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EMPLOYMENT TRIBUNALS

Claimant: Mr D Christie
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 21 June 2017
Before: Employment Judge Russell

Representation
Claimant: In person (assisted by his wife)
Respondent: Mr R Moretto (Counsel)

JUDGMENT

1. The claim for unauthorised deduction from wages succeeds.
2. The Respondent is liable to pay the Claimant the sum of £590.04 in respect of the unauthorised deduction.

REASONS

1 By claim form presented on 22 April 2017, the Claimant brings a complaint of unauthorised deduction from wages. The Respondent resists the claim.

2 The Employment Rights Act 1996 (“ERA”) s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker’s contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

3 A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA.

4 In deciding this case, therefore, I must first consider whether there has in fact been any deduction, in other words what amount was due to the claimant under the terms of his contract as set out above. In the event that I conclude that a lesser sum

was paid, I must consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

5 I heard evidence from the Claimant and Mr Pavlou a trade union official. For the Respondent, I heard evidence from Ms Davis (Human Resources Business Partner) and Mr Roy Ormsby (Divisional Director for Public Realm). I was provided with a bundle of documents by each of the Claimant and the Respondent. A large number of these documents were duplicated but I referred to those pages to which I was taken in the course of evidence.

Findings of Fact and Conclusions

6 The Claimant has been employed by the Respondent since November 2004. His substantive job title was of Market Inspector, also known as an Enforcement Officer, on an SO2 grade entitled to a basic salary of £2,774.50 gross per month. In addition he was also entitled to an allowance in respect of weekend working of £250.08 per month gross and a shift allowance of £312.55 gross per month.

7 In January 2015 the Claimant and a number of other Enforcement Officers in Markets were informed that they were being investigated for gross misconduct.

8 In February 2015 the allegation was downgraded to one of misconduct.

9 The Claimant continued to work in his substantive post during the investigation which concluded on 1 September 2015, when the Claimant was told that there was no case to answer. On the same date, however the Respondent commenced a new gross misconduct investigation against the Claimant. The Claimant had a period of sickness absence lasting approximately two months and upon his return to work moved into the Anti-Social Behaviour Team by way of temporary redeployment. In this post, the Claimant continued to receive the same basic salary, weekend enhancement and shift allowance as applied to his substantive Markets post.

10 In August 2016, the Claimant was informed that the second gross misconduct investigation had concluded and that no further action was to be taken. This was confirmed by Mr Ormsby in a meeting on 4 August 2016. The Claimant was subsequently provided with a letter sent to all other staff being investigated, a number of whom had been suspended from work on full pay in the intervening period. These other employees were invited to a meeting to discuss a return to work and the post to which they would return. Mr Ormsby's letter confirmed their right to return to their substantive post or the possibility of return to a different post on a temporary basis. A further option was the possibility of redundancy if agreed by the Respondent. I find that the Claimant did not receive this letter until 8 August 2016.

11 On 4 August 2016, before their meeting, the Claimant sent an email to Mr Ormsby making clear that he did not wish to return to Markets as he was enjoying his work in Anti-Social Behaviour and would like to be placed there on a permanent basis. The Claimant identified a vacant permanent post available due to a recent departure.

12 A further meeting took place on 14 September 2016 at which Mr Ormsby outlined the Claimant's possible options. First, he could continue working in Anti-Social

Behaviour on a temporary basis until 31 March 2017 by way of a formal secondment but this would be on Anti-Social Behaviour pay and conditions. Alternatively, he could return to his substantive Markets role on his current terms and conditions. The difference between the two roles is that whilst the Anti-Social Behaviour role carried with it a higher basic salary of £2,826.25 gross per month and a travel allowance of £129 gross per month it did not attract the weekend working or shift allowances which were payable in the Markets post. The Claimant candidly accepted in evidence that he agreed to give up the weekend allowance, independently of any agreement about the shift allowance. He did not seek to suggest, as had initially appeared from the documents, that that withdrawal of the weekend allowance was part of a broader agreement including the shift allowance. As such, I was impressed by the honesty and reliability of the Claimant's evidence where he did not seek to claim more than that to which he claimed had been agreed and to which he was properly entitled.

13 Mr Ormsby confirmed his offer to the Claimant in an email on 15 September 2016. It was explained to the Claimant that he could not, at that point, be permanently redeployed to Anti-Social Behaviour as the vacant position was being held for a bumped redundancy situation. This was why only temporary redeployment could be offered until 31 March 2017 when a more clear view of the future picture would be available. The Claimant was given until 19 September 2016 to notify Mr Ormsby of his decision.

14 On the morning of 16 September 2016, the Claimant's line manager in Anti-Social Behaviour, Mr Tony Gowen, told the Claimant that he had had a discussion with Ms Karen Davis in HR to see if "something could be worked out" because he wanted the Claimant to remain in Anti-Social Behaviour. Mr Gowen told the Claimant that Ms Davis would be happy to meet with him and discuss a way forward, including with regard to shift allowance.

