EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**RESPONDENT**
MR PHILLIP WOODS	**SWISSPORT GB LIMITED**

HELD AT: CARDIFF

EMPLOYMENT JUDGE: MR W BEARD **MEMBERS: MS LOVELL**
MR MEADS

Representation
Claimant: Ms H Randall (Counsel)
Respondent: Mr L Rogers (Solicitor)

JUDGMENT

1. The claimant was an employee as defined by section 230(1) of the Employment Rights Act 1996 between the dates of 24th of October 2017 and 11 July 2018.
2. The claimant was a part-time worker as defined by regulation 2 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 1996 between the dates of 24th of October 2017 and 11 July 2018.
3. The claimant's contractual obligation to work on call between the hours of 5:00 pm and 5:00 am is "working time" as defined by regulation 2(1) of the Working Time Regulations 1998.
4. The claimant's claim that he was unfairly dismissed contrary to section 103A Employment Rights Act 1996 is well founded.
5. The claimant's claim that he suffered detriment contrary to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.
6. The claimant's claim that he was dismissed contrary to regulation 7(5) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded and is dismissed.
7. The claimant's claim that he was subjected to less favourable treatment contrary to regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded and is dismissed.

8. The claimant's claim that he was subjected to detriment contrary to regulation 7(2) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded and is dismissed.

9. The claimant was entitled to payment, as working time, between the hours of 5:00 pm and 5:00 am between the 24th of October 2017 and 28th of February 2018 inclusive, that payment was at the rate of the minimum wage for hours on stand-by and at the prevailing contractual rate for aircraft re-fuellers working for the respondent when attending a call.

10. The claimant's claim that the respondent failed to pay the claimant the national minimum wage between the hours of 5:00 pm and 5:00 am between the 24th of October 2017 and 28th of February 2018 inclusive is well founded.

11. The claimant being ready, willing and able to work between 6th of June 2018 and 11th July 2018 the respondent failed to provide the claimant with work under the terms of the contract between the hours of 5:00 pm and 5:00 am on those dates inclusive.

12. The claimant's claim that the respondent failed to pay the claimant the national minimum wage between 6th of June 2018 and 11th July 2018 is well founded.

13. The claimant's claim that working time entitled the claimant to accrue holiday pay and that the respondent failed to pay the claimant's accrued holiday entitlement when his engagement ended on 11th July 2018 pursuant to regulations 14 and 15 of the Working Time Regulations 1998 and that the same amounted to unlawful deduction of wages contrary to sections 13 of the Employment Rights Act 1996 is well founded.

14. The claimant's claim that he was required to work in excess of 48-hours each working week between 24th of October 2017 and the 28th February 2018 without having agreed and signed a valid opt-out contrary to regulation 4 of the Working Time Regulations 1998 is well founded.

15. The claimant's claim that he was denied the opportunity to take sufficient weekly rest periods between 24th of October 2017 and the 28th February 2018 contrary to regulation 11 of the Working Time Regulations 1998 is well founded.

16. The claimant's claim that the respondent failed to provide the claimant with a statement of his written particulars of employment within 2 months of commencing employment with the respondent in April 2017 is presented out of time and the tribunal has no jurisdiction to deal with the complaint.

17. The claimant's claim that he did not receive a statement setting out changes to his role within one month of 24th of October 2017 is not well founded the claimant was not employed by the respondent directly prior to that date.

18. The claimant is entitled to statutory notice pursuant to section 86 Employment Rights Act 1996 and the claimant's claim that he has not been paid notice pay for that week is well founded.

REASONS

Preliminaries

19. The claimant was represented by Ms Randall of Counsel the respondent by Mr Rogers a Solicitor. The tribunal was provided with a bundle of documents approaching 300 pages. The tribunal heard oral evidence from the claimant and he called Mr Paul Knight who managed him when he was initially employed by the respondent. The claimant also asked us to take account of the statement of Mr Lee White who did not attend. The respondent called as witnesses Mr James Muldoon, who had been station manager at Cardiff Airport during part of the relevant period; Mr Alan Rodgers who took over from Mr Muldoon and Mrs Rachel Morgan, who was the HR professional dealing with matters relating to the claimant's complaints.

20. The tribunal heard significant evidence about the person managing the claimant at the time of relevant events. That individual has not been called as a witness by the respondent. Some of the tribunal's findings of fact are significantly negative about that individual who has not had the opportunity to respond in evidence. On this basis the tribunal shall refer to that individual as "A" throughout this judgment.

