sb

EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M Irfan	**AND**	Securitas Security Services UK Ltd

HELD AT: **London Central** **ON:** 11 January and 28 February 2019

BEFORE: Employment Judge Walker (Sitting alone)

Representation:

For Claimant: In person
For Respondent: Mrs J Young, of Counsel

RESERVED JUDGMENT

The Claimant's claims for redundancy payment, arrears of pay and arrears of holiday pay are all dismissed.

REASONS

1. The Claimant claimed a redundancy payment, arrears of salary and holiday pay.

Evidence

2. The Tribunal heard evidence from the Claimant himself and from Petra Semanova, Recruitment Administrator for the Respondent and Edith Hall, HR Advisor for the Respondent.

3. The Tribunal also had a bundle of documents.

<u>Issues</u>

Redundancy payment

4. Has the Claimant been dismissed?
5. The Respondent argued that the Claimant had not been dismissed and the Claimant himself indicated that his employment was continuing.
6. If the Claimant had been dismissed, was that by reason of redundancy?

Arrears of salary – unauthorised deduction

7. Did the Claimant do any work for the Respondent?
8. The Claimant says he is entitled to pay because he wanted to work in the North of England but accepts that in practice there were no job offers made to him and he did not work.
9. Is the Claimant entitled to work in those circumstances and/or entitled to pay if he is not provided with work?

Holiday Pay – Unauthorised deduction

10. Has the Claimant accrued holiday pay?
11. Has the Claimant asked to take holiday?
12. If the employment has not terminated, what right does the Claimant have to be paid accrued holiday pay?

Jurisdiction

13. Does the Tribunal have jurisdiction given various time issues which arise in relation to the different claims, in particular the unauthorised deduction claims?

Facts

14. In these reasons, the Tribunal has referred to the Respondent's clients by initial, even when using a quote. The Claimant worked for the Respondent as a security officer. He had started work with the Respondent as a Relief Officer on 12 January 2012. The parties had no date for the termination of his employment. This was because the Respondent had not actively dismissed the Claimant and the Claimant had not submitted a resignation.

15. The Respondent company provides security services. As a Relief Security Officer covering absences at relevant times, the Claimant worked in different locations for the Respondent but always out of a specific branch office.

16. The Claimant moved from Birmingham to Derby in April 2012 and then from Derby to London in December 2015. The Respondent facilitated those moves. The documents show that in relation to the move from Derby to London, the Derby branch where the Claimant worked at that time signed a transfer form. The London branch where the Claimant wanted to go also signed the transfer form. There was work in London for the Claimant to do.

17. After the Claimant had been in an accident, he suffered some medical problems. On 20 August 2016 the Claimant was advised by his GP to take time off on sick leave, which he did. The Claimant did some work in the month of March 2017. He then went off sick again. The Claimant sent the Respondent statements of fitness to work, or as the Claimant referred to them, sick notes, which covered the period through in to the end of November 2017, including the month of March when he did some work. Meanwhile, in March/April 2017, the Claimant decided to move back to the area he had lived in previously. The Claimant told the Tribunal that he could not afford a house in the London area and this was the reason for his move.

18. There is no evidence at all that the Claimant got prior approval for his move from the Respondent. Rather the Claimant arranged moved his home first and then asked the Respondent to sort out a transfer to a northern

branch. The Claimant wrote an email to David Peel who the Tribunal understands was a senior branch manager responsible for the Nottingham, Derby, Leicester and Coventry branches. This email dated 28 March 2017 said

> "I have been advised by Mark from Securitas Coventry branch to contact you with regard to a vacancy at CO in Nottingham. I have been working for Securitas since January 2012. I used to work for Derby branch before I moved to London in December 2015 due to family reasons. I shall be moving back to Nottingham on the 3rd of April 2017 and I shall be available to work from the 4th April 2017. Please feel free to give me a call at any time of your convenience."

