EMPLOYMENT TRIBUNALS

Claimant: Mr H Elagud

Respondent Britannia Jinky Jersey Limited

HELD AT: Liverpool **ON:** 14 December 2017
26 February 2018

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: J Thackeray, litigation friend
For the Respondent: R Wyn Jones, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. the claim of unfair dismissal is not well-founded and is dismissed;

2. the claims of breach of contract and unauthorised deductions from wages, in relation to Duty Manager's pay and also for 39 hours per week are not well-founded and are dismissed; and

3. the claims for redundancy pay, notice pay and holiday pay are dismissed on withdrawal.

REASONS

The claims

1. In his ET1, the claimant indicated that he claimed unfair dismissal, redundancy pay, notice pay, holiday pay and arrears of wages. A claim of discrimination was added within further and better particulars of the claim which were filed on 18 April 2017 and subsequently withdrawn by a letter dated 26 June 2017.

2. At the beginning of the first hearing day, the claimant confirmed that he had been paid his redundancy pay by the respondent and also had been paid notice pay in lieu, so those claims were withdrawn and are dismissed on withdrawal by the claimant.

3. In respect of holiday pay, the claimant claimed holiday pay accruing during his notice period; however, he had not worked for a period of notice. After discussion, the claimant withdrew his holiday pay claim which is dismissed.

4. The claims of unfair dismissal and in respect of arrears of wages proceeded. The claimant confirmed that his claim for arrears of wages consisted of a claim for pay at what the claimant contended was the rate for Duty Managers, and also in respect of pay for 39 hours per week.

The hearing

5. The liability hearing took place over 2 days, 14 December 2017 and 26 February 2018. The oral evidence was completed only at the very end of the second day. As there was insufficient time for submissions, the claimant's representative asked to hand in his written submissions at the end of the hearing day. Counsel for the respondent agreed to, and did send written submissions to the tribunal within 7 days and so the tribunal reserved its judgment.

Evidence

6. An agreed bundle of documents extending to 3 full lever-arch files was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the bundle.

7. The claimant requested that the tribunal listen to a covert recording he had made of his final consultation meeting. The claimant's transcript of the recording appeared in the bundle and the respondent confirmed that it agreed the transcript was accurate and complete. The tribunal did not consider that listening to the recording was a proportionate use of the hearing time and so refused the application. The claimant's representative was invited to cross-examine the respondent's witnesses on the agreed transcript and, if there were any points of evidence that would be assisted by listening to a specific section of the recording, he could then make a further application. No such application was made.

8. The claimant gave evidence himself and also called Taram Spencer, a former work colleague, to give evidence. Both tendered written witness statements and were subject to cross-examination. In addition, the claimant submitted a statement from Mohsen Rabiei who did not attend the tribunal to be cross-examined; and an email from Tess Campbell which was not signed and Ms Campbell was not in attendance to confirm its contents or be cross-examined. The tribunal therefore did not take these 2 items of evidence into account in reaching its decision.

9. The respondent called Mark Teare, its General Manager at Southport, and Tina Buck, its Group Personnel Manager, to give evidence on its behalf. Each of the respondent's witnesses gave evidence from a witness statement, with Ms Buck also tendering a supplemental statement in response to the claimant's disclosure of the transcript of a meeting.

Issues to be determined

10. At the outset the tribunal discussed with the parties the claims and issues to be determined. Counsel for the respondent produced a list of issues which was discussed and agreed with the tribunal and the claimant's representative. The issues which the tribunal therefore had to decide were:

Unfair dismissal

11. There was no dispute that the claimant was dismissed by the respondent and had more than 2 years' service and was an employee of the respondent at the date of his dismissal, so is qualified to claim unfair dismissal. It was also agreed that the claimant was dismissed on 21 November 2016. The respondent says the claimant was dismissed by reason of redundancy. However, the reason for dismissal was in dispute. The issues for the tribunal were:

11.1 was there was a genuine redundancy situation? –

had the requirement for the claimant to carry out work of a particular kind, in the place where the claimant was employed, ceased or diminished?

and/or

was the requirement for the claimant to carry out work of a particular kind, in the place where the claimant was employed, expected to cease or diminish?