21. The claimant's claims are set out in a list issues agreed by the parties which were as follows:

    21.1. was the claimant an employee as defined by S. 230(1) of the employment rights act 1996 between 24 October 2017 and the agreed date of termination on 11 July 2018?

    21.2. The respondent accepts that the claimant was a worker between those periods.

    21.3. In either case was the claimant a part-time worker as defined by regulation 2 of the part-time workers (prevention of less favourable treatment) regulations 2000?

    21.4. What was the claimant's contractual entitlement to work and did time on call amount to "working time"?

    21.5. Are the following matters the claimant set out in a letter to Keith Bradbury in his letter of 22 May 2018 disclosures? The matters are set out in paragraph 34 of the Particulars of Claim attached to the ET1.

        21.5.1.1. The respondent's failure to classify his time on call as working time in accordance with the working time regulations 1998

        21.5.1.2. The respondent's failure to provide adequate rest breaks in accordance with the working time regulations 1998, with the claimant not being provided with any days off within the period between 24th of October 2017 and 28th of February 2018

21.5.1.3. The respondent's failure to pay the claimant the national minimum wage during his time on call from 24th of October 2017

21.5.1.4. The lack of training provided to the claimant when requiring him to work nights on call

21.5.1.5. The failure of "A" to follow implement the requirements to wear personal protective equipment.

22. If the claimant was an employee, and if any of the disclosures in paragraph 5 are found to be protected disclosures:

22.1. Was the claimant dismissed because he made a protected disclosure and accordingly was he automatically unfairly dismissed contrary to section 103A employment rights act 1996?

22.2. Was the claimant subjected to detriment because he made a protected disclosure by the respondent failing to deal with his grievance, contrary to section 47B of the employment rights act 1996?

23. If the claimant was not an employee but a worker and if any of the disclosures in paragraph 5 are found to be protected disclosures was the claimant subject to a detriment contrary to section 47B employment rights act 1996 by:

23.1. The respondent failing to deal with his grievance? and/or

23.2. The respondent ending his engagement?

23.3. was either detriment imposed because the claimant and made the disclosures?

24. Did the following acts or omissions occur as stated at paragraph 43 the particulars of claim?

24.1. Alan Rogers decided to make the claimant redundant on July 2018 because part-time workers were not required. The claimant relies on the following as comparators: David Phillips, Gordon Harris, Robert Burrows, and Joshua Nicholas.

24.2. In October 2017 the claimant was not considered for the role of the respondent's Cardiff fuel farm trainer while Anthony Holton was.

24.3. In May and June 2018, the claimant was not considered for the role of fuelling operations manager unlike Paul Finlay-Watson, a full-time employee,

24.4. The claimant's salary was not comparable to that of a full-time worker (the comparators relied upon are David Phillips, Gordon Harris, Robert Burrows, and Joshua Nicholas)

25. If any of the acts/omissions in paragraph 24 above are found to have occurred was the claimant treated less favourably in comparison to the employee/s cited?

26. Was the claimant entitled to payment for the time when he was on call between 24th of October 2017 and 28th of February 2018

27. Was the claimant denied the opportunity to work his contracted hours, following his return from sickness absence, between 6th of June 2018 and the EDT?

28. If the answer either paragraph 25 or 26 is yes, did the respondent failed to pay the claimant the national minimum wage?

29. Did the respondent agree with the claimant that he would receive a weekly salary of £200-£300 per week from 24 October 2018?

30. Was the respondent's custom and practice to pay a minimum of 4 hours wages during any call out?

31. If the answer to either paragraph 28 and 29 above is yes did the respondent fail to pay the claimant the sums due?

32. If the claimant's time on call is working time was the claimant entitled to accrue holiday for such time? If so did the respondent fail to pay the claimant's accrued holiday entitlement when his engagement ended on the EDT amounting to an unlawful deduction of wages?

33. Was the claimant required to work in excess of the 48-hour working week between 24th of October 2017 and the EDT and if so was a valid opt out signed?

34. Was the claimant denied the opportunity to take sufficient weekly rest periods between 24th of October 2017 and the EDT?

35. In the alternative to paragraphs 32 and 33 above if the claimant's time on call was working time was the claimant entitled accrue holiday for such time? If so did the respondent failed to pay the claimant's accrued holiday entitlement when his engagement ended on the EDT, did that amount to a breach of regulations 14 and 16 of the working time regulations 1998

36. Did the respondent provide the claimant with a statement of his written particulars of employment within 2 months of commencing employment with the respondent in April 2017 or at all? Did the claimant receive a statement setting out changes to his role within one month of 24th of October 2017 or at all?

