Appeal No. UKEAT/0416/12/GE

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 16 July 2013

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR M CLANCY

MRS A GALLICO

MR M BORRER — APPELLANT

CARDINAL SECURITY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TONY GREENSTEIN (Representative) Brighton & Hove Unwaged, Advice & Rights Centre 4 Crestway Parade The Crestway Brighton East Sussex BN1 7BL
For the Respondent	MR STUART MORLEY (Representative) NorthgateArinso Employer Services Warwich House Hollins Brook Way Pilsworth Industrial Estate Bury BL9 8RR

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

The issue was whether the Appellant had a contractual entitlement to work 48 hours each week. The Employment Tribunal found he had no entitlement to work a minimum number of hours: "no work, no pay". The EAT allowed his appeal, holding he had a contractual entitlement to work 48 hours each week and remitted the issue of constructive unfair dismissal to the same ET for rehearing.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. This is an appeal against a decision by the Employment Tribunal sitting at Havant (Employment Judge John Warren presiding) and sent to the parties on 28 May 2012 which held that the Claimant was not unfairly constructively dismissed by Cardinal Security Limited and that the Respondent did not make unlawful deductions from his wages and as there was no dismissal he had no entitlement to notice of pay. The Respondent is a security company. The Claimant was employed by the Respondent as a security guard from 28 September 2009 until his employment ended on 12 November 2011. The principal issue is whether the Claimant had a contractual right to work a guaranteed number of hours each week, namely 48 hours.

2. The relevant facts found by the Tribunal are as follows.

(1) At the time the Claimant and a Mr McCarthy were taken on the Respondent was recruiting to cover 102 hours at Morrisons' Brighton store.

(2) Thereafter, the Claimant worked principally at the Brighton store, working 48 hours a week.

(3) At the time of his appointment, the Claimant was sent a letter that stated that the terms of employment would be set out in the main terms of employment.

(4) The statement of main terms of employment included the following: (a) in relation to place of work, "You may be required to work at any of the company's assignments and it is a condition of your employment that you are prepared whenever applicable to transfer to any other of the company's assignments"; (b) in relation to remuneration, "After completing training you will be paid the rate applicable to the assignment to which you are allocated. On your initial assignment the hourly rate is to be agreed. The rate for subsequent assignments will vary and may result in an increased or decreased hourly rate

of pay. Further details are contained in the employment handbook"; the Tribunal was not provided with a copy of the employment handbook; and (c) in relation to hours of work, "Your working hours will be specified by your line manager". The statement of main terms then goes on to deal with those who wish to opt out of the 48-hour **Working Time Regulations** provision.

(5) The Claimant indicated in evidence that he would receive on a regular basis a text from his area manager weekly telling him or confirming where he was to be working the following week. If he did not receive a text, then he would contact the control centre and be told where would be working the next week.

(6) In addition to being based on the Morrisons contract at the Brighton store, the Claimant would also cover on the Morrisons contract when individuals were absent on holiday or through sickness at other of the Morrisons' stores.

(7) Towards the beginning of October 2011 Morrisons requested that the Claimant be moved from the Brighton store; pursuant to their contract with the Respondent, Morrisons were entitled to make this request.

(8) The Claimant moved to Morrisons' Seaford store, where he worked for the next two to three weeks.

(9) On or about 25 or 26 October 2011 the Claimant was informed that the manager of the Seaford store was unhappy, for similar reasons as those given by the Brighton store, to have the Claimant guarding the store. Because no alternative work could be found for the Claimant for the next few days, arrangements were made for him to use up some outstanding holiday entitlement to which he was contractually entitled.

(10) Around 30 October 2011 Morrisons put formally in writing their concerns about the Claimant to the Respondent. Ms Morbey, the Respondent's regional operations manager,

then immediately contacted others within the Respondent's operation to see whether or not they had other assignments to which the Claimant could be assigned.

(11) Mr Hue, the Respondent's manager of the contract that looked after Peacocks, said that he had three shifts the following week that the Claimant could be put on.

(12) However, before the Claimant could start working on another client's contract, the Respondent considered it necessary to clarify the situation regarding the complaint made by Morrisons. A meeting with the Claimant was arranged for 7 November.

(13) After 7 November the Claimant was offered and worked for three days at Peacocks' store in Brighton.

(14) The Claimant and Mr Hue had a conversation on 11 November when the Claimant said that he was resigning because the Respondent did not offer him enough hours and "for no other reason".

(15) During the same conversation Mr Hue told the Claimant that the other guard on the Peacocks contract had indicated that he was leaving as of 10 or 11 November, so there would have been for the Claimant a full-time position of 38 hours at the Peacocks store in Brighton.

