Case Nos: 2501280/2020, 2501281/2020, 2501282/2020, & 2501283/2020

EMPLOYMENT TRIBUNALS

Claimants: **Mr IK Gibson (1),**
Mr J Toomey (2),
Mr G McCabe (3),
Mr N Crocker (4).

Respondent: **OVO (S) Metering Limited**

Heard at: **Newcastle CFCTC** **On:** **21 & 22 September & 16 December 2021**

Before: **Employment Judge Newburn**

Appearances
For the Claimants: **Each in person**
For the Respondent: **Mr McHugh (Counsel)**

JUDGMENT having been sent to the parties and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimants all brought claims of unlawful deductions from wages with respect to two elements of their wages: overtime and travel time.

2. The Respondent denied making any unlawful deductions from the Claimants' wages.

Issues

3. The Issues I needed to deal with were agreed as follows:

    3.1. What were the Claimants contractually entitled to receive?

3.2. Did the Claimants receive less than this sum?

3.3. If so, was this deduction required by law or agreed in writing by a term of the Claimants' contracts?

3.4. Did the Claimants have a copy of that contract before the deductions were made?

3.5. Did the Claimants agree in writing to a deduction being made before it was made?

The Hearing

4. The hearing was listed as an in person hearing for two days. On day one, discussions were held to resolve issues surrounding the limitation on room capacity due to COVID protective measures within the building. We were able to organise the room to permit the hearing to continue in person on day one, however on the morning of day two the Respondent's representative contacted the Tribunal to confirm that he was unable to attend in person as he was awaiting the outcome of a PCR test. I arranged a hybrid hearing, with the Respondent's representative attending via CVP and the remaining participants attending in person.

5. The disruptions meant a further day was required to conclude evidence and submissions.

6. On the first day both the Claimants requested that 8 documents and an email from Mr Edwards, which essentially amounted to a further witness statement, be admitted in evidence. The Claimants had not provided copies to the Respondent or the Tribunal until 19 September 2021.

7. We discussed the Issues in dispute and determined that some of those documents were not relevant to those issues. Some were small excerpts of a few cells from larger Excel spreadsheets that in isolation did not provide any relevant information. It was agreed that 3 documents would be added to the bundle, and whilst I accepted the email from Mr Edwards as evidence, I confirmed I would treat it as a witness statement and as he would not be in attendance at the hearing I would attribute weight to the document accordingly.

8. I had an agreed bundle running to 475 pages, to which we added the Claimant's additional disclosure pages. References to page numbers in these written reasons are references to pages I was directed to in that bundle.

9. All of the Claimants had prepared witness statements and gave oral evidence. Mr Cowgill (Head of Revenue Services) and Mr Elhasham (Senior Regional Performance Manager) gave evidence on behalf of the Respondent.

10. Having heard all the evidence, both oral and documentary, and having regard to the submissions of the parties, I made my findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the salient parts of the evidence upon which I based my decision.

<u>Calculations of the Claimants' loss</u>

11. There had been several discussions in preliminary hearings and correspondence between the parties regarding the Claimants' schedules of loss. The Claimants stated they were unable to calculate their losses until they received further disclosure from the Respondent.

12. The Respondent was unable to provide relevant documents for the period prior to October 2018, however the Respondent provided copies of spreadsheets from April 2019, copies of the Claimants' Individual Daily Log sheets (**IDLs**) from the start of 2019, and copies of the relevant payslips for the corresponding period, to enable the Claimants to carry out calculations of loss.

13. It was agreed in the preliminary hearing of 18 May 2021 that the Claimants would be able to make the necessary calculations of their losses for the dates covered by the documents that the Respondent had provided, and that the parties may then need to extrapolate from those calculations in order to determine any losses in respect of the period before those dates.

14. In accordance with this agreement the Claimants were ordered to set out:

> "*6.1 their respective calculations of overtime worked and therefore overtime payments due to each of them in relation to that same period commencing at the start of 2019;*
>
> *6.2 the periods to which the calculations relate;*
>
> *6.3 the dates upon which they consider that the overtime payments should have been made to them.*"

15. Further to this order the Claimants responded to confirm their losses were:

> "*John Toomey £5,354.70*
>
> *Ian Gibson £5,850*
>
> *Gary Mccabe £5,209.70*

Neil Crocker £6,404.09.

This is what we are owed between 30/07/18 - 01/04/20, incorporating TT and OT at 1.5 rate."

16. On 12 August 2021 the Tribunal directed the Claimants to explain how each of the amounts claimed had been arrived at. The Claimants emailed the Tribunal, copying in the Respondent, to state:

    "*The calculations we submitted incorporate TT and OT.*

    6.2) The period covered is 30/04/18 - 01/03/20.

    6.3) Payment should have been received 23rd of each month as that was the recognised "salary pay date"."

