mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Dogan**

Respondent: **Site Operative Solutions Ltd**

Heard at: **East London Hearing Centre**

On: **Friday 3 May 2019**

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

Representation

Claimant: In person

Respondent: Mr R Higgins (Managing Director)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

(1) The Claimant's complaint of dismissal, asserting a statutory right under section 104 of the Employment Rights Act 1996 fails and is dismissed.

(2) The Claimant's complaint of breach of contract fails and is dismissed.

(3) The complaint of unlawful deduction of wages fails and is dismissed.

REASONS

1 The Claimant brought a claim on 11 December alleging that he had been dismissed on 31 August 2018 because he made a request to be paid his outstanding

wages. He alleged that he was owed notice pay and that he had been dismissed following assertion of his statutory right to be paid. The claim form also mentioned the word 'victimisation' but did not clarify what that referred to.

2 In its response, the Respondent confirmed that the Claimant had been its employee and that he worked for it for a period of 11 days between 20 August and 31 August 2018. It was the Respondent's case that he had been paid all wages owing to him including holiday money, notice pay and any underpayment that he had claimed.

3 There had been some delay in preparation of bundles in this case. Sometime last week the Claimant received a hearing bundle prepared by the Respondent. The Claimant came to court today with a bundle of documents that he had prepared. During the hearing the Tribunal worked from both bundles after giving both parties the opportunity to consider the documents that were in them.

4 As a result of our discussion in the morning, Mr Higgins sent to the Tribunal two further documents: firstly, an email that he sent to ACAS on 19 March 2019 confirming that the Respondent would consider employing the Claimant again if it had vacancies for electricians; and secondly, an email he received from solicitors acting on behalf of the Claimant's previous employers, BMSL, asking - apparently on direction of an Employment Judge from London Central Employment Tribunal - whether he could give a statement in relation to the Claimant's employment for another case. Mr Higgins' was that he felt that he had to give that statement to the solicitor. However, those proceedings were resolved before hearing and Mr Higgins did not give live evidence in support of BMSL against the Claimant.

5 The Claimant submitted at the start of today's hearing, that he wanted to pursue a complaint that he had been blacklisted from the site and from the project by a combination of the Respondent and BMSL. This had not been part of the Claimant's ET1. The Respondent had not been aware that this was going to be part of the Claimant's complaint. In the Claimant's witness statement, he asserts that he has not been offered work by the Respondent or BMSL after raising grievances and tribunal claims but no allegation of blacklisting was made in the ET1 or in the witness statement. The Claimant did not apply to amend his claim but assumed it was already part of his claim. After discussion between the parties and the Tribunal, it was determined that there was no complaint of blacklisting in his case. What the Claimant really wanted the Tribunal to consider ordering the Respondent to pay him wages for the time that he has been unemployed as it is his case that the Respondent is responsible for the losses that have arisen from him losing his job and not being back on the site. The complaints which the Tribunal would consider today were as follows: the complaint that the Claimant had been dismissed for asserting his statutory right to be paid promptly and to be paid all wages that are due to him; a breach of contract claim regarding notice pay; an unlawful deduction of wages claim; and if he was successful in his unfair dismissal claim the Claimant would also seek wages for a period of time to reflect the fact that the Respondent refused to consider him for work thereafter.

Evidence

6 The Tribunal heard from the Claimant in evidence and from Mr Ray Higgins, managing director of the Respondent. As already stated, the Tribunal had two bundles of documents before it and two additional documents were submitted by the Respondent during the day.

7 From the evidence heard today, the Tribunal made the following findings of fact.

Findings of fact

8 The Claimant is a qualified electrician.

9 The Tribunal finds that the Respondent is a recruitment company that provides a variety of technical personnel to support major contracts within the rail, utility, energy and construction sectors. The company supplies labour to the Crossrail project at Paddington station in London. The Respondent had historically only engaged self-employed persons but it was a stipulation of the Crossrail project, possibly from the UK Government, that anyone working on it had to be employed. In relation to the Crossrail project, the Respondent is a subcontractor who has contracted with Crossrail's contractor to supply qualified electricians to the site. This means that there are 2 levels of contracts between Crossrail and the Claimant. Crossrail contracted with EMICO to recruit staff and then EMICO contracted with the Respondent to recruit the specialist technical staff that it required. The contract was not between Crossrail and the Respondent.