19. The emails show that in response to the Claimant's first approach to David Peel, Mr Peel had replied stating I have a site Nottingham and a few in the surrounding area which include Derby and Leicester. He then suggested an interview at CO which was a client. He explained that there would have to be a typing test for that role and he had copied Lauren Tyler in to the email with a statement "Lauren, this looks like a perfect person to assist with CL". It seems that David Peel was the equivalent of an area manager while Lauren was a branch manager, suggesting that David Peel was senior to Ms Tyler in the Respondent's hierarchy.

20. As I have noted, the Claimant was absent from work due to sickness for some time but in March 2017 he did some work and he was in contact with the London administrator, Petra Semanova about this. However, by 3 April he was asking Petra Semanova if he could get back to her tomorrow and he continued not to accept shifts for a few days. On 5 April, the Claimant wrote to Lauren Tyler asking her to help to get his transfer back to Nottingham. On 7 April the Claimant was again contacted by Petra Semanova about his availability. His response to Miss Semanova was set out in a text. The Claimant said

> "Hi Petra, they have still not told me anything. I don't think I'll be able to work in London for a good few months as I cannot afford to live there at

the moment. I have requested Derby branch to transfer me back to Nottingham as it is cheaper to live here. As soon as they get back to me, I'll let you know. Thanks."

21. Subsequently, at an uncertain date, but certainly before July, the Claimant texted Miss Semanova and said

"Hi Petra, I've been transferred to Nottingham I think. Jeremy sorted my transfer out for me last week".

22. On 21 April, Jeremy Green had sent a change of post form to Lauren Tyler, the branch officer responsible for Nottingham. The form was never actioned by Miss Tyler and the formalities required to transfer the Claimant were never concluded.

23. Nothing happened and Mr Irfan became increasingly irate as can be seen from his communications. On 17 May 2017 Lauren Tyler emailed Mr Irfan telling him that her operations support tried to call him on Monday at 11:58 to arrange an interview however, he did not answer the call. He was told there was a spare slot for an interview on Friday at 3pm. He was asked if he could attend. Mr Irfan responded that his phone did not ring at 11:58 on Monday and there was no record of a missed call in his call log, nor did he have any voice message or text or emails but he could come for an interview at 3pm on Friday. Lauren Tyler replied stating that she looked forward to seeing him for interview and she advised him "please be aware that your transfer request will be based upon whether you are successful through the interview process for the role(s) you are applying for.

24. Mr Irfan responded that same day explaining that he had been doing the relief officer role for over five years and had been transferred to two different branches including Derby in the past and no Branch Manager had ever interviewed him before excepting his transfer request or sending him to work. He then referred to his previous experience of working with Lauren in the Derby branch from April 2012 to December 2015 and he could not understand why she wanted to have an interview before accepting the transfer request.

He indicated that he never said no to work, but he could drive and was available for work 24/7, 365 days a year. He then said

> "I hope you are not trying to play games with me as I was not expecting you to ignore me for over a month before calling me for a meeting or sending me to work. I was expecting a much better response from you when I spoke to you last month and when I sent you my transfer request. Please do not try and exercise any grudge against me that you might have been holding for me. I have not said or done anything bad or disrespectful to yourself or to any of your colleagues (operations team). However, your behaviour clearly does not seem normal to me as you are trying to resort to procedural complications to abuse your position against me. Anyway, I shall see you on Friday and we can take it from there".

25. Lauren Tyler replied explaining that there are always changes and improvements made as regards to the processes and policies and she was trying to ensure that these processes were followed in the correct manner. She also explained that she had been on annual leave just over two weeks, which may have slightly delayed the process of the interview for which she apologised. She was not sure what the grudges or games were that he was referring to and she was disappointed to read the email. She was just following the procedure. Mr Irfan replied again. He started off by saying that she would never have any problems with him if he ended up working at the Derby branch again. He continued to explain that he would look after his own interest and if someone tried to victimise him he would be using all forms available in this country and may be beyond its borders as well to seek justice. He then complained that he had not received an automatic reply from her email account stating that she was on holiday. Then eventually he said he would go to the interview on Friday.