17. During the hearing the Claimants did not provide details or documentary evidence setting out the specific dates upon which they claimed that deductions had been made to their wages in relation to overtime payments.

18. The Claimants were able to locate a number of time sheets and overtime sheets from 2017, however I was not directed to any corresponding payslips for these 2017 time sheets.

Findings of fact

19. All the Claimants were employed by the Respondent as Revenue Protection Officers (RPOs) within the Respondent's Revenue Services team. The Respondent has 10 RPO teams across the UK. The RPO team the Claimants were part of was responsible for covering 2 geographic locations, Yorkshire and North East England. As RPOs, the Claimants were responsible for investigating energy theft which involved travelling within the team's geographical area to attend sites to carry out investigations and other associated tasks.

20. Their employment contracts all stated that their employment was also subject to the terms of the SSE plc Joint Agreement (the '**Joint Agreement**').

21. The Joint Agreement is a collective agreement between the Respondent and its Trade Union partners. The Claimants accepted their contracts of employment were subject to the terms of the Joint Agreement and the Joint Agreement could be amended from time to time through collective bargaining between the Respondent and the Trade Unions. The Claimants accepted that the Unions were entitled to negotiate with the Respondent to effect changes to their working practices and the Joint Agreement on their behalf and they were bound to the changes agreed; although, Mr Crocker stated he believed he should only be

bound to changes which he felt were reasonable and that the terms of their contracts took precedence over the terms in the Joint Agreement.

22. All of the Claimants' contracts stated that they were paid an annual salary, paid monthly in arrears, and they would work 37 hours per week. Mr Gibson's oral evidence was that their working hours were planned in advance with their managers and were usually 8am – 4pm Mondays to Thursdays and 8:30am – 4:30pm Fridays.

<u>History of grievance</u>

23. The Claimants raised a collective grievance on 7 August 2019 which included 2 complaints:

    23.1. their 37 weekly contracted hours had been increased to 39.5 hours per week to include travel time of 15 minutes at the start and end of each day and they were not being paid for this (the 'Travel Time' issue); and,

    23.2. their 37 weekly contracted hours were being calculated as a 4-weekly total, with time subtracted where an early finish had occurred due to a lack of work or operational reasons which resulted in lower overtime payments (the Overtime issue).

24. Mr Elhasham conducted an investigation into the grievance. Mr Gibson attended the grievance hearing as representative of all the Claimants on 3 September 2019 accompanied by Mr Toomey. They discussed and clarified the grievance points. The Respondent wrote to Mr Gibson on 20 September 2019 to confirm the Grievance had not been upheld. They appealed the decision on 23 September 2019 but did not give any grounds of appeal. The hearing was held on 19 February 2020, conducted by Mr Connelly (Commercial and Portfolio Manager). Mr Connelly considered the points raised, carried out further investigations, and wrote to Mr Gibson on 18 March 2020 upholding the original outcome.

<u>Overtime issue</u>

25. The Claimants claimed that in 2018, the Respondent changed the way in which their overtime was calculated resulting in a loss to them.

26. Clause C1 of the Joint Agreement (page 80) confirmed that the Claimants' normal hours would be 37 hours per week, and that unless they were employed on a shift rota pattern, or a mutually agreed alternative pattern, then they worked under the "Flexible Hours Arrangement" covered by clause C2 of the Joint Agreement.

27. The Claimants agreed that they were not employed on a shift rota pattern, and no other specific arrangement related to them. The Claimants agreed that they worked under the “Flexible Hours Arrangement” and were subject to section C2 of the Joint Agreement.

28. The Relevant sections of Clause C2 of the Joint Agreement state:

*“**C2** **Flexible Hours Arrangement***

C2a Under the Flexible Hours Arrangement, employees shall work their normal thirty seven hour average working week on hours determined by the Company in line with the requirements of the business and customer service, within the following normal hours limits:

7 am - 8 pm Monday to Friday
8 am - 5 pm Saturday

C2b The thirty seven hour working week shall be averaged over settlement periods of four weeks duration. The total number of hours which an employee may be required to work in the settlement period is therefore 148 (i.e. 37 x 4).

…

C2e The actual hours required to be worked within the limits prescribed above shall be determined as far in advance as possible. and with not less than 72 hours notice. Short notice changes to these hours (at less than 72 hours notice) may only be worked by mutual agreement and shall attract a premium under Clause D4.

C2f Where the employee is authorised and agrees to work more than 148 hours in the settlement period, the excess hours will be treated as overtime and recompensed by payment at time and a half or time off in lieu under Clause D5.

…

C4** **Overtime

Overtime working shall be those hours authorised by the Company to be worked in addition to normal hours.

