EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2408533/2021

Held in person on 21 December 2021

Employment Judge Neilson

Colin Hardie	**Claimant** **Not Represented**
Network Scaffolding Contractors Limited	**Respondent** **Represented by** **Ms Bayliss, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimants claim under section 23 of the Employment Rights Act 1996 is well founded and the Employment Tribunal orders the respondent (a) to pay to the claimant the sum of £2,175.09 less appropriate tax and national insurance in respect of the claim for unlawful deductions from pay; and (b) to pay to the claimant the sum of £100 less appropriate tax and national insurance as compensation.

REASONS

1. This was a claim for unlawful deductions from pay under the Employment Rights Act 1996 ("the ERA").

2. The claimant was not represented. The respondent was represented by Ms Bayliss of Counsel. The claimant gave evidence on his own behalf. On behalf of the respondent evidence was given by Mr George Manson, Operations Manager for the respondent.

3. A bundle of documents had been lodged by the respondent.

4. The only preliminary issue related to the correct identity of the respondent. The respondent confirmed that the correct legal entity was Network Scaffolding Contractors Limited. This was the entity that employed the claimant.

Findings in Fact

5. The Employment Tribunal made the following findings in fact.

6. The claimant was employed by the respondent as a scaffolder.

7. At the time that his employment commenced and thereafter the claimant was in possession of a valid Construction Industry Scaffolders Record Scheme ("CISRS") card.

8. The claimant had held a CISRS card for approximately 20 years.

9. The claimant worked as a scaffolder for the respondents in and around the Edinburgh area.

10. The respondents have a depot in Livingstone.

11. The claimants working hours are 39 hours per week – 8 a.m. to 4.30 p.m. Monday to Thursday and 8 a.m. to 3.30 p.m. on a Friday.

12. The claimant commenced employment with the respondent on 9 March 2018 and remained in the employment of the respondent at the date of the hearing.

13. The claimant was provided with a written statement of particulars of main terms of employment dated 8 March 2018.

14. The claimant's contract of employment incorporated the terms of the Construction Industry Joint Council ("CIJC") Working Rule Agreement for the Construction Industry.

15. The claimant's entitlement to wages under his written statement of particulars dated 8 March 2018 was expressly stated to be "4. WAGES (Basic) per hour, payable weekly, 1 week in arrears, as per CIJC working rule agreement."

16. There are a number of different hourly rates of pay applicable under the CIJC Working Rule Agreement. These break down into General Operative; Skilled Operative (with four different rates in this category 1,2,3,4) and Craft Operative.

17. Under working rule 26 of the CIJC Working Rule Agreement the holder of a current valid CISRS Scaffolders card is entitled to the Craft Operative Rate of pay.

18. On or about 8 March 2018 the claimant was taken through an induction process by the respondent's employee Alan Jackson. The claimant was shown the written statement of particulars and told that the hourly rate of pay would be filled out later. The claimant also had sight at that time of a checklist stipulating a rate of pay of £11.36. The claimant did not know, at that time, that this was the Skilled Operative rate 1 rather than the Craft Operative rate of pay.

19. On commencing employment in March 2018 the claimant was paid at a rate of £11.36 per hour. This was the rate of pay applicable to a Skilled Operative rate 1 under the CIJC Working Rule Agreement.

20. From March 2018 through to 28 June 2021 the claimant was paid at the appropriate hourly rate of pay under the CIJC Working Rule Agreement that was applicable to a Skilled Operative rate 1.

21. From 28 June 2021 to date the claimant has been paid at the Craft Operative Rate of pay under the CIJC Working Rule Agreement.

22. From the commencement of his employment with the respondent until 28 June 2021 the claimant also received a payment of 1 hours pay for "travel time" per day. This applied irrespective of the amount of travelling involved. This was not an entitlement under the CIJC Working Rule Agreement but the claimant was notified at the commencement of his employment with the respondent that he would receive this payment.