11.2 subject to the above, was the claimant's dismissal wholly or mainly attributable to the alleged redundancy situation, if shown, or was it for some other substantial reason?

11.3 did the respondent act reasonably or unreasonably in treating the alleged redundancy situation as a sufficient reason for dismissing the claimant, having regard to the procedures undertaken, paying particular attention to:

11.3.1 whether there was consultation about potential redundancy;

11.3.2 the pool for selection;

11.3.3 efforts made by the respondent to look for suitable alternative employment for the claimant?

11.4 If the procedure was unfair what would the outcome have been if a fair procedure had been followed? (would the Gamezone have been able to support a Gamezone Supervisor role?)

Contract

12. Which contract of employment governed the claimant's employment? Was it the 39 hour contract at page 43 as contended by the claimant or the 16 hour contract as contended by the respondent?

13. What was the claimant's main role under the relevant contract? Did the claimant perform other additional duties in addition to that main role?

14. What was the claimant's hourly rate of pay?

Duty management shifts

15. It was agreed that the claimant undertook additional hours by covering Duty Management shifts.

16. What was the claimant's agreed rate of pay for such shifts?

17. Did the respondent ever promise the claimant a higher rate of pay for such shifts?

Rate of pay for Gamezone Supervisor

18. It was agreed that the claimant's initial rate of pay for working within the Gamezone was £7 per hour.

19. What was the policy of the respondent regarding pay rises?

20. Who authorised pay rises?

21. What was the procedure for authorisation of payment of a pay rise?

22. Was the claimant entitled to an automatic incremental pay increase to his rate of pay, as the national minimum wage increased?

Findings of fact

23. Having considered the evidence, the tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which are to be determined are as follows:

24. On 26 March 2007, the claimant commenced employment with Pontins at its Holiday Centre in Southport. The claimant worked in "service support" continuously for Pontins and later for the respondent which is a large leisure company running 6 holiday parks and 53 hotels across the country.

25. The claimant was initially engaged on a series of fixed-term seasonal contracts of which one, dated 13 January 2009, provided for "*39 [hours per week] or those [hours] necessary to fulfil the requirements of the position*", for the period set out in the contract, being until 30 January 2009. However, on 1 December 2009, the claimant was given a contract for 16 hours per week and, in 2010, the claimant's seasonal contract was extended until 14 November 2010.

26. The amount and nature of the work available at the Holiday Centre is driven by customer demand and to some extent by the weather. The Centre was shut for the winter months, between November and February each year, opening for a few days at New Year or for one-off special events. During the closed months of each year, Pontins retained some

staff to undertake security, cleaning and maintenance of the Holiday Centre. The claimant was one of the employees retained at the Holiday Centre during the closed months each year although the hours he worked during the closed months were less than when the Holiday Centre was open.

27. On 21 February 2011, the respondent completed the purchase of Pontins' operations in Southport, from the Administrators of Pontins, which was insolvent. The claimant's employment formally transferred, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 4 April 2011.

28. In August 2011, Crown Leisure issued the claimant with a zero-hours contract of employment as an Arcade Attendant within the Southport Holiday Centre, which the claimant signed on 16 August 2011. Crown's arcade operation was taken over by the respondent in October 2011 when the licenses transferred and the claimant's employment under this contract formally transferred, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

29. In 2012, the respondent set up a new arcade called the Gamezone at Southport. The Gamezone originally had 2 staff and was open from 10am to 10pm daily. When the original supervisor left, the claimant took over the supervision of this activity, receiving a rise in his hourly rate of pay to £7 per hour to reflect the responsibility. The claimant was responsible for arranging the rotas for staffing the Gamezone during opening hours which were agreed by Mr Teare, and for filling any hours that he could not work, with casual staff. Over time, the Gamezone opening hours were reduced to those days and times when teenagers were likely to use the facility. Mr Teare then offered the claimant additional hours on other activities from time to time, including covering absentees' shifts when required.

30. Thereafter, the claimant did not receive a pay rise and eventually found that his pay became equivalent to the national minimum wage rate because that rate had increased each year. The claimant came to believe that any extra duties were not reflected by his rate of pay because he was paid at the same rate as other new or casual employees, regardless of his length of service, experience or responsibilities. The claimant's rate of pay eventually went up because the national minimum wage rose to £7.20 on 1 April 2016.