D4** **Short Notice Changes to Normal Hours

Short notice changes agreed under Clauses C2e and C3e shall attract a premium payment of one half time based upon the hourly rate derived from schedule salary; that is, for each hour not envisaged to be worked until the short notice was given, the hour itself shall be treated as a

normal hour (from within the average 37 per week) but the one half time premium shall be paid in addition."

29. The Claimants confirmed that, prior to 2018, each month they were always paid their core hours. Where there were days in the month that the Respondent sent them home earlier than their planned finish time and they did not then manage to work their core hours over the month, they were still paid their core hours for the month in full. The Claimants agreed that no 'negative balance' was carried over into the next month, meaning that any time worked under their total core hours in one settlement period was not added to their core hours in the next settlement period for the Claimants to 'make up'.

30. The Respondent highlighted that, as an example, during the Coronavirus pandemic national lockdown, while some employees were furloughed, those that were not did far fewer hours than their core hours; despite this, they all received their regular monthly salary for their core hours and no 'negative balance' was carried over into the next settlement period.

31. The Claimants confirmed that their claims did not relate to payment of their core salary, it was limited to pay for overtime.

32. The Claimants stated that in 2018, the procedure by which they submitted information regarding the overtime they claimed was changed. They asserted that the old procedure for logging overtime was as follows: the Claimants would complete their IDLs, and they would submit those sheets to their manager at the end of each week. Each month they would sign and submit an overtime claim form to their manager which, alongside the IDLs, provided information from which overtime would then be calculated. The Claimants did not know what their managers did with their information once they had submitted it to them, however they stated that their payslips would correlate to the hours of overtime they had claimed in their overtime claim forms.

33. The Respondent's evidence was that in May 2018 the procedure for logging time sheets was changed; prior to this, each manager had their own way of checking and approving employee overtime. Around May 2018, it was decided the process for logging overtime should be standardised across the Respondent company to ensure consistency and transparency. The new procedure was therefore introduced whereby employees would submit their IDLs to their managers who in turn transferred the data onto a spreadsheet. That spreadsheet was then used to calculate overtime in accordance with the terms of the Joint Agreement.

34. The Claimants claimed that under the new overtime procedure, they noticed a significant reduction in their overtime payments on their payslips.

35. The Respondent was unable to provide relevant documents from the period prior to October 2018. I was directed to some of Mr Crocker's IDLs and Overtime

sheets from 2017 in the bundle, but I was not directed to any corresponding payslips in order to determine how overtime payment was previously paid.

36. The Claimants were not able to provide any specific examples with reference to their payslips, IDLs, and overtime sheets to show how the change in procedure affected their overtime payments.

The Claimant's submissions

37. The Claimants raised two arguments regarding overtime, Clause C2e, and the Respondent's contractual obligation to provide work.

Clause C2e

38. In his oral evidence and submissions Mr Gibson asserted that clause C2e of the Joint Agreement relates to overtime and it reads that: whenever the Claimants worked outside of their planned hours with under 72 hours' notice, they would be entitled to be paid under clause D4 at time and a half. Mr Gibson stated that because the Claimants worked regular hours as set out in their planners, those being 8am – 4pm Monday to Thursdays and 8:30am – 4:30pm on Fridays, whenever they worked past 4pm (or 4:30 on Friday) without being given 72 hours prior notice, clause C2e ensured they were paid an overtime payment under D4 at time and a half.

Respondent's contractual obligation to provide work

39. The Claimants submitted that their contractual terms stated that they worked 37 hours a week. The Claimants asserted that the Respondent was therefore contractually obliged to provide them with 37 hours work per week. Accordingly, they argued that where the Respondent did not have work for them to complete in a particular day, and this resulted in them finishing before the end of their planned shift, the Respondent could not hold that early finish as 'negative time' and set it off against any time they worked on another day in the settlement period over their planned hours, as this was a breach of the Respondent's contractual obligation to provide them with work.

40. The Claimants argued that this position was supported by Mr Edwards, the Joint secretary of the Trade Union Unite. Mr Gibson had emailed a question to Mr Edwards, and his response dated 5 March 2021 appeared at page 331 of the bundle. In this email Mr Edwards stated that workers under clause C2 were able to claim overtime worked each day as long as they carried out certain actions on days where they finished work early because the Respondent did not have work for them to do. Those actions were:

"*1. You must phone your Manager and ask for extra work or if one of your other colleagues needs help.*

2. *If there is no extra work you can say to your Manager that I am travelling home if any work comes in please let me know straight away and if I am able to I will do it .*
3. *If you arrive home you must still make yourself available until your finish time .*
4. *To be clear it is up to the company to provide you with work for yourself , and you shouldn't be penalised for it .*
5. *you shouldn't just go home and not tell anyone you are doing this as the company may take the view that you have not completed your minimum core hours.*"

41. The Claimants also referred to an email string between the Respondent HR and the Trade Union Representatives including Mr Edwards from April 2019 (pages 431 – 437) in which a Respondent HR representative confirms that she is trying to pull together an FAQ on Overtime and asks for input from the Trade Union representatives. I was directed to Question 4 of this FAQ which reads:

    "*Q4. During the week I have finished all my shifts 30 minutes early and got home each day 30 minutes before they were due to end but on Friday I had to stay late on my last job to complete extra pipework and arrived home 1 hour past my shift end. Can I claim overtime?*

    No, if your cumulative hours worked across the working week are less than your contracted total hours for the Working week the overtime would be viewed across the working week and not claimed for."