37. What was the claimant's notice entitlement? Did the respondent fail to make a payment in respect of the same?

The Facts

38. On 27 April 2017 the claimant was taken on by the respondent as an aircraft re-fueller. Mr Knight had been a consultant employed by the respondent to open a new re-fuelling facility at Cardiff Airport set up by the respondent, he encouraged the claimant to apply for this role being aware of the claimant's skills and abilities. Shortly after this another employee, Paul Finlay-Wilson commenced employment, the claimant helped this employee become familiar

with the systems involved in re-fuelling commercial aircraft as his previous experience was in the use of military refuelling systems.

39. The claimant, at his own request, asked to be moved onto a zero hours contract. This was agreed and the claimant became employed on the terms set out in a letter of 26 May 2017(page 114). The letter sets out that the company was prepared for the claimant to work as a casual employee, on an ad hoc basis, as an aircraft re-fueller. That role was to begin on 22 May 2017. The letter sets out a rate of pay for hours worked at £13:97 an hour. The letter is clear, it sets out specifically that during this arrangement the respondent was under no obligation to offer the claimant any hours of work or pay and that the claimant had the right to refuse the work.

40. At this stage it is worth mentioning that the document of 26 May 2017 was not actually received by the claimant. In fact, none of the documents purporting to be contractual documentation were seen or signed by the claimant. It is apparent that whatever arrangements the respondent had in place for providing employees with contractual documentation, those arrangements were honoured more in the breach than the observance, at least in the claimant's case. This can be seen by the fact that change documentation was altered on one occasion to record changes that took place on that occasion and, at the same time, changes which had taken place almost a month previously.

41. We make this general point, apart from reliability on the issue of remembered dates, we found the claimant an entirely credible witness. He was prepared to concede points to his disadvantage and was clear in his factual description of events. He was supported in some assertions by the documentary evidence e.g. that he had not received documents such as the contract (which would have been signed had he received it). Where there was no contradictory witness evidence we have accepted the claimant's account in its entirety, where there is any contradictory evidence we shall explain our reasons for preferring the claimant's account.

42. The claimant was not directly managed by the station managers but, in the period with which we are most concerned by an individual whom we shall refer to as "A" who was appointed in September 2017. All contact by the claimant with the respondent was through "A". In October 2017 "A" held a meeting with the full-time aircraft fuelling staff. At this meeting he sought to set up a rota for out of hours working. The full-time staff refused to engage with such a rota. The purpose behind attempting to establish the rota was that the respondent had recently agreed a contract to provide 24-hour fuelling on ad hoc basis. Such a contract required the respondent to ensure that someone was available, at short notice, to refuel aircraft (the reasons for this varied and included the arrival of diverted aircraft and medical transports). The notice that would be given to the person covering this duty would be longer or shorter depending on the nature of the callout. However, in evidence, Mr Muldoon made it clear that those who would be called upon to provide cover would live within 30 minutes of the airfield.

43. The claimant had always wished to return to a full-time re-fuelling role and told “A” of this. On 24 October the claimant came to an agreement with “A” changing his terms of appointment.

    43.1. The claimant was summoned to the main office by “A” who appeared to the claimant to be agitated. “A” told the claimant that there was a position which he could take up.

    43.2. “A” made it clear to the claimant that he would have to accept this position or be out of a job.

    43.3. The role offered required the claimant to be on call between the hours of 5pm and 5am every day of the week.

    43.4. The claimant enquired as to what days he could take off from work. “A” told him he could take any day because when he did “A” would arrange cover.

    43.5. The issue of wages was discussed; “A” informed the claimant that he could have “2 to 3 a week”. The claimant took this to mean £2-£300 a week.

    43.6. The claimant asked about callout payments and was told that he would receive the standard. Mr Knight told us, and was not challenged by the respondent, that the standard terms were for and employee to be paid minimum of 4 hours pay for any callout and any additional time above four hours to be paid at time and a quarter. Mr Knight also told us that this would normally be a full-time employee who was working a call-out shift as part of a rota. Mr Knight was clear, that because of safety concerns this individual would not be expected to work a shift after a callout because of tiredness (for health and safety reasons).

    43.7. This was an ultimatum but, in any event, the claimant accepted this agreement.

    43.8. It’s important to note that this agreement was not followed up in writing to the claimant in anyway. In respect of this change there is no change document that the respondent has drawn up as was the case on 26 May 2017.

44. The actual working arrangements as operated were a little different from those that had been agreed at that meeting.

    44.1. The claimant commenced work under the agreement on the evening of 24 October 2017. The claimant immediately asked for the following Friday off. The claimant was told by “A” that there was no one to provide cover on that day.