26. Later the same day, 17 May 2017, Lauren Tyler forwarded Mr Irfan's email on to various people explaining that as they could see from the email trail she was not particularly comfortable with having any one within her operations team interview this employee. She said "He has not yet been for

an interview and already today I have been accused of grudges and games". Lauren asked for advice as she explained she was concerned that if Mr Irfan was deemed unsuitable after an interview, he was going to take action against us.

27. Joanne Reece who was the HR Business Partner who appears to have been copied in to that email replied stating that Lauren was doing the right thing by following processes and arranging for an interview to assess suitability. She suggested that Lauren Tyler ignore all Mr Iran's comments as he was trying to muddy the water and if they followed the competency based interview process for all candidates Ms Tyler would then have the evidence to confirm why he was or was not successful in the role. She could see no reason why anyone from the ops team shouldn't interview Mr Irfan as that was only following process.

28. On 31 May 2017 Mr Irfan sent an email to Louis Parker and Lauren Tyler and HR Admin and Nigel Coates regarding the interview outcome, which indicated that he had been told that the interview had not been satisfactory. He complained about the decision from Lauren being unjust and how she had ignored his transfer request. He complained that first she had ignored his transfer request for over six weeks and then she opted to resort to procedural compilations to exercise her vendetta against me. He said, "I knew she was going to do her best to reject my transfer request as her behaviour towards me is pre-animated". This email was sent a short while after receiving an email from Mr Parker which attached a letter dated 30 May 2017 which referred to the recent interview on 19 May for the positions of a full-time security officer at Toyota Burnaston, a dedicated site relief at Toyota Burnaston and full-time security officer at Castle Donnington. The letter explained the decision had been a difficult one as the overall standard of candidates was high and after careful consideration he regretted to inform Mr Irfan that on this occasion they decided not to progress this application any further.

29. Mr Parker responded to Mr Irfan's email by explaining that he referred to his earlier letter and unfortunately Mr Irfan had been unsuccessful. He said

following the interviews I reviewed all applicants and chose those best suited for sites and roles and those are the candidates that have been chosen to be forwarded to take on the roles. Mr Irfan replied stating that he did not understand how he could be rejected for a role which he had been doing with Securitas for over five years. He was not asking for new employment as he was already an employee of Securitas. In response to that, Amy Jest, Employee Support Advisor emailed Mr Irfan stating that as he had been advised previously they had been unable to transfer his current employment to the Nottingham branch. Her email explained

> "unfortunately we are not able to guarantee that we will have suitable vacancies in other areas for officers who relocate during their employment. When an officer moves to outside of his branch area, he is expected to apply for a vacancy with the new branch, as if he were not an employee. The manager in the new branch would then review all applications, and hire as he/she feels appropriate. As it has been explained, you are employed to work for Securitas in the London area, and have been unsuccessful for your application in Nottingham."

30. Ms Jest then explained that if he was not satisfied in the decision Mr Irfan could raise a formal grievance which would allow the Respondent to investigate further. Mr Irfan did raise a grievance. He set out at length the history of the matter and referred to various phone calls including one in which Mr Peel had advised Mr Irfan that he should not worry regarding his interview at CO as he could not send him to work on another site in the East Midlands when they spoke over the phone in the second week of April 2017. It said "You also told me that you had spoken to Lauren and that she'd be doing my roster for the next week. Therefore, there was no point in me requesting for a grievance hearing".

31. Mr Irfan said he was not unhappy with the decision made to offer other applicants the positions advertised. He was unhappy because he had not been given a role that he had already been doing for over five years (Relief Officer) and he thought that being an employee of Securitas he enjoyed a right

of priority over outside applicants. He also referred to a telephone conversation he had with his current manager, Jeremy Green who had sent an email to Lauren on 21 April 2017 regarding the transfer. Jeremy had, he said, "spoken to me over the phone before he sent an email to Lauren and he had confirmed to me that he managed to get hold of Lauren and that he had a detailed chat with Lauren about my transfer request to Derby". He also referred to some historic difficulties he had encountered with regard to obtaining holiday pay and being banned from a site in Newark.