31. In addition to supervising the Gamezone, the claimant would, on occasion, be asked to cover a Duty Manager shift and also to work on gate security because he had the necessary licence. The claimant was considered to be a permanent employee, in contrast to those employees who were engaged for each season or on a casual basis to meet customer demand.

32. In 2015, the claimant queried his rate of pay with the General Manager, Mark Teare and asked for a pay rise. Mr Teare had no authority to award pay rises but he made representations to the respondent's directors on the claimant's behalf. The respondent did not agree to grant the claimant a pay rise.

33. In January 2016, the claimant asked the respondent if he could be made redundant. He was told that his request would be looked into but, on 29 April 2016, it was refused.

34. In February 2016, the claimant told Mr Teare that he was not prepared to cover any more Duty Manager shifts because he believed that he should be getting more money for the role of Duty Manager. However, the claimant continued to cover Duty Manager shifts.

35. On 1 April 2016, the claimant's rate of pay was increased to £7.20 per hour because of the rise in the national minimum wage.

36. In April 2016, the claimant learned that a number of other employees including Duty Managers had received a pay rise. The claimant again asked about a pay rise. Mr Teare told the claimant that he would ask the respondent again and he made representations on the claimant's behalf. Mr Teare also asked if the claimant could be promoted to a Duty Manager position but without success. Eventually, Mr Teare gave the claimant a copy of an email from a director, Eileen Downey, which confirmed that the claimant would not be getting a pay rise. As a result, the claimant decided to stop undertaking extra hours to cover for Duty Managers.

37. On 16 May 2016, the claimant submitted a grievance to the respondent about his rate of pay, lack of pay rises and pay for covering Duty Manager shifts. A grievance meeting took place on 26 May 2016, with Terri Dolan, a Head Office personnel supervisor, as a result of which the respondent increased the claimant's rate of pay by 20 pence per hour to £7.40 per hour. The claimant was told that pay rises were a decision for the respondent's head office and that nobody working at Southport had authority to give pay rises. The respondent confirmed that a director, Mr Ferrari, had agreed the claimant's pay rise in a letter dated 8 June 2016.

38. On 9 June 2016, the claimant emailed the respondent to complain that zero hours contracted staff had been given work in the winter months and that he had not always been given 39 hours.

39. On 15 June 2016, the claimant wrote to respond to the points made by the respondent in its letter of 8 June 2016. The claimant raised his contract, asserting that the contract for 39 hours which he had signed in 2009 was still in force, that he had been promised a higher rate of pay for Duty Manager duties and stated that he was working on under protest in relation to any extra hours worked.

40. On 29 June 2016, Terri Dolan replied to the points made by the claimant, asking for his evidence of a promise of a pay rise and pointing out that the contract states that the respondent reserves the right to place the claimant on short-time working hours or to lay him off from work altogether. The claimant was asked to clarify whether he wished to formally appeal the grievance outcome.

41. On 5 July 2016, the claimant sent the respondent a lengthy letter in response to the points of Terri Dolan's letter of 29 June 2016. The claimant asserted that the Duty Manager rate of pay was £8 per hour. The letter ends with the claimant saying that he had concluded that there was little point in appealing the grievance decision and, instead, he would take legal advice and consider his options. Nevertheless, on 4 August 2016, the claimant wrote to the respondent to ask them to either respond to his letter of 5 July 2016 or to confirm that they were not going to respond.

42. On 9 August 2016, the respondent wrote to the claimant to confirm that he had not provided any further evidence and so the respondent was not persuaded to change its position. The respondent also noted that the claimant had not appealed within the deadline previously set.

43. On 1 September 2016, the claimant wrote to the respondent listing his claims which were: for wages he said were owed for undertaking tasks as Duty Manager; payment for hours up to 39 per week; and for loss of earnings with sums to be calculated. The respondent acknowledged the letter as an appeal and commenced an investigation. An appeal hearing was then arranged although, as the claimant was off work due to illness, he indicated that he could not attend until October, but would be prepared to accept a paper hearing subject to being allowed to submit his concerns in writing.

