EMPLOYMENT TRIBUNALS

Claimant:	**Mrs A McKenzie-Bayliss**
Respondent:	**The Crown Prosecution Service**
Heard by CVP	
On:	**4 March 2022**
	Deliberations in chambers on 27 April 2022
Before:	**Employment Judge Langridge (sitting alone)**
Representation	
Claimant:	**In person**
Respondent:	**Mr A Henderson (Counsel)**

RESERVED JUDGMENT

1. Since 9 January 2017 the claimant has been entitled under the terms of her contract to wages paid at the respondent's National salary scale and not the London salary scale.
2. The claimant's claim in respect of unlawful deductions from wages is not well-founded and is dismissed.

REASONS

Introduction

1. This claim was listed for one day on 4 March 2022 and was conducted remotely by CVP video platform. Some delays occurred due to problems with the claimant's connection and in the event judgment had to be reserved due to lack of time to make a decision.

2. The claimant represented herself and gave evidence on her own behalf by reference to a short witness statement. Evidence was given on behalf of the respondent by Ms Stephanie Edgeley, senior payroll manager. An agreed bundle of documents was produced extending to around 270 pages, the vast majority of which were not relevant and neither referred to by witnesses nor read by me. In the absence of a single document setting out evidence of the claimant's terms and conditions of employment, the key evidence in this case were the Loan Agreements referred to below; the respondent's document entitled Annex C setting out guidance on its pay rules; and a handful of internal emails and records of contact between the parties regarding the subject-matter of this dispute.

3. Time was taken up during the hearing by virtue of some confusion arising from the presentation of the case by both parties. In her Application to the Tribunal the claimant sought a declaration as to the correct value of her salary as a senior prosecutor with the respondent, and a declaration that the respondent has made unlawful deductions from her salary since 1 September 2021. The Application did not identify any particular terms and conditions of employment – as to pay or generally – but did refer to the fact that the claimant was mostly a home-based worker, previously living in the South East and more recently based in the North East of England but carrying out work for the CPS South East region. The claimant also referred to the respondent's generic working from home policy and the fact that she had a disability-related passport, as well as Covid measures in place entitling her to work from home.

4. In its Response to the claim the respondent explained that it operates two separate pay rates: a London rate (defined to include certain adjacent counties) and a National rate. It referred to Annex C and the fact that the claimant had been a home worker by virtue of her deployment to CPS Direct in the years prior to relocating her home to the North East. The respondent also referred to arrangements for the claimant to work temporarily under a scheme whereby North East-based employees carried out work for the South East region which was understaffed (an arrangement referred to by the acronym SETINE). The respondent also referred in its pleading to a retention and recruitment allowance (RRA) but without giving any explanation for its relevance to this case. Mr Henderson explained at the outset of the hearing that the RRA was in effect a London weighting and payable only to those working in the London office.

5. The fact that a clear exposition of the pay arrangements was not set out in either party's pleadings or witness statements made the task of identifying the core points of dispute considerably more difficult in the time allowed. By the time the evidence and submissions were concluded, it became apparent that a key factor in my decision would be to consider the parties' respective interpretations of the phrase "permanent workplace".

Issues and relevant law

6. This claim was brought under Part II Employment Rights Act 1996 ('the Act'). The claimant sought a declaration that she was entitled to continue to be paid in accordance with the London pay range ('the London Rate') notwithstanding the relocation of her home address on a permanent basis to the North East of England in 2021, essentially on the grounds that she continues to carry out work for the CPS South East region, covering cases in Surrey, Sussex and

Kent. Following the relocation of her home-based office to the North East, the respondent continued to pay the claimant the London Rate and did not reduce her salary to the national rate of pay applicable to other parts of the country ('the National Rate'). The respondent says that it did this in error and once the error was identified in 2021 it took steps to reduce the claimant's salary with effect from 1 September that year. The claimant alleges that that was and continues on an ongoing basis to be an unlawful deduction from wages contrary to section 13 of the Act.