32. In the end there was a meeting on 9 June 2017 which Mr Irfan attended with Mr Peel. The outcome letter which was dated 27 June 2017 from Mr Peel to Mr Irfan explained that the grievance was rejected. Mr Peel did not dispute that he had spoken with Mr Irfan about other roles if he was unsuccessful at client CO. He said he was referring to the vacancies for roles at two other clients for which Mr Irfan did not attend for interview. He also said that he could confirm that any employee wishing to transfer to another branch would only be able to do so, providing there was an open vacancy which they successfully applied for. He said as confirmed to you during our meeting, your employment contract with the company does not afford to you the right to automatically transfer between branches. Each branch is responsible for maintaining their employee establishment to provide the required services to their specific customers and geographic area. As you are currently assigned to RC211 it is the expectation that you provide services to this area and customers. He then explained that if Mr Irfan still wished to transfer to the Nottingham branch it would only be possible if they had a vacancy for which he applied and he was successful at interview. Some vacancies also require additional client candidate approval. He suggested that Mr Irfan check the online vacancies on a regular basis for any positions that might arise in the near future. Mr Peel noted

> "you raised during our meeting that you believe that as you have not been successful in transferring branches you have lost your job and been made unemployed. I cannot find any evidence to support this view, as your role for RC211 still exists. If you have any concerns with regards to

your current role, I can only encourage you to make contact with your current branch to discuss your concerns".

33. Mr Irfan elected to go to appeal on the outcome of the grievance and he submitted his appeal on 10 July 2017. Meanwhile, on 6 July 2017 Mr Irfan sent Petra Semanova his sick note for the last three months, April to June 2017. He said:

> "Please find attached my sick note for the last three months, April to June2017. (My GP has covered me from March 2017 as well but that is only for medical referral purposes. I had worked in March 2017 therefore I am not asking for statutory sick pay for March 2017). I am receiving treatment and I have been referred for my MRI scan. More treatments shall be following my MRI scan."

34. It is clear that the HR team then tried to calculate the sickness entitlement and it appears the conclusion was that Mr Irfan was due six days statutory sick pay. That was all he had left. However, the sickness was based on a rolling year and would start twelve months again after the sickness.

35. On 18 July 2017 Mr Irfan emailed HR Admin an email headed "to whom it may concern" and explained his solicitor had asked him to provide him with a letter confirming that he had been off work sick since August 2016 and that he used to work on sites offering easy roles after his road accident dated 12 February 2015 until it became too difficult for him to carry on performing even the lightest possible duties while at work and then he was advised by his GP to take time off work so that he could fully concentrate on his recovery before returning to work.

36. He then set out an example of the letter that he wanted. His draft letter explained his sickness absence which the letter said started on 20 August 2016 with a short gap in March 2017, continued. He was asking the Respondent to confirm that he had still not returned to work as his GP has provided him with sick notes confirming that he is not fit to work due to him suffering from "PSTD" and pain in his lower back and hips.

37. In August 2017 it appeared that the grievance appeal had not yet been heard partly because Mr Irfan had not wanted his grievance heard in London as he had relocated to Nottingham and Nigel Coates had agreed to hear the appeal. The appeal hearing was arranged for 23 August 2017. It then had to be rearranged for Friday 29 September at 11am. On 20 November 2017 Mr Coates, Regional Director wrote an outcome letter for the appeal which was not sent but which stated that the appeal was not upheld. Mr Coates did not believe that Lauren Tyler had exercised a vendetta against Mr Irfan. He could see that Mr Irfan had applied for positions within the Derby branch and was interviewed by independent people and was not successful for those roles.

38. On 30 November Mr Irfan sent an email to whom it may concern addressed to HR Admin and to Edith Hall and Amy Jest. He explained that he had been waiting for the outcome of his grievance appeal since 29 September 2017. He explained that he was still out of work and had even requested voluntary redundancy but no one had ever responded to him explaining why he could or could not get voluntary redundancy and he asked what to do next. The response to that was that the team realised that the outcome letter had not been sent and it was re dated 7 December 2017 and sent at that point in time.