42. In an email of 9 April 2019 16:01 Mr Edwards responds to provide "*his take on it*". With respect to Q4 he states:

    "*In example four at SSE we don't have cumulative hours. it's up to SSE to provide work for these hours, if a person has phoned around for work, asked of anyone needs help tried to get EMI's, GMI's and there is none if they are still making themselves available even if they have gone home they can claim the overtime for the other day."*

43. The email string (page 435) shows that HR noted Mr Edward's view contrasted with the answer originally stated at Q4 and asked for guidance. In response to this request, Mr Vennoyer (the Respondent Regional Manager of Metering Operations (London)) stated:

    "*I have checked with Ask HR and the guidance given is correct however they have asked me to include wording to clarify we are looking only on a week by week basis and not looking to condense a month's shortfall by reducing days worked. If you think its appropriate we could get this reviewed by ER perhaps for surety?*"

44. At page 431, the final version of the FAQ appears to show that the answer to Q4 did not change save as a caveat to the end stating, "*if you are not working on an annualised hours contract and have agreed a preferred working contract this may not apply to you*".

The Respondent's submissions

45. The Respondent highlighted that the Claimants always received payment for their core hours, even in circumstances where the Respondent was unable to provide them with work for their core 37 hours per week. Accordingly, when the Claimants are sent home before the end of their planned finish time, they are still paid for this time as part of their core hours, and this was not a deduction from their wages.

46. The Respondent submitted that Clauses C2b and C2f of the Joint Agreement confirm that overtime should be calculated by reference to a settlement period which worked as follows: the employee's 37 hour working week would be averaged over a settlement period of four weeks (this was changed to a calendar month to accord with employees' payroll), at the end of the settlement period, if an employee worked more than 148 hours (this being their 37-hour times the 4 weeks) they would be entitled to overtime on the hours worked over and above 148 hours in that settlement period.

47. The Respondents' position was that while there had been a change to the procedure by which overtime was recorded and submitted in 2018, there was no change to the method of calculating overtime, and that the method of calculation used by the Respondent was in accordance with the Claimants' contracts at clause C, with reference to the settlement period as set out in clauses C2b and C2f.

48. The Respondent rejected the Claimants' interpretation of clause C2e and submitted that clause C2e cannot be read in isolation. The Respondent stated that it must be read in conjunction with clause C2 in its entirety; in doing so clause C2e does not provide a mechanism for payment of overtime, it applies in circumstances where there is a short notice change to the Claimants' planned hours of work where they fall outside of the normal limits set out in C2a, those being 7 am - 8 pm Monday to Friday and 8 am - 5 pm Saturday. The Respondent submitted that this clause does not dictate overtime payments, as the mechanism for calculating overtime is clearly set out in C2a and C2f.

49. The Respondent further submitted that the Claimants had failed to satisfy the burden of proof. They had not provided any documentary evidence demonstrating that they had suffered a loss with details of dates and amounts.

Travel time issue

50. The Claimants each had a company vehicle which they took home every night from work. At the start of their day, the Claimants were expected to: log on to their works management app, 'Triopsis', to download their daily jobs, identify their first job for the day, perform vehicle checks, then travel to their first job site to arrive by their start time, 8am. Whilst there were base locations listed in the Claimants' contracts, the Claimants' evidence was that they very rarely travelled to their base location for 8am to then began work from that location; instead, they would usually travel straight from home to their first job site. Similarly, when they finished work, they would travel straight home from their last job site.

51. Mr Cowgill's evidence was that historically, to promote flexibility, operatives such as the RPOs had been allowed to take company vehicles home so that they could travel straight to their job in the morning rather than always having to attend the depot first. However, there had been an inconsistent approach across the business as to how much travel time operatives were expected to give at the start and end of their shift, whether to travel to/from a job, or to perform vehicle checks, or review/download jobs for that day, and this had resulted in confusion and different approaches being taken by different teams across the business. Some teams were operating on the basis that the first 30 minutes at the start of the shift, and the first 30 minutes from site to home at the end of the shift would be unpaid and classed as 'Travel Time'. The Respondent believed the majority of teams however were operating on the basis that 15 minutes at the start and end of each day was considered reasonable 'Travel Time' where workers were travelling directly to a site from home, and from a site to home, rather than attending their base location at the start and end of their shifts.

