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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Abdulraheem**

Respondent: **Mitie Limited**

Heard at: **East London Hearing Centre**

On: **18 February 2019**

Before: **Employment Judge Burgher (sitting alone)**

Representation

Claimant: In person

Respondent: Miss A Smith (Counsel)

REASONS

Issues

1. The Claimant made claims for unlawful deduction of wages and breach of contract arising from his assignment to work at the Broadway Health Centre. The Respondent resists the claims.

Evidence

2. The Claimant gave evidence on his own behalf and Mr Rian Barnard, Regional Manager gave evidence on behalf of the Respondent. All witness prepared witness statements and were subject to cross-examination and questions from the Tribunal. I was also referred to relevant pages in a hearing bundle consisting of 82 pages.

Facts

3. I have found the following facts from the evidence.

4. The Claimant commenced employment with the Respondent as a security officer on 4 February 2008. He remains employed.

5. His role requires him to be assigned to different locations for organisations that the Respondent has contracts with. The Claimant relies on an extract of his contract paragraph 29(b) which states:

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

6. The Respondent did not have a copy of the Claimant's signed contract of employment and relied on its standard terms and conditions for a 'Core Security Officer' which states:

> *"You will be paid at the rate of pay that is agreed for the assignment/site at which you are carrying out your duties. Should you be required to work on a different assignment/site, the rate of pay will change to that for that specific assignment/site."*

7. On 1 March 2018 the Claimant was assigned to work at the Broadway Health Centre. He was informed that the rate for the site was £12.08 per hour. He was paid this rate until 1 August 2018.

8. By this stage the rate had come to the attention of the Operations Manager, Mr Anatolijis Rauza who discovered that the rate was wrong. There was a system error that led the Claimant, as an employee, being paid the same rate as that being paid to contractors. For the contractors, unlike employees, the Respondent had to make payments including holiday costs and tax that the subcontractor had to pay on behalf of the workers. For the Respondent's employees it also had to make payment in respect of national insurance contributions, sick pay and training costs. Consequently, the effect on the Respondent of paying the Claimant the rate of £12.08 an hour for the Broadway Health Centre contract was that it would suffer a 16.1% loss. The Respondent's business model is to generate a 7% profit margin as a minimum for sites it provides services to.

9. Mr Rauza informed the Claimant of the error by email of 6 August 2018. He explained that prior to the Claimant joining the Broadway Health Centre the site was managed by a subcontractor at the rate of £12.08 per hour and that it had not been operated by any of the Respondent's employees. He explained that the Respondent could no longer offer the rate of £12.08 per hour going forward and he was offered a rate of £10.00 per hour, which was one of the highest rates across the NHS portfolio. Mr Rauza apologised to the Claimant about the need to rectify the error and stated that he should not have been paid the rate at the beginning.

10. The Claimant was unhappy with this and wrote an email to Mr Barnard dated 19 August 2018 stating that there was a breach of contract. He asked for the matter to be investigated as he considered it to be grossly unfair.

11. The Claimant was invited to a grievance meeting on 5 September 2018 to discuss his concern. The meeting took place and the Claimant stated that he had not worked on a site where the rate was as high as £12.08 but that he did not think this was strange as he had been paid £11.70 per hour when working at Chelsea Harbour. The Claimant ended the meeting stating that he would like to be paid the rate he was told he would be paid.

12. On 21 September 2018 Mr Barnard notified the Claimant that he did not uphold the grievance. There was an error in the hourly amount paid. However, the Respondent would not be recovering any overpayments from him. The Claimant was offered a right of appeal. He did not exercise his right of appeal.

Law

13. Section 13 of the Employment Rights Act 1996 states:

Right not to suffer unauthorised deductions.

(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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

14. When determining was is properly payable to the Claimant under his contract, I have had to consider the terms of his contract. For the purposes of construction, I consider the terms of the extract of contract that the Claimant relies on as the operative contract terms. The Respondent did not provide a copy of the Claimant's signed contract of employment but the Claimant did provide an extract of the contract he says he was actually given.

15. I therefore consider that the following term needs to be construed:

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

16. The prevailing rate of pay for the assignment is that which is determined by the Respondent. It is not in the Claimant's power to decide the rate. The prevailing rate for the assignment at the site was £12.08 for contractors. However, to achieve budget the rate had to be less for the Respondent's employees as the Respondent had to pay national insurance, sick pay and training costs. The Claimant was mistakenly paid the contractor rate of £12.08 between March and July 2018. The Claimant was informed that the hourly rate paid to him was wrong and that the prevailing rate for employees was in fact £10.00 per hour going forward. The Claimant was not able to determine the prevailing rate. This was for the Respondent. Following identification of the mistake, the Claimant was informed that the rate for the site going forward was £10.00. He has been paid this rate since.

17. The Claimant has therefore been paid the proper hourly rate of £10.00 since August 2018. There are therefore no unlawful deductions and the Claimant's claim for unlawful deduction of wages is therefore dismissed.

18. The Claimant remains employed by the Respondent and therefore, pursuant to Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, the Tribunal does not have jurisdiction to hear the Claimant's breach of contract claim which is therefore dismissed.

Employment Judge Burgher

29 April 2019