EMPLOYMENT TRIBUNALS

Claimant: **Mr Bradley James**

Respondent: **Network Rail**

Heard at: **East London Hearing Centre**

On: **5 July 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **Ms R Owusu-Agyei (Counsel)**
Respondent: **Mr C Kelly (Counsel)**

JUDGMENT having been sent to the parties on **6 July 2021** and Reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The matter comes before me today by way of a claim of breach of contract brought by the Claimant in respect of payment for shift premium. The Respondent resists the claim. The employer's contract claim was withdrawn at the start of this hearing and was dismissed.

Liability

2. The Claimant was employed by the Respondent as an Operative from September 2003. He progressed well in his work and, in 2015, was invited to apply for the position of Mobile Operations Manager at Chadwell Heath. This was a significantly more responsible role for which he was entitled to receive higher payment.

3. The dispute is whether and to what extent the terms of the original contract should be applied in the seconded role and what is the correct basic rate of pay to which the Claimant was entitled.

4. Today, the Respondent conceded that the original 2003 contract continued to apply throughout the period of secondment. The Claimant was entitled to a basic salary of £22,018 per annum (plus London and South East allowance) and shift premiums as set out at clause 6. These included:

(1) 25% of basic hourly pay for each complete hour worked between 18:01 and 06:00 Monday to Friday;

(2) 15% of basic hourly pay for each complete hour worked between 06.01 and 18.00 on a Saturday;

(3) 25% of basic hourly pay for each complete hour worked between 06.01 and 18.00 on a Sunday or a public holiday;

(4) 45% of basic hourly pay for each complete hour worked between 00:01 and 06:00 on Mondays, Saturdays, Sundays and public holidays and/or 18.01 and 24.00 on Fridays, Saturdays and Sundays and bank holidays;

(5) 300% of basic hourly pay for each complete hour worked between 00.01 and 24.00 on Christmas Day, Boxing Day and New Year's Day.

5. Appendix A defines the London and South East allowance and states that it is pensionable but not to be taken into account for overtime or any other allowance. There is nothing within the 2003 contract that deals with an HQ allowance.

6. The Claimant was issued with an offer letter for the seconded role on 9 September 2015. That stated that he would be based at Chadwell Heath and his grade would be SUP7 (five grades higher than before). The total remuneration was £42,401, comprising the following elements:

Salary: £23,825 per annum pro rata

Inner London Allowance: £1,800

Central London Supplement: £900

Maintenance Allowance: £200

Direct Labour Allowance: £800

HQ Allowance: £14,885 per annum pro rata.

7. The Claimant queried the way in which the entitlements had been set out, in particular the HQ allowance as this would not be pensionable and wanted it included in his salary for the purposes of a mortgage application. The Respondent sent a revised letter on 14 October 2015 in which the total remuneration remained as £42,401 but with salary increased to £38,710 per annum pro rata and the HQ allowance removed (all other allowances remained as before). The Claimant signed that offer letter to agree its terms and began his secondment.

8. Contemporaneous email correspondence shows that there was some confusion within the Respondent as to the way in which the offer had been made. As a result, on 18 November 2015, a further offer letter was sent to the Claimant in which salary was stated as "**£38,710 per annum, pro rata, of which £14,885 is built up of an HQ allowance**". The other allowances remained as before. The Claimant denies receipt of this letter.

9. In December 2015, the Claimant complained to HR that he had not been paid a shift premium to which he claimed to be entitled. An internal email sent by Ms Johnston to Mr Roberts on 23 December 2015 states that the November offer letter was sent to the Claimant. On 8 January 2016, Ms Johnson emailed the Claimant to confirm that there would be no change to current terms and conditions during the period of secondment, the salary uplift would have to be paid as an HQ allowance and attaching a copy of the November letter for him to sign. The Claimant replied, "**there is not an option where I can sign the new contract**". The Claimant did not suggest at the time that he had not previously received the same or that he objected to its contents. Contrary to his evidence today, which I did not accept as reliable, I find that in this response the Claimant indicated a clear intention to accept the new agreement. On balance, I find that the Claimant did receive the November 2015 offer at the time that it was originally sent and that he did agree to its contents.

10. As a result, the 18 November 2015 is the agreement which sets out the terms governing the secondment. Whilst the earlier 14 October 2015 was the only contract expressly signed by the Claimant, he accepted the 18 November 2015 variation by his conduct and worked thereafter under its terms. For these reasons, I conclude that the Claimant's entitlement to remuneration is to be considered by application of the original 2003 contract and 18 November 2015 secondment agreement.