52. As a result of this inconsistency and the lack of standard approach across the business, the Trade Union formally challenged the issue of how much time would be considered 'Travel Time'.

53. In 2018 a joint Union and Respondent working group, the Joint Business Committee ('**JBC**'), was established to resolve a lack of consistency in respect of Travel Time across the Respondent's metering function. The JBC aimed to agree on a consistent standardised approach in relation to start and finish times.

54. The JCB Framework agreement (page 129) stated that "*the JBC will be empowered to negotiate business specific terms and conditions (excluding pay) within the context of the overarching JNCC Company Agreement. The JBC has the authority to discuss business specific organisational issues and reach mutually acceptable agreements on changes to current local agreements including terms and conditions.*"

55. The JBC agreed 15 minutes at the beginning and end of each working day was a reasonable unpaid commute time for field staff to reach their destination and return at the end of the day. The JBC agreed the solution would be to set a

standard approach of allowing 15 minutes unpaid time at the start and end of the employee's shift. This standardised approach was to be trialled in a 6 month pilot.

56. On 14 May 2018, a JBC joint statement was prepared to provide employees with details of this change (page 152). Following this, a presentation explaining the pilot was prepared (pages 153 - 161) and delivered to the Respondent's employees between May and June 2018. A further joint statement was prepared detailing the change on 20 June 2018 (page 164).

57. The Claimants accepted in oral evidence that the Respondent communicated the information concerning the JBC's agreement regarding Travel Time and the pilot scheme to them.

58. The initial trial period lasted 6 months. Thereafter it was extended and ended in June 2019. The Respondent's evidence was that it was agreed that this pilot was successful and this lead to the permanent implementation of 'Travel Time' and agreement via the JBC in July 2019.

59. In June 2019, a further joint statement was produced which announced that the that the pilot scheme for 'Travel Time' would become Business as Usual (Page 180). This was discussed during monthly team briefings with Employees in July 2019. Further to this announcement the Claimants raised their formal grievance on 7 August 2019 regarding the practice.

60. The Claimants' oral evidence was that prior to the 'Travel Time' change in 2018, they had always noted on their time sheets the time they got into their van as their start time, and the time they arrived home and got out of their van as their finish time. Accordingly, they claimed all of their time spent travelling to their first site and travelling home from their last job was recorded as working time for which they received payment. After the change was implemented, they were not paid for 15 minutes of their initial travel time to site, and 15 minutes of their travel time home from a site.

61. The Claimants agreed in oral evidence that their contracts of employment did not provide for them to receive payment for 'Travel Time'.

<u>The Claimants' submissions on 'Travel Time'</u>

62. The Claimants raised two arguments regarding 'Travel Time'; the Respondent had unilaterally changed their contracts and they are peripatetic workers.

<u>Unliteral change to contract</u>

63. The Claimants submitted that the introduction of 30 minutes unpaid 'Travel Time' each day was an increase in their working hours from 37 hours a week to 39.5 hours; they argued that this represented a change in their contract of employment to which they had not agreed.

Peripatetic workers

64. The Claimants claimed that they were peripatetic workers and that further to the Judgment in Federacion de Servicios Privados de CCOO. v Tyco. C-266/14 ('***Tyco***'), travel time for peripatetic workers was included as "work time" for purposes of the Working Time Regulations (**WTR**).

65. The Claimants referred to the Uber BV v Aslam [2018] EWCA Civ 2748 Judgment. In Uber, the Supreme Court found that the time that drivers were waiting to accept passengers while the Uber app was switched on was considered "Working Time". The Claimants asserted that their time logged onto Triopsis and carrying out work related tasks in the morning should therefore also be considered as "working time", and the asserted they were therefore entitled to be paid for that time.

The Respondent submissions on Travel Time

66. The Respondent submitted that the communication and implementation of the unpaid 'Travel Time' was a standardisation of local practices and did not amount to a change to the terms and conditions of the Claimants' contracts of employment.

67. In the alternative, the Respondent averred that if it did, the change was agreed with the Trade Unions via the JBC and communicated by way of a presentation and 6 month trial period from June 2018. The Claimants had all accepted that the Unions were entitled to negotiate on their behalf and make changes to which they would be bound. Accordingly, the Respondent submitted that the Claimants were bound to this change.

68. The Respondent submitted that the Court of Justice of the European Union CJEU in Tyco said inclusion of hours in "Working Time" does confer a right to be paid for that time, pay being solely determined by the contract of employment. The Claimants' contracts do not provide that such time must be paid.

