



EMPLOYMENT TRIBUNALS

Claimant: Mr David Bell
Respondent: NIBS Buses Ltd
Heard at: East London Hearing Centre (by telephone)
On: 20 June 2022
Before: Employment Judge Hook

Representation

Claimant: In person
Respondent: Mr Burgess, litigation consultant, Peninsula Law

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's claim is dismissed.

REASONS

1. The Claimant worked as a bus driver for the Respondent company from 11/11/19 to 30/11/21 when he resigned.
2. This case is about wages. The Claimant alleges that he has been paid less than he was properly entitled to receive. Many of the facts in this case are agreed. I heard evidence from the Claimant and Mr Crump, a manager of the Respondent's parent company, Stephenson's of Essex, was called by the Respondent.
3. It is agreed between the parties that the Claimant was paid £10.71 per hour and could earn a bonus of 72p per hour when driving provided he met certain standards in safe and fuel efficient driving. When the bonus was paid that makes an hourly rate of £11.43.
4. The Claimant gave evidence that he always met those standards and was paid the

bonus for all his driving hours. The Respondent conceded that they had no evidence before me today to contradict that. It was not within the knowledge of Mr Crump.

5. However, not all of the hours the Claimant worked were driving hours. Non-driving hours were not eligible for the bonus. The Claimant's case was that between 1/9/20 and 30/11/21 he worked 2482 hours of which 1861 were driving hours, leaving 621 hours that could attract no bonus. These figures were not disputed by the Respondent.
6. The terms of the Claimant's employment including his pay and entitlement to a bonus were set out in a written contract, signed by the Claimant on 13/12/19 and a representative of the Respondent on 31/1/20. The contract was produced in evidence together with the policy document setting out the safer and fuel efficient driving scheme that would attract the hourly bonus payment. Also produced was a letter raising the bonus figure to 72p from a lower amount.
7. If the Claimant's 621 non-driving working hours could attract a bonus that would provide the Claimant with an additional £447.12.
8. The Claimant gave evidence that in the autumn of 2021 he learned that the Respondent was hiring new drivers on a new contract. This is accepted by the Respondent. The new contract was introduced in September 2020 for all newly hired drivers.
9. A generic copy of the new contract was produced in evidence.
10. The key differences between the contract he had signed and the new contract (so far as they are relevant to this case) was the wage level and the operation of the bonus. The new contract operated a basic wage of £11.43 per hour. It stated that this sum included the 72p bonus within it. The £11.43 rate applied to all working hours so from that point of view is a better contract for the employee than the one the Claimant had signed. The employee could get a bonus for more hours than he could under the old contract. There was, however, another change that was less advantageous for the employee. In the new contract the bonus could be lost for failing to meet a longer list of driving standards and the evidence given to the Tribunal by Mr Crump was that if there was a failure was the bonus was withdrawn for a week. It was a weekly bonus (that could be withdrawn more easily) rather than an hourly bonus.
11. The Claimant believes that he would have earned more under the new contract and says it was unfair that he was not paid as per the new contract.
12. He gave evidence, which was accepted by the Respondent, that he raised the issue with the Respondent in November 2021. Email correspondence has been produced to the Tribunal in which the Respondent agreed to put him on the new contract and to back date this slightly but was not willing to back date this to September 2020 as the Claimant wished.
13. The Respondent's view was that on balance the new contract, with its more draconian scope to withdraw the bonus, was a less attractive contract for employees and it could not force existing employees to move onto it. Mr Crump's evidence was

that the Respondent intended that existing employees would be offered a chance to voluntarily switch to the new contract. The Respondent had expected that the supervisors of drivers such as the Claimant would verbally identify this to drivers, although it is plain that the Respondent did not expect drivers to take this up.

