



EMPLOYMENT TRIBUNALS

Claimant: Adefunke Adekoya and others
Respondent: Heathrow Express Operating Company Limited

Heard at: London South Employment Tribunal
On: 17 – 18 October 2022
Before: Employment Judge Apted

Representation

Claimant: Mr Patel (Counsel)
Respondent: Mr Salter (Counsel)

JUDGMENT

1. The claimant's claims for breach of contract are dismissed as the tribunal has no jurisdiction to hear them.

REASONS

2. This claim has been listed for a two-day Open Preliminary hearing. At a Case Management Hearing conducted on the 16th March 2022, Employment Judge Howden-Evans identified two issues that the Tribunal needed to determine:
 - a. Firstly, does the Employment Tribunal have jurisdiction to consider the claims?
 - b. Secondly, did the claimants have the pleaded contractual right to privilege travel.

The hearing:

3. The hearing was conducted using the Cloud Video Platform. I was satisfied that it was in the interests of justice to proceed in this way. It was possible to see and hear each participant clearly and I was satisfied that there were no barriers to communication. I was equally satisfied that the principles of open justice were secured.
4. In preparation for the hearing, I was in possession of a preliminary hearing bundle totalling 385 pages and witness statements. During the course of the hearing, I

heard evidence from Mr Cobb and Mrs Jones on behalf of the claimant and respondent respectively. I made a note of their evidence in my record of proceedings. I also heard submissions from Mr Salter and Mr Patel on behalf of the respondent and claimant respectively, which I also noted in my record of proceedings.

5. At the outset, there was a discussion between the parties as to whether one of the claimants could give evidence from abroad. The Presidential Guidance had not been complied with. Having read that witnesses statement, I concluded that there was a great deal of duplication between all of the witnesses. The contractual position and the issues were the same for all claimants. I therefore concluded that it would only be necessary to hear from one or two claimants and that it was unnecessary to hear from the witness who was abroad. Ultimately, both parties agreed to proceed as set out in the preceding paragraph.

The Issues between the parties:

6. The respondent's position was that the availability of discounted travel was not a contractual right, but was a benefit provided by a third party who could amend or withdraw it. Further, the respondent submitted that as the benefit was only payable after termination, any breach did not exist at the date of termination and therefore the tribunal had no jurisdiction to hear the claim.
7. The claimant submitted that the benefit had been incorporated into the claimants contracts of employment and that it could not be amended unilaterally by the respondent. Further the claimants submitted that the claimants eligibility to retain discounted travel arose on the termination of employment by reason of redundancy and therefore the breach existed at the date of termination.

Findings of fact and discussion:

8. When making findings I have taken into account all of the evidence provided to me, including the witness statements. I only refer to those pieces of evidence necessary to explain my decision. The fact that I do not mention a particular piece of evidence, does not mean that it has not been considered.

Background:

9. The respondent operates the Heathrow Express train service. It is part of the Association of Train Operating Companies (ATOC). Each of the claimants was employed by the respondent until a voluntary redundancy exercise concluded, following which each of them was made redundant on the 30th June 2020.
10. Membership of ATOC provided certain benefits, one of which was the provision of discounted travel on other members services. This benefit is offered on behalf of Rail Staff Travel Ltd, which is part of the Rail Delivery group.
11. For the purposes of this benefit, a distinction was drawn between employees referred to as "Safeguarded Staff" and "Non-safeguarded Staff". Safeguarded staff are those employees who were employed before the 31st March 1996. All other employees are regarded as Non-safeguarded staff. (The relevance of this distinction will become apparent below).
12. All of the claimants in this claim are non-safeguarded employees.
13. In common with the way that the Issues were dealt with before me, I propose to deal with the second issue first.

Did the claimants have the pleaded contractual right to privilege travel:

14. It is not in dispute, that whilst employed all of the claimants were entitled to discounted travel. The issue is whether the claimants were entitled to discounted travel after they ceased to be employed by the respondent, in this case, as a result of redundancy.
15. An example of the respondent's contract of employment with one of the claimants can be found at pages 87 – 93. This is the contract of Mr Cobb (who gave evidence). He signed that contract on the 21st March 2014.
16. There is no reference to the discounted travel benefit within that contract.
17. Mr Dillon was also employed by the respondent. His signed contract is at pages 96 – 102. He signed that contract on the 9th April 2014. His contract is the same as Mr Cobb's. I therefore find that all claimants are likely to have been employed under the same or very similar terms of employment. This is not disputed by the respondent.
18. Mr Dillon's contract was accompanied by a letter from the respondent dated the 1st April 2014 (at pages 94 – 95). This states that as an employee, he can "...look forward to the ATOC Standard Class Leisure Pass."
19. The ATOC Terms & Conditions are at pages 120 – 134 of the bundle. This document bears the name and logo of the respondent. At page 122, it states that the following are terms and conditions upon which privilege travel is issued to Heathrow Express employees for leisure use on the services of the train operating companies. It states that the arrangement will grant those eligible unlimited privilege travel facilities.
20. It then states that privilege travel facilities will be granted to a number of people who are then identified. It identifies retired members of staff and states that those members of staff who are retired and who had 5 years of service, were granted privilege travel facilities. It also states that staff who are made redundant are treated the same as retired staff – namely, if they have 5 years of service, they are eligible to retain privilege travel facilities.
21. At the conclusion of this document, the employee is required to sign and date it and in doing so, the employee accepts that abuse of the ATOC travel card could lead to disciplinary action (including dismissal). Page 140 contains the signature of Mr Joseph on this document.
22. Mr Cobb's application for his discounted travel card on behalf of his family members is found at pages 176 – 177. This makes it clear that the scheme is operated by Rail Staff Travel Ltd.
23. In her witness statement at paragraph 5, Mrs Jones on behalf of the respondent states that the ATOC terms and conditions was usually sent out to new joiners as part of their contract packs. At paragraph 7, Mrs Jones accepts that historically, those employed for at least 5 years and whose employment terminated by reason of retirement or redundancy could retain the privilege travel facilities.
24. I therefore find (and I do not think this is disputed by the respondent), that when objectively construed, when each of the claimants was originally employed by the respondent, the terms and conditions of the ATOC agreement were incorporated into the claimants contracts of employment, such that they could benefit from the privilege travel facilities if they were employed for 5 years and their employment ended by reason of retirement or redundancy. Although the ATOC document may