23. With effect from 28 June 2021 the claimant received 30 minutes pay each day in respect of "travel time" instead of one hour per day.

24. Throughout his employment the claimant has received a weekly bonus payment of £1 an hour for productivity and timekeeping. The claimant was notified at the start of his employment that he would receive this payment.

25. The difference between the Craft Operative Rate of pay and the Skilled Operative rate 1 under the CIJC Working Rule Agreement for the claimant in the period between 21 July 2019 and 28 June 2021 was £2,175.09.

26. The claimant received an employer pension contribution of 5% of his pay.

27. Shortly after commencing his employment in April 2018 the claimant complained to Alan Jackson that he was not receiving the correct rate of pay. Alan Jackson told the claimant he would get it fixed.

28. Alan Jackson did not resolve the pay issue for the claimant and passed it to George Manson, the Operations Manager for the respondent. In June 2018 the claimant had a conversation with George Manson where George Manson told the claimant that the rate he was getting was basically the rate

they were willing to pay for the job as that was the skill set required and he could take it or leave it.

29. Following the discussion with George Manson the claimant raised the issue of his pay with Alan Jackson on a couple of further occasions but then forgot about it for a while. He took no further formal action until lodging a grievance on 29 April 2021. That grievance was that he had not received the correct rate of pay – the claimant alleged he should have received the Craft Operative rate of pay.

30. The claimant's grievance was heard by the respondent on 19 May 2021. His grievance was turned down on the basis he had effectively been paid the CIJC Craft Operative rate when taking into account the travel allowance and bonus payment. There were four occasions when that had not been the case and the claimant was offered £18.02 to cover those periods. The claimant rejected that offer.

31. The claimant appealed the outcome of his grievance but his appeal was unsuccessful.

Submissions - Claimant

32. The claimant's position was that he was paid at the wrong rate of pay under his contract of employment from the date of commencement through to 28 June 2021. He should have been paid at the Craft Operative Rate under the CIJC Working Rule Agreement. He had in fact been paid at the Skilled Operative rate 1.

33. The bonus payment and the payment for travel are separate issues.

34. In addition to the loss of wages the claimant has lost employer pension contributions on the higher Craft Operative Rate not paid.

Submissions – Respondent

35. The respondent made reference to sections 13 and 27 of the ERA. The definition of wages is "any sums payable to the worker in connection with his employment". It could accordingly include the bonus and travel allowance element.

36. The respondent's position is that there was a clear agreement to pay at £11.36 (skill rate 1) from the commencement of employment. The claimant effectively agreed to that. He did not complain until his grievance in 2021 – 3 years later.

37. Whilst the respondent did not dispute that the CIJC Working Rule Agreement applied it was the respondent's position that there was a clear agreement to pay at the skill rate 1 – which overrode the terms of the CIJC Working Rule Agreement.

38. In any event there is provision under working rule 6.2 of the Working Rule Agreement for there to be agreement on different rates of pay where there are alternative shift working arrangements.

39. In any event the claimant did receive the Craft Operative Rate of pay as you must include the bonus payment and travel allowance payment as part of the overall definition of wages.

The Law

40. Under section 13 of the ERA an employer shall not make a deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction.

41. Under section 13(3) of the ERA "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 workers wages on that occasion."

42. Under section 23 of the ERA a worker may present a claim to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13 of the ERA.

43. Under section 24 of the ERA where the tribunal finds a complaint under section 23 well founded it shall make a declaration to that effect and shall order the employer to pay to the worker the amount of any deduction made in contravention of section 13.

44. Where a tribunal makes a declaration under section 24 it may (under section 24(2) of the ERA) order the employer to pay to the worker … such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

45. Under section 23(4A) of the ERA a tribunal is not to consider any complaint relating to a deduction from wages where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of the presentation of the complaint.