44. On 1 November 2016, the claimant emailed the respondent to say his appeal submission had been delayed and shortly afterwards he submitted his appeal and supporting documents. The claimant contended that he had been promised pay at a Duty Manager wage of £8 per hour for Duty Manager work, that his workload of 3 roles had caused him stress for which he was off sick, that his contract entitled him to be paid for 39 hours per week, that pay due to him had been withheld since 2008 and that he wanted compensation for his loss of earnings.

45. Also on 1 November 2016, the respondent wrote to the claimant to notify him that his position was at risk of redundancy and inviting him to a consultation meeting. The respondent sent the claimant its business rationale for closure of the Gamezone at Southport due to falling usage and revenue, and the anticipated costs savings. The casual staff who had worked in the Gamezone for the season were all let go. The claimant was therefore in a pool of one.

46. On 9 November 2016, the claimant had a telephone consultation meeting with Ms Buck, the Personnel manager. The claimant said that he accepted his redundancy and just wanted to go. The following day, Ms Buck asked the claimant to confirm his wish to be made redundant but the claimant replied that this was wrong and that it was the respondent that was making him redundant, although the claimant also confirmed that he did not dispute the rationale for his redundancy.

47. A second consultation meeting took place on 17 November 2016. The claimant covertly recorded this meeting. There was a discussion of alternative employment within the respondent's business across the North West and Ms Buck offered to seek out any alternative jobs that the claimant might do. However, the claimant confirmed that he was unable to travel to those sites identified, or to perform the jobs highlighted.

48. On 21 November 2016, Ms Buck telephoned the claimant to inform him of the decision that he would be made redundant. The respondent confirmed that the claimant's employment was terminated by letter that day. The claimant was paid his statutory redundancy pay based on his previous average working hours. The claimant also received pay in lieu of his statutory notice entitlement.

49. The claimant challenged the calculation of his final payments on the basis that he considered the calculations should be based on his 39 hour contract. The respondent declined to recalculate the amounts on that basis and confirmed in a letter of 25 November 2016 that his entitlements were based on his average hours worked and average earnings for a 37.41 hour week.

50. In the interim, the respondent also investigated matters raised in the claimant's grievance appeal of 1 November 2016 and, on 24 November 2016, Tina Buck replied to the claimant upholding the original grievance decision.

The Law

51. A concise statement of the applicable law is as follows.

Unfair dismissal – redundancy

52. Under section 98 (1) and (2) of the Employment Rights Act 1996, the tribunal must first decide what was the reason for the claimant's dismissal.

53. The respondent has advanced redundancy as the reason for the claimant's dismissal. Redundancy is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996.

54. The definition of redundancy is set out in Section 139 (1) of the Employment Rights Act 1996:

… An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-

...

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

have ceased or diminished or are expected to cease or diminish.

55. If the respondent can show a potentially fair reason for dismissal, the tribunal must then consider the test in section 98 (4) of the Employment Rights Act 1996: whether in the circumstances including the size and administrative resources of the respondent's undertaking the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant; and the tribunal must make its decision in accordance with equity and the substantial merits of the case.

56. In assessing the reasonableness of a dismissal for redundancy, the tribunal must follow the guidelines laid out in Williams and others v Compair Maxam Ltd [1982] ICR 156 having regard to the question of whether the dismissal lay within the range of reasonable conduct which a reasonable employer could have adopted. The factors to be considered are:

56.1 whether employees were warned and consulted about the redundancies;

56.2 whether the pool for selection was drawn appropriately;

56.3 whether the selection criteria were objectively chosen and fairly applied;

56.4 the manner in which the redundancy dismissal were implemented; and

56.5 whether any alternative work was available.

Breach of contract

57. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623, provides that a claim for damages for a breach of a contract of employment can be brought in the employment tribunal where the breach of contract arises or is outstanding on termination of employment.

Unauthorised deductions from wages

58. A worker is entitled to be paid for work done under his or her contract of employment. The Employment Rights Act 1996, Part II, provides that a failure to pay wages owing constitutes an unauthorised deduction from wages.

59. Wages are defined in section 27 of the Employment Rights Act 1996. Section 27(1) (a) provides that:

> "Wages includes any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise".

60. The Employment Rights Act 1996, section 13, governs circumstances in which an employer can make deductions from an employee's wages. A failure to pay wages due under the contract of employment constitutes an unauthorised deduction.