15 The Claimant then went to see Ms Davis the same day. A discussion took place in the kitchen on the HR floor. No-one was present and no minutes of the meeting were taken.

16 The Claimant's evidence was that Ms Davis confirmed that Mr Gowen was very happy with the Claimant's work and that if the Claimant came up with a rota that was similar to his work pattern in Markets, he could keep his shift pay. Ms Davis told him that they had worked out similar situations for other staff. This accorded with the Claimant's knowledge that some employees received allowances for shifts that they did not do. Ms Davis had agreed that he would receive the shift pay in the Anti-Social Behaviour role so long as he put together a proposed shift pattern which mirrored that worked in markets. At no point did Ms Davis mention the single status agreement which was concluded in April 2008 and which defined "ordinary hours" as those worked between 7am and 8pm.

17 Ms Davis' evidence, by contrast, is that the Claimant had said that he was working hours outside of normal working hours. The Claimant asked for the shift allowance to be maintained if he stayed in the Anti-Social Behaviour role until 31 March 2017. It was agreed that if the Claimant and Mr Gowen submitted a rota for consideration, Ms Davis would look at the proposal. She accepts that she told the Claimant that if the pattern were similar to Markets it would probably get the allowance.

Ms Davis maintains that the rota was not a mere formality, rather the allowance would only be offered if warranted by the proposed work pattern. Ms Davis accepts that she did not refer to the single status agreement. Ms Davis' evidence was that she did not have the authority to agree a shift allowance, although she did not say this to the Claimant.

18 In resolving the conflict of evidence and in particular whether and to what extent an agreement had been reached in respect of shift allowance on 16 September 2016, I have regard to the email from Mr Christie sent to Mr Ormsby copied to Ms Davis on 19 September 2016. The email stated:

“It was also discussed between the three of us that while usually ASB officers do not do shifts, I have in fact been doing shift work while in the post and that this will continue for the next six months.

I will still be working regular out of hours shifts as this has benefited the service. It was agreed that I should therefore continue to receive shift pay, so long as Tony, Karen and I formalise the shift pattern with a written rota. Tony and I have agreed to do this and will provide Karen this on her return from annual leave, such that the finer points of this secondment can be worked out.

I am aware that officers are receiving shift allowances (including night shift payments) whilst they are not working these shifts.

On the basis of the above discussions, I would be willing to take up the temporary post in ASB until March 2017...”

19 Mr Ormsby replied thanking the Claimant for confirming his decision, said that he would need to speak to Ms Davis regarding the payments as he thought that the Claimant was working Monday to Friday only and indicated that he was sure that they could work this out on her return. In the email, Mr Ormsby did not dispute that an agreement had been reached to continue the shift allowance upon formalisation of the shift pattern in a written rota.

20 The Claimant and Mr Gowen produced a rota which covered a three week period, each of the weeks contained an identical shift pattern, namely Monday 12 till 8, Tuesday core hours, Wednesday core hours, Thursday 1 till 9, Friday core hours, Saturday and Sunday off. The Claimant's note on the proposed rota stated that this mirrored the rota in the Market's post. In Markets, the Enforcement Officers worked one week out of three on the 12 till 8 shift (lates). Overall, therefore, in both the ASB and the Markets role, five of the fifteen shifts in the three week period would be lates.

21 I find that the shift rota submitted by the Claimant was similar to that worked in Markets, including the same number of late shifts. Whether or not the hours included fell within core hours, I accept that the provision of fixed shifts and the similarity of the arrangement with the Market rota was sufficient to meet the requirement that the Anti-Social Behaviour shift pattern be formalised.

22 The rota was sent to Ms Davis, copied to Mr Gowen, by email on 12 October 2016. Ms Davis did not revert to the Claimant upon her return from holiday to discuss the rota nor did Mr Ormsby make any further contact with the Claimant or consider the

matter further until December 2016. Ms Davis stated that she did not reply to the Claimant's rota as she did not think that she needed to do so. I did not find reliable her evidence that she looked at the rota with a colleague and concluded that it was not a shift pattern as the hours fell within the parameters of the single status agreement. Such a decision is inconsistent with her failure to reply to the Claimant or any reference to the single status agreement in the eventual refusal on 19 December 2016.

23 The Claimant worked to the proposed shift rota and continued to receive the shift allowance.

24 On 19 December 2016, Ms Vincent, a Business Partner in HR wrote to the Claimant stating:

"Further to the meeting you had with Roy in September and the subsequent emails that followed ..., I write to confirm that following your request to remain in the ASB Team at present the following temporary changes will be made to your contract of employment."

