EMPLOYMENT TRIBUNALS

Claimant: Mr P Saunders

v

Respondent: Veolia ES (UK) Limited

Heard at: Nottingham (via CVP)

On: 27 January 2023

Before: Employment Judge Fredericks

Appearances
For the claimant: In Person
For the respondent: Ms L Quigley (Counsel)

JUDGMENT

1. By consent, the respondent's name is amended to 'Veolia ES (UK) Limited'.

2. The claimant's claim for unlawful deduction from wages is not well-founded and is dismissed.

WRITTEN REASONS

Background

1. These reasons are produced at the claimant's request after an oral judgment was delivered on the day of the hearing.

2. The claimant represented himself at the hearing and gave evidence in support of his own case. The respondent was represented by Ms Quicgey of Counsel, and I heard evidence from Mr I Fahey, Senior Business Partner at the respondent. I also

had the sight of a bundle of documents which ran to 207 pages. Page references in this judgment relate to page references in that bundle of documents.

The claims

3. The claim arises from differing interpretation of a clause contained in a 'Way Forward Agreement' agreed between (1) Veolia, (2) its employees, and (3) the UNITE, URTU and GMB unions. The clause, incorporated into the claimant's employment contract, governs that circumstances within which the claimant would be entitled to additional pay on a 'per day' basis when he was utilising his qualification as a 'driver assessor' at work. The claimant says that he should have been paid the additional pay every-day for a period of some three and a half years previously. He notes that he has been getting paid the additional sum since May 2022, but only received it before then on days he conducted a driver assessment.

4. The respondent asserts that the additional pay is only payable when the claimant was fulfilling the job description found in Appendix B of the Way Forward Agreement, and says that the claimant only started to do this from May 2022. He was not, it says, entitled to any additional pay prior to this.

5. There was in essence only one issue to be decided: *was the claimant entitled to the additional pay on every day of work prior to May 2022?*

The facts

6. The facts were broadly agreed and the substantive dispute is about the interpretation of the contractual terms. The facts as I find them, on the balance of probabilities, are as follows.

7. The claimant began work at the respondent since 4 December 2004 as an HGV Driver. His current role is as a Driver/Operative. From around 3 May 2019, the claimant began to carry out assessments of drivers alongside his usual role. The claimant's certificate enabling him to conduct those assessments is at page 73. The claimant agrees that he only occasionally conducted driver assessments and agrees that his principal job at that time, and now, is as a driver. During the period of his claim, the claimant was paid an additional £12.70 for each day he conducted an assessment. He had initially completed the training as a form of development and had not expected to be paid an additional amount at all.

8. The claimant did not conduct driver assessments during a period of assessment suspension in response to the Covid-19 pandemic in 2020. The bundle contained pay slip evidence from page 120 to page 201, covering the weekly payments made to him from 23 April 2021 to 11 November 2022. Prior to May 2022, the claimant was only paid one day's premium. This was during the week beginning 30 October 2021 (page 149). In the hearing today, the claimant said that he thought he completed more driver assessments than that single one. He said that the respondent's pay systems are sometimes incorrect and he may not have noticed the lack of pay. He accepted that he had not queried his pay or raised that days of assessments are missing. The claimant has no record of dates of assessments of his own. In my view, the only record I have of dates where the claimant may have conducted assessments are the pay slips. Consequently, I prefer the respondent's

case on this point. In any event, the claimant accepts that he was an ad hoc assessor and that there would not be many days where he completed an assessment.

9. At some point in 2018, the Way Forward Agreement came into force. The version in the bundle from page 46 to 65 was unsigned and undated. On 31 October 2018, the claimant signed new particulars of employment (pages 68 to 71). The parties agree that the Way Forward Agreement was incorporated into the claimant's contract of employment by clause 4, which reads:

> *"Your employment may be subject to Collective Agreements made from time to time between the Company and the relevant union. The details of the agreements that may be applicable to the operative's employment will be given to you by your local site".*

10. In the event, I find that the claimant was not given a copy of the Way Forward Agreement at the point he signed his new contract. This is because this is what the claimant has told me under sworn affirmation, and because the respondent can find no evidence of having sent it to the claimant. The parties agree that, notwithstanding a failure to give the document to the claimant, the Way Forward Agreement was operative between them.

