EMPLOYMENT TRIBUNALS

Claimant: Mr. P. Klicner

Respondent: G4S Secure Solutions UK Limited (1)
G4S PLC (2)

Heard at: **London South Croydon** **On:** **21 June 2017**

Before: **Employment Judge Sage**

Representation
Claimant: In person
Respondent: Ms J. Owusu-Akyaw In-House Counsel

JUDGMENT having been sent to the parties on ***12 July 2017*** and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 1 March 2017, the Claimant claimed constructive unfair dismissal "by reason of unpaid holiday entitlement" and holiday pay. He had been employed by the Respondent starting on 26 December 2012 and ending on 16 January 2017 as an Events Steward. The Claimant stated in his claim form he was claiming the sum of £205.44 together with compensation for unfair dismissal.

2. In response, the Respondent stated that the Claimant did not have two years' continuous service to bring a claim of unfair dismissal and did not give notice of his resignation therefore did not receive any notice pay. It was submitted that the Second Respondent was a Holding Company of the First Respondent and was not the employer.

3. It was submitted on behalf of both Respondents that the Claimant was not an employee but was a casual worker who did not have two years' continuous employment. The Claimant could therefore not pursue a claim of unfair dismissal. There was also a lack of mutuality of obligation between the parties as this was specifically excluded in the contract. He was free to turn down work and the contractual relationship only subsisted

when the Claimant was working and it ended when an assignment came to an end.

4. The Respondent stated that the Claimant's claim for holiday pay for the years 2013 and 2014 were out of time and therefore the Tribunal does not have jurisdiction to consider them. The Respondent also stated that the Claimant did not work in the year of 2017 so is not entitled to annual leave pay.

The issues

The issues in this case as follows:

5. Was the Claimant an employee and therefore entitled to bring a claim of unfair dismissal?
6. Had the Claimant accrued two years of continuous service?
7. Who is the proper Respondent?
8. Was the Claimant unfairly dismissed?
9. The Claimant claims he was constructively unfairly dismissed and must show that there was a fundamental breach, and he resigned because of that breach. The Claimant told the Tribunal that the fundamental breach was as follows:
    a. the contract was not valid
    b. there were several attempts to change the contract and
    c. he had to remain on the books to remain on the database.
10. Is the Claimant entitled to compensation if found to have been unfairly dismissed?
11. At the date of termination, was the Claimant due any holiday pay?

Witnesses

The witnesses before the Tribunal were the Claimant
For the Respondent, we heard from Mr Banaris the Operations Manager for the First Respondent.

Findings of fact.

12. The First Respondent provides security officers and security and surveillance services to a wide variety of client premises; the Second Respondent is a Holding Company. There was no evidence that the Second Respondent was a trading entity or that it employed any staff. The Tribunal therefore find as a fact that the consistent evidence before the Tribunal was that the First Respondent was the proper Respondent.

13. Mr Banaris gave evidence on behalf of the First Respondent and told the Tribunal he had been Operations Manager since January 2012; as part of his role he provided staff for security and stewarding. He confirmed that the Claimant commenced employment in the Events Section of the business on 26 December 2012 on a zero hours' contract as a casual worker.

14. Mr Banaris told the Tribunal that the Claimant would volunteer for work by accessing the First Respondent's computer system called ESS which would provide him with an opportunity to sign up for shifts. He described

how the Claimant only worked occasionally for the First Respondent and stated that the Claimant worked on New Year's Eve in 2012 (see page 86 of the bundle) and his next assignment was not until March 2013, which was evidenced at page 88 of the bundle.

15. Mr Banaris told the Tribunal that all those working for the First Respondent are casual employees and he referred to the terms and conditions of employment seen at pages 41 to 52 of the bundle. The Tribunal were taken specifically to page 41 of the bundle which was a sample letter which stated "on each occasion when you accept work offered by the company, your contract of employment with the company will commence on the date when you start the work accepted by you and will end on the date when you finish the work (unless it is mutually agreed that the period of work should continue)". The letter also stated that the work was offered on an "as and when required basis." There were no guaranteed minimum hours of work.