The changes were that weekend working allowance would cease with effect from 1 October 2016 and shift allowance would cease from 3 January 2017. Despite the September 2016 agreement, the weekend working allowance had continued to be paid to the Claimant. The email did not refer to the single status agreement or "ordinary hours".

25 Mr Ormsby gave evidence that action was taken in December 2016 to remove the shift allowance because, in November 2016, Unite the Union had told him that the other Anti-Social Behaviour officer (a woman named Caroline) had complained that she was not receiving equal pay. Mr Ormsby accepted that between October 2016 and December 2016 nobody had reverted to the Claimant about the proposed rota or the shift allowance. Mr Ormsby had not seen the Claimant's proposed shift pattern until the day of this Tribunal hearing nor had the same been discussed with him.

26 On balance of probabilities and having regard to the contemporaneous documents and the evidence to this Tribunal, I prefer the evidence given by the Claimant and find that there was an agreement that the Claimant would be paid his shift allowance in the Anti-Social Behaviour and that the production of a shift pattern rota to match that in Markets was a mere formality to justify the allowance rather than a pre-condition to entitlement to it being paid.

27 The single status agreement was not something which was in the Respondent's mind at the time of the discussions or even on 19 December 2016. It was not the genuine reason for removing the shift allowance and/or arguing that the proposed shift rota did not mirror that in Markets because of the definition of "ordinary hours". The single status agreement was not relied upon by the Respondent before its Response to the Claimant's claim in the Tribunal. I find that the decision to withdraw the shift allowance was due to concern that it may open the Respondent to an equal pay claim and the single status agreement has been used after the event as an attempt to justify that decision.

28 As a matter of contract, I am satisfied that there was a concluded agreement on 19 September 2016 that the Claimant would give up his weekend allowance but would

retain his shift allowance. He was entitled to be paid in that way thereafter.

29 The Claimant objected to the proposal to remove the shift allowance and expressed unhappiness at the way in which he was being treated. He considered that Anti-Social Behaviour was no longer a priority for the Respondent and felt that he had no prospect of a permanent job there. As such, he asked either that the Respondent honour the agreement to leave the shift allowance in place until 31 March or that it allow him to return to Markets in the New Year. The Claimant advised that if he returned to Markets, he not be available on weekends until the end of March but would forego the weekend allowance. The Claimant could not immediately return to weekend working because he had entered into commitments believing that he would be working weekdays only in Anti-Social Behaviour until the end of March 2017.

30 On 21 December 2016 Mr Ormsby emailed the Claimant. He relied upon the original options given on 15 September 2016 and did not take into account the agreement reached with Ms Davis subsequently. Mr Ormsby stated that if he returned to his substantive Markets post, the Claimant needed to return to weekend work too. Mr Ormsby did not attempt to accommodate the problems with weekend working which had arisen since September 2016.

31 The Claimant commenced a period of sickness absence due to stress.

32 On 3 January 2017, the Claimant was advised that he must repay £500.16 in respect of the weekend allowance which had been paid in October and November 2016. The Claimant accepts that this was an overpayment and was properly recovered.

33 On 10 January 2017 the Claimant again emailed Mr Ormsby stating that he wished to return to Markets with immediate effect and upon all allowances. He repeated that he had never agreed to lose the shift allowance although he had agreed to lose the weekend enhancement.

34 On 12 January 2017 Mr Ormsby wrote to the Claimant having taken advice and refused to reinstate the Claimant with immediate effect into his substantive role which he suggested was “**in order to be paid enhancement whilst off through sickness**”. He indicated that the Claimant would continue to be paid the Anti-Social Behaviour basic rate with no enhancements for weekend or shift working. The position was subsequently modified when the Claimant began to receive the travel allowance for the Anti-Social Behaviour role which had not previously been paid to him.

35 Whether or not it was reasonable for Mr Ormsby to refuse to permit the Claimant to return to Markets in January 2017 is not a matter for this Tribunal. Its only relevance it that the Claimant remained contractually entitled to the basic rate of pay for the Anti-Social Behaviour post, the shift allowance which I have found had been agreed in September 2016 and the travel allowance with retrospective effect to October 2016.

36 In other words, for each of the months from 1 October 2016 to 31 March 2017, the Claimant was entitled to pay of £3,267.80(g), which gives a net figure of £2,296.03 per month. The total properly payable to the Claimant in the whole six-month period was £13,776.18 (net). The actual sums paid to the Claimant in this six-month period,

taking into account the weekend allowance overpayment which was properly deducted, the was £13,186.14 (net). This leaves an underpayment of £590.04 (net). There was no relevant provision in the contract authorising the deduction. The claim for unauthorised deduction from wages therefore succeeds.

37 The Claimant has paid fees in connection with this claim, with £160 on issue and £250 for the hearing. **In R (on the application of UNISON) v Lord Chancellor** [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the Claimant. The details of the repayment scheme are a matter for HMCTS.

Employment Judge Russell

18 August 2017