EMPLOYMENT TRIBUNALS

Claimant: Mr Z Cwajda

Respondent: Citizen Housing Limited

Heard at: Birmingham (via CVP) **On:** 25 October 2021

Before: Employment Judge J Jones
Representation

Claimant: in person
Respondent: Miss Serena Crawshaw-Williams (Counsel)

JUDGMENT having been sent to the parties on 25 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. By a claim form lodged on 29 June 2021, after a period of early conciliation between 11 April and 13 May 2021, the claimant made a claim for the repayment of some deductions that had been made from his wages during the preceding 3 months.

2. At the time the claimant lodged the claim, he had suffered deductions over 3 months at the rate of £44.03 per month, totaling £132.09. The deductions continued after the claim form had been lodged, until the respondent had recouped the total sum of £308.25, but the claim was limited to £132.09.

3. The respondent admitted making these deductions. Its case was that they were lawfully made following the discovery that the claimant had been overpaid some mileage expenses the previous year.

The evidence

4. The Tribunal was provided with a a joint bundle of documents running to 373 pages. This bundle included the witness statements and some duplicates of the relevant documents.

5. The Tribunal heard evidence from the claimant and from three witnesses for the respondent. These were Mr Richard Hughes, the Neighbourhood Manager and the claimant's direct line manager, the respondent's Head of Payroll, Ms Emma Farrow, and the respondent's Head of Neighbourhood Services, Mrs Pauline White.

6. Based on this evidence the Tribunal made the following findings of fact. References in these reasons to page numbers are references to the pages of the joint bundle of documents, unless otherwise stated.

The facts

7. The claimant was employed as a Neighbourhood Officer at all relevant times and remains in the respondent's employment. He commenced employment on 26 June 2006 in a different role and by 2020 he was on secondment as a Neighbourhood Officer. This role involved primarily two tasks - one being office-based administrative desk work and the other being carried out on site and requiring the claimant to visit various premises within his patch to see clients and properties. On a given work day, the claimant would visit sites either in the morning or the afternoon depending on client need. The other half of the day he would generally spend doing his administration. He was based at the respondent's Torrington Office and that was his "main place of work" when he commenced employment.

8. The Claimant had a contract of employment (page 83). It was common ground that the contract provided for the claimant's principle place of work to be the Torrington Office. The sections that were of particular relevance to the claim were in paragraph 7 in a section headed "Remuneration, Expenses and Deductions". Paragraph 7 explained that, in addition to salary, the claimant would receive the following expenses:

> "all expenses wholly, properly and necessarily incurred by you in the performance of your duties provided they are agreed in advance with your Line Manager and you submit receipts to the company as it may reasonably require."

It went on:

> "Further information on the Business, Travel and Expenses Policy ("the BTEP") can be found on the company's intranet.."

The contract stated that the BTEP may be changed from time to time.
It also provided (at paragraph 7.4) that the claimant authorized the company to deduct from his remuneration any funds due to the company during his employment or outstanding on its termination. There was express reference to overpayments.

9. The version of the BTEP that was in effect at the material time was provided to the Tribunal at page 61 onwards. The key provisions were not in dispute and were to be found under section 5.5 on page 63, headed "Car Mileage". After setting out that mileage could be claimed at 45p per mile up to 10,000 miles, the Policy provided that

> "employees will be reimbursed for car journeys on business over and above their normal travel costs to and from their normal place of work."

Any car journey costs claimed should therefore exclude employee travel costs to and from their normal place of work. There is a worked example of an expense in the Appendix to the BTEP. This explains that, where a mileage claim is made, the individual needs to deduct the number of miles that they would ordinarily travel to get to work. In Appendix 2 of the BTEP (page 75), it is again reiterated that business mileage claimed must only be for that which is over and above normal travel costs to and from work. The example is given that if home to work is 20 miles and an employee travels to a meeting from home and then back to work, completing 50 miles, his/her mileage expense claim should be for 30 miles (50 miles travelled minus 20 miles home to work).