16. The Tribunal saw the terms and conditions of employment at pages 47 to 52 bundle. At page 47 at paragraph 1.5 it stated that if employees do not work over 'a continuous period of three months' they would have to be re-screened and on that basis their contract would be terminated. At paragraph 7.1 the contract stated that "on each occasion when you accept work for from the company, your contract of employment will commence when you start the work and end when the work is finished." Again, in the contract paragraph 8 on page 48 of the bundle it confirmed that there were no minimum guaranteed number of hours under the contract and that the actual hours of work were agreed on an event by event basis and were agreed in advance. The Tribunal therefore find as a fact that this was a zero hours contract, between assignments there was no mutuality of obligation. The terms and conditions of employment and the working patterns were consistent to meet a genuine need to staff one off events.

17. The holiday entitlement due to the Claimant under his contract was seen at page 49 of the bundle at paragraph 16. It confirmed that the Claimant was entitled to 5.6 weeks per annum of which eight days were paid in lieu of bank holidays. The company's holiday year was the calendar year and casual employees were entitled to a pro rata of the leave entitlement which was usually quoted in hours (paragraph 16.3). The contract confirmed that the annual leave entitlement was equivalent to 12.07% of the total working weeks in the year. The onus was on employees to ensure that they took all their annual leave during the holiday year and that "untaken holidays cannot be carried forward from one holiday year to the next. No payment will be made of untaken holidays." (See paragraph 16.7). The Tribunal saw the annual leave policy at pages 77 and at page 81 of the bundle it stated that "calculation for annual leave for casual workers will be based on average hours over a 12 week period" and any applications for leave "must be made at least one month in advance using a leave application form". The specific policy that applied to annual leave for Events Casual Staff was at pages 83-4 of the bundle and it was noted that the Respondent "encourages all casuals to take any accrual of annual leave"

18. The Tribunal heard that Mr Banaris would occasionally call the Claimant to offer work and it was open to him to accept or refuse any work offered. The Claimant's work pattern appeared to reflect this as the Tribunal noted that the Claimant only worked one day in August 2016 (see page 111 of the bundle), he then worked one day in September 2016 (see page 112, the bundle), he did not work in October and then only one day in November 2016 (see page 113) and he did not work in December 2016.

19. The Tribunal heard evidence that in order to be paid for annual leave the calculation of the amount due was produced by the computer system called Signet. The contract also called for leave to be applied for giving notice of one month by completing an annual leave form. The Tribunal heard that in the calendar year of 2015 the Claimant worked 40 hours and in 2016 he worked 51.33 hours. Using the calculation in the contract at 12.07%, the Claimant was due to be paid 4 hours and 49 minutes of annual leave for 2015 and in 2016 was entitled to 6 hours and nine minutes of annual leave. If the rate of pay were applied to these figures (which at the time they were accrued at a rate of £7.20 an hour) the gross annual leave figure was £75.42p. The First Respondent's evidence was that these sums were paid to him into payslips dated the first and 15 March 2017.

20. The Claimant accepted he received the sum of £75.42 from the Respondent and he accepted in answers to cross examination that he had been paid outstanding holiday owed to him, after he had notified ACAS of his claim. The Claimant was asked in cross examination whether he accepted he been paid all his holiday entitlement due to him, he stated that he thought it was about £85 and suggested it he may be owed a further sum of £10 but could provide no evidence to substantiate this. Although it was put to the Claimant that payment of his outstanding holiday pay had been authorised by Mr Banaris on 29 February, the Claimant stated that he was not notified of this and received no notification that this was being paid to him. The Claimant told the Tribunal that he was "misled" by the Respondent's holiday pay policy but did not explain how he had been misled and in what way. There was no consistent evidence before the Tribunal that the Claimant had been misled, as he emailed Mr Banaris on the 15 January 2017 stating that he had "not been paid in respect of the statutory holiday entitlement", the reply he received the following day from Mr Banaris was "Have you claimed this via ESS", the Claimant replied that he had. This was the correct procedure to follow and the Claimant confirmed that he had followed the correct process. He was subsequently paid his accrued leave entitlement. There was no evidence that the Claimant was misled or he had misunderstood the process. There was also no evidence that he had been denied the right to claim for his statutory holiday pay.