Submissions

61. The representative for the claimant made a number of detailed submissions which the tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the claimant's role as Gamezone supervisor was a minor role and that his true role was as a Duty Manager, and that he was not made redundant from that role; that the evidence of the claimant's hours of work had been manipulated; that the claimant was promised appropriate pay for doing Duty Manager work which should be £8 per hour; that the claimant's pay should have increased by custom and practice; that the 39 hour contract should prevail in the absence of any other signed document; that Pontins was open after the claimant was made redundant and there was work for the claimant; and that the respondent failed to help the claimant to avoid redundancy. The submissions also included a number of points that had not been made in evidence in chief nor explored in cross-examination of the respondent's witnesses.

62. Counsel for the respondent also made a number of detailed submissions which the tribunal has considered with care but do not rehearse in full

here. In essence it was asserted that:- the contract for 16 hours was in force although the claimant worked considerably in excess of the minimum 16 hours each week; that during previous winter periods the claimant had been given some work and had never before complained that such was not in accordance with his contract; that there was no evidence that the respondent promised to pay the claimant £8 per hour for Duty Manager shifts nor that such shifts were offered on that basis; that the claimant's role was that of Gamezone supervisor and that other work was undertaken voluntarily; that the respondent had made a commercial decision to shut the Gamezone in November 2016 and to reduce staff over the winter months; that the claimant accepted that his role was redundant; and that the respondent had made efforts to find the claimant suitable alternative employment without success.

Conclusions (including where appropriate any additional findings of fact)

63. The tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

64. Unfair dismissal for redundancy - the tribunal considered that there was a genuine redundancy situation. The respondent made a commercial decision to close the Gamezone. Its opening hours had been reduced and it was not making money. If the Gamezone reopened at all in the following season, the respondent had decided that this would be on a different basis than it had previously operated. The claimant had not disputed that the Gamezone was operating on a reduced basis and he accepted, in the first consultation meeting that, as a result, his position was therefore redundant. The claimant made much in his evidence of the hours he worked in other areas of the business which he accepted had been due to Mr Teare's efforts to give him work/hours when the Gamezone was not open. Hence, the requirement for the claimant to carry out work of the particular kind for which he was employed, as Gamezone supervisor, had been diminishing and ceased. In addition, the respondent decided to close the Southport Holiday Centre for the winter months and to cover its maintenance/cleaning with a skeleton staff and casual workers for individual events. Some staff were redeployed across the region where appropriate, including the Head Chef who was sent to work at a hotel in Wigan. Therefore there was to be no opportunity for the claimant to undertake cover for Duty Managers. The tribunal therefore concluded that the respondent has shown that a redundancy situation was the reason for the claimant's dismissal.

65. The claimant suggested that the respondent had a plan to remove all permanent employees and to replace them with casual or zero-hours contractual arrangements. This was not borne out by the evidence that

casual staff in the Gamezone and elsewhere were laid off and that other permanent employees like the Head Chef were retained and redeployed.

66. The tribunal then went on to consider the test in Section 98(4) of the Employment Rights Act 1996 and to consider whether the respondent acted reasonably in treating redundancy as a sufficient reason for the claimant's dismissal. The tribunal addressed the factors set out in Williams and others -v- Compair Maxam Ltd and those aspects which are set out in the agreed list of issues. The tribunal dealt with those issues as follows:

67. The tribunal took account of the consultation meetings between the claimant and Ms Buck in November 2016. The transcript of the recorded meeting was agreed and Ms Buck's account of other discussions went largely unchallenged. The claimant was given the respondent's justification for the closure of the Gamezone and he accepted it. The tribunal therefore concluded that there was meaningful consultation on the redundancy situation and efforts by the respondent to undertake a process in relation to the claimant's redundancy, even though he was in a pool of one.

68. On the question of the pool, the respondent's case was that the claimant was in a pool of one because all other employees who had worked in the Gamezone had been employed on casual contracts or for the duration of the season and so their employment had terminated when their contracts ended. This assertion went unchallenged by the claimant. In the claimant's written closing submissions, there is a suggestion that there were 2 other arcade employees who were apparently retained by the respondent over the winter months and who should have been pooled with the claimant; alternatively that 2 Duty Managers should have been pooled with the claimant. This aspect was not raised by the claimant during the redundancy consultation nor was any alternative pooling mentioned in the claimant's witness statement. The suggestions were not put to the respondent's witnesses, nor was the respondent's choice of pool challenged in cross-examination. In the circumstances, and in light of the evidence, the tribunal considered that the pool of one was reasonable.