39. Meanwhile, Mr Irfan continued to send certificates of sickness to Petra Semonava and these indicated that he has post traumatic stress disorder and was not fit to work. These continued throughout the period ending on 30 November 2017.

40. There were some contractual references to the Claimant’s hours of work and to his place of work in various documents which are relevant to the claim.

41. On 8 June 2014 the Claimant signed a contract which substituted for previous contracts. It said at clause 4, your normal hours of work are as set out in clause 1.6 and cannot be taken as contracted hours as they are subject to variation. Clause 1.6 provided “Average of 48 hours- subject to variation”.

42. Clause 4 continued as follows

"Your hours of work will vary subject to a rostered shift pattern and you will only be paid for hours worked."

43. Clause 3 provided under the heading "Place of Work":

> "You are required to work across customer sites within a reasonable distance as agreed and in accordance to your geographical location, in line with Company requirements to provide security services."

44. The Claimant then was sent a further contract by a letter dated 17 June 2015 which provided that if the Respondent had not received a signed contract or received any objections within 14 days of receipt they would assume the contract was accepted and it would go on the Claimant's file. The wording of clause 4, clause 1.6 and clause 3 were identical to the previous document which the Claimant had signed.

45. On 21 December 2015, the Claimant was sent a letter which said that the Respondent had reviewed the Claimants current working hours and availability and were of the opinion that his current Contract Support Officer with RC503 did not match his current working circumstances, therefore they had decided to offer him a Relief Securitas Security Services (UK) Ltd Contract of Employment as a Contract Support Officer with RC405 based on an average of 48 hours over 5 days per week. The Claimant was asked to sign to confirm if he wished to accept this which he did.

46. The wording of his acceptance was "I accept the offer of a Relief Securitas Security Services (UK) Ltd Contract of Employment as a Contract Support Officer based on an average of 48 hours over 5 days per week with RC405 effective from the date of my signature." He signed it on 28 December 2015.

47. I was shown a standard contract for the Contract Support officer but there was no suggestion that the Claimant was shown or signed that

document, or any other new contract. However, what was clear was that this offer was made at the time the Claimant moved to live near London and it was intended to reflect his move from the branch identified as RC503 to branch RC405.

48. In the course of the Hearing I asked Mr Irfan what he was doing now and whether he had got another role. He confirmed that in December 2017 he started work for another company, Santander, and that role carried on until March 2018. He then had a gap after which he managed to get another role with Nationwide which he was still undertaking. There was no disclosure about these roles but he said that they were self employed roles and that he had to pay his expenses such as hotels and feeding for himself. Because of the amount he received with these jobs he considered he had an ongoing loss. However, he confirmed that both roles kept him fully occupied all day from Monday to Friday each week.

49. The Claimant applied to ACAS on 20 February 2018 and the conciliation was closed on 20 March 2018. The Claimant lodged his claim with the Tribunal on 16 May 2018.

Submissions

Respondent's Submissions

50. The Respondent submitted that the breach of contract claim which the Claimant was bringing could not be considered by the Tribunal as it had no jurisdiction to consider his claim as, in order to do so, s.3(c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 stated that the jurisdiction applied when "the claim arises or is outstanding on the termination of the employee's employment". As the employment had not been terminated there was no jurisdiction.

51. In relation to the Claimant's claim for unpaid salary, the Claimant was not eligible for payment as he had not worked for those wages. The Respondent pointed out that it was not disputed that the Claimant had not worked for the Respondent's in the period of 7 April 2017 – 16 May 2018.

52. The Respondent referred to the wording of the Claimant's contract and specifically said that the Claimant was not contracted to work 48 hours per week as he claimed, but an average of 48 hours per week of a period of five days, provided that the hours could not be taken as contracted hours as they were subject to variations.

53. Additionally, the contract provided "if you do not work on a particular day or week you will not be entitled to pay apart from any holiday or sickness to which you are entitled to the period". The Claimant's sickness was subject to provision of sick certificates. It also depended on the Claimant's SSP entitlement. The Claimant's SSP entitlement was exhausted by July 2018 when in August 2017 he was paid his final six days of sickness pay.

