raised with management about subsistence allowance until the claimant raised a grievance on 20 June 2019 [369 – 370]. Much of this grievance went beyond the subsistence allowance and concerned other aspects of the claimants pay. The claimant's grievance was not upheld by Mr Thomas and the outcome from confirmed on 18 July 2019 [384 – 385]. The claimant appealed this grievance decision and his appeal was dismissed on 10 September 2019 [414 – 416].

The law

58. Given the revised scope of this hearing I will not set out the law relating to unauthorised deductions from wages.

59. The law relating to construction of contracts was largely agreed by counsel and set out in their helpful skeleton arguments.

60. Mr Welch drew my attention to a round-up of the relevant authorities and analysis of the principles of contractual construction in paragraph 8 of Mr Justice Popplewell's judgement in ***Lukoil Asia Pacific Pte Ltd v Ocean Tankers Pte Ltd.*** **[2018] EWCH 163 (Comm)**. The following principles emerge:-

    a. The tribunal's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The court must consider the language used and ascertain what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant;

    b. The tribunal must consider the contract as a whole, and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used;

    c. If there are two possible constructions, the tribunal is entitled to prefer the construction which is consistent with business common sense and to reject the other;

    d. The tribunal must consider the quality of the drafting and must be alive to the possibility that one side may have agreed to something which, with hindsight, did not serve its interest;

    e. A clause might be a negotiated compromise, or the parties may have not been able to agree a more precise term.

61. One further point can (uncontroversially) be added to this, and that is that the meaning of the relevant words of the contract is to be assessed in the light of a number of matters which include the overall purpose of the clause and the agreement, but disregarding subjective evidence of any party's intentions ***Chartbrook Homes Ltd v Persimmon Homes Ltd*** **[2009] 1 AC 1101** (cited at paragraph 8 of ***Lukoil***.)

62. Where the language of a contract of employment is truly ambiguous, the practice of parties can be relied on as an aid of construction of the ambiguous language (***Dunlop Tyres v Blows*** **[2001] IRLR 629***).* However, this principle must be applied with caution as it is not proper to use the conduct of parties to a contract after its conclusion as an aid to construction. Any practice relied on as establishing a particular meaning to contractual provisions should be "certain, well established and notorious", as is the case when custom is relied on to support the implication of a contractual term (***Choudhry v Treisman*** **[2003] EWHC 1203**.

63. While it is possible for an employer to reserve the right to vary the terms of the contract unilaterally, such clauses purporting to have this effect should be interpreted with caution and restrictively ***Wandsworth LBC v D'Silva*** **[1998] IRLR 193**.

The parties' submissions

The respondent's submissions

64. Mr Welch says clause 10(a) bears a straightforward meaning which would be understood by practically every reasonable person (with the requisite background knowledge) reading it.

65. The subsistence allowance, he submits, is paid on a nightly basis "at the rate of £22 per night" and is only to be paid where the claimant is "necessarily living away from the place normally resides".

66. Mr Welch submits that the contract should be read as a whole, and that clause 10(d) (which he accepted in oral submissions seemed clear in its meaning) must be read by reference to the background knowledge available to the parties in the situation they were in at the time the contract was entered into. Against this background "week" means the last week of a block of time working away when the employee necessarily has to pay for 7th night in order to comply with the fatigue management rules. This allowed workers to keep accommodation open when they were staying away for long periods. So, a worker might be incurring an expense for a room for nights that they were not actually staying in it. The clause states that the allowance is to contribute towards accommodation and meal "expenses", and on any objective reading, submits Mr Welch, this means expenditure actually incurred.

67. Mr Welch further submitted that the claimant's interpretation of the contract creates absurdity in that i) it would mean employees are entitled to payment for seven meals they did not eat, ii) it would be necessary to delete clause 10(a) to achieve the meaning of the claimant the tributes to the contract, and iii) it is inconsistent with clause 9ii) which prevents travel allowance being paid to employees on receipt of subsistence allowance.