(16) On 12 November 2011 the Claimant wrote to Mr Stone, the Respondent's group human resources manager, stating, in so far as is material, "Following my conversation with James Hue today and the letter to you yesterday from my union representative Tony Greenstein, I have decided to resign forthwith. I was told there was only one day's work for me next week. I have been suspended without pay for over 2 weeks. The present situation is intolerable. I have worked as a security guard at Morrisons for over 4 years, including two with you. I always worked 48 hours a week. You are in clear and fundamental breach of my contract of employment. As far as you and the company are concerned, employment rights do not exist. I absolutely reject your statement that I was

on a zero hours contract. I worked the same hours since I have been with you. Given the way you have behaved, I therefore have no alternative but to resign". The Respondent replied by letter dated 14 November saying that the Claimant's letter was of concern to them and that before they accepted the resignation they wanted to discuss it and investigate matters with the Claimant. Mr Greenstein for the Claimant responded to that letter by email the following day.

3. At paragraph 22 of the decision the Tribunal recorded that it had asked itself the question: what were the terms this Claimant was employed on? Referring to the statement of main terms of employment the Tribunal said it

> **"[…] is clear that the contract enables the employer to move the employee from one site to another. That the remuneration paid by the Respondents to the employee can vary so that if an employee is paid a particular rate on one site the contract provides he can be moved to a different assignment at a lesser rate and that is something which the Respondents are entitled to do. Then we move to the hours of work 'your working hours will be specified by your line manager'. The evidence of the Claimant was that he was texted each week and if not texted would check up with the controller as to where he was working the next week and it must follow on which contract and hence for what hours."**

4. The Tribunal continued:

> **"23. That would not be the practice of a normal employee, someone who is employed in an office nine to five, they do not phone up on Friday afternoon to find out where they are working the next week.**
>
> **24. It is very clear that the hours of work are 'your working hours will be specified by your line manager'. That was why the Claimant checked up each week to see what those hours were.**
>
> **25. The fact that the Claimant had worked for two years working on that basis save for times off when he was working on some other site is that sufficient to imply that the Claimant was working there fixed on 48 hours a week? We think not.**
>
> **26. It is clear and it is not uncommon in security contracts that this arrangement occurs so in the period towards the end of October when the Claimant was not assigned to any particular site and therefore given no work that was not a breach of the term of his contract. That was something that the Respondents were entitled to do and it follows no work no pay. So by not working the Claimant was not entitled to be paid during that period so there can be no unlawful deduction from wages."**

5. That analysis led the Tribunal to find (at paragraph 28 of the decision) that there was no breach of the fundamental term of the Claimant's contract and so he was not entitled to resign or terminate the contract and claim unfair constructive dismissal. So, the Tribunal concluded, both the unlawful deduction from wages and the constructive unfair dismissal claims must fail, and it also followed that the claim for notice pay must also fail.

6. In summary, Mr Greenstein, for the Claimant, puts forward four grounds of appeal. First, the Tribunal accepted, without actually making a finding to this effect, that the statement of main terms of employment was incorporated into the Claimant's contract of employment. The grounds of appeal state that the Claimant denies receiving this document until after being suspended on 26 October. Second, the Tribunal erred relying on the statement of main terms of employment in concluding that the Claimant was employed in effect on a zero-hours contract. Third, the Tribunal failed to have regard to the intention of the parties, the relevant bargaining power of the parties and the course of conduct of the parties when operating the contract when finding that there was a zero-hours contract. Fourth, the Judge displayed antagonism, hostility and bias.

7. We shall consider each of these grounds in turn. Regarding ground 1, incorporation of the statement of main terms of employment in the Claimant's contract, at paragraph 11 of his witness statement before the Tribunal dated 26 February 2012 the Claimant said:

> **"I did not have a contract but simply terms and conditions that are described as being incorporated within a contract of employment."**

8. That appears to be a reference to the statement of main terms of employment. At paragraph 9 of the decision the Tribunal make a finding that the Claimant was sent a letter that

refers to the terms of employment that would be set out in the main terms of employment. There is no express finding that he received this statement of main terms of employment. However, we consider that on the evidence the Tribunal was entitled to assume that he did, and Mr Greenstein does not argue to the contrary.