7. Section 13 gives the claimant the right not to suffer unauthorised deductions from her wages unless certain provisions are complied with. The definition of wages is found in section 13(3) which provides that:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the 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."*

8. The provisions set out in section 13(2) are not applicable to this case, which does not turn on the question whether the claimant had agreed in writing in advance to any deduction being made.

9. Section 14(1) of the Act is relevant as it deals with excepted deductions:

> *"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 …"*

10. In considering the question what was "properly payable" on the occasion of the alleged deductions, it was necessary for the Tribunal to make an assessment based on the evidence presented to it of what the claimant was legally entitled to be paid under the terms of her contract. Such an assessment required me to construe the contract terms after making enquiries about the evidence of the express and any implied terms. In this case neither party was able to produce a copy of the contract of employment originally issued to the claimant on beginning her employment in 1991, which meant it was necessary for me to consider the terms of the respondent's Loan Agreements, as well as the evidence provided through emails and witnesses. It was not in dispute that the Loan Agreements amounted to a variation to the claimant's terms and conditions, and were to be read alongside its clarification of the General Pay Rules set out in Annex C to the annual pay award.

11. In reviewing the evidence within the statutory framework I was guided by the decision of the EAT in Weatherilt v Cathay Pacific Airways [2017] IRLR 609. This approach was endorsed by the Court of Appeal in Agarwal v Cardiff University [2017] IRLR 600.

Findings of fact

12. The claimant is a solicitor employed by the respondent as a Senior Crown Prosecutor, having originally started her employment on 8 April 1991. On 1 April 2008 the claimant joined the respondent's London team and was issued with written terms and conditions of employment. The respondent was unable

to produce a copy of this, as contracts pre-dating 2005 were held locally and the claimant's was not available. The claimant was also unable to produce a copy. The contract terms were later varied by agreements for the claimant to be seconded to work with a virtual region known as CPS Direct ('CPSD'). This was done under formal Loan Agreements which stated that:

> "This document sets out the changes in terms and conditions of employment relating to your loan appointment as Duty Prosecutor with CPS Direct subject to your acceptance."

13. The first Loan Agreement with CPSD took effect from 3 December 2012 and was was signed by the claimant on 11 February 2013. It meant that the claimant was loaned from CPS London and her terms and conditions were varied to the extent set out in that Loan Agreement, with her other terms and conditions remaining the same. The agreement provided that the claimant would revert back to her previous area on the same grade when the secondment ended. While working for CPSD the claimant worked exclusively from her home in the South East, as the virtual region was not attached to any geographical area.

14. It was an express term of the agreement that the claimant's work location would be her home base [emphasis in bold added, throughout this judgment]:

> "When you are working away from your **usual work location, ie your home**, travel costs to the Area [London] will be paid …"

15. Under the terms relating to pay the Loan Agreement provided as follows:

> "As set out by HMRC under EIM32065 – Travel expenses […] definitions: permanent workplace 'A place at which an employee works is a permanent workplace if he or she attends it regularly for the performance of the duties of the employment […] Consequently, for the duration of your loan to CPSD your home address will become your **permanent work location** resulting in a **potential change to your pay location**."

16. The Loan Agreement went on to say that:

> "Your postcode of MK40 1JA means that your pay location will remain unchanged, however as your home postcode falls outside of a London Pay Location your Retention and Recruitment Allowance (RRA) will be removed."

17. Those terms and conditions were renewed on an identical basis with a second Loan Agreement signed by the claimant on 17 February 2015.

18. In around September 2016 the claimant requested to move to the CPS in the North East of England for family reasons. There were no vacancies in that region but she did reach agreement with the respondent to work temporarily under the SETINE arrangements whereby staff in the CPS Northumbria region were assigned to work remotely in order to support the understaffed South East region. Various emails were exchanged between the parties when those arrangements were made, and these were consistently headed "move to SE area but working from NE".

19. The arrangements for the claimant to work under the SETINE scheme were intended to be temporary and the Loan Agreement ended on 7 January 2017. At that point the parties agreed that the claimant would work under a new permanent contract, carrying out work on behalf of CPS South East but based

at her home address on a permanent basis. This change took effect from 9 January 2017. Although notionally the claimant was due to revert to CPS London, her previous region, she did not in any practical sense do so and did not carry out any work for that team before moving her normal workplace to the North East. The move took effect from January 2017 and in Easter that year the claimant moved her home address permanently to the North East. In December 2017 she changed her home address in the respondent's records.

