



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Salvatore Casanova

v MITIE Limited

Heard at: Watford

On: 3 July 2019

Before: Employment Judge Alliott

Appearances

For the Claimant: In person

For the Respondent: Ms C Ibbotson, Counsel

JUDGMENT

1. Due to the way this case has been prepared and presented it has not been possible for myself to determine what, if any, sum is due and owing to the claimant. The claimant is alleging that there has been a shortfall in the payment of his wages from April 2018 until at least April 2019. Consequently, and with the agreement of the parties, I intend to make findings of fact, on disputed areas, and it is to be hoped that, with such findings of fact, the parties will be able to go away and agree what, if any, unauthorised deductions of wages there may have been.
2. If agreement can be reached between the parties and a judgment is required then the parties can write to the tribunal requesting, if appropriate, a declaration and a judgment sum. In the event that the parties do not agree then this matter will have to be relisted before myself to determine such issues as are outstanding.
3. Matter adjourned generally. The parties to apply for the matter to be listed before Employment Judge Alliott if necessary.

REASONS

Evidence

1. I heard evidence from the claimant and Ms Sonia Silva, Contract Director of the respondent. In addition, I had a hearing bundle stretching to some 513 pages.

The law

2. The claimant remains employed by the respondent and consequently this is not a breach of contract claim. The claim is made pursuant to s.13 of the Employment Rights Act 1996 which prohibits unauthorised deduction of wages. The relevant provision is 13(3) which provides:

“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.”

Findings of fact

3. On 1 April 2018 the claimant “TUPE” transferred from the Compass Group to the respondent. Obviously enough his terms and conditions of employment could not be worse than they had been prior to the transfer.
4. When employed by the Compass Group the claimant was subject to the Whitley Councils for the Health Services (Great Britain) General Council Conditions of Service. This is a document some 187 pages long, which somewhat surprisingly, does not deal with the issue of how overtime is paid.
5. Initially the claimant was employed on a basic hourly rate for 39 hours a week. After 39 hours a week he was entitled to be paid overtime at an enhanced rate.
6. In 2006, against the threat of redundancy, the claimant agreed a reduction in his basic hours to 37.5 hours per week. The claimant accepted the new role and signed a document dated 8 May 2006 indicating that he accepted the variation to his contract. This letter states:

“Your length of service remains unaffected by this change, and all other terms and conditions remain the same as per your previous role.”

7. That suggests, and I find that, the claimant’s contract of employment which provided for overtime at an enhanced rate to be paid once he had worked 39 hours remained in place.
8. When the claimant was “TUPE” transferred to the respondent, the Compass Group provided employee liability information. As regards overtime rate the following is recorded:

“Above 39 hours time and a half/double dependent on if normal working day or rest day.”

9. That further suggests that overtime was only payable after the claimant had worked 39 hours.
10. The payslips that I have seen from the Compass Group have been calculated on a calendar monthly basis rather than on a weekly basis. That is clear from the hours recorded as the basic pay hourly wage usually around 163.12 per calendar month.
11. It is fair to say that the Compass Group payslips pose some questions not all of which have been satisfactorily answered as far as I am concerned. However, they do contain, on a regular basis, a reference to basic rate overtime. The basic rate overtime paid varies between 7.5 hours a month up to 31 hours a month. Accordingly, that rate cannot be simply explained as the claimant working between 37.5 and 39 hours before the overtime rate clocks in. However, it is certainly consistent with it.

12. Both sides have written to Compass to seek clarification as to whether or not the claimant was entitled to be paid an enhanced overtime rate after working 37.5 hours. Whilst it is true to say that the claimant showed me a letter which suggested that his erstwhile employers agreed with him that he was entitled to overtime at an enhanced rate after working 37.5 hours, the respondent sought clarification from the Compass Group on 29 May 2019 and the response states:

“Also confirmed that his working hours before transfer was 37.5 but the overtime was still payable after 39 hours.”

13. Accordingly, I find that the claimant was only entitled to be paid overtime at an enhanced rate, namely at time and a half, after working 39 hours a week.
14. The next issue to be determined is whether the claimant was entitled to be paid an enhanced overtime rate if he worked on a Saturday or a Sunday.
15. I have relied considerably on the Compass payslips in determining this issue. I have been provided with 11 payslips covering the period April 2017 to March 2018. These indicate that the claimant very regularly worked at the weekends. By reference to the payslip dates the claimant worked weekends as follows:

April 2017:	4 Sundays and 4 Saturdays
June 2017:	2 Sundays and 2 Saturdays
June 2017:	4 Sundays and 2 Saturdays
August 2017:	3 Sundays and 4 Saturdays
September 2017:	4 Sundays and 4 Saturdays
September 2017:	4 Sundays and 3 Saturdays
November 2017:	2 Sundays and 3 Saturdays
December 2017:	3 Sundays and 4 Saturdays
December 2017:	3 Sundays and 3 Saturdays
February 2018:	5 Sundays and 4 Saturdays
March 2018:	3 Sundays and 2 Saturdays

16. As I have already stated, the Compass Group payslips do pose some unanswered questions. Not only is the basic rate overtime paid in excess of the difference between 37.5 and 39 hours but also there are unexplained references to overtime at double time and to rest day pay (although that may be explained by a rest day being worked during the working week).
17. The Compass Group payslips record payments for Sundays at double time and Saturdays at time and a half repeatedly. The way the payslip works is that Sundays are recorded as plus 1 days pay and Saturdays as plus ½ a days pay. Those calculations come on top of the basic pay hourly wage and are not mirrored elsewhere by other overtime payments. Consequently, I have concluded that where the claimant was rostered to work on a Saturday and Sunday as part of his 37.5 hour, 5 day, normal working week, he was paid by the Compass Group an enhancement for Saturday and Sunday working. For the avoidance of doubt, I find that the claimant was entitled to be paid pursuant to his contract of employment at one and a half times his pay if he worked on a Saturday and two times his pay if he worked on a Sunday.

18. In order to clarify the position and given the difference between the parties as to the contractual entitlement to be paid if the claimant worked on a rest day, I find that he was entitled to be paid for the first rest day at time and a half and for a second rest day worked at double time. The reason I find that is that I consider it makes more logical sense to work up towards a higher rate of overtime pay in the event that two rest days are worked. For the avoidance of doubt, in the event that the claimant is given a Sunday as a rest day and works on that rest day as a first rest day, I find that he would be entitled to double time rather than the time and a half for the first rest day worked.

19. The claimant claims 3 days pay for when he was off sick from 29 to 31 January 2019. Ms Silva, on behalf of the respondent, sought to justify not paying him for that period by reference to an employee handbook but I find that that did not cover this situation as it dealt with periods of sickness in excess of 7 days. The respondent has always indicated that if the claimant self-certified his sickness then that would be passed to Payroll and he would be paid his 3 days. The claimant has indicated to me that he will provide the necessary paperwork. Three days pay at 7.5 hours a day at £8.75 would indicate that the claimant is due the sum of £196.87 gross. That sum stands to be subject to income tax and National Insurance as appropriate.

Employment Judge Alliot

Date: ...11 July 2019.....

Sent to the parties on:

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For the Tribunal Office