Discussion & Decision

46. The issue here is whether or not there has been an unlawful deduction from wages in respect of the claimant.

47. It was not disputed that the claimant was employed as a scaffolder and the terms of the CIJC Working Rule Agreement were applicable to his contract of employment.

48. This was not a case where there was any issue surrounding whether or not there was a requirement or authorisation to make a deduction. It was simply a case about whether or not, under section 13(3) ERA, the total amount of

wages paid on any occasion by the respondent to the claimant is less than the total amount of the wages properly payable by the respondent to the claimant on that occasion. In other words did the claimant receive the rate of pay he was contractually entitled to?

49. The claimant presented a straightforward case, he was (and this was not disputed) a scaffolder and a holder of a CISRS card. As such his entitlement to pay under the CIJC Working Rule Agreement was to an hourly rate of pay commensurate with a Craft Operative Rate. That was what the express terms of the CIJC Working Rule Agreement provided for. He had not been paid at that rate.

50. The respondent maintains that the claimant did receive the rate of pay he was contractually entitled to as there was an agreement to pay him at the lower rate – Skilled Operative rate 1. That was the figure he was told about when he started employment and that was the rate that applied (adjusted for periodic changes in the rate) down to 28 June 2021. The respondent also relies upon working rule 6.2 of the CIJC Working Rule Agreement which allows for employer and operatives to agree flexibility in rates of pay where, at any job or site, flexibility is essential to achieve completion of the work. In any event the respondent maintains the claimant did receive sufficient wages to cover his entitlement to the higher Craft Operative Rate of pay (assuming, which they do not accept, that he was entitled to that higher Craft Operative Rate of pay) because you must include in the definition of wages the bonus payment and travel allowance payment.

51. With regard to the alternative argument the Tribunal does not accept that if it were the case that the claimant was entitled to the Craft Operative Rate of pay that he should be treated as having received that rate of pay by including the bonus and travel allowance. The evidence was clear that the bonus payment of £1 an hour was an additional bonus payment. Under the CIJC Working Rule Agreement there is under working rule 2 a clear reference to a separate bonus entitlement – “It shall be open to employers and operatives on any job to agree a bonus scheme based on measured output and

productivity for any operation or operations on that particular job". The evidence from the claimant and from Mr Manson was clear that there was a standing bonus scheme that paid £1 an hour. That was agreed at the commencement of the employment. There was dispute about what this related to. The claimant insisted that he was told it applied in respect of timekeeping and productivity. Mr Manson agreed but added that safety was also a criteria.

52. With regard to the travel allowance this was also notified to the claimant at the outset of his employment. It was one hours extra pay per day in respect of travel time. He was told this would apply irrespective of the actual travel time involved. It was consistently paid up to 28 June 2021. This was not a payment that was provided for under the CIJC Working Rule Agreement.

53. In the view of the Tribunal both the bonus payment and the travel allowance were separate contractual entitlements under the contract of employment. The Tribunal notes that in his evidence Mr Manson talked about these additional payments being part of a package to get to £14/15 an hour to incentivise the employees. That may be so but under the claimants contract he had an entitlement to a basic hourly rate, a bonus payment of £1 an hour and a travel allowance of one hour a day. Whilst the terms of the CIJC Working Rule Agreement applied there was nothing to prevent the parties agreeing additional terms. In the view of the Tribunal there was a clear agreement to pay both the bonus and the travel allowance. Accordingly it is not permissible to set off the travel allowance and the bonus payment against the basic hourly rate of pay. In the response to the claimant's grievance this is what the respondent initially sought to do and it was a submission advanced before the Tribunal. The Tribunal rejects that submission.

54. The Tribunal also rejects the respondent's submission that working rule 6.2 of the CIJC Working Rule Agreement gives scope for the application of the Skilled Operative rate 1 to be treated as simply an application of that working rule. Under rule 6.2 there must be agreement on both alternative shift working

arrangements and rates of pay where “at any job or site, flexibility is essential to achieve completion of the work”.

