RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr MA Khan**

Respondent: **Mitie Limited**

Heard at: **East London Hearing Centre**

On: **3 September 2018**

Before: **Regional Employment Judge Taylor**

Representation

Claimant: Dr C Chandrachud, FRU representative
Respondent: Miss A Smith, Counsel

JUDGMENT having been sent to the parties on 11 September 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The claimant presented a claim form on 6 June 2018 by which he made claims of "breach of contract, hours, pay rate and holidays". The respondent resisted all of the claimant's allegations and claims by a response received by the tribunal on 12 July 2018. In its response the respondent also made an application, pursuant to Rule 27(1) Employment Tribunal Rules 2013, for the tribunal to dismiss the claimant's breach of contract claim, given that the claimant's employment with the respondent was on-going. The responded added, in the alternative, that if the claimant claims that the alleged breach of contract in December 2010 constituted a termination and re-engagement it had not been presented in time and the tribunal lacks jurisdiction to consider the claim.

2 The application came before the tribunal to consider the respondent's application to strike out the claim. In the event, it was unnecessary for the tribunal to consider the application because at the outset of the preliminary hearing the claimant abandoned all of his claims ("breach of contract, hours, pay rate and holidays"). That would have brought the proceedings immediately to an end, but the claimant made an application to 'amend' his claim, which the tribunal proceeded to consider.

The background

3 In his claim form, the claimant gave details that he had joined the respondent company on 10 April 2007 working full-time as a security officer from 2009. He describes himself as having worked as a 'permanent' member of staff, working as a security officer at the location of one of the respondent's clients, Capita Plc. The claimant set out that in that position he was contractually entitled to 28 days annual leave per year. The claimant alleged that his contract "was broken since 2012" and that since then he had been "treated as a zero hours contract" and was made to work at many different sites, on reduced hourly rates of pay and fewer hours each week. Additionally, his application to book holiday leave in October 2017 "was rejected" by the respondent.

4 The claimant added that working as a "floater" had adversely affected his health, specifically he had developed epilepsy and his financial circumstances stating that for 'more than five to six years I have been struggling to survive financially'. The clamant set out that all attempts he had made to deal with this alleged 'broken contract', informally through an operations manager and formally through the respondent's grievance procedure, had been unsuccessful.

5 The respondent resisted all of the claimant's claims and allegations. It attached copies of the claimant's most recent contracts of employment to the response form. These were 'zero hours' contracts. The first contract was dated and signed by the claimant on 10 April 2007 and the second contract was signed by him on 11 May 2009.

The claimant's application to amend his claim

6 Shortly before the preliminary hearing, the claimant had sent a written application to amend his claim (comprising of 16 paragraphs) to the respondent and to the tribunal. The letter sent by email on 23 August 2018, began:

> 'This is a claim for unlawful deduction of wages in respect of my rate of pay. In the alternative to the claim for unlawful deductions from wages, I am claiming a written statement of particulars of my employment with the Respondent.'

7 The respondent opposed the application to amend. It argued that this was a wholly new claim, it did not amount to a mere relabelling exercise and the application to amend should be dismissed.

8 The Tribunal heard submissions from the parties.

The claimant's submissions

9 The claimant submitted that from 2009, when he was assigned to work at Capita Plc, he was entitled to be paid at an hourly rate of £8.50. He was removed from that site in 2010 and afterwards had been assigned to work at various sites. This was an application to amend the claim to a claim for unauthorised deduction of wages, under section 13 of the Employment Rights Act 1996. The claim being for a series of weekly deductions beginning from September 2017 to the date of the application, the application was presented in time (section 23(3) ERA).

10 To explain the delay in making the application, the claimant submitted he had secured representation during the first week of August and before that time had been waiting for the respondent to give him access to copies of his past pay slips. The claimant had requested copies of his payslips, dating back to February 2016, which he had received last week. The respondent was not prejudiced by the date of presentation of this application because the internal grievance procedures concerning the same matters had only recently been completed. The grievance had covered a wide range of matters and the respondent would have been on notice that if the claimant was dissatisfied with the outcome he might file a further complaint in these proceedings. Given that the unlawful deduction claim could only go back two years, what had or had not occurred in 2010 would not be relevant. If it is necessary to construe the 2009 contractual terms and conditions any argument about the construction of those terms must be narrowly construed against the respondent.

The respondent's submissions

11 It remained unclear precisely what the claimant was claiming in the way of unlawful deduction from wages. Whatever the intended claim, it is entirely different from a breach of contract complaint. Moreover, time limits in this case apply in respect of this application.

12 The claimant had earned £8.50 per hour under a contract to work at the Capita site but he was removed from working at that site at the end of 2010. Any complaint arising out of his wages differing after his removal from that site are wholly and disastrously out of time. The application to amend his claim was made on 23 August 2018 and therefore his complaint is out of time. The fact that the claimant only received advice about his claim recently is not sufficient to support this late application.

13 The respondent would not be able to fairly defend itself against any claim that was so old. The respondent's potential witnesses do not recall what happened in 2010 and other witnesses have since left the respondent company, additionally there are some documents from that time, including the letter removing the claimant from the Capita site, which cannot be found.

14 As to the merits of this application, the central claim is that the claimant should be paid £8.50 an hour. His contract states that if he worked at the Capita site he would be paid £8.50 per hour. The claimant has worked at other sites and has always been paid the contractual rates of pay applicable to the sites at which he has worked. There had not been any deductions from his pay, and there had not been any breach of contract. The claimant's contract has been fulfilled in respect of each site he has worked at. In short, if he does not work at the Capita site he cannot receive the pay rate for the Capita site. There is no contractual basis for his claim. The claim has no reasonable prospect of success.