68. Mr Welch argued that the claimant's contended meaning for clause 10 was not consistent with business common sense in that it prevents the respondent from complying with its regulatory obligations and exercising their duty of care to apply fatigue management standards to keep their staff safe.

69. Mr Welch cautioned me against relying on the practice of the parties after the contract had been entered into, relying on ***Choudhry's*** observations on ***Dunlop Tyres***. There was no evidence as to what practices were adopted prior to the entering into the contract, beyond some evidence from Mr Thomas that workers would be working away for long periods of time. ***Dunlop Tyres*** was a case where there was evidence of a state of affairs before and after the entering into a contract.

70. In his skeleton argument produced before the hearing Mr Welch, in relation to variation of contract, focused on the question of whether the contract was varied so as to imply into the contract a term entitling the claimant to payment for seven nights accommodation irrespective of whether he stays away or incurs any accommodation expense. This was not the way that the claimant put his case. Mr Welch did not make further oral submissions on this issue.

The claimant's submissions

71. Ms Ling argued that on a proper construction of clause 10, that it was plain that clause 10(a) was not intended to restrict subsistence allowance only to nights where the employee actually stayed away in accommodation.

72. In support of this she submitted that "living away" is used rather than "staying away". This indicates the long-term state of affairs of living away, rather than shorter term staying away of one or more nights. She observed that if the respondent was right then the term "living away" can mean a single shift or a single night where the worker is lodging away from home. The natural meaning, she suggests, is a long-term situation persisting over a period of time. Ms Ling pointed out that the claimant's contract required him to work throughout UK, and that he had "lived away" for the entire period of his working for the respondent.

73. Ms Ling observed that there is no suggestion in clause 10(a) that the subsistence allowance is payable on a nightly basis but that it is calculated on a nightly rate.

74. Ms Ling submitted that the use of the term "cover" rather than contribute to accommodation expenses suggests a more generous allowance as contemplated then one that is payable at the low rate agreed when an individual has actually stayed away.

75. Ms Ling further submitted that if the respondents contended meaning were correct there would be no need for clauses 10(b), 10(e) or 10(f).

76. Ms Ling submitted that the wording of 10(d) is entirely clear and actually helps understand 10(a). If the claimant works his rostered shifts his subsistence allowance is paid for the seven shifts. This is regardless of how many shifts he has actually worked or how many days/nights he has stayed away from home. There is no support within the contract or elsewhere for the suggestion that the worker has to be holding accommodation open, or as Mr Harper determined in Mr Walker's appeal, that the worker had to have worked six shifts. Ms Ling pointed to the different ways the respondent had struggled to apply its own interpretation and the conflict between Mr Harper's and Mr Thomas' interpretation.

77. Ms Ling said that clause 10(e) contradicted the respondent's interpretation of clauses10(a) and 10(d).

78. Ms Ling argued that the respondent's contention that the claimant's interpretation of the contract prevents the respondent from complying with its regulatory obligations to manage fatigue and ensure the safety of its staff is nonsensical. The respondent could easily discipline workers who were not complying with fatigue management requirements, or it could vary the contract to ensure compliance with fatigue management requirements. The way a worker is paid has nothing to do with how fatigue management practices are enforced.

Conclusions

79. I read the contract as a whole in seeking to ascertain what a reasonable person with the requisite background knowledge would have understood the parties to have meant.

80. Overall, I prefer the interpretation advanced on the claimant's behalf.

81. Looking solely at the contract, it was set out clearly that the claimant's normal working hours are 39 hours per week with a requirement to work overtime on request (clause 5). It is also clear from the contract that the claimant would work various different roster patterns which might include nights and/or days (clause 8). Clause 11 of the contract governs enhancement rates for overtime. In setting out these rates, this clause makes clear that normal working hours for a day shift would be eight hours per day Monday to Thursday, and seven hours per day on a Friday. Normal hours Monday to Friday would give a total of 39 hours per week. This clause also sets out enhancement rates for weekends and night shifts. It appears that a normal night shift would run from 2200 to 0600 Monday to Thursday (i.e. eight hours), or 2000 to 0600 Friday to Monday (i.e. 10 hours).