21. Mr Banaris told the Tribunal he had not been informed of the Claimant's resignation; he was not aware that the Claimant had purportedly resigned on 16 January 2017 and in support of this he referred the Tribunal to an email he sent to the Claimant on 18 January 2070 wishing him all the best the New Year and listing all the 2017 events at Edgbaston, where he worked (see pages 178 180 bundle). The Claimant confirmed in answers to cross examination that he "discontinued" his

employment; he told the Tribunal that he told ACAS that, if he did not receive his monies owed, he would claim constructive unfair dismissal. He accepted he did not communicate his decision to accept no further work after January 2017. The Tribunal find as a fact that the Claimant did not resign from his employment and he did not communicate his decision to accept no further work. There was also no evidence to suggest that his decision to discontinue his relationship with the Respondent was as a result of a fundamental breach (or any breach) committed by the Respondent as the Claimant had completed a holiday pay request form, which had been processed and paid in accordance with the First Respondent's policies and procedures.

22. The First Respondents computer system recorded that the Claimant's contract terminated on the 19 April 2017.

The Respondent's oral submissions.

23. You have heard evidence from the Claimant. He was only paid by the First Respondent and only provided work by the First Respondent therefore we state that the claims against the Second Respondent should be dismissed.

24. On 26 December 2012, the Claimant began work for the First Respondent, the Claimant was based in the Midlands and fell within the area covered by Mr Banaris. There were a number of employees in this area and the Claimant was on zero hours' contract. He was not an employee he didn't work regularly, he worked every 6 to 7 weeks. He was not working every week and did not have continuous service. We contend that there was no mutuality of obligation and we refer to pages 41 to 52 of the bundle. The Claimant accepted that be the case, he accepted he was available for work and on occasions not provided with any work. It depended on whether the Claimant was available and work was available. He was free not to accept he wasn't obliged to accept, therefore we state there was no mutuality of obligation.

25. We also state that the Claimant does not have two years' continuous service. There were significant gaps in his employment and he accepted that he worked one day every six weeks. There was no temporary cessation of work. He tried to refer to some collateral agreements, even if the Tribunal accepted this argument there was no continuous contract. The Claimant was given a recommendation that if he did not work once every three months would be taken off the books. However, there was no prior agreement. In 2017 the Claimant didn't work at all and a P45 was sent to him until April 2017. We say the Claimant therefore does not have continuity of service for two years and cannot claim unfair dismissal.

26. Turning to the claim of constructive unfair dismissal, I refer to the case of Weston Excavating v Sharp which states there must be a repudiatory breach, the Claimant must also resign as a result of that breach. The Respondent states there is no breach and the Claimant has made no reference to a breach. The Claimant was always allowed to take his holiday and was paid in 2014. The Respondent states the evidence that when the Claimant brought to their attention that he had not been paid holiday pay; they paid it and the Claimant never complained. The Claimant

did not resign and he accepted that he never communicated his intention to resign to the Respondent. This is a fundamental part of his unfair dismissal claim.

27. I refer to the case of Hunt v British Railways Board [1979] IRLR; the Claimant's conduct is inconsistent with a resignation. At best, it is equivocal. Silence is inconsistent with resignation and the Claimant's behaviour does not reach that standard.

28. The Claimant claims holiday pay and it is incumbent upon him to show that he was not paid and he has failed to show this. The Respondent gave evidence that the calculation was checked against the government website, the Claimant refers to a supplement but cannot show that it should be part and parcel of the rate of pay. The Claimant's claim should therefore be dismissed.

29. The **Claimant's oral submissions** were as follows: over the last two years I have suffered a financial loss of £75. This has been paid to me. This is fraud indictable and a conspiracy to defraud under the criminal Justice act. I had no chance to continue with my employment. I will refer to the CPS about this matter. I am a victim of fraud. Others may be affected by these policies.

The Law

Section 95 Employment Rights Act 1996

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Regulation 13 Working Time Regulations 1998

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(3) A worker's leave year, for the purposes of this regulation, begins--

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply--

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture [in Wales or Scotland]) except where, in the case of a worker partly employed in agriculture [in Wales or Scotland], a relevant agreement so provides.