54. Additionally, the Respondent relied on the contractual provisions which referred to place of work, stating "you are required to work across customer sites within a reasonable distance as agreed and in accordance to your geographical location, in line with company requirements to provide a security services". Given the Respondent's geographical operations, the Claimant was attached to the London branch and, although he told the Respondent he wanted to work in the Nottingham area, there was no obligation to transfer him there or to offer him work in that area, especially if there was none available.

55. The Claimant himself had refused work from the London branch and told them that he would not be able to work in London for a good few months. It was therefore reasonable for the Respondent to stop offering the Claimant work in London as he had told them he would not make himself available for that work. The Respondent relied on the case of **Besong v Connex Bus (UK) Limited [2005] EAT** in which the EAT had said that the proper interpretation of the applicant's claim was that the Respondent's in that case had not made shifts available to him to work as frequently as they should have done and on the days and at times that suited him. His complaint was therefore that he was not given the proper opportunity to work an earn wages and that this was a breach of contract. The EAT held that the failure to allow an employee to work and thereby earn wages does not mean in our judgment that the employee can make a claim for unlawful deduction from wages.

56. The Respondent submitted that the Claimant could not be eligible for payment for the whole period because he provided sick notes from a doctor in covering the period 1 March to 23 June 2017 and then ran out of SSP although he continued to submit sick notes until 30` November 2017. As he was therefore on sick leave but not entitled to sick pay he would not have received pay for this period in any event.

57. In relation to the redundancy payments claim the Respondent said that the Claimant had not been dismissed, laid off or put on short term working. Rather the Claimant was referring to voluntary redundancy and this should be taken as indicating the Claimant recognised he had no entitlement to statutory redundancy pay but was asking the Respondent to consider an application for redundancy. The Tribunal had no jurisdiction over of such a matter.

58. On annual leave the Respondent said the Claimant did not make any Requests for annual leave in the year 2017 and was not therefore eligible for any. He had not made a request for annual leave in 2018 and therefore was not entitled to paid annual leave.

<u>The Claimant's Submissions</u>

59. The Claimant submitted that he had been badly treated. He had asked the Respondent to make him redundant in August 2017 as he couldn't afford to sit at home. The Respondent didn't get back to him. His case was based on the contact not being fulfilled as the Respondent didn't send him to work. The Claimant considered that his contractual entitlement was to 48 hours work per week and he considered that if he was not given work, he was still entitled to pay.

60. On holiday pay the Claimant said he couldn't request holiday pay unless they sent him to work as then he had a manager to give him holiday approval., If he was entitled to 48 hours work per week then he was entitled to holiday pay as well.

61. On the claim for arrears of pay the Client said he was basically available to work. In March 2017 he was told by David Peel that they had work. He was assured there was other work. The situation got to the point where he was told they had other sites in Leicester and Derby. They took the uniform details from him. He believed that Lauren persuaded the other managers not to give him work.

The Law

62. The right to a redundancy payment is governed by sections in the Employment Rights Act 1996.

Section 139

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)the fact that his employer has ceased or intends to cease—

> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*

(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.

Section 135

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

Section 136

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(a) the contract under which he is employed by the employer 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.

63. The right to a declaration and an order from the Tribunal regarding arrears of pay (or unauthorised deductions of pay as they are treated) including holiday pay, is also set out in the Employment Rights Act 1996.

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Section 23

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Conclusions

64. This was an unusual case in that both parties attended the Tribunal on the basis that the Claimant had never resigned or been dismissed and that his employment was continuing. Nevertheless, the Claimant claimed a redundancy payment, which I took to be a statutory payment, although at times the Claimant mentioned matters which indicated that he might have meant a voluntary redundancy payment. The essence of the Claimant's complaint was that the Respondent had not provided him with work at the location he wished, being the northern region to which he had moved. He regarded that as unfair as he had been able to move in the past and had been a security officer for the Respondent over five years and he therefore thought the Respondent should have provided work for him. Additionally, he thought there was work in the north and that some managers of the Respondent had been ready to provide him with work. However, prior to the Claimant taking up other employment, he had continued to submit sickness certificates to the

Respondent's London branch and he did not dispute that he had received all the sick pay he was eligible for.

