



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4117001/2018

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Held in Glasgow on 7 and 16 November 2018

Employment Judge: Michelle Sutherland (sitting alone)

10 **Malcolm McGuire**

**Claimant
In Person**

15 **Caledonian MacBrayne Crewing (Guernsey)Limited**

**Respondent
Represented by:
Ms F MacLellan -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgement of the Tribunal is that there was no unlawful deduction from wages and the claim is dismissed.

REASONS

Introduction

1. The Claimant presented a complaint of unlawful deduction from wages in
25 respect of a failure to pay guaranteed overtime.
2. The parties lodged a joint bundle of documents. At the hearing, parties agreed that additional documents could be included into the agreed Joint Bundle.
- 30 3. The Claimant gave evidence on his own behalf. The Respondent led evidence from Bridget Hume (HR Manager, Respondent) and John Melvin (Chief Officer, Respondent).
4. Closing submissions were made on behalf of both parties.

E.T. Z4 (WR)

Findings in Fact

5. The Tribunal made the following findings in fact:–

6. The Respondent operates ferry services to islands and peninsulas on the west coast of Scotland. The Claimant has been employed by the Respondent as a bosun since 12 June 2000 and his employment is continuing. The Claimant reports to the Chief Officer.

7. The Claimant's offer letter issue on 26 September 2008 specifies that he may be required to sail on any vessel operated by the Respondent.

8. The terms of the Claimant's employment are regulated by the Western Isles Agreement (the 'WIA'). The WIA is a collective agreement with the recognised unions. The WIA also serves as a contract of employment and was signed by the Claimant on 8 March 2016. The WIA does not have an entire agreement clause but does specify that variations may be made by negotiated amendment. The WIA specifies –

9. – the manning levels on board each vessel. The deck manning level for the MV Caledonian is 8 in summer and 7 in winter.

10. – the normal working day is 12 hours.

11. – if a rest break is required it will be a minimum of 2 continuous hours arising during the day or the night shift as appropriate and it does not count towards working hours.

12. – if schedules are disrupted due to unforeseen circumstances and/or operational reasons work rotas will be adjusted.

13. – employees may claim overtime for hours worked in excess of normal hours. Overtime is only paid if it is worked. The WIA does not specify any guaranteed overtime.

14. Following the introduction of the Merchant Shipping (Hours of Work) Regulations 2002 a seafarer is entitled to 10 hours of rest in a 24 hour period and the master of the ship must prepare and display a table of scheduled hours of rest.
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15. The MV Caledonian services the route from Ardrossan to Brodick (the 'Arran crossing'). There is an additional Friday night late sailing on the Arran crossing. The MV Caledonian crew had previously received a Friday night late sailing bonus of £50. This was consolidated into the arrangement that additional crew would not be recruited to man the additional sailing and the crew would instead be allowed to work 4 hours overtime.
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16. In order to service the Arran crossing summer timetable, the deck crew on board the MV Caledonian each fortnight worked 1 hour overtime on both Mondays, both Tuesdays, both Wednesdays, alternate Thursdays, and both Saturdays and 4 hours overtime both Fridays totalling 17 hours of overtime. The overtime was not paid unless it was worked. Where the ship did not sail for operational reasons or unforeseen circumstances the overtime was not worked and was not paid. (The arrangements for the winter timetable were not entirely consistent and generated less overtime.) The overtime arrangements had been in place for 15 years prior to the Transfer and continued thereafter. The off and on shore management teams were aware of these arrangements. Each year these arrangements generated 164 hours of overtime and overtime payments to the Claimant of around £2,800.
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17. The Claimant was relocated from MV Caledonian to MV Hebridean Isles on 14 February 2018 (the 'Transfer'). That transfer was compulsory and was undertaken to address issues on board the MV Hebridean Isles. The Claimant did not transfer in a redundancy situation. The Claimant's basic salary remained the same both pre and post Transfer. The MV Hebridean Isles services the Islay crossing and also acts as a relief boat for other crossings. There is no regular pattern of overtime for MV Hebridean Isles crew and the Claimant suffered a reduction in his overtime earnings following the Transfer.
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18. On 13 February 2018 the Claimant submitted a grievance about the loss of his 'guaranteed overtime'. A grievance hearing was held on 12 March 2018. On 9 April 2018 the Claimant was advised that his grievance was not being upheld and that the overtime was not guaranteed because any additional sailing could be withdrawn or amended at any time. The Claimant sought to appeal on the basis that additional sailings were not withdrawn or amended. An appeal hearing was held on 16 May 2018. His appeal was not upheld and he was advised that the amount of overtime may vary and is dependent on the operating hours, hours of rest, passenger certification, muster list, etc.
19. On 13 February 2018 the Claimant submitted a separate grievance that he had not been given adequate notice of the transfer. A grievance hearing was held on 13 June 2018. On 28 June 2018 his grievance was upheld and it was accepted that the Claimant had not been given adequate notice of the transfer and that they would re-visit this issue for future transfers.
20. Only staff who were transferred in a redundancy situation had benefited from any pay protection.

The Claimant's submissions

21. The Claimant provided oral submissions which in summary that he had worked a pattern of overtime that was reasonable, certain and notorious and accordingly he had an implied right to guaranteed overtime.

The Respondent's submissions

22. The Respondent provided written submissions which in summary were that the overtime is not certain but is variable and is not therefore guaranteed.

Discussion and Decision

23. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written

consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

- 5 24. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA).
- 10 25. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
- 15 26. Under Section 27(1) of the ERA “wages” means any sums payable to the worker in connection with their employment including overtime pay.
- 20 27. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.
- 25 28. The total amount payable on any occasion depends on the employee’s legal entitlement including the express and implied terms of the employee’s contract. Terms may be implied by law, custom and practice or a prior course of dealing and reflect the presumed intention of the parties. An implied term may not contradict an express term of the contract. The terms must be reasonable, notorious and certain (**Devonald v Rosser and Sons 1906 2 KB 728 CA and Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA**).
- 30 29. The implied term must reflect the custom and practice. Accordingly, if there was an implied term it was that the Claimant was entitled to 17 hours guaranteed overtime whilst working on board the MV Caledonian during the summer timetable provided the ship sailed to timetable (i.e. was not withdrawn or amended for operational reasons or unforeseen circumstances).

Accordingly, any implied term regarding guaranteed overtime pertained only to him working on board the MV Caledonian. Any such term did not apply to his work aboard the MV Hebridean Isles. (Overtime was only paid if it was worked and there was no practical need to roster such overtime having regard to the MV Hebridean Isle's timetable).

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30. Separately, there was no evidence of any custom and practice regarding any entitlement to pay protection on compulsory transfer other than in a redundancy situation. The Claimant's transfer did not arise in a redundancy situation and accordingly there was no entitlement to pay protection in respect of any loss of guaranteed overtime.

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31. Accordingly the Claimant was not paid less than the amount properly payable and there was therefore no deduction from wages.

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Employment Judge: Michelle Sutherland
Date of Judgment: 30 November 2018
Entered in register: 03 December 2018
and copied to parties

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