10 Initially, the Respondent entered into permanent employment contracts with around 50 electricians who were then sent to Crossrail as part of the Respondent's contract with EMICO. Unfortunately, the Crossrail project was delayed and the Respondent was asked to find more specialist staff. It did so and those were also employed on a permanent basis. In the summer of 2018 there was additional demand for qualified electricians on the site. The Respondent was told that this was a short-term need and that these additional staff would only be required for a few months. The Respondent entered into discussions with the relevant union and it was agreed that it could employ these additional members of staff on temporary one-month contracts.

11 The Claimant was one of 12 people recruited in August 2018. The Claimant started his employment on 20 August 2018. During the induction process, one of the 12 failed a drug test which meant that 11 were offered and accepted employment. The Claimant was not given a written contract of employment straightaway but it is likely that sometime in the first week he was given the document titled 'Notice of Assignment' which was in the Respondent's bundle. The hours of work were stated to be 7:30pm to 5:30am with a 30-minute paid lunch break. The rates of pay were set out in that document and the Claimant was informed that he also would be entitled to claim mileage from the Respondent.

12 The Claimant confirmed that he also received the written contract of employment from the Respondent at a different time. That document states at paragraph 3.3 that the Claimant's employment would start on 20th August and continue until 20 September at which time it would automatically expire unless otherwise agreed

in writing between the parties. It also stated that notwithstanding that the contract is for a fixed term, the Respondent reserved the right at its discretion to terminate the Claimant's employment at any time by giving him the required notice; whether for operational reasons or otherwise.

13 The contract states that at the end of each week of an assignment, or at the end of the assignment period, the Client, i.e. in this case EMICO, would send the Respondent the timesheet duly completed to indicate the number of hours the Claimant had worked the previous week which would then be used by the Respondent to pay the Claimant, regardless of whether it had by then received payment from the Client. The contract confirmed rights to annual leave, pension, sick pay and notice of termination.

14 At paragraph 10.1, the contract states that either party or the Client may terminate the employee's assignment for whatever reason with the correct amount of prior notice. This was one day's notice if the employee had been employed for less than a month. For employees who had worked over one month and up to 2 years, one week's notice was required from either party of termination of employment.

15 At paragraph 10.2, the contract states that the Respondent reserved the right to terminate the employee's employment for whatever reason by paying the employee their basic wage in lieu of any unexpired period of notice or to require the employee to remain at home during the notice period.

16 The Respondent reserved the right in the contract to terminate the employee's employment with no notice if there was a serious breach by the employee of terms in the employment contract or in the event of misconduct or gross negligence.

17 The Claimant began induction on 20th August and started work on the site with the other 10 colleagues who started with him. The Claimant worked the night shift. In the hearing today, he made allegations of bullying from the supervisors on the site which the Respondent refuted. I had insufficient evidence on that matter to be able to decide whether there was bullying on the site during the time the Claimant worked there. The Claimant's witness statement confirmed at paragraph 6 that the supervisors were employed by EMICO rather than the Respondent. EMICO supervised the site.

18 There were no issues with the Claimant's performance of his job. On 29th August the Claimant received a letter from the Respondent which was a standard letter setting out that he could join the company pension but that he would not be able to do so until 20 November 2018 as there was a 3-month postponement to auto enrolment. The Claimant hoped that was an indication that his employment was likely to last more than 1 month even though the contract stated that it was to expire on 20 September.

19 On 30 August 2018 the Claimant received his payslip via email. The Claimant worked nights and so it was not until the morning of 31st August that he checked it and discovered that he had not been paid for 3 hours of work. He had worked 49 hours per week but by his calculation it looked as though he had only been paid for 46.

20 The Claimant telephoned the Respondent and spoke to Maria McLeod in finance. Her name was on the email attached to his payslip as the person to call with any queries. Ms McLeod stated that she was unable to assist the Claimant and she insisted that the Claimant had been paid according to biometric system operated at the site. The Claimant and other operatives at the site had to sign in with their fingerprints to record when they come in to work and when they leave. They also had to sign a physical form which was held by supervisors.

21 Ms McLeod also referred the matter to Jolanta Attrill at the Client, EMICO, which is a separate corporate entity, so that she could check the Claimant's claim that he worked 10 hours on the Thursday night. Ms Attrill replied to Ms McLeod on the same day to state that the biometrics i.e. the reading from the machine into which the Claimant put his fingerprint on, had a record of him leaving the site at 2.30am. Ms McLeod forwarded that email to the Claimant on the same day. Ms McLeod had also directed the Claimant to telephone Ms Attrill, which the Claimant did. It was his recollection that Ms Attrill was angry and adamant that the Claimant was only going to get paid what was on the biometric reading.