Claim for a redundancy payment

65. In order to claim a statutory redundancy payment, the Claimant has to have been dismissed in circumstances where the work of the kind which he did had ceased or diminished at the place where he did it. The first question in relation to the Claimant's claim for a redundancy payment was whether his employment had terminated. A dismissal for the purposes of the legislation includes a dismissal by the Respondent and de facto dismissals including potentially a constructive dismissal.

66. The Respondent did not actually dismiss the Claimant and it is clear that the Claimant did not submit a resignation. However, in the course of the evidence the Claimant admitted that he had taken on another full-time role for a different employer in December 2017. This was the point when he stopped submitting sickness certificates to the Respondent. That may well have been a termination by the Claimant by conduct, driven by the lack of work.

67. If there was no dismissal, the right to a statutory redundancy payment is not triggered.

68. If the Claimant had effectively been transferred to the northern region, and then not given work, he might have had a claim for breach of contract, and even possibly been able to claim constructive dismissal. There was nothing to demonstrate that the Claimant had left the Respondent's employ because of a constructive dismissal. Nevertheless, I understand the Claimant left as he could not afford not to earn money so I have gone on to consider the next question.

69. The second question is, if there was a termination of the Claimant's employment, was that by reason of redundancy. There was no indication of any diminished work in the place where the Claimant used to work, which was the London area. The Respondent had made clear their position in relation to

his transfer request by 31 May 2017 and this was repeated again by Amy Jest on 1 June 2017. The Claimant was in no doubt from that point onwards that his role remained a role in the London area, although he did raise a grievance and he pursued that through an appeal. There was work in the London area and the only reason the Claimant was not allocated that work was that he said he was not available for it. The Claimant did not get allocated work in the norther region because the Respondent decided he was not the most suitable candidate for that work. There is no suggestion the Claimant was not given work because the work was diminishing.

70. In those circumstances the Claimant is not eligible for a statutory redundancy payment.

71. The Claimant repeatedly talked about a voluntary redundancy payment and in section 8.1 of his ET1 he says "I had requested for redundancy back in August 2017 but they did nothing until I got in touch with Acas but after that they went quiet again".

72. The Tribunal has no jurisdiction over a request for redundancy.

73. If and in so far as the Claimant really intended to ask for a contractual sum equivalent to a voluntary redundancy payment, I have no evidence of any contract which would entitle the Claimant to such a sum.

Arrears of salary/Unpaid wages

74. The Claimant has indicated that he was employed under a contract which entitled him to 48 hours of work per week and the Respondent should therefore pay him for that work. I understand why the Claimant may have been confused by the wording of both the contract and the letter of 21 December which he had signed, which he interprets as entitling him to 48 hours work a week. However, in practice the Claimant did not go to work and did not make himself available for work at the locations which the Respondent had to offer him in the London region. Additionally, the Claimant submitted sick notes to Petra Semanova in the London region until 30 November 2017.

There can be no entitlement to pay if you do not make yourself available for work in the location where your employer has agreed to provide work.

75. The Claimant appeared to be saying that he should have been treated as de facto transferred to the northern region and that his contractual position was such that he should have been treated as available for work and that the Respondent wrongly refused him work. In practice the Respondent made it clear to the Claimant repeatedly that he was not transferred to the northern region. Even if that was a breach of contract, and I make no finding about that, the Claimant was well aware that was the position. In consequence he found other work starting at the beginning of December 2017.

76. In practice, the Claimant treated his employment as ending in December 2017 when he started work elsewhere. The fact that he did not notify the Respondent meant that they understood that he was still on their payroll and they continued to send him payslips showing nil pay. However, he had a settled intention not to return to the London area and the Respondent had made it clear that they were not going to accede to his request for a transfer to the Nottingham/Derby area. The Claimant had exhausted his sick pay and had decided that he would take up work with another entity, which he did. That was full time work. It lasted for some four months.