    44.2. The claimant says that he knew at that point that he was, probably, in his own words “shafted”. However, the claimant put up with the situation and did not ask again for time off.

44.3. The claimant therefore was available on call 12 hours a day 7 days a week.

44.4. Because of the requirement to live and be near to the airport and respond immediately to any callout, the claimant was unable to engage in social arrangements. The claimant was, to give effect to the agreement, confined to an area within 30 minutes of the airfield whether that be at home or anywhere else within that distance.

44.5. The claimant told us, and we accept, that he was contacted by the airfield staff, not the respondent's staff particularly "A" when there was a call out.

44.6. On callouts, even when the aircraft might be an hour or so coming, the claimant still needed to attend the airfield very quickly in order to test the necessary fuel and equipment and set things up before refuelling the aircraft.

44.7. The respondent has denied that there were flights concerning medical emergencies. We have been shown text messages which indicate that there were medical emergency flights which the claimant dealt with.

44.8. The reality is that the claimant was the only person contacted to attend the airfield; we have heard no evidence that on any specific occasion someone else was asked to attend to deal with ta callout at a time when the claimant was engaged to provide cover.

45. In or around the time when the claimant received his December 2017 pay the claimant confronted "A". On this occasion "A" told the claimant that he was being paid £7 per shift on call and, in addition was only being paid for callouts on an actual time worked basis. The claimant did not challenge this change in terms. The claimant told us that he did not do so because he held a belief that in some way employment law would protect his original agreement after he had worked the arrangement for three months.

46. The claimant contends that he was available to work throughout the period 24 October until he became ill and went sick on 28 February 2018. There is a document which purports to show that the claimant was not available between the 12 and 22 December 2017. The evidence of Mrs Morgan was that the administration staff would have included that note on the documents showing working time because they would have been told to do so by "A". We prefer the claimant's account, he was actually paid for those days at £7 per day, and we have heard no evidence beyond the document to support a contention that there was period of absence such as the appointment of another person to cover the callouts during that period.

47. Employees were taken on in Cardiff, apparently there is no evidence that these roles were advertised as usual on the company website. It is the claimant's belief, based on conversations with some of those employed, that the persons chosen were former colleagues of "A".

48. The claimant was taken ill in February 2018 and was not well enough to return to work until June 2018 at which point he informed the respondent that he was available. Despite this absence it is our understanding that the respondent continued to pay the claimant at the rate of £7 a day, they did not pay statutory sick pay.

49. In May 2018 the claimant, being aware that "A" had resigned, sent a letter to the respondent. The letter included a number of complaints which can be seen at (p.145- 149). The claimant told us that those matters he raised relating to his pay and working arrangements were entirely personal matters. In respect of a complaint of lack of training, in cross examination the claimant accepted this too was about his position rather than a broader proposition about training. However, he did relate the issue of training to the JIG requirements which he considered mandatory. However, in terms of the complaint about "A" and a failure to wear appropriate protective clothing this was clearly unrelated to anything about the claimant's specific employment and the claimant contended that this complaint was about the dangers that could occur in such circumstances.

50. The complaints raised by the claimant were not investigated by the respondent. The tribunal came to the conclusion that there were, in reality, only two possible reasons for the failure to investigate: one would be total incompetence, the other would be to avoid the issues raised.

    50.1. The respondent has a dedicated human resources function, we find it difficult in those circumstances to accept that this arose from incompetence; the level of failings in approach are so complete.

    50.2. There is also evidence, in our judgment, that Mrs Morgan in her email at page 141 is attempting to limit the claimant's complaints by stating she considers them resolved. Any rational reading of the claimant's email to her on page 142, to which she was responding, would demonstrate that he did not consider that matters had been dealt with, but that he was seeking an informal resolution.

    50.3. We consider that, in this respect, Mrs Morgan was less than forthcoming with the tribunal. In our judgment her written evidence misquoting the claimant in relation to this, was at best misleading and at worst approaching dishonesty, it undermined her credibility on these matters.

    50.4. In our judgment the reason for a failure to investigate was to avoid the potential of embarrassing evidence emerging which would demonstrate poor management on the part of "A", an absence of training of safety critical staff and failure to comply with mandatory JIG requirements.

51. When the claimant asked to return to duty in June 2018 he was told by Mr Annan, the new manager, that he (Mr Annan) had been instructed that the claimant was not to be given any work.

51.1. The claimant was asked by the respondent to come to a meeting on 4 July 2018. It is pertinent to note that his airside pass had already been cancelled by the respondent before that meeting. The respondent dismissed the claimant at this meeting and did not attempt to discuss with him the operational matters he had raised in his complaint.