10. The claimant operated within the terms of the BTEP and there was no issue with his expense claims until the Coronavirus pandemic hit. The respondent's response to the government guidelines/ instructions in March 2020 was to instruct the claimant and his colleagues in the Neighbourhood Office not to attend their normal place of work but instead to work from home. Arrangements were hurriedly made for employees to be able to work from home and staff, including the claimant, were provided with computer equipment and furniture. As keyworkers, the claimant and his colleagues continued to work, and went to site to visit their clients as required, returning home to do their administrative work.

11. This was a way of working that had happened on occasion before the pandemic in that, from time to time, Neighbourhood Officers, including the claimant, would work from home in the morning or the afternoon before or after their site visits. It was common ground that, in those cases in the past, staff had not made mileage claims unless their mileage exceeded what they would ordinarily claim when they went to and from the office, in accordance with the contract.

12. The claimant and his colleagues worked away from the office for the first2 or 3 months of government Covid restrictions before the question of mileage claims came up. After this initial period, however, the claimant realized that he was losing money – at least in cash terms - by way of travel expenses. The claimant was going from home to site and returning home again. Because he lived very close to his patch, he would go to site, do his visits and come home having carried out about 10 miles of business mileage. This would be less than the 12 miles it normally took him to travel to the office and back and therefore under the terms of the BTEP, he could make no expense claim.

13. This state of events struck the claimant as unfair. He felt that he was working to keep the respondent running, was taking the inevitable health risks that many key workers were taking at that time and was also working hard to support colleagues who had to shield. Feeling this apparent injustice, the claimant raised the question of his mileage with his line manager, Mr Hughes, in order to find out whether or not his place of work had changed to home such that he would be entitled to make a claim for mileage from home to site

and back.

14. The Tribunal concluded, having heard the evidence of the claimant and Mr Hughes, that the evidence of the claimant was to be preferred. The Tribunal found that there was a conversation at a meeting of the team during which Mr Hughes did indeed give the claimant and his colleagues the distinct impression that it would be appropriate to make a claim for mileage from home to site and back during the Covid pandemic "work from home" restrictions. This was, the Tribunal found, an indication that it "felt fair" for this to be done rather than an authoritative statement on Mr Hughes' part that he had checked the Policy, or taken the matter up with his own Line Manager and was passing on the respondent's formal position on the subject.

15. The claimant was consistent in his assertion that he believed that his approach had been endorsed by his line manager from the very first time he raised his claim relating to mileage expenses. Mr Hughes told the Tribunal that he thought that this approach was alright and that he "might have thought that was an appropriate way of construing the BTEP". Mr Hughes also told the Tribunal that he had made a claim of this kind himself and had ended up having to make a small repayment of overpaid expenses later down the line as a consequence.

16. After this team discussion, the claimant began to claim his expenses as if his home was his workplace. He therefore claimed mileage when he went to work on site and came back again without the deduction of the 12 miles that it would normally take him to get to the office and back.

17. Mr Hughes told the Tribunal that he approved the claimants' expenses and that of all his colleagues that were made on this basis although his practice was always to approve expense claims and not to check them individually, leaving that to others.

18. It was most unfortunate that Mr Hughes did not take his team's query about mileage expense claims to the payroll team for an opinion. It was obvious to the Tribunal from the very clear evidence of Miss Farrow, the Head of Payroll, that, had she been asked, she would have been able to explain the position to Mr Hughes who could then have passed it onto his team. That position was that the expense policy was under review in light of the changing circumstances but was still applicable in its current form with contractual places of work remaining unchanged. The Tribunal found that in all likelihood in that case no claim would have been made by the claimant and he would not have been put in a position where he later had money deducted from his wages. However, that did not happen.

