# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON SOUTH EMPLOYMENT TRIBUNAL**

**BEFORE:** **EMPLOYMENT JUDGE WEBSTER**

**BETWEEN:**

**Mr M Cross** **Claimant**

AND

**Angel Security Ltd**

**Respondent**

**ON:** **23 February 2018**

**Appearances:**

**For the Claimant:** **In person**

**For the Respondent:** **Mr Fox (Director)**

# JUDGMENT

1. The claimant's claims for unlawful deduction from wages and breach of contract are not upheld.

# WRITTEN REASONS

The Claim

1. By an ET1 dated 24 November 2017 the claimant brought a claim for breach of contract and unlawful deduction from wages. He was employed on a zero hours contract. He had worked for the respondent 14 hour per day shifts for 3 years. Around mid July 2017 the respondent reduced the claimant's shifts to 12 hours per day. The claimant was claiming that this reduction and the following reduction in wages was a breach of his contract and that he was entitled to be paid the loss in wages that he suffered as a result.

2. By an ET3 dated 29 January 2018 the respondent refuted those claims stating that they were able to reduce the hours because the contract expressly allowed for a change to the claimant's hours.

The Hearing

3. At the outset of the hearing it was agreed that the claimant was Mr Marlon Cross, an individual and that everyone involved in the matter could and would be using his name to refer to him. There appeared to be some suggestion that his name was trade-marked and that anyone using his name would have to pay a fee but I was not willing to accept that in this open hearing.

4. It was also agreed that the correct respondent was Angel Securities Ltd and not Mr Fox as an individual.

5. I was provided with a small bundle of documents. Neither party had prepared witness statements. Both Mr Cross and Mr Fox provided evidence to the tribunal under oath but without reference to a written statement. Both were given the opportunity to cross examine the other.

6. I gave my oral judgment at the hearing and the claimant requested written reasons at the hearing.

Findings of fact

7. The respondent provides security services to clients who generally own and operate buildings or who are tenants in commercial buildings. The claimant was employed on a zero hours contract from 8 August 2014 until the present day. He worked as security guard.

8. The claimant signed a contract on 8 August 2014 which stated, at clause 2;

   *"You agree to be available for work should the company offer you work. However the company has no obligation to offer you work at any time and you are not entitled to a minimum number of hours of work per day, week or year. You have the right to decline work offered."*

9. The claimant agreed that he was aware of this clause, understood what it meant and confirmed that he had signed the document. The claimant agreed in evidence that the clause applied to him but felt that he should have had a site-specific document that altered this clause because he had always worked at one site and always worked 70 hours per week. The claimant's evidence was that the respondent had never sought to rely on this clause before and therefore he felt that it should not be able to rely on it now.

10. It was not disputed that the claimant had always worked at the same building for 70 hours per week. He worked the same shifts and always accepted the work given to him. His hours were made up of 12 hours for one client of the respondent and 2 hours per day, at the end of the day, for another client, AIG. Both clients were tenants at the building. Mr Fox accepted that the claimant had a reasonable expectation that he would be offered those hours but stated that the change arose for a reason beyond his control namely the demands of the company's clients i.e. the tenants of the building and that it was for this reason that they included the relevant clause in the contract as the needs of their clients changed frequently so they needed flexibility in their workforce.

11. The claimant stated that he did not feel able to refuse work and that as and when it was offered he had to take it. Whilst I accept that he always accepted the work offered to him I do not believe that he would have been penalised for refusing it. Mr Fox stated, and I accept his evidence, that it was common practice that employees turned down and chose shifts at the beginning of each week. The fact that the claimant did not do this himself does not change that he could have done had he chosen to do so.

12. In or around mid-July during a phone call with Mr Fox, the claimant was told that AIG was leaving the building as a tenant and that he would no longer be required to work those 2 additional hours and that his hours would be reduced to 12 hours per day.

13. It was not in dispute that during the phone call the claimant accepted the change to his hours. However the claimant believed he had accepted this change on the basis that the reduction in hours would not result in a reduction of his wages. The claimant claimed that Mr Fox promised him he would be no worse off because he would be paid a higher rate of pay.

14. Mr Fox accepts that there was a conversation but states that he said he would make every effort to ensure that the claimant would not be worse off by asking the client to pay at a higher rate. He states that he never promised that the claimant would not be worse off just that he would make every effort to ensure that he was not.

15. Mr Fox says that he clarified this situation to the claimant in a text on 10 August 2017 and again in his letter dated 11 September 2017 (both in the bundle). Both

those messages make it clear that Mr Fox was going to ask the tenants not that he could guarantee no loss to the claimant. The claimant disagrees that this was the case. He wrote to Mr Fox (p54) saying that he was disappointed with the way the situation had been handled and considering that the respondent had cut his wages in breach of his contract.

16. I find on balance that Mr Fox's evidence was more plausible regarding this conversation. I find it unlikely that he would have promised the claimant the same rate of pay without knowing whether he could secure the claimant additional hours or a higher pay rate. He clearly wanted the claimant to continue with the 12 hours per week and understood that it would lead to a drop in income but he would see what he could to offset that. I find this more plausible than an employer making an unsubstantiated promise that he could pay an employee more than he paid his other employees. I find that this version is supported by the consistent messages in his text and email following the conversation which clearly say the same thing.