55. It is clear that 6.2 is an exception to the standard agreed hourly rates. There would need to be evidence of an agreement relating to specific sites or jobs where flexibility is essential. The unchallenged evidence of the claimant was that he worked standard hours across a variety of different sites in and around Edinburgh. There was no evidence of different rates being agreed because of the need for alternative shift working arrangements. Mr Manson in his evidence simply stated that the Skilled Operative rate 1 was applied from the outset because that was the rate they were willing to pay as it reflected the skillset that was required. Accordingly there was no evidence presented to the Tribunal that would support an argument that the rate of pay paid to the claimant was an agreed rate under working rule 6.2.

56. That left the respondents primary submission that Skilled Operative rate 1 was the agreed rate from the outset and this overrode any other entitlement. This was not an argument that was advanced by the respondent in the ET3 but the Tribunal was prepared to consider it as it goes to the heart of what the employment contract stipulated as regards the basic hourly rate of pay. The Tribunal accepts that as a matter of law it may be possible for parties to agree that a contract will be subject to the terms of a Working Rule Agreement such as the CIJC Working Rule Agreement but to expressly exclude certain provisions or modify certain provisions. However to achieve that very clear language would be required and the position regarding pay would need to be very clearly set out. The written statement of particulars of the main terms of employment expressly states under Wages that the pay per hour will be as per the CIJC Working Rule Agreement. The written statement is evidence of the contract and in circumstances where it is the employer who contests that the written statement does not reflect the true terms of the contract they face a very heavy burden of proof – ***System Floors UK -v- Daniel 1981 IRLR 475***. Based on the evidence that Tribunal was satisfied that at the outset the contract of employment did expressly provide for the hourly rate of pay to be

at the appropriate rate under the CIJC Working Rule Agreement – and that that rate should have been the Craft Operative rate of pay.

57. The fact that an hourly rate of pay figure may have been provided in the check list document which did not accord with the entitlement to a higher hourly rate of pay under the CIJC Working Rule Agreement would not override the express term set out in the statement – particularly as the claimant states he did not know at that time whether or not that was the correct amount.

58. The issue then is whether there was a variation to the contract of employment as regards pay by virtue of the fact that the respondent paid that lower rate of pay consistent with Skilled Operative rate 1 and if there was such a variation did the claimant accept that change. Again this was not an argument advanced in the ET3 and the respondent did not lead any evidence in respect of this – although there was some evidence from the claimant.

59. By continuing to pay at the lower rate there was a clear breach of contract by the respondent. That in effect was a variation to the rate of pay. Where there is a unilateral variation the employee by continuing to work may be treated as having accepted that unilateral variation. In considering the position here the Tribunal had regard to the authorities and principles analysed by the Court of appeal in ***Abrahall and Others -v- Nottingham City Council 2018 IRLR 628.*** It is clear on the evidence that the claimant objected to the lower rate of pay at the outset. He was specifically told to take it or leave it in June 2018. He then raised his concerns about his pay with Alan Jackson on a couple of occasions after June 2018 but by his own admission he forgot about it for a while. He lodged his grievance on 29 April 2021.

60. In all the circumstances the Tribunal could not conclude, on the evidence, that there had been an acceptance by the claimant by him continuing to work. He had clearly objected and continued to object and had then lodged a formal grievance.

61. The Tribunal accepts the claimant's submission that his contract of employment gave him the right to be paid at the Craft Operative rate of pay.

62. The parties had agreed that the unlawful deduction was the sum of £2,175.09 and accordingly that is the sum the Tribunal awards.

63. In addition, under section 24(2) ERA, the Tribunal may award compensation to compensate for financial loss. The claimant will have lost the 5% employer contributions towards his pension. The Tribunal considers it appropriate to award £100 as compensation in that regard.

Employment Judge: Stuart Neilson
Date of Judgment: 10 January 2022
Entered in register: 13 January 2022
and copied to parties