19. It was in many ways later only by chance that the Payroll Team picked up that claims for mileage expenses had been made by the claimant (and others) without the deduction of normal mileage from home to office, as per the terms of the BTEP. When it did come to light, Miss Farrow asked Mr Hughes to carry out an audit of his team's claims and in doing so she discovered that there had been overpayments of expenses.

20. In February 2021 the matter was raised with the claimant, and a letter was sent to him requesting a repayment of the £308.25 he had received

which was for mileage that should have been deducted because of the travel to work rules in the BTEP. There was a discussion about the matter and the claimant, who was not willing to agree to pay back the money, raised a grievance.

21. The claimant's grievance was dealt with by Mr Hughes. Whilst not directly relevant to the issues in this claim, the Tribunal observes that Mr Hughes should not have been appointed to deal with this, or, if appointed, should have recused himself and declared a conflict of interest in view of his earlier discussions with the claimant about whether or not he could make the claim in the first place.

22. Having reviewed the matter, and looked at the BTEP, Mr Hughes determined that the Policy had not been applied correctly, that the mileage claims were incorrectly made and that the claimant needed to repay the money.

23. The claimant appealed this decision and the appeal was dealt with by Mrs White. Mrs White dealt with the matter objectively and appropriately. She felt obliged to uphold Mr Hughes' outcome on the claimant's grievance but, in doing so, put forward support for the suggestion that the BTEP should be reviewed because she had some sympathy for the claimant's position.

The law

24. The first legal issue that arose in this case was the question of jurisdiction. The claims were made under section 13 of the Employment Rights Act 1996 (ERA), the relevant parts of which state:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Section 14 of the ERA goes on to state:

Excepted deductions.

(1) 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.

25. This section 14 is a direct replica of the old Wages Act provision from the 1986 legislation which was lifted and put into the ERA when it was enacted. The original provision was considered by the Employment Appeal Tribunal (Mummery P, as he then was) in a case called **Sip Industrial Products Limited v Swin** [1994] UKEAT279. Unlike Mr Cwjada, the claimant in that case had dishonestly deprived his employer of some expenses. Dishonesty forms no part of this case. However, the Employment Appeal Tribunal, whose decisions bind this Tribunal, decided in that case that, if section 14 applies, then section 13 cannot give the Tribunal jurisdiction to hear a case of unlawful deductions from wages. Put another way, if the reason for the deductions (whether it is lawful or otherwise) is that there has been an overpayment of expenses then the Tribunal is not empowered to determine whether or not there has been an unlawful deduction from wages or not.

Conclusions

26. There was no dispute in this case that the respondent deducted the sums in question from the claimant's wages because it genuinely believed there to have been an overpayment of expenses to him. The Tribunal concluded in those circumstances that this case falls within the terms of section 14 ERA and that therefore, unfortunately, the Tribunal does not have jurisdiction to consider whether or not there has been an unlawful deduction of wages.

27. This is a rather unsatisfactory position for both of the parties because they hoped to have an adjudication on the substantive issue in the case. Consequently, the Tribunal offers the view that, had this been a breach of contract claim (which it could not be in the Employment Tribunal because the claimant remains in employment), the Tribunal would have found that there had been no breach of contract by the respondent in deducting these monies from the claimant. The claimant was paid in accordance with the BTEP. The claimant agreed, and very candidly said in his evidence, that mileage from home to office had to be deducted from any claim he made in accordance with the Policy. The

only way he could succeed, therefore, would be if his place of work had changed when he began to work from home due to Covid-19. There was never a formal change of work place. There was an emergency scenario brought about by the pandemic when individuals were told they needed to base themselves for a period of time at home. That was made clear from the Coronavirus Policy which expressly stated that there was *not* to be a change in individual employees' places of employment (page 305) stating "the employee's contractual designated base will remain unchanged".

Employment Judge J Jones
24 November 2021

REASONS SENT TO THE PARTIES ON 08/12/2021
FOR THE TRIBUNAL OFFICE