82. Putting clause 8 and clause 11 together, it was clearly envisaged at the time of entering into the contract that the claimant might work, for example a "mid week days" roster for a week which would require him to work a 39 hour week of day shifts Monday to Friday. This is likely to have meant that he needed four, or at the very maximum, five nights' accommodation during that week. Similarly, it was envisaged at the time of entering into the contract that the claimant would be required to work a "week including 3 weekends turns". Looking at clause 11, it is clear that this would involve 10 hour nights on Friday Saturday and Sunday plus one further day or night to work a 38 hour week. This too, would have required five nights' accommodation if the shifts were sequential. The contract itself does not spell out whether days or nights would be worked sequentially, however, a week of "mid week days" would have to be sequential to amount to the normal 39 hour week.

83. A working week within a four-week roster requiring four or five nights' accommodation was clearly within the contemplation of the parties when they drafted clause 10(d). Nonetheless, the clause was drafted in the clearest terms setting out that "*where all shift patterns for the week are completed, subsistence allowance will be paid for seven shifts*".

84. During cross-examination of the claimant, and in closing submissions Mr Welch raised the apparent absurdity of the claimant being rostered to work one shift during the week, completing that shift and yet being paid for seven nights. In the abstract this might sound an absurd and unfair windfall for the claimant. However, again focusing solely on the contract, it was clearly contemplated by the parties when forming the contract that the normal working week was 39 hours, which would always be a minimum of four shifts. Indeed, in his correspondence with the ORR Mr Thomas referred to the fact that staff "*regularly work at Chadwell Heath on a 3.5 week 5 day roster with one long weekend every fourth weekend*". The unfair absurdity that Mr Welch sought to raise would therefore be unlikely arise in practice if the claimant worked according to his contract.

85. The business commonsense reality, therefore, was that the claimant would be working away from home and requiring overnight accommodation at least four nights per week and more for other weeks. If his shifts were not sequential, if he worked overtime, or if his working week was otherwise not a straightforward pattern, or if he needed to keep his accommodation open for a longer period than a week it makes perfect sense for the employer to pay subsistence allowance for seven shifts when the reality was that he would practically never actually work seven shifts. In fact, the rationale put forward in paragraph 2.7 of the Amended Grounds of Resistance and paragraph 2.1 of Mr Thomas' witness statement for the respondent continuing after transfer to pay the claimant for seven shifts regardless of how many he actually worked (and doing so for 10 years), namely administrative ease, is a rationale that could perfectly well have been in the minds of the parties when they drafted clause 10(d). Giving clause 10(d) the meaning that the claimant contends for is not without its advantages for the respondent – it simplifies their payroll.

86. There is some superficial attraction in the respondent's interpretation of clause 10(a) <u>in isolation.</u> However, the contract as a whole has to be read. On balance, if the respondent's interpretation of clause 10(a) is right then 10(d) has to be more-or-less ignored or totally rewritten. Indeed, the respondent has struggled to put forward a consistent meaning or rationale for clause 10(d). On the one hand it was advanced that the reason for clause 10(d) being so drafted was to allow accommodation to be kept open, and on the other it was advanced that it was to compensate for a seventh night when working six shifts. Neither of these interpretations are supported by the words of the contract.

87. However, if the claimant's reading of 10(d) is right then it is possible to make sense of 10(a). Clause 10(d) sets out that the 7 shifts will be paid when all rostered shifts have been completed, and clause 10(a) sets out the rate payable, and the general purpose behind the payments, that is to say, as an "allowance" towards accommodation and meal expenses when necessarily living away. "Living away" is understandable by reference to the contract itself (clause 3, "required to work throughout the UK") and the broader context of the claimant being a worker who spends practically all of his working life living away from his normal residence. It indicates a rather more extended state of affairs than the respondent contends.