20. The claimant has continued to conduct cases for the CPS South East, the team on whose behalf she currently works on a permanent basis, handling cases relating to Sussex, Surrey and Kent. All of those counties fall within the respondent's London Rate.

21. At the time of her move to the North East the claimant made no enquiry about how, if at all, her pay might be affected although she was aware of the previous removal of her RRA when entering into the first Loan Agreement. The claimant was also aware, or was able to find out, that under Annex C her relocation might have an impact on her rate of pay. Annex C was reissued annually at the time of the national pay negotiations and available to all employees on the respondent's intranet. The possibility of a "potential change to your pay location" was also drawn to her attention in the Loan Agreement.

22. The respondent provided no reassurances to the claimant either verbally or in writing that her pay would remain the same following the move. When issues with the claimant's pay later came to light, the respondent took the view that her salary should have been amended from the London Rate to the National Rate with effect from 9 January 2017. Instead, it remained unchanged at the London Rate due to her then address being based in Bedford and because she had been recorded as a home worker. The respondent's internal payroll record, Form PU14, noted that these changes were effective from 1 September 2017, at which point the claimant's new region was CPS South East. The form also recorded that her rate of pay was to be the National Rate, though this was not implemented at the time. As with the Loan Agreements, no new contract was issued (nor was one necessary) as the changes to existing terms and conditions were notified in writing.

23. In 2020 the respondent's Annex C, which sets out clarification to the General Pay Rules, was updated. The claimant did not dispute that this formed part of her terms and conditions as at 2020 though she said she had not seen a previous version. Neither party suggested that the substantive content of this document had changed in any material way from previous versions.

24. Annex C includes the following information relevant to this claim:

> "The following clarifies the general pay rules for CPS.
>
> London and National pay zone areas.
>
> The CPS utilises two separate pay ranges. These are referred to as London and National pay ranges. **The location of the permanent workplace, as set out in the employee contract, determines whether London or National pay ranges apply**.
>
> The following locations/offices are designated as London pay workplaces: […] Kent, Surrey, Sussex […].

All other locations and offices are designated as National pay workplaces."

25. The purpose of the respondent's RRA was to recruit and retain staff by offering a supplement to help with the cost of travelling into the London office to attend work on a permanent basis. That was not an issue in this case. The purpose of the London Rate was to reflect the higher cost of living for those based not only within the London area but also in named adjacent counties. When the claimant was living in Bedford and working in the CPS London office, she received both the London Rate (due to her postcode) and the RRA as she was travelling into the London office. The latter was removed when the first Loan Agreement was entered into as by then the claimant was working from her home in Bedford for the duration of the Loan Agreement and continuing to receive the London Rate by virtue of that home office location.

26. An employee working for the respondent from a home office location outwith the designated parts of London and the South East is not entitled to the London Rate or to the RRA, but only to the National Rate regardless of the location of the CPS team on whose behalf the work is carried out.

27. By August 2021 the respondent became aware that the claimant may have been overpaid incorrectly by receiving the London Rate rather than the National Rate since 9 January 2017. An investigation was carried out and the respondent calculated the overpayment at that stage at around £31,595 gross. A net figure was later calculated at £18,237 and this was amended to £16,852. The claimant maintained that she did not agree in principle with the change to her pay rate and did not agree the calculations either. The claimant was invited to a meeting with her line manager and the respondent's HR representative which she attended on 25 August 2021. The claimant was understandably shocked and upset by being notified that she had been overpaid such a considerable amount of money and over a lengthy period of time. She was given notice that a salary based on the National Rate would be applied in the future, taking effect from 1 September 2021. It was made clear that claimant was expected to enter into an arrangement to repay the past sums overpaid, but no such deductions have been made from the claimant's salary to date as she has not consented to that.