not be referred to as a contract, it does in my judgment use language of entitlement. The document at pages 133 – 134 expressly states that as an employee of the respondent, employees “...will enjoy the benefit of discounted leisure train travel (ATOC)”

25. If the ATOC agreement is incorporated into the claimant's contract (as I have found it to be), then it follows that in my judgment, all of its terms and conditions must also be incorporated. As I have already set out, the scheme is operated by Rail Travel Staff Ltd. The terms and conditions are set out in the document at pages 198 – 220. This Reciprocal Agreement between Rail Staff Travel Ltd and the respondent states that the agreement may be withdrawn.
26. I then move on to consider what occurred in May 2019 and beyond. In May 2019, the position changed. On that occasion, the Rail Delivery Group, drew a distinction between safeguarded and non-safeguarded employees. As of May 2019, only safeguarded staff who retired or who had been made redundant would retain the benefit of the discount. No reference is made in this document to non-safeguarded staff.
27. The effect of this document therefore is obvious. As of May 2019, any non-safeguarded employee would not retain the travel discount upon retirement or upon being made redundant. This means that each of the claimants in this claim, therefore lost that benefit.
28. It is accepted that this document which came into effect in May 2019 was not sent to the claimants. I have been referred to the judgment of HHJ Auerbach sitting in the Employment Appeal Tribunal in the appeal of **Amdocs Systems Group Ltd v Langton** 2019 EAT 001237 and in particular paragraphs 68 – 69. However, as I have already said, the terms of the contract permitted the contract to be varied. I have also already found that those terms were incorporated into the contract. I therefore find that the respondents were able to vary the terms of the contract of employment.
29. In February 2020 the respondent's undertook a review of their pay and conditions. (These can be found at pages 330 – 335). It is clear in my judgment that this document relates to employees and at Appendix B, it sets out the travel discounts that employees can benefit from. This document does not make reference to any travel discount that an employee can enjoy after they have left the respondent's employment.
30. During the redundancy negotiations, various employees raised with the respondent questions over whether staff would retain their travel discount. It is clear from the emails in the bundle (at pages 336 – 338 and 354 – 356) that the respondent's position was that the rules had previously been interpreted incorrectly and that non-safeguarded staff were not eligible for the travel discount.
31. Prior to being made redundant, each employee received a copy of their Notice of Redundancy (a copy is at page 357. Mr Cobb confirmed in evidence that he had received such a letter). This letter confirms a payment in lieu of notice and that any other benefits will cease on the 30th June 2020. It then sets out what each claimant would receive. This letter does not state that any of the claimants would be entitled to reduced travel. Each claimant accepted the terms of the redundancy package.
32. Drawing all of this together, I therefore make the following findings. When the claimants were employed by the respondent, they were entitled to the benefit of the discounted travel scheme. I find that that the terms and conditions of the scheme (as set out in the ATOC document and the Reciprocal Agreement) were incorporated into their contracts of employment. As such, when originally

employed, if they were made redundant, then subject to having 5 years' service, they could continue to benefit from the scheme. However, I find that the respondent changed the claimant's contracts, as they were entitled to do under the terms and conditions. As a result, unless an employee was a safeguarded employee, then upon redundancy, they could no longer benefit from discounted travel.

33. Additionally, during the redundancy negotiations and as part of the redundancy package, the claimants were aware that they were not entitled to the benefit of reduced travel upon being made redundant.
34. In answer to the second issue to be determined, I therefore find that the claimants originally had the pleaded contractual right to privilege travel, but that their contracts were varied, so that upon being made redundant, they no longer had that pleaded contractual right.

Does the Employment Tribunal have jurisdiction to consider the claims?

35. As is agreed, the tribunal's jurisdiction to hear contractual claims is derived from the Employment Tribunals Act 1996, and found in the Employment Tribunals England and Wales (Extension of Jurisdiction) Order 1994 ("the Order"). The Order contains the following limitation on the Tribunal's jurisdiction:

"Extension of jurisdiction

3. *Proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

...

(c) the claim arises or is outstanding on the termination of the employee's employment."

36. I have already found that the claimant's contracts were varied, so that upon being made redundant they were no longer entitled to the benefit of discounted travel. It therefore follows that at the date of termination, no claim arose. Accordingly, I find that the tribunal has no jurisdiction to hear the claim.
37. The claimant's claims are therefore dismissed, as the tribunal has no jurisdiction to hear them.

Employment Judge Apted

Date: 18 October 2022