22 It is the Claimant's case that about 20 minutes later, Dan West from the Respondent telephoned him to inform him that he should not return to the site. He informed the Claimant that he was no longer needed on site. He also informed the Claimant that he would try to get him onto the Bond Street site, where the Respondent had operatives working. He told the Claimant that he would telephone him again to confirm. There were no further phone calls from Mr West and the Claimant was not told to report to work at the Bond Street site. The Claimant was not offered any other work by the Respondent and his employment ended on 31 August 2018.

23 The Respondent had an email from the construction manager at EMICO at 8am on 31st August asking for the Claimant and 5 other operatives to be released from site. The email was also copied to Dan West. That email was in the bundle of documents. There was also another email in the bundle from the EMICO construction manager which asked the Respondent to contact two individuals to inform them that they were to be released from Paddington. The second email was dated 17 September 2018. The Respondent produced an email on 30 April 2019, following an order from EJ Prichard in which the Respondent stated that out of the 10 operatives who started with the Claimant, another employee's contract was also terminated on 31 August, another employee's contract was terminated 29th of August and the remaining employees' contracts were terminated either in September or October 2018.

24 At the same time, the email stated that the Respondent had 12 operatives starting on the 3 September 2018. Mr Higgins explained this in his evidence today. Three weeks before the start of August, the Respondent had been asked by EMICO to send a further 50 operatives to the site. The Respondent was unable to do so as it had difficulties in sourcing qualified operatives who were available. It was only able to get the 12 operatives which included the Claimant. The Respondent also had to approach other companies on the Client's 'Preferred Supplier list' to source more operatives. One company founded 12 operatives for the Respondent to supply to its Client. Those individuals were known to the Client. At the time, those individuals were in the middle of working on another project but were released to come to the Crossrail site in September. They were booked to start their induction to the Crossrail site on 3

September. By the time that September arrived, the Crossrail site had begun to reduce the number of operatives required. As a result, although the Claimant and his colleagues were released at various dates in August and October, the other 12 operatives were due to begin working there on 3 September.

25 The Respondent confirmed that the Claimant and the 5 individuals were released on 31st August were not all part of the group of 11 that started on 20 August. They were all operatives that were likely to have been working on a section of the site that no longer needed them for the time being.

26 The Respondent stressed that it was not responsible for the way in which the site was organised and freely admitted in today's hearing that there was an element of disorganisation in the way the requirement for qualified electricians on the Crossrail site had been handled.

27 The Respondent also confirmed today that it has since requested that future instructions to release staff should, in the initial stage, be indicated to the employees on site by someone from EMICO rather than just be left to the Respondent to do. This would be appropriate even though the Respondent was the employer as it was not the Respondent's decision. The representative from EMICO may be better able to explain why the employee is no longer required on the site.

28 The Respondent was aware that employees had been unhappy about how their employment had been terminated especially when there had been no indication of that being about to happen when they left the site at the end of their last shift.

29 It was Mr Higgins' evidence and the Tribunal finds it likely that apart from the Claimant there were other employees who queried their pay during the course of their employment with the Respondent. During the week ending 31 August, the person from EMICO who usually entered the time from the records on the fingerprint machine into the timesheets was on annual leave. That job was being done by someone who had been filling in on a temporary basis. That person made errors in calculating the amount of time that employees work on the site. For example, the Claimant had clocked out of the site at 2.30am because he was on a break but had clocked back in and finished work at the usual time for the night shift at 5:30am. The time after he clocked out at 2.30am had not been added to the total shift time and that is why he was underpaid by three hours. The Respondent did not find this out until much later. The Claimant was paid for 46 hours on 31st August when he should have been paid for 49 hours.

30 The Respondent's evidence was that it would normally address pay queries from staff without it being an issue. Mr Higgins' evidence was that it was helpful to the Respondent if those queries were raised as soon as possible so that it could be clarified and cleared with the Client as most of the time the Respondent paid the employee before it had received the money from the Client. The Respondent's evidence was that pay queries from employees was something that it readily addressed and had no issue with as it occurred on a regular basis. It was his evidence that the Respondent would never dismiss an employee for making a pay query.