51.2. In our judgment the respondent, considering that the claimant was subject only to a zero hours contract, made the decision to dismiss in connection with the complaints the claimant had raised, particularly those about operational matters.

51.3. It appears to the tribunal that it was this that precipitated the claimant's dismissal, as his absence had not resulted in a decision to dismiss at an earlier stage. This is despite the respondent's evidence that a rota had been set up to cover the claimant during his absence and beyond. We have also been made aware that there is additional staff availability (in terms of hours) during the summer months.

51.4. This raises the question for the tribunal, if those circumstances were in place earlier, why is it only when the claimant makes a complaint and later indicates that he is available to work the respondent says that he cannot.

51.5. The fact that the meeting was held in July was due to the availability of Mr Bradbury to attend that meeting. We are also aware that Mr Rodgers and Mrs Morgan had annual leave at around that time too. That is the reason, it appears to us, that the meeting and dismissal takes place in July and not immediately after the claimant raised the issues.

The Law

52. The nature of the distinction between actual and implied authority to enter into contracts is as set out by Diplock LJ at p 502 in ***Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*** **[1964] 2 QB 480**,

> *"An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor."*

In ***Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549*** the Court of Appeal held an implication of authority arises when in general terms a person appears authorised to do all such things as fall within the usual scope of the office held by the individual. The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority see ***Financing Ltd v Stimson [1962] 1 WLR 1184***

53. The Employment Rights Act (ERA)1996 provides:

    53.1. In section 43A: *(i)n this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*.

    53.2. In section 43B: *(1)In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

    ----------(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

    ---------- (d)that the health or safety of any individual has been, is being or is likely to be endangered,

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    53.3. In section 43C*: (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer*

54. In ***Bolton School v Evans [2007] ICR 641*** it is made clear that it is the disclosure of information that gives rise to the protection. In ***Fecitt & Ors v NHS Manchester EWCA Civ 1190*** Elias LJ held that liability arises if the protected disclosure is a material (more than trivial) factor in the employer's decision to subject the claimant to a detrimental act. Dealing with an argument related to the applicability of interpretation of discrimination law this area he considered that the reasoning in EU analysis is that unlawful discriminatory considerations should not have any influence on an employer's decisions and that the same principle is applicable where the objective is to protect whistleblowers. This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair.

55. The PID provisions also raise issues on the burden of proof. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure. The tribunal must answer these questions when considering the burden of proof in a PID dismissal case. Has the claimant

shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal? If so, has the respondent proved his reason for dismissal? If not, has the employer disproved the section 103A reason advanced by the claimant? If not the dismissal is for the section 103A reason. This is set out in ***Kuzel v Roche [2008] IRLR 530*** on that approach it is possible to find that an employer has disproved the section 103A reason without establishing its own reason (i.e. both reasons advanced are not the real reason for dismissal).

56. In ***A –v- Chief Constable of West Midlands Police UKEAT/0313/14*** an Employment Tribunal rejected the claimant's complaint of victimisation. The EAT dismissed the appeal and in particular because it indicated that it was difficult to contemplate how a failure to hear a complaint fully could be caused by the making of the complaint in the first place. It appears to the tribunal that this would raise similar issues in regard to detriment arising from a public interest disclosure, it is difficult to see how the disclosure itself can be the cause of failing to investigate the disclosure.

57. Section 230 of the Employment Rights Act 1996 provides:

> *"(1) In this Act "employee" means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing."*
>
> *(3) In this Act "worker" ---------- means who has entered into or works under (or where the employment has ceased, worked under)*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby an individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by that individual.*

58. The starting point for questions of employment status is the decision in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C*** where MacKenna J said:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."*

59. There are further general propositions: ***Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612***, 623 per Stephenson LJ "There must … be an irreducible minimum of obligation on each side to create a contract of service". In the circumstances of this case we have to consider the question of casual workers. In ***McMeechan v Secretary of State for Employment [1997] ICR 549*** Waite LJ indicated that in examining questions about casual workers care needs to be taken to analysing what may be two distinct engagements. He described a general engagement where sporadic tasks are performed by the individual and the specific engagement which begins and ends with the performance of one task. Thus, it is possible that there can be a contract of employment for a limited duration for the specific task whilst the general contract is not of that nature. It is necessary, in order for the general contract to be a contract of employment, for there to be a mutuality of obligation to provide work and accept work when that work is available: see ***Clark v Oxfordshire Health Authority [1998] IRLR 125*** and ***Carmichael & Anor. v National Power PLC [2000] IRLR 43.***

60. The Working Time Regulations 1998 provide in the interpretation section that:

> *"rest period", in relation to a worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations;*
>
> and that
>
> *"working time", in relation to a worker, means any period during which he is working, at his employer's disposal and carrying out his activity or duties,*

The above definition is copied verbatim from the Working Time Directive.