69. Ms Buck made efforts to seek out possible suitable alternative employment for the claimant. Her evidence, which went unchallenged, was that she wanted to retain him if at all possible. Ms Buck sent the claimant the respondent's vacancy lists and specifically identified vacancies near to his home and other jobs that he might be able to do. However, the claimant was unable to relocate or to travel to Liverpool for work, where there were vacancies at the respondent's Adelphi Hotel.

70. In all the circumstances, the tribunal considered that the procedure undertaken by the respondent was a fair procedure. The Gamezone was

to close when the Holiday Centre closed over the winter and the claimant was the only permanent employee affected by that decision. He was consulted. The decision to have a pool of one was not outside the range of reasonable responses. Ms Buck made reasonable efforts to seek alternative work for the claimant even though he appeared to the tribunal to dismiss her efforts without due consideration. In light of the claimant's response to Ms Buck's efforts, the tribunal also considered that on a balance of probabilities the outcome, that is to say the claimant's redundancy, would have resulted whatever the procedure adopted. The claimant was therefore fairly dismissed for redundancy.

71. The claimant's contract – this aspect troubled the tribunal simply because the position, based on the documents presented was unclear. Mr Teare gave evidence that the paperwork was not in good order when Pontins went into insolvency and that the employee records were incomplete.

72. The 39 hour contract in existence that is signed by the claimant was a Pontins contract which he relies upon as, in his view, giving him an entitlement to be paid for 39 hours per week regardless of the hours he actually worked. However, that view ignores the wording of the contract which provides for 39 hours per week *"or those [hours] necessary to fulfil the requirements of the position*" and which does not therefore give the claimant an absolute right to work and/or be paid for 39 hours every week. In addition, the contract in question is a fixed term contract for the period until 30 January 2009. It was the claimant's evidence that he worked different hours during the winter/closed periods and on entirely different jobs to those he undertook in the summer season. To complicate matters, in 2011 the claimant signed a zero hours' contract with Crown Leisure for work in the arcades at the Southport Holiday Centre and this employment TUPE transferred to the respondent in late 2011.

73. In the circumstances, the tribunal did not accept that the contract for 39 hours was the latest contract that the claimant had agreed to or that it was still in force. The latest contract signed by the claimant was the zero hours' contract. It was apparent from the evidence of both parties that the respondent would re-issue and/or renegotiate employees' working terms and conditions at the beginning and end of a season and the documents in the bundle evidencing changes to employee details confirmed this. In any event, the 39 hour contract, on its wording, did not entitle the claimant as of right to be paid for 39 hours per week. In addition, the evidence was that the claimant worked a variety of hours week to week and was paid accordingly without question by him for many years. Indeed, until these proceedings, the claimant did not think he was on a 39 hour contract because he wrote in his grievance of 16 May 2016, which appear in the bundle at page 198, that he would like to return to operating as he was initially employed under what he describes as his original contract. This was confirmed to be a reference to the 39 hour contract dated 13 January

2009 which, given that the claimant started working for Pontins in 2007, cannot have been the first contract he worked under. In any event, the fact that the claimant asks to return to this contract tends to suggest he believed that it no longer applied.

74. The tribunal noted that the latest contract which the claimant had was the zero hours' contract for employment as an arcade attendant. The tribunal considered that the claimant's employment with the respondent in 2016 was as the Gamezone supervisor, to which he had been promoted from the position of arcade attendant. The claimant performed other duties from time to time including as a security officer and as cover for Duty Managers. However, at all times the claimant's principle role and responsibility was that of Gamezone supervisor. For this he was paid at the national minimum wage rate until he was awarded a 20 pence per hour pay rise in June 2016, to £7.40 per hour.

75. In those circumstances, the tribunal was unable to uphold the claimant's claim to a 39 hour contract or to be paid for 39 hours per week.