14. The Claimant gave evidence that the existence of the new contract was not drawn to his attention by the Respondent and no opportunity to switch to it was given to him until the emails of November 2020. The Respondent accepted that there was no written notice to drivers about the new contract. The Respondent did not call any drivers' supervisor to give evidence and referred to personnel changes having taken place that made it hard for the Respondent to know what had been said about the new contracts. The Respondent could not disprove the Claimant's evidence on this point that no supervisor had told him about the new contract.
15. It was agreed between the parties that not long after the email correspondence the Claimant chose to resign from the Respondent's employment.
16. The Claimant gave evidence that he would have switched if he been given the chance to switch from September 2020.
17. The Claimant submits that he should have been given the chance to switch to the new contract as soon as it was created for new employees in September 2020. He further submits that he should be compensated for the greater sum he would have been paid under the new contract.
18. The Respondent submits that it was under no obligation to offer him a change of contractual terms in September 2020 or at all. The Respondent submits that in the period September 2020 to the end of the Claimant's employment he was, as a matter of fact, employed on the contract he had signed (subject to the increase of pay advised in a letter) and he was paid the wages due under this contract. The Respondent also makes the point during the period in question the Claimant had the benefit of the old contract in giving greater protection to his bonus, even if the standard of his driving was such that he would not have lost any bonus. The Respondent suggests the Claimant is trying to achieve a result where he enjoyed a benefit of his existing contract but now with hindsight wishes to retroactively change to a different contract.
19. As a matter of fact, it is plain that the Claimant's contract at the time was the one he had signed (to be read together with the other documents mentioned). For his claim to succeed there would have to be some term in that contract or some other legal duty on the Respondent to have told him about the new contract and agree to move him to the new terms if he so wished.

The law

20. A basic legal principle is that employment is subject to the contracts that employers and employees agree between themselves. The law will sometimes superimpose, upon the terms and condition they agree, a number of statutory rights and restrictions and in some cases identify the existence of implied contractual terms.

21. Contracts can, in general, be changed by the mutual consent of the employer and employee.
22. In Scally and ors v Southern Health and Social Services Board and ors 1991 ICR 771, HL, the House of Lords found an implied term in a contract in relation to an employee's right to buy extra pension entitlement such that the employer was under a certain duty to draw this to the employee's attention. However, the House of Lords held that such an implied term was contingent upon, among other factors, the terms of employment having been negotiated with a representative body.
23. There are other cases where the right of an employee to be told of options that are advantageous to him are clearly limited. In University of Nottingham v Eyett and anor 1999 IRLR 87, ChD, where an employee took voluntary early retirement the employer was not under a duty to tell him that his pension would be higher if waited until the following month to retire. The court was not prepared to extend the implied duty of trust and confidence to create a positive duty on the employer to give such advice.
24. The Respondent referred the Tribunal to the case of Ibekwe v London General Transport Services Ltd [2003] IRLR 697. In that case an employee had a right to transfer his pension in a way that would have been beneficial to him. He complained that he did not receive a letter about this and did not exercise the right, to his detriment. The court considered that there might be either an implied term or a duty of case to tell the employee about the right to transfer his pension but on the facts of that case had met such a right by enclosing information with a payslip.

Conclusion

25. The present case is clearly distinguishable from the cases mentioned above. This is not a Scally type case. The Claimant's contract with the Respondent was an individual contract of employment and not one that was subject to negotiation with a representative body. In University of Nottingham and Ibekwe those cases concerned rights in relation to retirement and the claiming of pensions. The present case is not about a right the Claimant had. He had no right to switch to the new contract. To do so would have been subject to the consent of the Respondent and in effect would have been the making of a new contract between the employer and employee.
26. For these reasons I find there was not an implied term (or other legal duty) that required the Respondent to tell the Claimant about the new contract and to switch him to that contract if he so desired.
27. It follows that the contract terms applicable to his employment were those of his existing contract with the bonus payment available for driving hour only. It is agreed that he was paid the sums due for his driving hours.
28. The Tribunal can readily understand the Claimant's sense of frustration in this matter, and it may be surprising that the Respondent did not more pro-actively choose to inform drivers of the new scheme's existence and that the Respondent would agree to a voluntary transfer to the new contract but the Tribunal must decide the case solely on the basis of the law.

29. The Respondent has not breached a legal duty it owed to the Claimant and therefore the claim must be dismissed.

**Employment Judge Hook
Dated: 23 June 2022**