THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr N Solomon**

Respondent: **Engie Services Limited**

Hearing at London South on 16 April 2018 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **Joseph Bryan - Counsel**

JUDGMENT

It is the **judgment** of the Tribunal that the claim by the Claimant is dismissed.

REASONS

1 On 16 October 2017 the Claimant presented a claim to the Tribunal in which he had ticked the box in section 8.1 to indicate that he was making a claim for arrears of pay. He set out his claim as follows:

> I was TUPE over from First Security to Engie. My MOPAC contract was with First Security from 2007 up until 2014 when the TUPE happened, I always receive the same annual pay rise as the other guards. The same day rate, even though I worked 10 hours and they worked 12. This was always the case until after the TUPE. Engie will not acknowledge this fact and have gradually been paying me less than the other guards. This happens in the annual pay rise. I no longer get the same as the other guards. I have payslips to back this up. It was my understanding that a TUPE means everything remains the same.

2 The claim is based upon a term implied into the Claimant's contract of employment. The Claimant provided amended particulars of claim and Mr Bryan suggested that the formulation of the term which the Claimant was seeking was as follows:

> Each annual pay rise received by other security workers which increased their hourly rates would also increase the Claimant's hourly rate in line with the calculation that whatever a 12 hour shift would produce the Claimant would receive that amount for his 10 hour shift at the Met site.

That appears to me to be a fair formulation.

3 The security contract in question concerns the provision of security for the Mayor's Office for Policing and Crime ('MOPAC') covering some 35 buildings occupied by the Metropolitan Police. In addition to hearing from

the Claimant I heard from Mr Santok who has at all material times been responsible for managing about 20 of those buildings, which buildings are in south London. It is agreed that there was a transfer within the Transfer of Undertakings (Protection of Employment) Regulations 2006 with effect from 30 April 2014. At the time the Claimant was allocated to work at Brandon House, being the Overseas Registration Office – 'OVRO'. The employment of both the Claimant and Mr Santok transferred to the Respondent. Towards the end of 2014 the OVRO moved to Southwark Police Station, and the Claimant moved with it. The Claimant also undertook occasional shifts at weekends on other sites.

4 A spreadsheet was prepared by the transferor at the time of the transfer setting out the material details of the employment terms of the staff to be transferred. That document showed the Claimant to be employed for 50 hours per week at £9.43 per hour. That was also the information set out in a consultation form dated 4 April 2014.[1] On 6 August 2014 a letter was written to the Claimant on behalf of the Respondent again confirming a rate of pay of £9.43 and working hours of 50 per week.

5 The case for the Claimant is as follows. He says that when he was given the opportunity in 2007/08 to work on the MOPAC contract on a 50 hour a week basis, as opposed to a 70 hour week, it was agreed that his daily rate of pay would not be reduced. Consequently he was paid more on an hourly basis than his colleagues who received the same daily rate, but worked a 12 hour shift. It is easiest now to cite parts of the Claimant's witness statement:

> I agreed to permanently move to the Met site because I believed that the calculation was simple, I would continue to retain my pay which was equivalent to my co-workers who were undertaking 12 hour shifts at different sites compared to my 10 hour shifts at the Met site.
>
> In addition, I would also continue to receive annual pay rises in line with the other security guards who were also working for the company. Each annual pay rise received by other security guards, which increased their hourly rates, would also increase my hourly rate, that being that for whatever a 12 hour shift would produce, I would receive that amount for my 10 hour shift at the Met site due to its less desirable working conditions.
>
> However, I have not been receiving pay rises which are comparable to the pay rises my co-workers at other sites have received. This agreement is no longer recognised by the Respondent. The previous link between others increases and my own, had been broken.
>
> My argument is that although I don't have an *individual* contractual right to annual pay increases in my own right, I was expressly told that I would receive the rate I did. My right to annual pay rises became contractual through established custom and practice over the years despite not being expressed within my written terms and conditions of employment.

6 The Claimant gave further evidence that his 20% premium rate was paid 'without fail for 7 years' by the transferor. The evidence before me was very limited. In the bundle provided for this hearing were some pay records for the Claimant from 2012, 2013 and early 2014. They show the Claimant principally working 10 hour shifts, but also occasional 12 hour shifts. As an example, there is a payslip dated 26 May 2012. That shows the Claimant

[1] The rate of pay was actually shown as being £9.34 but the parties agreed that that was a simple error for £9.43.

as having worked 18 shifts of 10 hours and four shifts of 12 hours. He was paid £92 for each shift,[2] and consequently the hourly rate for a 12 hour shift was lower than for a 10 hour shift. The rates were £9.20 and £7.67 per hour. Both were above the national minimum wage at the time. Mr Santok told the Tribunal that he did not know why this discrepancy had arisen.

7 There was no documentary evidence as to what rates the Claimant was paid before the transfer to the Respondent by comparison with the Claimant's colleagues. There was also no original documentary evidence as to how the Claimant's pay rates compared with those of his colleagues after the transfer. Mr Bryan provided a table in his written submissions which was not disputed by the Claimant. That shows that some members of the Respondent's workforce received increases on 1 May in each of the years 2014 to 2017 inclusive to bring them in line with the London Living Wage ('LLW'). It also showed that the Claimant received an increase from £9.43 to £9.53 on 1 April 2015, but that he did not receive any increase in 2016, but did receive a further increase to £9.67 in 2017.