76. Duty management shifts – The claimant was not employed in the role of Duty Manager; he worked additional hours to cover for those employees who were Duty Managers when they were absent. This situation was confirmed by the claimant's witness, Mr Spencer, who gave evidence that the claimant was not employed as a Duty Manager in the way Mr Spencer was but the claimant would be called upon to cover Duty Manager shifts. Therefore the claimant's name did not appear on the Duty Manager shift rotas unless cover was agreed long in advance. In the bundle at page 249 there is an email between the Duty Managers stating, "Today Hassan's down on our rota for the 3-11pm", the reference to "our rota" suggesting that the claimant was not seen as one of the Duty Managers.

77. There was no evidence to suggest that the claimant was entitled to any extra pay or different rate of pay for the work that he did covering Duty Manager shifts. Nor was any promise of a higher rate of pay made to the claimant by Mr Teare or anybody else at the respondent. The claimant formed a view that he was somehow entitled to a higher rate of pay for this work, after a conversation he has with Mr Teare. What had happened was that, in offering the claimant extra hours' work to cover for a Duty Manager, Mr Teare had said to the claimant that if he did the hours he would get paid. The claimant mistakenly took this to mean that he would get paid at what he believed to be a Duty Manager rate of pay of £8 per hour all though that was never said to him. In fact, what Mr Teare meant was nothing more than "you will get paid for the hours you work" without reference to a particular rate of pay. On 6 June 2016, when asked by Terri Dolan about the rate of pay to be expected, Mr Teare confirmed that an employee working a Duty Manager shift is paid at their usual rate of paid until agreed otherwise by a Director of the respondent. Mr Spencer's

evidence was that the claimant had complained about the pay for covering for Duty Manager shifts and was told by Mr Teare to do the shifts and that Mr Teare would sort out the claimant's pay. It may have been reasonable for the claimant to hope from this that he would be paid more, but such a statement does not amount to a promise or an entitlement to a higher rate of pay.

78. The respondent does not have pay scales against which jobs are evaluated or a specific rate set, nor does it have a system of incremental points or annual pay increases. There is no mechanism for collective bargaining or pay reviews. The Duty Manager rate, if one exists, is unclear - Mr Spencer gave evidence that he understood that Duty Managers were on a variety of rates, up to £9 per hour and that he had been aware that some were paid more than him. Mr Teare's evidence was that he promised to ask for the claimant to be paid at a higher rate for Duty Manager shifts and not that he has promised a pay rise and the tribunal accepted that this was the case.

79. In light of the above, the claimant has no entitlement to be paid at a higher rate of pay for undertaking cover for Duty Managers.

80. Rate of pay for Gamezone Supervisor – the claimant was appointed to this role on the basis of a rate of pay of £7 per hour. At the time, that rate was significantly above the national minimum wage. However, over time, the pay differential was eroded by the lack of a pay rise being given to the claimant coupled with the annual increase in the national minimum wage, to the point where the national minimum wage matched the claimant's pay. Then, the claimant got a pay rise because, by law, the respondent had to pay him at least the national minimum wage.

81. There was no entitlement to a pay rise in any of the claimant's contracts although the respondent's staff handbook does state that "your pay will be reviewed from time to time". This does not guarantee that, upon review, a pay rise will be given. The respondent's evidence was that pay rises were discretionary. Mr Teare was also clear in his explanation to the claimant that he had to ask a director about pay rises. Authority to grant pay remained with the respondent's directors. The claimant knew this to be the case because he was eventually given a copy of an email from a director, refusing him a pay rise.

82. As the tribunal has found, there were no job grading system or rates of pay assigned to jobs and roles at the respondent, many of which attract the national minimum wage only. The only entitlement to a pay rise that the claimant had was an entitlement to an increase in line with the increase of the national minimum wage from time to time, in order that the respondent pays him in line with the law. The claimant had no entitlement

to have his pay differential preserved on the basis that he had been paid originally at a rate above the national minimum wage, or at all.

83. In the circumstances, the rate of pay for Gamezone supervisor had become the national minimum wage over time. There was no contractual entitlement to a higher rate of pay or to an annual pay rise for the role.

_____
Employment Judge Batten

Date 6 April 2018

JUDGMENT SENT TO THE PARTIES ON:

1 May 2018

FOR THE TRIBUNAL OFFICE