11. The relevant part of clause 28 of the Way Forward Agreement (page 62) reads:

> *"Effective from 15 August 2015 a set payment will be made (Appendix A) to those individuals who take on the responsibility of a Driver Assessor / Trainer job description (Appendix B). To qualify for this payment the Driver must be willing and able to undertake training organised by the Company to the standard required for the Driver Assessor / Trainer and be required to carry out duties as stated in the job description…"*

12. Appendix A (page 64) sets out that the *"Driver Foreman/Driver Trainer Rate"* is £12.03 for 2018 and £12.33 for 2019. The amount has inflated over the years, but the principle for the payment is the same.

13. Appendix B (page 65) is the 'Driver Assessor/Trainer Job Description'. The claimant admits that he did not fulfil two elements of the role requiring him to:

> *"To develop tools and processes for the driver training and assessment programme"*
>
> *"To identify and implement initiatives for improvement and training".*

14. The respondent concedes that the claimant fulfilled the other elements of the job description on days when he was doing the assessments. These elements concern following instructions, doing the assessments competently and safely, communicating outcomes of training, pursuing development, and having a positive attitude. This is the reason offered for why the claimant was paid the additional pay on days when he completed a driver assessment.

15. As a consequence of this agreement, I find as a fact that the claimant was not completing the job description at Appendix B prior to May 2022. Although he was fulfilling most of the description, he was not accountable for the pro-active strategic side involving developing training and improvement processes. Further, the respondent says (and I accept) that the claimant was not required to complete those elements of the job description because there was another supervisor at the same depot whose role involved carrying out those pro-active and strategic element.

16. The claimant discovered the appendices in the Way Forward Agreement when the respondent was consulting on replacing it with a new agreement in April 2022. His interpretation of the relevant clauses is that he should get the additional rate every day by virtue of holding the assessor qualification. On 15 May 2022, the claimant and Mr Fahey spoke. Mr Fahey says and I accept that the needs of the respondent had changed at this point because the person who had been responsible for the pro-active training elements of the Appendix B role had left the business. This means that there was a resourcing gap to be filled. Consequently, Mr Fahey saw a solution to the claimant's queries: the claimant could be utilised from May 2022 to fulfil the whole of the Appendix B job description. This would also enable the claimant to get the payment each day as he was saying he felt entitled to.

17. The claimant still felt that he was owed additional payments for each day he worked prior to May 2022. He raised a grievance about his pay and this culminated led to a grievance meeting between the claimant which took place of 2 and 3 August 2022. The minutes of those meetings were at pages 104 to 117. An outcome letter dated 3 August was at pages 118 to 119. In the grievance process, Mr Fahey explained that he considered the claimant had been under-utilised in the past because the respondent had not needed him to fulfil the whole job description that would qualify him for the additional pay. He explained that the claimant was now required to fulfil the whole job description and so he would be paid and measured accordingly.

18. It is apparent that the claimant is in a period of transition and is still awaiting training to be able to fulfil the part of the description that he was not doing previously. Mr Fahey explained that the training for that is underway and that the claimant should have access to all of the required systems. It is clear to me that the respondent now requires the claimant to fulfil the Appendix B job description and is taking the responsibility to provide the training to help him develop to be able to do that.

The law

Interpretation of contractual terms

19. In *Arnold v Britton [2015] UKSC 36*, Lord Neuberger outlined how a court or tribunal should approach disputes about the meaning of contractual terms. The correct way to do so is to interpret the intention of the parties as to the meaning of the terms 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"* (per Lord Hoffmann in *Charterbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*).