28. In a letter dated 7 September 2021 the respondent said to the claimant:

> "CPS London and National rates of pay are based on where you work, not which area you work for. This is clarified in Annex C of the 2020 pay award general pay rules, a copy of which is attached. Employees working for CPS South East and based in the South East area are paid on the London pay scales. Employees working for CPS South East and based outside the South East area are paid on the National pay scales."

29. The impasse between the parties was not resolved and the claimant brought this claim in order to have the issues determined by the Tribunal.

Submissions

30. Mr Henderson submitted for the respondent that much of the confusion caused during the course of the hearing had been created by the claimant's interpretation of the position. He fairly acknowledged that the respondent had made a mistake and not picked it up for over four years, but maintained that in principle the case was a simple one. Firstly, he invited me to construe the

evidence of the terms and conditions of employment in order to determine whether the claimant was entitled to be paid the London Rate or the National Rate, and whether that was determined by her physical location at work whether in the respondent's office or at home. He submitted that the respondent's interpretation was consistent with all of the documents and oral evidence available, referring to Annex C, the internal form PU14 and the emails at the time of the transfer to the North East. He also relied on the terms of the Loan Agreement as supporting his argument that it is the physical location which determines pay. Mr Henderson further submitted that issues about the RRA and the respondent's home working policy were not relevant.

31. The three important dates in this case are 3 December 2012 when the claimant was in the London team, living in the South East and on loan to CPSD. On 9 January 2017 she then transferred to the SETINE team, and in Easter 2017 she moved her home address permanently to the North East. Mr Henderson submitted that it is clear that the claimant should have been on the National Rate from her time in the North East, and as such section 14 of the Act applies because the recoupment of an overpayment of wages is a permissible deduction. Mr Henderson argued that I should not accept the claimant's evidence that representations were made to her in 2016 that she would remain on the London Rate, because there was no supporting evidence of that, even when the claimant was probed by me during her oral evidence to provide details. In fact, the claimant conceded that she did not ask about her pay and assumed that it would continue at the London Rate.

32. Finally, Mr Henderson submitted that the respondent's approach adheres to common sense. The arrangements are London-centric but they are usual and are in place because it is a more expensive part of the country to live and work. There was therefore no unlawful deduction and the question of recoupment should be left for the parties to sort out themselves.

33. In her submissions the claimant referred to the fact that she had been a permanent member of the CPS London area and paid that salary and the RRA wherever she worked. Referring to Annex C, she said that the location of the "permanent workplace" is not the employee's home. The claimant said she was at the point of the transfer assigned to the CPS South East and still is. When she initially transferred to the CPS South East team, there was an opportunity to work under the SETINE arrangements and at that time she was still living in Bedford. That was only ever intended to be a temporary arrangement and the staff seconded to that team from the CPS North East region returned to their previous base.

34. The claimant submitted that her ability to work from home or a temporary hub office was superseded by the respondent's smarter working policy which makes no reference to pay being altered. Her disability passport would also have allowed her to work from home without any change to her pay. The claimant did not accept that the purpose of the London Rate relates to the cost of living, as her costs in the North East are the same. She attributes the pay rate to the fact that the respondent cannot recruit people. The claimant referred again to her view that the respondent's calculations are not accurate, and concluded by referring to the fact that she has relied on her pay when incurring expenses in respect of herself and her family.

Conclusions

35. The key question for me to decide was what was "properly payable" to the claimant from 9 January 2017 when she initially transferred to working from home in the North East region. This required consideration of the Loan Agreement terms and the Annex C guidance, read alongside the oral evidence and some contemporaneous documents relating to the move to the North East.

36. It was also open to me to consider what, if any, implied terms had a bearing on the interpretation of the contract terms. Mr Henderson relied on common sense and the tradition of paying higher rates to those working in and around London for reasons relating to the cost of living. It is not difficult to imply into the evidence about the parties' intentions that this interpretation is correct, taking the limited written evidence alongside the oral evidence of the respondent's payroll manager.

37. Whether the London Rate was the "amount properly payable" under section 13(3) of the Act, or whether paying the London Rate for four years and eight months was an overpayment for the purposes of section 14, amounted on the facts to the same analysis. If the respondent had made a mistake by continuing to pay the London Rate, then that would amount to an overpayment such that the London Rate was not the salary properly payable from 9 January 2017. It would also be permissible to make deductions from pay so as recoup this overpayment.