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)] equal to the proportion of that leave year remaining on the date on which his employment begins.

(6)-(8) ...

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but--

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

Rule 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that--

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; [or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]

Decision of the Tribunal

30. I first conclude that the consistent documentary evidence shows that the First Respondent is the proper Respondent for the reasons stated above at paragraph 12, there was no evidence before the Tribunal to suggest that the Second Respondent was the employer in this case. The claims against the Second Respondent are therefore dismissed. The First Respondent shall in the following paragraphs be referred to as the Respondent.

31. Dealing with the first issue of whether the Claimant's claim for constructive unfair dismissal against the Respondent can proceed, the Claimant must show that he was an employee of the Respondent and he had accrued continuous service of two years.

32. The Tribunal saw the consistent evidence that the Claimant was employed on a casual as and when required basis. The offer letter and the statement terms and conditions at page 48 bundle at paragraphs 8.1 and 8.2 provide consistent evidence to show that the employment relationship commenced on the first day of an assignment and ended on the last day of an assignment. The Claimant accepted in evidence he was free to accept or reject any work that was offered to him. The evidence was therefore consistent with a casual contract; between assignments there was no evidence of mutuality of obligation on either side. The Respondent was not obliged to offer work but if they did, the Claimant was not obliged to accept it. The terms of the contract were consistent with the working practices, this is not a case where the contract amounted to a sham.

33. The Claimant accepted that he only worked one day every six weeks and there were a few months where he carried out no work at all. He also accepted he did no work in 2017 his last assignment being in November 2016. The Claimant prays in aid in support of his contention that there was a continuing contract or an overarching contract that all casual workers were expected to work one shift every three months to avoid having to be re-screened. The Respondent provided a good reason for making this a requirement (see page 42 of the bundle), this requirement did not amount to sufficient evidence to suggest that between assignments, there was mutuality of obligation or continuity of employment. A requirement for all casual workers to work once every three months did not create mutuality of obligation to suggest that, between assignments, there existed a contractual obligation that could amount to an employment relationship.

34. I conclude therefore that there was no mutuality of obligation between assignments worked and during the significant gaps between assignments when no work was carried out, continuity of service was broken. The Claimant does not have sufficient continuous service of two years required to pursue a claim for unfair dismissal.

35. Even if I am wrong about the issue of continuity, the next issue for the Tribunal is whether the Claimant resigned. The Claimant conceded in cross examination that decided to discontinue his employment and he added that during his discussions with the ACAS conciliator (the conciliation process ran from the 29 January until the 24 February 2017) he informed them he <u>would</u> resign if he didn't receive his holiday pay (see above at paragraph 21), which strongly suggested that he had not resigned. The evidence ran counter to his evidence to the Tribunal and in his claim form that he resigned on 16 January 2017; there was no evidence of a resignation in the bundle or in his witness statement. The Claimant also conceded in cross examination that he failed to inform the Respondent that he had resigned. In the light of the Claimant's inconsistent evidence, I conclude that he did not resign from the Respondent Company. This conclusion is entirely consistent with the Respondent's evidence that they received no communication from the

Claimant resigning from his position. The evidence at page 175 dated the 16 January 2017 corroborated that the Claimant's holiday pay claim was being processed and corroborated that the relationship was continuing. I therefore prefer the consistent evidence of the Respondent that the Claimant did not resign from his employment and did not communicate his intention to do so.

36. Even if I am wrong on the issue of whether the Claimant resigned, it is incumbent on the Claimant to show he resigned as a result of a fundamental breach. I asked the Claimant what he replied upon in order to resign at the start of the hearing and he suggested that it was due to the fact that the contract was not valid, that they changed his contract and there was a collateral contract requiring him to stay on the books. These matters were not referred to in his claim form or in his statement and he produced no evidence in support of any of the above allegations. There was no evidence that the Respondent had attempted to change his contract and no evidence that the contract was 'not valid', the consistent evidence before the Tribunal was that he was offered and accepted the contractual terms and worked in accordance with those terms and conditions without complaint. There was a term in the contract that required him to work once every three months otherwise the contract would terminate due to the need to re-screen. There was no evidence that the Respondent had breached the Claimant's contract either expressly or by their conduct. It was noted that in his claim form he stated that he was claiming unfair dismissal "by reason of unpaid holiday" this was at variance to what he told the Tribunal at the start of the hearing; the Tribunal conclude that the Claimant's evidence was inconsistent and unreliable.