61. In ***Ville de Nivelles v Matzak: C-518/15, [2018] IRLR 457***, the ECJ confirmed that there is no facility to derogate from the scope of the definition

of working time under the WTD, all three requirements of must be satisfied in order for the period to constitute working time. It should be noted that (periods of annual leave apart) there are only two categories of time encompassed by the regulations: working time or rest. Moreover, 'rest' is not defined in the Directive but the regulations show time which is not working time or breaks set out in the regulations is 'rest'. Rest breaks are periods within a period of working time during which the worker is freed from the obligations of work, whereas rest periods are simply periods free from working obligations between successive periods of working time. In this case Mr Matzak was a retained firefighter under arrangements where he was required to be available on call for work, for one week out of every four, during the evenings and at the weekend. He was paid only in respect of time when he was on active service. Time spent on call without being required to carry out any professional duties ('stand-by time') was unpaid. On stand-by duty, Mr Matzak had to remain contactable and, if necessary, report to the fire station as soon as possible and in any event within no more than eight minutes under normal conditions. It was observed that this meant in practice that the firefighter must reside near the fire station and that his activities during those periods are correspondingly restricted. The following are quotes from the judgment as it relates to standby time:

> *(T)he concepts of 'working time' and of 'rest period' are mutually exclusive ------. Thus, it must be observed that, as EU law currently stands, the stand-by time spent by a worker in the course of his activities carried out for his employer must be classified either as 'working time' or 'rest period.'*
>
> *Moreover, the intensity of the work by the employee and his output are not among the characteristic elements of the concept of 'working time'.*
>
> *It has also been held that the physical presence and availability of the worker at the place of work during the stand-by period with a view to providing his professional services must be regarded as carrying out his duties, even if the activity actually performed varies according to the circumstances ------.*
>
> *If the stand-by period in the form of physical presence at the place of work were excluded from the concept of 'working time', that would seriously undermine the objective of Directive 2003/88, which is to ensure the safety and health of workers by granting them adequate rest periods and breaks ------ ------.*

> *Furthermore, it is apparent from the case-law of the Court that the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties ----------)-.*
>
> *Finally, it must be observed that the situation is different where the worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as 'working time'---------.*

62. In ***Edwards and Morgan v Encirc Ltd [2015] IRLR*** 528 a purposive approach is to be adopted, reflecting the aims of the WTD so that the attendance by the claimants, a union safety representative and a shop steward, respectively at a safety committee meeting at the workplace convened by the employer and at a meeting arranged by the employer to discuss a pay rise, were 'work' within the definition. Applying that broad approach, the claimants were also 'at their employer's disposal.

Analysis

63. We begin by dealing with the question of whether the claimant was an employee.

    63.1. On our findings of fact that the claimant reached agreement with “A” under which the claimant was required to be available to work between the hours of 5pm and 5am from 2017 October 2017, unless cover was arranged.

    63.2. There was therefore an obligation for the claimant to provide that availability to work and for the respondent to pay the claimant for being available to work; mutuality of obligation.

63.3. The changed agreement did not permit the claimant to send someone along in his place (the respondent by agreeing the claimant was a worker must accept the claimant provided his service personally).

63.4. Over and above that the claimant could not refuse to turn out if cover had not been arranged.

63.5. In our judgment there can be no clearer case of a continuing contract where there is a continuing obligation.

63.6. In our judgement this agreement also fits with the commercial realities of the situation that applied. The claimant lived close to the airport and therefore could get to the airport quickly. There had been severe difficulties in getting anyone else to cover because of the employee's refusal to agree to work a rota. That refusal had preceded the agreement which, was applied to the claimant as an ultimatum.

63.7. In our judgment all of the facts point to the claimant being engaged make himself available to attend at the airfield as an employee not a worker.

64. Was that agreement made between the claimant and the respondent? The respondent contends that Mr "A" did not have actual authority to enter into such contracts.

64.1. We have seen that discussions between the claimant and Mr Knight (who was not an employee), the original person managing the site led to the first agreement to employ the claimant.

64.2. Further that the changes discussed leading to the claimant being employed on a zero hours contract was similarly agreed with Mr Knight.

64.3. Further, the respondent was relying on "A", who was in the same role as Mr Knight, but also an employee of the respondent, to act as is its general agent when discussing matters of work with the claimant. It did not, for instance, require the claimant to meet a more senior manager in order to discuss when and how the claimant was to work.