The Law

17. S13 Employment Rights Act states that it is unlawful for an employer to make a deduction from a worker's wages unless:
    - The deduction is required or authorised by statute or a provision in the worker's contract; or
    - The worker has given their prior written consent to the deduction.

18. In determining whether the contract was amended and/or breached I have considered the cases of:
    - Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397
    - London Export Corp v Jubilee Coffee Roasting Co [1958] 1 WLR 661
    - (United Bank v Akhtar [1989] IRLR 507).
    - Hart Builders v Lyall
    - Hussman Manufacturing Ltd v Weir [1998] IRLR 228

Conclusion

19. Neither party made any submissions regarding the law. The claimant's claim in summary, were as follows:
    (i) The original contract had been changed by custom and practice to entitle him to 14 hours per day because the respondent had given him 14 hours per day at the same site since his employment had commenced and had never changed it.
    (ii) The respondent could not fairly rely on Clause 2 of the contract because they had never sought to rely on it before.
    (iii) The contract had been changed by Mr Fox's promise to the claimant that any reduction in hours would be offset by an increase in his rate of pay

and that this new contract had been breached when he received reduced wages.

20. I do not find that the clause had been varied by custom and practice or a course of dealing or that there was an intention by both parties to waive the obligation under an express term of the contract.

21. Mr Fox gave evidence that the claimant was given his shifts on a weekly basis and had the choice to turn them down if he wanted. The claimant said in closing submissions that he felt obliged to take the shifts but did not say why he felt obliged to do this. Mr Fox stated that other employees in similar positions did turn shifts down for a variety of reasons and were free to do so.

22. Following the case of Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 and London Export Corp v Jubilee Coffee Roasting Co [1958] 1 WLR 661 which established that a court will not imply a term into a contract where it would contradict an express term of the contract or the tenor of the contract as a whole. I therefore cannot imply into the contract the fact that the claimant was either entitled to 70 hours per week, or wages equivalent to those hours.

23. It is possible that a court may decide that a course of dealing evidences an intention to waive an obligation under the express terms of an agreement. However there was no evidence of such an intention to waive in this case. The course of dealing was the fact that the claimant worked the same hours every week. However it was clear that those hours were subject to client demands on the respondent, that they were agreed each week not guaranteed, and that the respondent had not waived its right to rely on the express clause.

24. Mr Fox stated in evidence that just because they had not sought to change the claimant's place of work or hours that did not mean that there was any intention to waive their right to exercise the clause. The claimant confirmed in evidence that he understood that it was possible for his hours and place of work to change and that he had understood this clause when he signed the document. The fact that he did not expect them to does not mean that the respondent had waived its right to do that.

25. I therefore find no evidence that the express clause in the contract was either waived or varied by the actions of the parties.

26. I also considered whether there was an implied clause that limited the effect of the flexibility that the respondent could operate in respect of this clause and therefore limit their ability to reduce his hours.

27. In this way the situation is anomalous to a situation where an employer requests an employee to move premises. Is that a reasonable use of the contract? The

case law on this establishes that employers must operate flexibility in way that is not capricious, that gives reasonable notice and so that it does not act in way that will undermine the mutual trust and confidence (United Bank v Akhtar [1989] IRLR 507). This approach is supported by the cases of Hart Builders v Lyall which held that when an employer instructed an employee to transfer to another site in accordance with the terms of employment their approach had been 'cavalier' but not a fundamental breach of contract.

28. I find that the respondent had sound business reasons for needing to reduce the claimant's hours namely that a tenant of the building they provided services to moved out of the building. They gave the claimant some notice that this would change his hours and they offered to try and help to offset the losses to him by putting a proposal to the remaining client that they should pay him a higher wage. The fact that they did not manage to persuade the client to pay the claimant more does not mean that they were acting unreasonably in relying on the clause to amend the claimant's hours. I find that there was no irrationality or perversity or capriciousness in the way in which the respondent used its flexibility clause and reduced the claimant's hours.

29. Further I do not conclude that they behaved in a way capable of breaching the implied term of mutual trust and confidence as in the case of Hussman Manufacturing Ltd v Weir [1998] IRLR 228. There it was found that the change to an employee's shifts which resulted in a reduction in pay was not sufficient to be a fundamental breach of the term of mutual trust and confidence. The facts are similar here and I find that the respondent made efforts to try to mitigate the claimant's losses by saying that they would try to arrange a higher rate of pay.

30. I have every sympathy for the claimant who had come to rely on the money he earned in this way but I find that the express clause in his contract allowed the respondent to reduce his hours in the way that they did. They had sound business reasons for so doing, they notified him of it and they did not do anything capricious or irrational. It is situations such as this that many in the political arena have sought to rectify but failed to date.

31. As set out in the factual findings I do not find that Mr Fox promised the claimant that his wages would not be reduced. In the absence of such a promise there was no amendment to the contract on this basis and therefore there was nothing to breach. Further there was no obligation on the respondent to pay the claimant at the higher rate of pay and therefore there has been no unlawful deduction from his wages.

32. Accordingly I dismiss the claimant's claims for breach of contract or unlawful deduction from wages as the respondent was entitled to reduce the number of hours it asked the claimant to work.

Employment Judge Webster

Date: 9 March 2018