



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr Jozsef Fitz

Holland and Barrett Retail Limited

Held at Southampton

On 20 March 2019

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: In person

For the Respondent: Mr J Medhurst, Solicitor

JUDGMENT

The decision of the tribunal is that:

1. the Respondent made unlawful deductions from the pay of the Claimant in relation to work that he was required to do following the end of his contracted hours on a day that he was required to work, but for which he was not paid.
2. The Claimant is awarded the sum of £1019.75

REASONS

1. The Claimant claims unlawful deduction from wages in relation to two matters, first a reduction in his hours of work in October 2015 and second in relation to a requirement to work some hours unpaid when he had to act up in the absence of the Store Manager. I heard evidence from the Claimant himself and from Mr Nick Gold, Area Sales Manager on behalf of the Respondent.
2. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.
3. The Respondent runs a chain of shops and the Claimant started employment as a Sales Associate on 6 January 2014.
4. The Claimant was issued with terms of employment which he signed on 29 April 2014 which described him as a part time sales associate. Under the heading 'hours of work' the statement reads: 'Your normal hours of work will be 6 each week on such days and between such times as are reasonably required and agreed by your Store Manager'.
5. There was no mention of overtime in the contract but the evidence of Mr Gold was that although overtime was not guaranteed, an employee could seek out extra hours either at their own store or at another of the respondent's stores and they would be paid for these hours by agreement with the managers concerned.
6. The Claimant was initially paid at an hourly rate of £6.32.
7. On 7 September 2014 the Claimant was promoted to the role of Supervisor. His hours increased to 13.5 per week. It is not in dispute that in this capacity he would have to cover for the Store Manager if absent due to leave or sickness. This involved opening the store in the morning and closing the store at night, among other tasks. Mr Gold says that it is custom and practice across the retail sector for managers not to be paid for time spent closing the shop. He says this process takes a few minutes. The Claimant says that over the course

of his employment he worked for over two hundred hours after his contracted shifts were due to finish for which he was not paid.

8. I have seen in the bundle documents describing the process for both opening and closing the store. Closing the store involved a four-stage process: Closing the tills on the shop floor; reconciling the tills in the back office; closing the register, and closing the store.
9. It is the Respondent's case that other tasks such as sweeping the store or changing the promotional material would normally be undertaken during the working day and that a manager would not be paid if they stayed behind after store closure to complete tasks like this. The Claimant said that he also had to undertake other tasks at the end of the day including cleaning, fridge and freezer temperature checks, performance and sales target calculations.
10. On 4 January 2015 there was a consultation meeting with the Claimant to discuss his availability for work in the future, during which the meeting record notes that he queried why he was paid for opening the store but not closing the store.
11. On 5 April 2015 the Claimant's hours increased to 21 hours per week. He was sent a notice stating that these were his 'new contractual hours' and he signed the letter to indicate acceptance.
12. On 8 August 2015 the Claimant transferred to the Poole store. His weekly hours increased to 38.75 which Mr Gold confirmed amounted to full time hours.
13. The Claimant's evidence which I accept is that he was happy with each increase in his hours.
14. In October 2015 the Respondent sought to reduce the Claimant's hours. Mr Gold was not able to describe the process adopted by the Respondent in relation to the Claimant on this occasion. He stated that in general if a store was not performing well, the staffing deployment could be reduced. They would seek volunteers to reduce their hours and have individual discussions with others to reach agreement. If not agreement could be reached, staff would be given notice of the change in working arrangements.

15. The Claimant says that his Area Manager, Christopher Thompson, discussed the proposed reduction in hours with him. The Claimant was not happy and they had an argument. He says that Mr Thompson promised to try and find him extra hours. The Claimant said that he decided to continue working on the basis of this promise. He did not want to be unemployed.
16. On 14 December 2015 the Claimant lodged a formal grievance about his holiday pay. In that letter he says 'your records will show that my contract of employment has been altered several times this year because of transfers between shops and changed working hours'.
17. It seems that Mr Thompson made good on his promise as on 21 January 2016 the Claimant's hours were increased to 29.
18. In July the Claimant resigned mid-way through a disciplinary process.
19. He claims that the Respondent has made unlawful deductions from his wages in relation to his reduction from 38.75 hours in October 2015. He also claims unlawful deductions in relation to the failure to pay him for additional work carried out when he was covering for the Store Manager.
20. My decision on these matters is as follows.

Reduction in working hours in October 2015

21. My starting point is the Claimant's terms of employment signed on 29 April 2014. Although the Claimant's hours were varied on five separate occasions during the course of his employment, he was not engaged under a flexible hours contract. Clause 5 of the written terms is quite clear: he was employed on fixed hours, initially six hours per week.
22. This interpretation of the contract is supported by the fact that some of the changes to working hours are confirmed in writing. For example, on 16 October 2014 a letter confirms promotion to supervisor and new working hours of 13.5. The letter dated 1 May 2015 confirms 'new contractual hours' of 21 per week. There is no letter confirming the increase in hours to 38.75. However a letter dated 7 November 2015 confirms reduction to 19 hours.