31 On 3rd September the Claimant wrote a letter appealing against his dismissal which he referred to as his 'unfair dismissal' and alleging that he had been dismissed because he requested to be paid his outstanding wages. He complained that the Respondent had failed to meet the minimum standards that apply to his employment. He asked for a grievance hearing to discuss his dismissal and unlawful deduction of wages. He asked to be allowed to have union representation at any such meeting.

32 The Respondent received the email and Ms Corinaldesi responded on 4 September to inform the Claimant that she had requested 'clocking-in sheets' from the Client to verify what the Claimant said.

33 Once the Respondent received the 'clocking-in' information, it recognised the error and paid the Claimant the three additional hours owing to him. The evidence produced today shows that this amount was paid to the Claimant on 7 September 2018. The Claimant confirmed that today. The Claimant wrote to the Respondent to confirm that he still wished to have a response to his grievance and that he had not received accrued holiday pay or notice pay from the Respondent.

34 In its response dated 13 September, the Respondent through Ms Corinaldesi, informed the Claimant that he would be receiving his holiday pay, in the sum of £192.62, in his pay for that week. She informed him as far as the Respondent was concerned, he was paid notice pay as he was paid for the Friday when he did not work that day. The Claimant was informed of his dismissal on the morning of Friday 31 August after he worked the night shift on the evening of 30 August. The Claimant had been paid for 31 August although he had not worked that night shift.

35 The Respondent did not offer the Claimant a grievance hearing and once it had paid him all the amounts that it believed were outstanding to him, it considered the matter closed.

36 The Claimant did not agree that it was closed. He referred the matter to the JIB which is the electrotechnical Joint Industrial Board and the relevant regulatory body. The JIB has a dispute procedure which allows it to arbitrate between the parties through its national disputes panel. After consideration of the Claimant's complaints, the JIB decided that it could not assist as the Claimant was making a complaint of unfair dismissal linked to the assertion of a statutory right which should be considered by an employment tribunal. The JIB also looked at the Claimant's complaint of victimisation and confirmed that it could not address complaints made under the Equality Act, if that was what the Claimant was doing. By letter dated 16 January, the JIB informed Mr Higgins of the Respondent that the claim could not progress any further through the JIB.

37 On 14 September, the Claimant was paid £192.62 by the Respondent, which was his outstanding holiday pay.

38 On 22 March 2019, the Claimant was paid an additional 6.5 hours to make up a day's notice pay. The Claimant had previously been paid 3 hours for work on Wednesday 29 August. The Claimant's case was that he had worked a full shift that night and should have been paid for 10 hours. In the Respondent's investigations, it obtained copies of both printouts from the timesheets and from its Client which showed

that at the end of the shift on 29 August, the Claimant clocked out at the end of his shift at 5:18am when he should have clocked out at 5.30am. He had already been paid 3 hours for that shift. It was the Respondent's evidence that the client would not pay for the additional half-hour. Although the Claimant claimed an additional 7 hours for that shift the Respondent paid him an additional 6.5 hours to make a total of 9.5 hours for that shift rather than the usual 10 hours.

39 During the early conciliation process Mr Higgins made it clear to ACAS in an email seen by the Tribunal today that should the Claimant apply for work with the Respondent when they had vacancies, he would be considered. Mr Higgins confirmed that there was at present, no temporary workers at the Crossrail site. This was the only extent to which the Tribunal heard evidence on the ACAS early conciliation process. Mr Higgins offered the email in evidence as the Claimant contended that Mr Higgins had told ACAS that it would never re-employ him and Mr Higgins denied that was the case. He referred to dealing with this matter in an email and it was then that he offered to send the email to the Tribunal office from his mobile telephone so that it could be considered in evidence. The email was printed off and both parties allowed to make comments on it. The Claimant had the opportunity to cross-examine Mr Higgins on it.

40 Mr Higgins was asked by solicitors acting for the Claimant's former employers, BMSL, whether he would be prepared to give evidence to assist their case. Mr Higgins' evidence was that he reluctantly agreed to do so when the solicitor told him that he had been ordered by the court to do so. Perusal of the letter produced today shows that Mr Chaudhuri, BMSL's solicitor, referred to a conversation with the Judge at London Central but stopped short of stating that Mr Higgins had been ordered to provide a statement. However, the way in which the solicitor's letter is written could lead a lay person to assume that the Judge had told Mr Chaudhuri to get a statement from Mr Higgins. It is unlikely that a judge would do so in the context of an employment tribunal. However, Mr Higgins would not have known this and did not have his own legal assistance in that matter. He did give a witness statement to Mr Chaudhuri. The parties in that case resolved the matter between themselves which meant that Mr Higgins was not asked to give any live evidence against the Claimant in that case.