8 The issue of pay was first raised by the Claimant on 19 February 2015 in an email to Mr Santok. That email was as follows:

> I was made aware [during a conversation on 16 February 2015] that all staff who transferred over from First Security, who work on MPS, were given a significant pay rise on April 1st 2014. However I did not receive any pay rise. I was also made aware that they will receive an annual pay rise. However I won't receive this annual pay rise.
>
> I am a reliable, hard worker and I do not think it is fair that I have not received a pay rise like everyone else.

9 Mr Santok made enquiries and was informed by Ms Bennett, HR Coordinator, as follows:

> I will speak to him but what he has to realise is that the guards are getting their pay raised to the London Living Wage from £8.80 to £9.15. However, he is already on £9.43 ph. He would not be eligible.

10 On 17 March 2016 the Claimant wrote to Lyn Dodd, HR Adviser, complaining that he had not received the same pay rise as other guards. There was apparently a grievance hearing on 5 June 2017 as a result of which Nick Swallow wrote to the Claimant. His conclusion was that in recent years other guards had had their pay increased in line with the LLW, but until then the Claimant's pay had not risen at the same rate because he was being paid above the LLW. Mr Swallow added that there was no agreement that the Claimant be paid more than colleagues at other sites. The Claimant appealed the decision of Mr Swallow, and the appeal officer, Patricia Conran, reached the same conclusion.

11 In broad terms, without citing figures, I find on a balance of probabilities that from 2007/08 until the transfer to the Respondent in 2014 the Claimant received the same daily rate, whether he was working a 10 hour shift on his normal site or a 12 hour shift on another site. I also find that the effect was that when an increase in rates was agreed, or required due to an

[2] Subject to the odd pence here and there.

increase in the LLW the Claimant received the same increase in his daily rate as those normally working a 12 hour shift.

12 I further find that after the transfer the Respondent increased the pay of the Claimant's colleagues working 12 hour shifts in accordance with the LLW, but although the Claimant received some annual increases they were at a lower percentage hourly rate than his colleagues because he was already being paid at the relevant time at a rate above the LLW.

13 Mr Bryan provided me with written submissions to which he spoke. I agree with his submission that when the Claimant refers to custom and practice he is referring only to his own position. He referred to the decision of the Court of Appeal in *Park Cakes Ltd v. Shumba* [2013] IRLR 800. The facts are very different in that that case involved the question as to whether four employees were entitled to have redundancy payments enhanced to accord with such payments which had been made to other employees in the past.

14 Mr Bryan submitted that the claim had to fail on an evidential basis as the Claimant had only asserted that until the transfer his pay had increased in line with other guards and had not produced any documentary evidence to that effect. The burden is of course on the Claimant to prove his case. I entirely accept that the only evidence was in the Claimant's witness statement, but I note that the Respondent did not seek to bring any evidence to rebut that evidence. An application could easily have been made to the Tribunal by the Respondent for an order that the transferor produce the pay records for the Claimant and other guards. I have made my findings of fact above based on the evidence which I did have.

15 Mr Bryan submitted that the Tribunal should not imply the term for which the Claimant contended. There was no written evidence of the alleged term. The Claimant did not raise it during his TUPE consultation meeting. When the issue of a pay rise was first raised on 19 February 2015 the Claimant did not refer to the alleged agreement.

16 Mr Bryan referred to two other points about which evidence was given. The first was whether the Claimant's role at OVRO was more or less challenging than working on other sites at different times. The second was whether in fact from time to time the Claimant left the site before completing the 10 hour shift. Those issues were not explored in any detail and I do not consider them to be relevant.

17 Mr Bryan submitted that any linking of pay was explicable by the employer having exercised a discretion, or that the Claimant would only receive a linked pay rise where it was not a consequence of bringing the pay of others up to the LLW.[3]

18 Although I would not use exactly the same words as Mr Bryan, I effectively agree with his second point. It may well be that if more evidence had been produced that I would have been prepared to hold that until the transfer was effected there was a term implied into the contract of the nature sought by the Claimant. However, in order for any such term to apply after the

[3] Mr Bryan referred the LLW as being a 'mandatory minimum level.' I think that that is not correct.

transfer had been effected to the Respondent it would be necessary to expand it to include a further provision to the effect that the premium element would apply to the Claimant where the increase payable to other guards was not what one might consider to be a normal annual increase, but was one to put into effect the Respondent's more generous policy of paying its guards a rate at least as high as the LLW. The 'significant pay rise' referred to by the Claimant in his email of 19 February 2015 was for the purpose of increasing the hourly pay of all guards to the LLW.

19 In considering the question of an implied term one way of looking at it is to consider what would have happened if an officious bystander had posited to the Claimant and his previous employers that circumstances would arise under which the employer were to decide that there would be a significant increase beyond the 'ordinary' annual increase to take all employees up to a significantly higher minimum hourly rate. I do not accept that the Claimant's previous employers would have said without hesitation that the Claimant would still be entitled to a 20% premium above that new enhanced hourly rate.

20 For those reasons I find that this claim fails.

Employment Judge Baron

Dated 15 May 2018