23. These letters confirm that the change in hours amounted to a separate variation to the terms and conditions of employment on each occasion. Mr Gold said in evidence that letters were not sent out on every occasion - sometimes the new hours were simply logged with HR. In light of that I find that the failure to send out a letter confirming the increase in hours to 38.75 a week is an administrative error. I find that as of 8 August 2015 the Claimant had agreed to a contractual variation to full time hours. That became a term of the contract.
24. One party to a contract cannot change the terms of that contract without the agreement of the other, or without bring the contract to an end. In his evidence Mr Gold was able to describe the process that the Respondent would *normally* follow in seeking to vary the hours of its staff. He is not able to say what process was followed in relation to the Claimant. There is no record of any discussions that took place.
25. In light of that I accept the evidence of the Claimant about what happened. A proposed reduction was put to him. He was not happy about it, and he protested. His line manager promised to try and increase his hours. He was eventually able to do so. On the basis of what his line manager said to him, the Claimant agreed to carry on working. There is no evidence that he did so 'under protest'. The matters set out in his grievance sent on 14 December 2015 include a statement about the fact that there had been changes but the grievance itself related to holiday pay. I do not find that the contents of the grievance amount to evidence of an ongoing protest about the hours reduction. I find that the Claimant affirmed the contract. He later accepted a further variation in his hours to 29.
26. I therefore accept that the Respondent is likely to have been in breach of contract in trying to impose a unilateral variation to a contractual term, namely in seeking to reduce the agreed hours. However I find that in this case the Claimant accepted that change and affirmed the contract in deciding to carry on working, and in the hope that his hours would eventually increase.

27. As the Claimant affirmed the contract his claim that the Respondent made unlawful deductions from 19 October 2015 onwards must fail.

Claim for overtime for shop closing

28. The key question identified in the list of issues set out in the case management order dated 19 December 2018 is as follows: was the Claimant contractually entitled to be paid additional wages as overtime if he did not leave his workplace, when locking up the premises, after the end of the hours of his shift?
29. I have found that during each stage of his employment, the Claimant was employed on a fixed hours contract, although the number of hours worked varied on a number of occasions.
30. It is not in dispute that the Respondent operated an overtime scheme where employees would be paid for additional hours worked, over and above their contractual hours.
31. Mr Gold makes a significant statement at paragraph 9 of his witness statement: 'When the Claimant was promoted to Supervisor, his guaranteed hours were increased to 13.5. *Again this did not mean that he never worked for more than 13.5 hours per week but rather that, when he did, it would be treated as non-guaranteed overtime*' (my emphasis).
32. Taking into account the written contract for fixed hours, and the unwritten overtime arrangements, and the evidence I have quoted from Mr Gold, I find that it was an implied term of the contract that if a member of staff worked extra hours, by agreement with or at the request of a manager, they would be paid for that work.
33. No job description for the role of Supervisor has been produced as evidence, nor any other written material which makes it clear that if a Supervisor was acting up in the absence of a store manager, they would be obliged to close up the shop without additional pay.

34. Mr Medhurst refers me to *Driver v Air India [2011] IRLR 992* and a quotation from the Court of Appeal judgment as follows: 'It may be expressly agreed that the contractual wage or salary covers work done by the employee, even if done in excess of, or out of the contracted hours of work, and whether that extra work has been done unilaterally by the employee, or at the express or implied request of the employer. That would make sense where it was contemplated in the workplace that the employee should be able to complete the contracted work within a contracted time. In those cases the employee will not usually be entitled to extra pay'
35. The difficulty here is that there is no such express agreement that the Claimant was being paid for all the duties of Supervisor and/or Acting Store Manager and that his salary covered that work, whether completed within his normal working hours or not. There is nothing in writing that makes it clear that when covering for the manager, the Claimant would have to complete the shop closing procedure without pay and this is considered part of his normal duties which are compensated for in the hourly rate. In any event, it is clear that closure of the store took place at the end of the working day, and after the time the Claimant's shift was due to end.
36. I therefore find that to the extent that the Claimant was required to stay on beyond the end of his shift, to close the store and to undertake other tasks that were a requirement of management, and could not have been completed during his working hours, he is entitled to payment for them. He is an hourly paid member of staff and is entitled to pay for hours worked.
37. I have noted and accept Mr Gold's evidence that the Respondent should not have to pay for work that formed part of the Claimant's role, that he could have or should have completed during his working day. Mr Gold states clearly at paragraph 6 of his witness statement that this would include tasks such as updating promotional material or sweeping the floor.
38. However I note that the Claimant has provided evidence that he was required to carry out other tasks such as temperature checks and performance and

sales target calculations. He states that 'we also had more tasks to complete as described in the Daily Communications sheet'. This evidence was not challenged by the Respondent.

39. This hearing was listed to deal with liability only. Having issued my judgment and reasons above at the hearing, Mr Medhurst took instructions and advised me that for reasons of proportionality, the Respondent was prepared to concede that the Claimant had worked the additional hours that he was claiming. The Claimant had calculated that he was owed wages of £1777.95. Mr Medhurst was prepared to accept this calculation but pointed out that under section 23(4A) of the Employment Rights Act, I could not consider a claim for sums owed in relation to a date more than two years preceding the date when the claim was presented, on 19 December 2017. He therefore suggested that the sum awarded should be £1019.75. The Claimant pointed out that this section had not been raised at the preliminary hearing in December, but nevertheless it was clearly binding on this tribunal. As a result I have awarded the sum of £1019.75 as set in the Respondent's counter schedule of loss.

Employment Judge Siddall

Date: 20 March 2019