20. To assist with this exercise, Lord Neuberger reviewed existing authorities and distilled them into six relevant factors to be considered in order to determine how a contract has been constructed and how it should be interpreted. Those factors are [para 15]:

    20.1. the natural and ordinary meaning of the clause;
    20.2. any other relevant provision of the contract (Lord Neuberger was considering a lease in *Arnold* but the same principles apply);
    20.3. the overall purpose of the clause and the contract;
    20.4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
    20.5. commercial common sense; but
    20.6. disregarding subjective evidence of any party's intentions.

21. Consequently, the interpretation is an objective exercise by design. Lord Neuberger emphasises the importance of the ordinary language of the provision being considered, which should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

Variation of employment contract

22. Variation to contractual terms may become effective by agreement. Such an agreement may be oral and the variation never committed to writing. The question is whether the tribunal is satisfied on the evidence available that an oral agreement served to vary the contract of employment (*Simmonds v Dowty Deals Ltd [1978] IRLR 211)*. Naturally, the best form of evidence of a variation by agreement is through writing.

23. Any variation of contract requires the exchange of consideration to be valid. Courts and tribunals have been able to find consideration for variations quite quickly, whether that is in relation to the settling of a pay claim where a pay rise is awarded (*Lee and ors v GC Plessey Telecommunications [1993] IRLR 383)*, or where the employer enjoys greater staff retention where guaranteed bonuses are promised (*Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394)*.

Unlawful deduction from wages

24. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

Discussion and conclusions

25. There is a dispute between the parties about what clause 28 means. The claimant considers that clause 28, Appendix A and Appendix B should be read as requiring the respondent to pay him the additional rate for each day of his employment. Ms Quigley urges me to look at the wording of the whole clause and to conclude that any person will only qualify for the payment where they agree to fulfil the whole job description at Appendix B and where the respondent requires them to do that whole role. To that end, I start the analysis of the terms with Lord Hoffman's words in mind from *Charterbrook* and then considered the list of factors articulated by Lord Phillips in *Arnold*.

26. Unfortunately for the claimant, that analysis inevitably leads me to agree with Ms Quigley's submission about the meaning of the relevant clauses. The part of clause 28 relating to qualification for payment must be read as a whole and considered on its natural and ordinary meaning. The whole operative part of the clause must be considered because the parties are bound by the whole clause. It is not sufficient for some of the clause to be met. The operative conjunction linking the qualifications for the payment is *"and"*. To qualify, the claimant must take on the responsibility of the Appendix B job description, and:

    26.1. *"be willing and able to undertake training organised by the Company to the standard required for the Driver Assessor / Trainer";* and

    26.2. *"be required to carry out duties as stated in the job description".*

27. The claimant agreed in cross examination that he did not fulfil the whole job description prior to May 2022. He argued that he was under-utilised by the respondent. These admissions, together with Mr Fahey's evidence, led me to find as a fact that the respondent did not require the claimant to fulfil the Appendix B job description prior to May 2022. This changed in May 2022, when Mr Fahey considered that the claimant could fill a resourcing gap that had arisen and take responsibility for the additional elements which meant that he was fulfilling the whole job description required to qualify for the additional payment. From this point, the respondent required the claimant to do the full role and it has taken steps to train the claimant to allow him to do so. From May 2022, the additional pay per day has been properly payable. Prior to May 2022, the additional pay was not properly payable because the requirements of clause 28 were not satisfied. It follows that I must dismiss the claimant's claim because there has been no unlawful deduction from wages.

28. The claimant commented at the end of his submissions that he would be returning to work following this weekend and that he was concerned that bringing this claim would negatively impact on his career at the respondent. I hope that there is no such impact. In the grievance notes, Mr Fahey makes clear that he would hold nothing against the claimant. In my view, the claimant had the right to bring this claim and he has done so. It might be that the claimant would not have been set on this course if the Way Forward Agreement had been provided to him upon his on-boarding process as it perhaps should have been.

Employment Judge Fredericks

30 January 2023