64.4. Whatever arrangements for cover were to be put in place was left for "A" to deal with.

64.5. The respondent was content for "A" to inform HR as what he had agreed with the claimant for the claimant to work (even on the respondent's account this would be the case if there was an ad hoc callout).

64.6. In our judgement there is no clearer case of implied authority than in circumstances where a manager informs an employee of the terms an employee could expect to be employed under unless there is specific information which shows that the specific individual is not entitled to bind the employer. In our experience employers, in contractual documentation and manuals, may set out that no written agreement can be altered or

changed without a specific step being taken or specific person/s being involved. There is nothing of that sort here.

64.7. In very straightforward terms Mr Woods went to “A” for his instructions; “A” gave instructions with the authority of the respondent. In our judgement agreeing terms with the claimant falls within the necessary and subsidiary elements of implied authority that “A” could agree with the claimant of the terms of his employment.

65. What were those terms?

65.1. The claimant had agreed to work for a sum of money but not what that sum of money was to be. It seems to us that that aspect of the agreement must be void for uncertainty.

65.2. The objective observer would necessarily ask “which is it £200 or £300 per week or somewhere in between, before being able to say that there was agreement. That was not done a figure was not pinned down by the claimant; further he did not complain about the position when he was actually paid less than he was expecting.

65.3. In our judgement, an important aspect is that the claimant accepted, certainly after his December wages were paid, £7 per shift on call. By not complaining about that, in our judgment, in terms of the agreement the claimant by that stage accepted that sum as the agreed wage.

65.4. The claimant was required under the terms of that agreement to be available for 12 hours each night between the hours of 5pm and 5am every day of the week for which cover was not arranged.

65.5. This was agreed on a permanent basis (no fixed term was arranged).

65.6. Given the terms of that agreement, practicalities required the claimant to live or stay within 30 minutes of the airfield. It was a necessity in order to service the agreement for the claimant not to travel outside such an area. Whilst the claimant may have spent much of that time at home, in our judgement the claimant was confined to a place, that place being within a distance which allowed the claimant to reach the airfield within 30 minutes.

65.7. The claimant was required to request any time off. He could not take breaks, the claimant could not decide not to attend.

66. We need to deal with the issue of “working time”.

66.1. We are clear that between 5am and 5pm in the evening there was a rest period. That time can amount to nothing else. The claimant was not required to be available during that time.

66.2. It cannot be said that the claimant was enjoying a rest break during any of the other 12 hours where he was available to work. There could be no predicting when he would be required to attend during those 12 hours.

66.3. We have to recognise the reality that this type of arrangement would normally be made with an existing employee of the respondent who was working full-time. That person would be on rota and being paid £7 a shift for being available would be in addition to full time earnings. In terms of that situation an employee would also have the additional 4 hours of pay and, on the evidence of Mr Knight, would be given time off the following day.

66.4. It appears to the tribunal the arrangement with the claimant was, essentially, some sort of adaptation of that general approach. In this case, however, the claimant was employed to do nothing else and was required to work 7 days every week.

66.5. The claimant was not required to be physically present at the place of work (the airfield) and as such this would not, in most cases, be considered working time.

66.6. However, in the specific circumstances of this case, such an arrangement appears extremely exploitative. It would mean that a person who has no pre-arranged days off in a week and has no possibility of knowing when, if at all a break can be taken, would be paid £7 for 12 hours which could not be utilised as his own time.

66.7. This is a case that, on the facts, falls between what might be the described as the clearly defined standby situation and a case where a person is physically present the work.

66.8. Considering these matters, we are of the view that a purposive approach to the legislation requires us to consider the health and safety aspect of working in such conditions and for such a considerable period of time.

66.9. In our judgement it cannot be within the purpose of the regulations that an employer is permitted to have, at very low rate of pay, an individual available for work for 84 hours per week. In our judgement taking account of the purpose of the regulations and the approach taken in ***Matzak*** a requirement to be available for such hours could put the health and safety of the employee at risk.

66.10. If it had been the case that the claimant was required to work one or two days a week it might be considered that the arrangement would have no health and safety implications. However, the claimant was required to carry out this role week in week out for a period of months. In our judgment that must have some implications as to the claimant’s health and safety especially as this is work being carried out exclusively at night.