37. There was no evidence that the Respondent had refused to pay the Claimant his holiday pay due and owing and had in fact paid his accrued holiday pay in accordance with the terms of the contract. There was no evidence of a breach and no evidence that the Claimant resigned (or left) in response to a fundamental breach.

38. The Claimant conceded in cross examination that he was paid approximately £75 in respect of accrued holiday pay by 1 March, the only reason he had not been paid his holiday pay for the 2015 to 2016 before that date was due to the fact that he had not claimed it in accordance with the Holiday Pay Policy. The Claimant conceded he was paid his annual leave in 2014 when he claimed it and he also conceded he received the money for accrued holiday for 2015 and 2016. It was also noted under the annual leave policy that if the Claimant had resigned unequivocally and communicated this to the Respondent, he would have received all outstanding holiday pay due to him on receipt of his resignation as he had not resigned this procedure did not come into play.

39. I conclude therefore that the Claimant's claim for constructive unfair dismissal against the Respondent is not well founded and is dismissed.

40. Turning to the Claimant's claim for holiday pay, the Claimant accepted when put to him in cross examination that he was only owed "about £10." He suggested that he was owed about £85 and had already received £75.

The Claimant suggested he was entitled to a supplement for travel time but was unable to be specific as to whether it was paid (and if so in respect of which assignment) and how much it amounted to; he produced no evidence to support his claim that his holiday pay had in some way been underpaid. In the absence of any consistent evidence to show that there has been an underpayment holiday pay this claim is dismissed due to the lack of evidence.

The Respondent's claim for Costs.

41. After the decision was delivered the Respondent then presented their application for costs. The Respondent stated that they were claiming their costs of £200 which was travel costs of £105.50 and a hotel bill of £94 the total which came to around £200. The Respondent stated that they informed the Claimant via ACAS that he would be paid his holiday pay and that they informed him the amount that he would be paid and how the hours were calculated. The Respondent stated that the first time they became aware of the Claimant's unfair dismissal claim was when it appeared in the claim form, this was not raised via ACAS.

42. The Respondent stated they were claiming costs as the Claimant's claim had no reasonable prospect of success and the Respondent warned the Claimant of this in the response from and during the ACAS conciliation and a costs warning was given to the Claimant.

43. The Claimant accepted that the offer to pay holiday pay was made, but he was suspicious because they required it to be subject to a confidentiality clause. The Claimant told the Tribunal that he had a suspicion of fraud and therefore at wish to proceed to Tribunal. The Claimant told the Tribunal that what Respondent said to the Tribunal was untrue.

Decision on Costs

44. The Tribunal considered the Respondent's application costs and it was concluded that this is a case where costs should be awarded as the Claimant's claims for unfair dismissal and holiday pay had no reasonable prospect of success. There was no evidence that the Respondent had committed a fundamental breach and no evidence that the Claimant was an employee with two years' continuous service. The Claimant also accepted that he had been paid his holiday pay and could not provide evidence to support his claim that he was owed more money than that already paid to him. This was a case that had no reasonable prospect of success.

45. The Tribunal took into accounts the Claimant's ability to pay; he told the Tribunal that he had a monthly income of about £1400 and his rent was £500 and bills of £300, he paid Internet of £30 and his mobile bill was approximately £10 a month.

46. Having taken into account ability to pay, the Tribunal allowed the Respondent's cost of travel but not the hotel bill; this was a journey that

could have been undertaken on the morning of the hearing therefore it was not reasonable to claim an overnight stay.

47. The Claimant is therefore ordered to pay to the Respondent their costs of £100.

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Employment Judge **Sage**

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Date: 6 September 2017