The Relevant Law

Unlawful deduction from wages

69. Section 13 of the Employment Rights Act 1996 (**ERA**) provides:

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

(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."

70. The effect is that if an employer pays a worker less than is properly payable under his contract that is deemed to be a "deduction".

71. Section 27 ERA defines wages as including any sums payable to a worker in connection with his employment or other emolument referable to his employment, whether payable under his contract or otherwise.

72. Section 23 ERA says:

"*(1) A worker may present a complaint to an employment tribunal—*

(a) that his employer has made a deduction from his wages in contravention of section 13

73. The question for the Tribunal is whether the 'wages' claimed were 'properly payable' which involves consideration of the Claimants' contractual entitlement. Agarwal v Cardiff University [2018] EWCA Civ 1434 confirms that a Tribunal can construe the terms of a contract of employment in determining whether an unlawful deduction from pay has occurred.

74. The burden of proof is on the Claimants to show wages were properly payable and they were entitled to those wages.

Contractual terms

75. In Investors Compensation Scheme v West Bromwich Building Society [1997] UK HL 28, p913 Lord Hoffman stated:

"*The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even, as occasionally happens in ordinary life, to conclude that the parties must, for whatever reason, have used the wrong words or syntax.*"

76. At paragraphs 15 – 17 of Arnold v Britton and others 2015 UKSC 36 Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms stating:

> ""*When interpreting a written contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in Chartbrook Limited v Persimmon Homes Ltd [2009] AC 1101, para 14."*

Lord Neuberger went on to say that the meaning must be assessed in the light of:

76.1. the actual ordinary meaning of the clause;

76.2. any other relevant provisions of the contractual agreement;

76.3. the overall purpose of the clause and the agreement;

76.4. the facts and circumstances known or assumed by the parties at the time the document was executed; and,

76.5. commercial common sense.

76.6. However, subjective evidence of any parties' intentions should be disregarded.

77. In Wood v Capita 2017 UKSC 24 the Supreme Court held that a court's task is to ascertain the objective meaning of the language used in the contract. The court must consider the contract as a whole and depending on its nature, formality and quality of drafting give more or less weight to elements of the wider context. Where there are rival meanings the court can reach a view as to which construction is more consistent with business common sense.

78. Contracts can be varied either expressly (in writing or orally) or variation can be implied by the parties' conduct. In McConomy v ASE plc and another [2017] EWHC 92 (Ch), the High Court concluded that in order for a contract to be varied, it is necessary to show "*a clear and consistent pattern of behaviour*" that is inconsistent with the terms of the original contract, and consistent only with the parties having agreed to vary those terms. At paragraph 62 Judge Davis stated that where a party "*is unable to point to any clear express agreement to vary a particular term or terms, but instead is seeking to establish a variation by conduct. In such a case it is more difficult in my view to establish that either or both of the parties intended, looking at the matter objectively, a permanent legally binding variation of the contract going forwards, especially in circumstances where it is not entirely clear what the precise terms of the variation are."*

79. The terms of collective agreements are often expressly incorporated, in whole or in part, into individual contracts of employment but, incorporation can be by

implication. If a collective agreement is effectively incorporated, an employee will normally be bound by the incorporated terms whether or not he is aware of their existence or of the existence of the collective agreement. The case of Tocher v General Motors Scotland Limited [1981] IRLR 55 makes it clear that a collective agreement is incorporated even if an employee may not approve it.

Jurisdiction

80. In Coors Brewers Ltd v Adcock [2007] IRLR 440 the court held that in order for the Tribunal to have jurisdiction to hear an unlawful deduction claim, the claim must be in respect of an identifiable sum. The employees in Adcock were unable to quantify their loss under a share scheme and required the ET to do so, which rendered their claim one for damages for breach of contract rather than a quantifiable claim for unlawful deduction of wages. Claims for unquantified sums of damages do not fall within part II of ERA, which was designed to deal with straightforward cases where an employee could point to quantified loss. Accordingly, it was held that an unquantified claim to payment could not be brought as an unauthorised deductions claim.

81. However, Smith v Chelsea Football Club [2010] EWHC 1168 confirmed that ‘quantified’ or ‘quantifiable’ does not necessarily mean that the employee has to be able to quantify their claim at the point at which it is presented. In Lucy v British Airways UKEAT/0033/LA the court confirmed that a claim does not fall out of the jurisdiction of the Tribunal under Part II ERA merely because quantification of the claim might be difficult, indeed “very difficult”, to resolve.