41 The Claimant is presently unemployed.

Law

42 Section 104 of the Employment Rights Act 1996 (ERA) states that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee brought proceedings against the employer to enforce a relevant statutory right or alleged that the employer had infringed a right of his which is a relevant statutory right.

43 The section makes it clear that it would be satisfied if the employee made it reasonably clear to the employer what the right was that he claimed was infringed even if he was not specific. The right to be paid correct wages, holiday pay and the correct

amount of notice pay applicable to each employee's circumstances are relevant statutory rights for the purposes of section 104.

44 As the Claimant was only employed from 20 August to 31 August, the claims he makes against the Respondent all arise out of this section.

45 The question for the Tribunal was whether he was dismissed because he asserted his statutory right to be paid correctly and if he was, what remedy was he entitled to be paid?

Decision

46 Although the Claimant hoped that his contract would be extended, he was only contracted to work for one month. There was no offer to renew his contract.

47 The Claimant did complain about an error in his wages. That was rectified although it took some time before that happened.

48 The Respondent was able to show the Tribunal an email from its client which instructed the Respondent to terminate the Claimant's contract of employment.

49 It is an unfortunate coincidence that the instruction to terminate the Claimant's contract and that of his other colleagues came on the same day as he raised a query on his pay. There is nothing apart from the fact that they both occurred on the same day to link the two together. The Tribunal did not have evidence on which it could base a conclusion that the decision to terminate his contract was related to his telephone query on his pay.

50 The Respondent had many employees on site but did not run or supervise the Crossrail site. There were engineers and electricians working on the Crossrail project to different employers, on different contracts and working different shifts. The introduction of the fingerprint clocking in and off machine would assist in recording the accurate start and end times of everyone's attendance at work so that they could be paid correctly by their employer and so that the Client could correctly pay the contractors. However, it is likely that there were queries raised by staff about their pay. It is unlikely that the system resulted in everyone being paid correctly.

51 The evidence was that the people the Claimant spoke to when he initially queried his pay on the telephone on the morning of 31 August. However, even though she may have been impatient with him that morning, Ms McLeod did pass the query on to the Ms Attrill at the Client (EMICO) so that they could check and make sure that the machine had recorded correct times for the Claimant and that those times had been recorded correctly on the sheet. She had not dismissed his complaint but had passed it on. This eventually resulted in the Claimant being paid the correct amount.

52 It is this Tribunal's judgment that there was no evidence on which the Tribunal could come to the conclusion that the reason to terminate the Claimant's employment

was related to his query about his pay. The reason for the termination of his employment is evident from the email from the construction manager at EMICO instructing the Respondent to 'release' the Claimant and 5 other operatives. The decision to terminate his employment was made by the Respondent on instruction from its client, EMICO. The Respondent tried to find other work for him on another site at Bond Street which was not possible and so his employment terminated on 31 August.

53 The Claimant's contract was for two months. His employment was terminated after one month. To date it is likely that extensive work continues to be done on the Crossrail site in Paddington. However, it is likely that different technicians are required at different stages of the operation. It was not clear from the email dated 31 August why the Client had decided to terminate the Claimant and his 5 colleagues but it is this Tribunal's judgment that there was no evidence that it was related to the pay query he raised on the phone earlier that morning.

54 The Claimant's dismissal took effect on 31 August 2018. The Claimant was entitled to one day's notice. He was paid one day's notice pay as he was paid for 31 August when he had not worked that shift.

55 Eventually the Claimant was paid for the full shift for the night shift of 30 August and for the full shift he worked on 29 August.

56 The Claimant has been paid £192.62 in lieu of holidays accrued but untaken.

57 It is this Tribunal's judgment that the Claimant was dismissed on 31 August 2018. There was no evidence that his dismissal was due to or related to his assertion of a statutory right to be paid correctly or any other statutory right.

58 The Claimant has been paid all money due to him as wages, holiday pay and notice pay. The Claimant's complaints of unlawful deduction of wages in respect of holiday pay and wages fails and is dismissed. The Claimant's claim for notice pay fails and is dismissed.

59 The Claimant's claims are dismissed.

Employment Judge Jones

5 June 2019