11. The Respondent now accepts that the Claimant was entitled to the shift premia set out in clause 6.1 during the period of secondment. The issue is whether basic hourly pay should include or exclude the HQ allowance.

12. There is no definition of an HQ allowance in the contract and no statement that it is not to be treated as part of basic salary, unlike the London and South East allowance it is not expressly excluded. In deciding whether the HQ allowance should be regarded as part of the basic salary, I took into account the three different iterations of the secondment offer letter and the conduct of the parties prior to the contractual variation on 18 November 2015 in order to ascertain what the parties must have intended.

13. The Claimant wanted to ensure that the HQ allowance formed part of his basic salary and made this clear to the Respondent. The Respondent agreed to the variation in the offer letter sent on 14 October 2015. The final secondment terms included in the letter dated 18 November 2015, accepted by the Claimant on 18 January 2016, clearly states that the salary is £38,710. The £14,885 HQ allowance is expressly included in the definition of salary and not in the list of allowances set out separately. Whilst it is referred to as an HQ allowance, it was treated by both parties as part of the salary in response to the Claimant's express request. For these reasons, I conclude that it does form part of the Claimant's basic salary and shift premium are payable on the full £38,710 per annum.

14. The Claimant was contractually entitled to be paid the 2003 contract shift premiums calculated at the enhanced salary. On the basis of my liability Judgment, he was not entitled to be paid in accordance with all of the terms of the SUP7 substantive contract, only those parts included in the secondment agreement dated November 2015.

Remedy

15. Having given Judgment orally on liability for the reasons set out above, the Claimant produced a table setting out the sums to which he claimed to be due by way of

premium payments based on recent disclosure by the Respondent of the rosters he had worked whilst on secondment. The schedule has considered each day worked, the hours attracting a premium, the rate of the premium as set out in the 2003 contract, what should have been paid if the HQ allowance was included in salary and what was in fact paid. As a result of the hourly rate the Claimant claims £1,650.16.

16. On behalf of the Respondent, Ms Haq had conducted the same exercise and, in addition, for each of the rostered days she analysed the payments in fact received by the Claimant based upon the SUP7 contract which paid different enhancements and was more generous in payment for free days and Bank Holidays.

17. Ms Owusu-Agyei submits on behalf of the Claimant, that there is no ability to operate an equitable set-off in this case, unlike for an unauthorised deductions claim. In any event, equity would fall in favour of the Claimant due to the very complicated nature of the payslips. As a result of this complication, the Claimant could not have known that he was receiving more pay under the SUP7 contract than that to which he was entitled. She says that he has asserted his rights to the shift premia throughout the period of the secondment and is therefore entitled to this as an additional payment. If I am against her on that submission, Ms Owusu-Agyei further submits that it is not as simple as determining the sums due as shift premia and looking at the sums in fact paid as some were additional allowances which would have been paid in any event. She accepts that it is not easy to follow but that there may still be an underpayment.

18. By contrast, Mr Kelly submits that this is not a question of set-off but one of mitigation. There has been a breach of contract in that the Respondent incorrectly paid the Claimant on the SUP7 contract but that breach operated to the Claimant's benefit in some respects and therefore has extinguished the entirety of the sums that would otherwise be due by way of shift premia.

19. Starting from first principles, the breach of contract was the failure of the Respondent to pay the Claimant the shift premia to which he was entitled by reason of clause 6 of the 2003 contract. In assessing damages, I must look at the sums to which the Claimant would have received had there been no breach of contract. On this point, I prefer the submissions of Mr Kelly: this is a claim for damages for breach of contract and not for debt. I conclude that the correct approach is to determine what the Claimant should have been paid absent a breach and deduct from that the sums in fact paid.

20. Whilst I appreciate the tables are complicated, I found the evidence of Ms Haq to be clear and compelling. She has carefully researched not just the sums due by way of shift premia and night shifts but the entirety of the Claimant's pay received during the period of secondment. I am satisfied that her Excel spreadsheet is robust, it is reliable and therefore that I can accept it as evidence of the sums which would have been due and those which were paid. I find that the Claimant has been paid for overtime, free days, Sundays and Bank Holidays under the terms of a substantive SUP7 contract. These were sums to which he was not contractually entitled and they operate to extinguish in its entirety the underpayment for shift premia. In the alternative, it is for the Claimant to prove his loss. The fact that, as Ms Owusu-Agyei puts it, there "may" still have been an underpayment is not sufficient to discharge the burden of proof on him.

21. For all of these reasons, I am not satisfied that the Claimant has proved loss suffered by reason of the breach of contract and I make no award of damages.

Employment Judge Russell
Date: 30 November 2021