Working time

82. Federacion de Servicios Privados del Sindicato Comisione Obreras v Tyco Integrated Security SL and anor [2015] IOCR 1159 ECJ discusses the EU Working Time Directive (No. 2003/88) (“WTD”) and defines ‘working time’ as “any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice” (point 1 of Article 2). The ECJ held, in interpreting the WTD, that for workers with no fixed place of work, time spent by employees travelling between their homes and the premises of the first and last customers constituted “working time” within the meaning of point 1 of article 2 of Directive 2003/88. However, the ECJ stated:

> “…*it suffices to point out that, even if, in the specific circumstances of the case at issue in the main proceedings, travelling time must be regarded as working time, Tyco remains free to determine the remuneration for the time spent travelling between home and customers.*”

83. The EAT confirmed in Thera East v Valentine [2017] IRLR 878 that the issues of working time and remuneration are separate issues and that the ECJ in Tyco had

made it clear that the WTD is not generally concerned with questions of payment for working time. Where a court finds that a period of time constitutes "Working Time", whether the employee is paid for that time is determined by the provisions of the contract of employment.

Conclusions

Jurisdiction

84. The Respondent's representative submitted that the Tribunal did not have jurisdiction to hear the Claimants' claims because the Claimants had failed to quantify the sums and they were claiming an unidentifiable sum.

85. The legal test is whether the sums are "quantifiable", and case law reminded me that the sums do not need to be quantified as at the date they are presented, so long as they are quantifiable. Furthermore, sometimes the sums may be "very difficult" to quantify, but that does not make them "unquantifiable".

86. In light of the fact that many of the documents prior to 2018 were not available, I considered that it might be difficult to quantify what sums, if any, were due to the Claimants, however it would not be impossible, as the sums were quantifiable.

87. On the Travel time issue, the Claimants' claim was that no time for travel ought to have been deducted from their wages as they argued this was a change to their contract and they were not bound to it. If I found that to be correct, this sum was quantifiable.

88. On the overtime issue, the Claimants argued the method calculating overtime could not take into account 'negative time'. Accordingly, if I agreed with the Claimants' claim, it would be possible to calculate overtime using that method to determine what should have been paid, and to see if what had in fact been paid was a sum less than that.

89. Accordingly, I found the Tribunal did have jurisdiction to hear the claims.

90. Thereafter I split the two elements of the Claimants' unlawful deduction from wages claims and dealt with them each in turn.

Overtime

91. In order to establish whether there had been an unlawful deduction from wages, the first question to determine was what the Claimants were entitled to be paid.

92. The Claimants raised two arguments regarding overtime: Clause C2e, and the Respondent's contractual obligation to provide work.

Clause C2e:

93. The Claimants accepted their contracts were subject to the terms of the Joint Agreement at clause C2, however submitted that clause C2e dealt with overtime payments.

94. Having reviewed the terms of the Joint Agreement, I did not find that clause C2e dealt with payment of overtime.

95. Clauses C2a – C2d provided the limits on what hours an employee can be asked to work in a "settlement period". C2a defined "normal hours limits" as between 7am to 8pm Monday – Friday and between 8am to 5pm on Saturdays. Clause C2b explained that employees would work an average 37 hours a week, and that average would be calculated by reference to a settlement period of 4 weeks. Clause C2c provided an employer would work a maximum of 48 hours work in any one week, and clause C2d provided limits on how many evenings and Saturdays an employee would work in a settlement period.

96. Thereafter, Clause C2e tells an employee that they will be told which hours they will actually be working in the settlement period in advance. It then provides that where an employee is asked to change these hours at short notice (with under 72 hours notice), they will be recompensed for this.

97. Clause C2f then details how overtime should be calculated.

98. On the face of it, Clause C2e does not deal with overtime; it does not use the word 'overtime', it refers to "short notice changes". Clause C2e provides a mechanism for payment where there has been a short notice change to hours. Considering the document as a whole, it could not have been the parties' intention that clause C2e would represent the mechanism by which payment of overtime would be calculated because the contract goes on to specifically detail how overtime would be calculated and paid in the next clause, C2f with specific reference to the word overtime in that term. Clauses C2e and C2f describe different types of payments and both reference different sections in clause D (D4 and D5 respectively), to describe the rate of pay an employee should receive for each type of payment.

99. I therefore concluded that overtime was not calculated by reference to clause C2e.

<u>Respondent's obligation to provide work</u>

100. The Claimants agreed that, prior to 2018, they were always paid their core hours, even in circumstances where they were sent home early because the Respondent did not have any further jobs for them to carry out on any specific day. The Claimants conceded that they did not suffer deductions from their base annual salaries in circumstances where they did not carry out their core hours because work was not made available to them.

101. The Claimants submitted that overtime could not include ‘negative time’ because the Respondent was contractually obliged to provide them with 37 hours work a week and if it did not do this, it was acting in breach of contract. Essentially, this means that the Claimants are submitting that overtime can only be calculated on a daily basis, i.e., by reference to how many hours in excess of their normal planned hours they worked on any specific day.