The Tribunal's deliberations and conclusions

15 The claimant began his employment as a security officer for the respondent and at the date of this hearing, he remains employed by the respondent. The claimant's 'zero hours' contracts were attached to the response form. They show that the claimant was engaged on a zero hours contract in 2007. The claimant was not employed on a

permanent contract as alleged, he had been located at one site; which is not the same as working under a permanent contract. It appears that the claimant is aggrieved by the continuing financial consequences of the change from what he regards as a 'permanent' contract to being employed at various locations on a 'zero hours' contract, following his removal from working at the Capita site.

16 The claimant has worked at various sites and has always received the applicable rates of pay for each location.

17 The claimant did not disagree that he had signed the 'zero hours' contracts put before the tribunal. The Tribunal considered the contracts, they are almost identical. They are zero hours contracts and under them there is no obligation on the respondent to provide the claimant with work. Clause 3 of the contracts read:

> "The company does not guarantee a minimum number of working hours per week. Your hours of work will vary according to the site(s) to which you are assigned. In situations where no work is available you will not receive payment. You will only be paid for the hours you work."

As to the claimant's rate of pay, Clause 2(b) of the contracts reads:

> "You will be paid at the prevailing rate of pay for report/site at which you work. Should you be required to work at different assignment/site, the prevailing rate of pay for that assignment/site will apply"

Clause 5(c) sets out the claimant's entitlement to holiday pay:

> "an annual entitlement of four weeks holiday pay pro rata to the amount of hours worked per week."

Clause 3(b) sets out the respondent's right to move the claimant to work at various locations:

> "Due to the nature of the company's business the company reserves its right to change your working hours and location of duties to meet the needs of the business at any time. You will be required to work at any place nominated by the company within reasonable travelling distance."

The applicable law

18 Whether to allow a claimant to amend a claim is a matter for the tribunal's discretion. In *Selkent Bus Co Ltd v Moore 1996 ICR 836*, EAT, guidance as to how tribunals should approach applications for leave to amend was given. The guidance includes that an employment tribunal must carry out a balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties. The tribunal must also consider the nature of the amendment applications to amend, such as whether the amendment sought a minor matter or a substantial alteration, for example pleading a new cause of action. The tribunal should have regard to the applicability of time limits; if a new claim or cause of action is proposed to be added by way of amendment, it is necessary for the tribunal to consider

whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. The merits are another consideration. The timing and manner of the application is also a relevant consideration. The tribunal should consider why the application was not made earlier in the proceedings.

Conclusions

19 In deciding whether to grant this application the Tribunal has not heard evidence from the parties but has taken into consideration the claim form, the response form, the claimant's contracts, the claimant's written application, written submissions and the oral submissions of the parties.

20 The Tribunal considered whether the claim of unauthorised deduction of wages was an entirely new cause of action. The Tribunal considered that it was in the circumstances of this claim. The position is that the relevant contracts were attached to the respondent's response. The contracts provide a whole answer to this proposed amendment application. These demonstrate that the claimant was not a permanent member of staff as he alleges. The claimant's claim of breach of contract arises out of his allegation that the respondent had in breach of the contract removed him from working at Capita on a permanent contract at £8.50 an hour in 2010.

21 A claim of unauthorised deductions can be successfully brought where the employer pays less than the total amount of wages properly payable to a worker under the terms of their contract; that is if the pay is deficient. In the circumstances of this case, it cannot be disputed having regard to the contracts put before the Tribunal that, the claimant has been properly paid for each job he has been assigned to. Not all of the jobs attract the higher pay rate of £8.50 per hour or the number of weekly hours that the claimant wishes to work, but the claim has no prospect of success given there is no dispute that he was not paid less than the set pay rate for each site he worked at under the zero hours contract.

22 The claimant also appears to claim holiday pay was unlawfully deducted. Under clause 5(B) the claimant is paid rolled up holiday pay and when he takes time off he is not paid an additional wage for those days. It follows he cannot book holiday in the way that he did when he worked continuously at the Capita site. The Tribunal is satisfied that the claim for holiday pay has no prospect of success.

23 It is also apparent to the Tribunal that the claimant seeks to proceed with a claim for failure to provide written particulars that also has no prospect of success. Written particulars have been provided. The respondent has shown to the tribunal a statement of initial employment particulars as required by s1 of the **Employment Rights Act 1996**. It follows that any claim that might be presented under section 11 ERA has no prospect of success.

24 The Tribunal bears in mind the submissions of the claimant that this unauthorised deduction claim was a different claim which has some merit. The Tribunal disagrees. The application to amend to add claims of unauthorised deduction of wages or failure to provide a statement of employment particulars is misconceived and has no merit; that is the primary reason for rejecting the application.

25 The Tribunal also considered whether the claim was presented in time. The allegation of breach of contract and damages arising out of a breach said to have occurred in 2010, is out of time by at least eight years. The claimant's (misconceived) allegation about being dismissed from a permanent position and transferred to a zero hours contract is a matter that could have been brought to the tribunal when the claimant was transferred from the Capita site.

26 The respondent's submission that the balance of hardship lies with it is accepted, given the passage of time and the likely difficulties it would have locating all of its witnesses and the missing documentary evidence.

27 The Tribunal concludes that it is not in the interests of justice to grant this application to amend the claim and, accordingly, the claim is dismissed.

Regional Employment Judge Taylor

Dated: 29 October 2018