38. There is no doubt that the claimant was previously entitled to the London Rate by virtue of working from her home office in Bedford. Her then postcode entitled her to be treated as within the geographical range, being close to London and explicitly included in the respondent's definition of counties where the London Rate would be paid. It is also clear that the purpose of that higher rate was to recognise the higher cost of living affecting staff in and around London. Whether that is a perceived or an actual higher cost is not the point. The claimant may well have experienced little or no change to her living costs in the North East, but contractually it is important to recognise the parties' express or implied intentions in entering into such an agreement.

39. Turning to the documents, these are consistent with the respondent's interpretation of the contractual entitlement.

40. Annex C makes clear that "The location of the permanent workplace, as set out in the employee contract, determines whether London or National pay ranges apply." The claimant argued that her permanent workplace is the region for which she works, the CPS South East region, but this is at odds with the express terms identified in the documents.

41. The Loan Agreements address the point explicitly:

> "Consequently for the duration of your loan to CPSD your home address will become your **permanent work location** resulting in a potential change to your pay location."

42. The express use of "the pay location" reinforces the notion that this is not to be treated as the same place as the region for whom the work is carried out.

43. The HMRC travel expenses guidelines incorporated into the Loan Agreements define "permanent workplace" as:

> "A place **at which** an employee works is a permanent workplace if he or she **attends it regularly** for the performance of the duties of the employment."

44. Applying these definitions to the facts of this case, I find that the claimant's permanent workplace was her home address in Bedford for the duration of the loan to CPSD. At the outset of the secondment her RRA payment stopped because the claimant was no longer travelling into the London office that she was previously attending. Her salary continued at the London Rate because her home postcode fell within the defined counties for this purpose.

45. The claimant accepted the loss of the RRA at that time and expressly consented to the variation in her terms and conditions of employment set out in the Loan Agreements. This included specific reference to being moved to the National Rate if she moved outside the area covered by London pay. This change reflected both the express terms agreed by the parties and was in keeping with the common sense argument put forward by the respondent. Nothing in the wording of the documents supported the claimant's view that the pay location related to the region for whom the work was done, as distinct from the "place at which" the work was physically carried out.

46. By the time the Loan Agreements ended the claimant's permanent place of work was her home address, and this did not change in principle. However, the location of the home address did change from January 2017. Accordingly, when the claimant moved to the North East, her entitlement to pay should have changed to the National Rate. It was very unfortunate that the respondent did not realise its mistake for such a long time, but the result is that the claimant has been overpaid by the difference between her former London Rate and the National Rate payable from 9 January 2017.

47. The other limited written evidence supported these conclusions. The respondent's payroll Form PU14 about the move to the North East recorded that the rate of pay was to be the National Rate, which is consistent with the physical place of work being the factor determining salary. The email correspondence at the time when the move was being arranged was headed "move to SE area but working from NE". Nothing in the documents supports the claimant's argument that her pay should be based on the fact that her cases are handled in respect of the South East region. The purpose of the two rates has no relevance to the type of work being done, only the place where it is carried out.

48. Although I was referred briefly to other policies offering flexibility through home working, such as a disability passport or the respondent's working from home policy, these did not have a direct bearing on the legal questions arising in this case. There is a distinction to be drawn between an employee's permanent workplace as defined by the contract, and arrangements to accommodate particular needs, possibly on a temporary basis.

49. For the above reasons, my conclusion is that the claimant's permanent workplace is the location at which she carries out the work, previously her home in Bedford for the virtual region, and since 9 January 2017 her home in the North East working on cases for CPS South East. From that date the claimant has been entitled to the National Rate and in paying the London Rate the respondent has overpaid what was properly payable under the contract.

In reducing her pay from 1 September 2021 the respondent has not made any unlawful deduction from wages.

50. It is not appropriate for me to deal with the detail of the overpayment or its recoupment, which left to the parties to aim to resolve between themselves.

SE Langridge

Employment Judge Langridge

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Date

12 July 2022

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