66.11. In our judgement therefore, the geographical requirement of being within 30 minutes of the airfield and which is also in itself a temporal requirement means that the claimant is completely at the respondent's disposal. This is despite the fact that the claimant can be at home because, nonetheless, the amount of time that the respondent expects the claimant to comply with that requirement under the contract is such that we conclude that it places significant restrictions on the claimant's freedom of action at a time when he is at the respondent's "disposal". We are of the view that the constraints on the claimant mean that for the purposes of this employment he is physically where the respondent requires him to be.

66.12. In our judgment this means that this 12 hours is working time within the meaning of the Working Time Regulations.

67. The claimant wanted to return to work in June 2018. The respondent offered him no work. The claimant was ready, willing and able to work and therefore the respondent was in breach of contract in not providing work or paying the claimant.

68. The claimant was paid £7 per 12 hours of working time. This was below the national minimum wage.

69. Dealing with the issue of whistleblowing.

69.1. In our judgement, the claimant's complaints relating to matters which affected him personally were not made in the public interest the claimant did not believe them to be so. He raised them in his own interests. Whilst there may be alleged breaches of various aspects of employment law as part of the complaints the claimant was raising them for his own personal reasons.

69.2. The claimant, however, also raised the issue of lack of training and related that to team working. He also indicated how it might impact on specific health and safety requirements. On balance we consider that the claimant may have had mixed motives in raising that issue.

69.3. However we are of the view that the information provided by the claimant about the failure of "A" to wear personal protective equipment is an issue that the claimant raises which he clearly believed to be in the public interest. The claimant told us it was his concern about health and safety matters that made him include it in his letter of 26 May 2018.

69.4. It is not important to know whether that was motivated by his attitude and antipathy towards "A". Good faith is no longer a matter which the tribunal needs to concern itself with since the change in the provisions the only question, therefore, is did the claimant believe that raising the matter would be in the public interest in our judgement he did.

70. That protected disclosure it seems to us was part of the motivating factor causing the respondent to dismiss the claimant. Is that the principal reason for dismissal? In our judgment the respondent decided that it did not want the

claimant working for them because it did not want these embarrassing issues raised. That means that in our judgment the principal reason for dismissal is that the claimant provided the information, at least part of which was a public interest disclosure, to the respondent in his letter of 26 May 2018. In our judgment the health and safety issue means it is clearly a qualifying disclosure. In addition, we consider that the health and safety aspect would have been an important aspect of the matters which the respondent wished to suppress. Therefore, this is an automatically unfair dismissal.

71. That being the case we have to consider the question of detriment. The claimant relies on the faults in the investigation; there was a clear failure to investigate. However, in this case the view that there is a problem as pointed out by Mr Justice Langstaff in ***A v Chief Constable of West Midlands Police: UKEAT/0313/14/JOJ***. On that basis we consider that the manner of investigation, or in this case the failure to investigate, cannot be a detriment.

72. The claimant was not a prat time employee as no-one was carrying out the role of the claimant on a full-time basis. The claimant was in a role which was

73. Because of our findings on the reasons for the respondent's treatment of the claimant we do not consider that the treatment or dismissal arose because he was a part time employee

74. Based on those considerations the tribunal finds as follows:

    74.1. The claimant was an employee of the respondent between 24 October 2017 and 11 July 2018.

    74.2. The claimant was not a part-time worker and the claimant was not dismissed nor was he treated unfavourably or suffered detriment because of part time worker status.

    74.3. The claimant's contractual obligation to work on call between the hours of 5:00 pm and 5:00 am is "working time" and the claimant is entitled to be paid for it. Further the claimant is entitled to be paid for this working time at the rate of the minimum wage for hours on call and at the prevailing contractual rate for aircraft re-fuellers working for the respondent when attending a call. Further to this the claimant is entitled to accrued holiday pay for that period.

    74.4. The claimant was automatically unfairly dismissed because he had made a protected disclosure.

    74.5. The claimant did not suffer a detriment because he had made a protected disclosure.

    74.6. The respondent failed to provide the claimant with work under the terms of the contract after the claimant indicated his availability for work in June 2018.

    74.7. The respondent require, the claimant to work in excess of 48 hours even though the claimant had not agreed to sign the appropriate opt out.

The hours the claimant was required to work meant that he was not afforded his entitlement in rest breaks.

74.8. The claimant complained about a failure to provide terms and conditions of employment in April 2017. This claim was made out of time and the tribunal has no jurisdiction. In addition, he complained about changes of October 2017 not being notified in writing, this claim was not supported on the facts as the claimant was not an employee with continuous employment at that stage.

74.9. The claimant was entitled to a statutory notice period of one week for which he is entitled to be paid.

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Employment Judge Beard
Date: 16 July 2019

Order sent to Parties on

……20 July 2019……

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