9. Grounds 2 and 3 can properly be considered together. The Respondent accepts that the Claimant was an employee employed under a contract of employment. This is not a case where there is a dispute as to the genuineness of a written term in an employment contract (see **Autoclenz Ltd v Belcher** [2011] IRLR 820). There is no express term in the contract, as in **Pulse Healthcare Ltd v Carewatch Care Services Ltd** UKEAT/0123/12, that the hours of employment should be zero hours. The question in this case, as in every case, is: what was the true agreement between the parties? In this regard the Supreme Court in **Autoclenz** approved the approach of this Tribunal in **Consistent Group Ltd v Kalwak** [2007] IRLR 560 and that of the Court of Appeal in **Firthglow Ltd v Szilagyi** [2009] IRLR 365. All of the relevant evidence must be examined, including the written terms of the contract, how the parties conduct themselves in practice and their expectations of each other. The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement (per Clarke LJ, **Autoclenz**, paragraph 35):

> **"[…] in truth represent what was agreed, and the true agreement will often have to be gleaned from all the circumstances of the case of which the written agreement is only part."**

10. At paragraph 12 of his witness statement the Claimant stated:

> **"48 per week was agreed by Anya Morbey at my interview, over 2 years ago and there has never been any hint that this might be subject to change or review."**

11. Ms Morbey in her witness statement at paragraph 4 says that the Claimant did not have a contractual right to a minimum number of hours per week. The Tribunal does not deal with this evidence in its decision. However, we infer that the Tribunal did not accept that there was an express agreement that the Claimant would be given 48 hours per week at the interview; if it had, that would have concluded the issue.

12. We turn, then, to consider the findings made by the Tribunal. The Tribunal found:

(1) that at the time of recruiting the Claimant and Mr McCarthy the Respondent was doing so for them to cover 102 hours at Morrisons' Brighton store between them;

(2) that the Claimant worked from the commencement of his employment for the next two years principally at the Brighton store working 48 hours per week;

(3) that then for two to three weeks he worked the same hours at Morrisons' Seaford store; and

(4) that when Morrisons formally expressed their concerns about the Claimant the Respondent sought to find him alternative work, at first, when it was not available, they arranged for him to use some outstanding holiday entitlement and thereafter found him temporary work at Peacocks, and then the offer of a full-time position of 38 hours, 4 or 5 days a week, at the Peacocks store in Brighton.

13. The Tribunal's conclusion that the Claimant had no contractual entitlement to guaranteed hours of work, namely 48 hours, appears to be based on two findings: first, the provision relating to hours of work in the statement of main terms of employment that his working hours would be specified by his line manager; and second, the evidence of the Claimant that he was texted each week, and if not texted would check up with the controller as to where he was

working the next week, from which the Tribunal inferred it must follow on which contract and hence for what hours.

14. Mr Morley, who appears for the Respondent, supports the analysis of the Tribunal. Mr Morley, relying on the provision as to hours of work in the statement of main terms that the Claimant's working hours would be specified by his line manager, submits that the Claimant had no contractual entitlement to any work and accordingly no entitlement to any remuneration under his contract of employment. He submits the Respondent was not contractually obliged to provide the Claimant with any work. He adds, as did Ms Morbey in her witness statement, that as long as the Respondent had work available it would of course try to ensure that staff were provided with work, but that does not amount to a contractual obligation to provide work.

15. In our view, the two matters that the Tribunal considered to be interrelated – see paragraph 24 of the decision – neither individually nor cumulatively lead to the conclusion that the Claimant had no guaranteed hours of work. We do not accept Mr Morley's submission that the Claimant had no contractual entitlement to be provided with any work. In our judgment, the true agreement between the parties, considering the evidence as a whole and by reference to the specific findings made by the Tribunal that we have referred to, is that the Claimant did have a contractual entitlement to work 48 hours each week. His remuneration for these hours of work would depend on the rate applicable to the assignment to which he is allocated.

16. Regarding ground 4, bias, in our view there is no basis for this allegation. HHJ Shanks, making a rule 3 direction, observed that there was no apparent substance in this ground, and Mr Greenstein has not sought to resurrect this ground before us.

17. In summary, for the reasons we have given, we are of the view that the Claimant had a contractual entitlement to work 48 hours each week. This case must therefore now be remitted to a Tribunal to determine whether in the light of this conclusion there was a repudiatory breach by the Respondent on the facts, whether there was a constructive dismissal, and if so, whether the constructive dismissal was unfair.

18. Mr Greenstein has invited us to remit the case to a newly constituted Tribunal. He does so on the basis that he clashed with the Employment Judge, who showed, he said, hostility towards him as an advocate, and that, this Tribunal having reached a different conclusion from the Employment Tribunal on the law, it would be difficult for that Tribunal to consider this case further. We reject this submission. We have had regard to the guidance given in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. We have no reason to doubt that the Tribunal will be able to deal with this matter in a proper manner following our decision. Our conclusion on the law has been reached by reference to the findings of fact made by the Tribunal. Time and expense is likely to be saved by remitting the matter to the same Tribunal. Accordingly, we allow this appeal and remit this case to the same Tribunal for reconsideration.