88. Furthermore, and as Ms Ling pointed out in her submissions, if clause 10(a) bore the meaning that the respondent contended for, clauses 10(b) and 10(e) would be redundant. If clause 10(a) means what the respondent says it means then there would be no need to spell out that no subsistence allowance would be payable absences or non-availability as set out in clauses 10(b) and 10(e), as that would already be covered by clause 10(a).

89. I did not understand the argument advanced by Mr Welch that the claimant's interpretation of the contract would lead to the absurdity of him being paid for meals he did not eat. Clause 10(a) is better understood as giving the claimant an "allowance" towards his food and lodgings rather than strict compensation for his exact expenditure (this appears to be how Mr Thomas understood the clause when writing on 21 June 2016 "*you receive an allowance and not actual cost*" [186]). Similarly, I do not see

how the claimant's reading of the contract is inconsistent with travel allowance not being payable to workers in receipt of subsistence allowance.

90. Mr Welch also advanced the case that the claimant's interpretation would lead to the respondent not being able to fulfil its regulatory requirement and ensure that fatigue management principles were being adhered to. I do not accept this. It was not spelled out to me why having seven nights subsistence allowance rather than, say, six would make it more likely that a worker would choose to drive home to their families as soon as they finished their working week. Furthermore, disciplining employees for not adhering to health and safety requirements or not following reasonable management instructions, or varying their contracts is a better way to ensure this compliance than unilaterally changing the way their pay has been calculated and paid for the previous 15 or so years.

91. Although I have seen a degree of ambiguity between clauses 10(a) and 10(d), I have not relied on the conduct of the parties subsequent to the formation of the contract as helping in its construction. Ms Ling makes the point that it is unlikely that clause 10 suddenly sprang into existence when the claimant began his employment on 6 November 2001, and that the clause was transparently operated exactly in accordance with his interpretation of it for 15 or so years. However, on balance, this falls short of the circumstances in ***Dunlop Tyres***. While there is crystal clarity about how the contract was operated after it was entered into and for many years, there is some obscurity about what went before. I have been able to reach my conclusions on construction while maintaining a firm focus on the contractual provisions themselves, and, given the quality of the drafting, some of the broader context. I have not considered the subsequent actions of the parties as being part of this broader context.

92. While Mr Thomas, during cross examination, suggested that the claimant's contract may have been amended by the letter of 11 October 2016 [234], I do not accept this. The respondent has, in clause 26, retained the power to vary but I must interpret this restrictively (***D'Silva***). I consider that there is no evidence to suggest that the respondent was seeking to vary the contract, but merely to impose its understanding of what it says the contract has always meant on the claimant. Accordingly, he was not notified of any purported variation or issued a fresh statement of terms and particulars.

93. In all of the circumstances I find that clause 10 has the meaning that the claimant contends. When he has completed his rostered shift patterns for the week, he is entitled to be paid for seven shifts regardless of how many he has actually worked.

Financial consequences of the decision on the preliminary issue

94. I hope the parties' confidence that the financial consequences of this decision can be readily agreed between them is well-placed, but I will make arrangements for a further half day to be listed, as suggested by counsel. I will direct that the claimant produces, two weeks before the relisted hearing, an updated schedule of loss which indicates the deduction he claims in each monthly pay period. The respondent is to

produce an updated counter-schedule one week before the hearing. This will be set out in a Case Management Order which will be sent separately to the parties. Given the parties expressed confidence that financial consequences will in all likelihood be agreed I have not made any further orders about further evidence. If the arrangements for the hearing or the date given are not suitable, the parties should write to the tribunal offices setting out their positions. Also, if the parties manage to agree terms between them, they should write to the tribunal offices to vacate the hearing.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was [V – video, conducted using Cloud Video Platform (CVP)]. It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

Employment Judge **Heath**

30 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON: 01/07/2021

FOR EMPLOYMENT TRIBUNALS