102. Whilst I understood the Claimants’ logic, I did not agree with their conclusion.

103. In circumstances where the Respondent did not reduce the Claimants’ base annual salaries with reference to any ‘negative time', the Respondent was providing the Claimants with their base contractual hours. Thereafter, how the parties agreed to calculate overtime would be determined by any agreement that had been reached between the parties.

104. The Respondent asserted that it calculated the Claimants’ overtime in accordance with clause C2, making an overtime payment where the total hours worked were in excess of the core hours in the settlement period; with respect to the period after the procedure for logging overtime changed in 2018, the Claimants did not suggest the Respondents had calculated overtime any differently.

105. Whilst calculating overtime by reference to the settlement period could result in setting off ‘negative time’, that set-off did not affect payment of the Claimants’ core hours. The Claimants conceded that the Respondent always paid them their base salary corresponding to their 37 hours a week whether they had worked their base hours or not.

106. The Claimants were unable to specifically say in what way the Respondent had changed the overtime calculation post-2018. They stated that in 2018 they noticed a real change in their pay further to the change in the procedure for claiming overtime and concluded that prior to 2018 'negative time' was not deducted from their overtime.

107. Clause C2 is a clear express clause setting out how overtime should be calculated. The Claimants accepted that it formed part of their contracts. The Claimants were essentially asserting that this clause was varied. The Claimants did not claim that this clause had been varied expressly, therefore, it must be that they asserted it was varied by conduct.

108. To prove that the clause had been varied by conduct the Claimants would need to have provided evidence of a clear and consistent pattern of behaviour demonstrating evidence that the parties intended to be bound by the variation.

109. Save as for their oral evidence, and the email from Mr Edwards with his opinion on how he understood overtime should be calculated, there was not enough evidence to demonstrate a clear and consistent pattern of behaviour from which I could conclude the parties had intended to vary the terms of the contract. Furthermore, given that the Claimants were unclear as to how exactly overtime had previously been calculated, whether this was on a daily basis or by reference to clause C2e, it would have been incredibly difficult to conclude what that variation would have been.

110. The Respondent was calculating overtime in accordance with the express contractual provision at clause C2 and I did not find that this clause had been varied. The Claimants did not provide me with any evidence of any specific deductions from wages relating to their overtime that they assert they had suffered. I did not therefore find that they had received a sum less than that due to them under their contracts of employment.

111. The Claimants' claims for unlawful deduction from wages in respect of overtime were therefore dismissed.

Travel Time

112. This hearing was not a determination of whether the Claimants were peripatetic workers, and it was not necessary for me to find one way or another because even if they were peripatetic workers, the Judgment in Tyco does not afford the Claimants the protection they sought from it.

113. Case law confirms that even where an employee's 'Travel Time' is considered 'Working Time', this does not determine whether the employee has a right to be paid for that time. Whether an employee has a right to receive remuneration for that time is a contractual matter.

114. The Claimants' contracts did not include an express right to receive payment for 'Travel Time' at the start and end of their day.

115. The Claimants argued that the Respondent had made a change to their terms and conditions resulting in an increase to their contractual hours from 37 to 39.5 per week to which they did not agree.

116. The Claimants accepted that their contracts of employment were subject to the terms of the Joint Agreement. The terms of the Joint Agreement confirmed that the Claimants agreed the Trade Unions had collective bargaining powers and were entitled to negotiate changes to their working practices and contractual terms on their behalf. The terms of the Joint Agreement confirmed that joint committees could be established to negotiate and agree on terms.

117. The JBC negotiated and agreed a standardisation of the working practices surrounding 'Travel Time', which was being operated differently around the business. The JBC had the authority to negotiate and reach agreements on terms and conditions excluding pay.

118. The evidence demonstrated that JBC consulted on the issue of 'Travel Time', a trial period was implemented, the practice was agreed upon and the new practice was presented to the Respondent's employees. The Claimants all accepted in oral evidence that they were informed of the proposals for 'Travel Time', they took part in the pilot, and were informed that the JBC had agreed 'Travel Time' was reasonable and would be business as usual going forward.

119. The Claimants were bound by the JBC agreement with respect to 'Travel Time'. This specifically confirmed that Employees were not entitled to be paid for this time.

120. Mr Crocker suggested the Claimants were only bound by *reasonable* changes to terms. However, the Trade Unions had, on the Claimants' behalf at the JBC, entered into joint negotiations and reached an agreement that 15 minutes 'Travel Time' at either end of the day *was* reasonable, and agreed to this becoming the standard practice across the business.

121. Accordingly, the Claimants' claims for deductions with respect to 'Travel Time' were dismissed.

Summary

I did not find the Claimants' claims for unlawful deduction for wages in respect of their overtime and 'Travel Time' to be well founded and accordingly they were dismissed.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 March 2022

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.