77. In those circumstances, any claim that did arise for arrears of salary would be for the period ending at the end of November after which the Claimant himself treated his employment as having ended. As I have noted for the period up to 30 November the Claimant submitted sick notes. He did not carry out any work for the Respondent and he asked them to write letters to confirm his absence was due to the sickness. The only work which the Respondent regarded the Claimant as eligible for was in the London area and that work he chose not to do. Moreover, not only did he choose not to do it, but he submitted sick notes indicating he was not fit to do so.

78. The Claimant is only entitled to statutory sick pay while he was submitting sick notes of that nature and those continued up to 30 November. The statutory sick pay has been paid. The Claimant does not claim that it has

not, but rather that he wanted full pay on the basis that he should have been carrying out work for 48 hours per week. In all the circumstances the claim for unpaid wages is dismissed.

79. I should also note that this claim may also be out of time and it is also possible that the Tribunal does not have jurisdiction.

80. Holiday Pay

81. The Claimant does not suggest that he ever applied for holiday. His only eligibility for holiday pay would arise on termination of his employment at which time the employer would have to consider what holiday pay was due to him. If the Claimant's employment ended, it did so on 30 November 2017 being the last day before the date on which the Claimant started work for his new employer. Had the Claimant he communicated this fact, the Respondent would have had to consider what holiday pay was due to him, if any. Had they failed to pay holiday pay at that time the Claimant has the right to claim, provided he did so within three months from the termination in his employment as extended by the ACAS conciliation period.

82. If and to the extent the Claimant has a holiday pay claim, there are questions about the Tribunal's jurisdiction.

83. Other than that, I was not able to consider this claim as the Claimant did not have any calculations and was not ready to argue what was owing to him. I did inform the Claimant that this claim could be assessed at the remedy hearing but if the Tribunal does not have jurisdiction, that brings an end to the matter.

Jurisdiction

84. Any claim for unpaid holiday pay is brought under the provisions of the Employment Rights Act 1996 which address unauthorised deductions. The failure to pay holiday pay is treated as an unauthorised deduction. Such claims have to be brought within three months of the relevant date, as

extended by the ACAS conciliation period. The question is therefore, are the unauthorised deduction claims, including the holiday pay claim, in time?

85. As the conciliation period extends time by one month, I have looked at the period of four months ending with the filing of the ET1. On that analysis the last event would have to be carried out on or after 17 January 2018. That was some time after the Claimant had started work elsewhere and on that basis the claim is out of time.

86. In practice, in order to claim holiday pay, the Claimant's employment has to have ended and it would appear that it did end on 30 November 2017. He would have to have applied to ACAS before the end of February 2018, which he did. After the conciliation period, his time would be extended by one month. The Claimant applied to ACAS on 20 February 2018 and the conciliation was closed on 20 March 2018. As the Conciliation extends time by one month, that would result in the Claimant having to file the ET1 by 20 April 2018.

87. The ET1 was lodged on 16 May 2018. The Tribunal has jurisdiction to extend time in accordance with Section 23(4) of the Employment Rights act. The Tribunal must be satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months, in which case the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

88. I asked the Claimant what had happened to delay his claim and he explained to me that he had problems with his marriage and with his health. He said that his personal injury claim arising out of his car accident had been frustrated for some reason and that he had had a very difficult time over a long period. However, there is nothing that he told me which explained that it was not reasonably practicable for him to have submitted the claim within time in about April/May 2018. Despite asking, I was given no explanation for any change of circumstance which led to the Claimant to the point where he did apply to the Tribunal. In all the circumstances there was no evidence that it was not reasonable or practicable for the Claimant to have brought the claim

in time or that he had brought the claim within such further time was reasonable. Therefore, the claim for holiday pay also has to be dismissed on the basis that the Tribunal has no jurisdiction to consider it.

____

Employment Judge Walker

Dated: 28 February 2019

Judgment and Reasons sent to the parties on:

7 March 2019

....

For the Tribunal Office