EMPLOYMENT TRIBUNALS

Claimant:	Respondent:
Mr Sengan Faal-Trinn	Guardwell Security Ltd

Heard at: Leeds On: 6 September 2019

Before: Employment Judge R S Drake

Representation:

Claimant: In Person
Respondent: Mr S Robinson (Solicitor)

JUDGMENT

1. The Claimant has established (and the Respondent accepts) that he has sustained a deduction or withholding by the Respondent from his pay in respect of accrued pay in the sum of £1,180.00 (gross before deduction of tax) for the purposes of section 13 of the Employment Rights Act 1996 ("ERA") and is awarded Judgement in that sum which shall be paid by the Respondent.

2 The Claimant has failed to establish an alleged entitlement to pay for being available to work but not being called and not agreeing to any assignments of work for the period from 12 June 2018 to 18 September 2018 and therefore his claim of alleged withholding of any for this period fails and is dismissed.

3 The Claimant has not established that he was entitled to holiday or unpaid holiday pay pursuant to Regulation 15 of the Working Time Regulations 1998 for the period of the 6.75 years preceding his resignation and therefore his claim under this head fails and is dismissed.

4 The Claimant has failed to show that his aggregated hourly rate of pay falls beneath the level prescribed by the National Minimum Wage Act 1998 and subsequent Regulations and therefore his claim under this head fails and is dismissed.

REASONS

5 I make the following findings and apply the law as described below.

Facts

6 The Claimant asserted that the contract document relied upon by the Respondents as the basis of their defence was not a valid document because he alleged in particular that his signature to it had been forged. He asserted that there were material differences in appearance between his signature on that document and other documents which he agreed he had signed. I did not agree with him. He did not adduce any expert forensic evidence in support and therefore I rejected his assertion that his signature was forged, and I accepted the Respondent's assertion that the document is valid. It is clearly contract for services (or zero hours contact) and its method of application was borne out by the Claimant agreeing that he could be asked to take assignments and accept them or refuse then if he wished. The fact he chose nearly always to accept them is immaterial, since he readily accepted he could refuse.

7 The Contract provides that break time is not paid, so the question of whether it is to be regarded as a basis for payment depends on interpretation of statute law
– see Regs 30 and 35 of the National Minimum Wage Act Regs 2015 (the "NMW Regulations") – I find it is not time work.

8 The Claimant asserted that he was prevented from taking time off, but his evidence is equivocal and not as clear as Mr Durrans for the Respondent. The Claimant says that he only asked three times for leave, but the evidence of the terms of his requests are not clear and his account of responses varied and was equivocal, so I prefer the account of Mr Durrans that he wasn't in receipt of formal request and did not nor would not decline or prevent holiday being taken. This is also borne out by the records shown today that many people did apply, and I have no reason to disbelieve Mr Durrans when he tells me that many such requests were granted and no barriers put in their way, let alone in respect of the Claimant.

9 Of the allegation that the Claimant was not provided with work to do between June and September 2018, I find that indeed he was not offered any,

but this leaves open the question of whether he was entitled to expect such work and then to be paid being a matter of law and interpretation of the Contract I have found exists between the parties. It provides for occasional call off and doesn't express of imply any mutuality of obligation such as to impose a liability on the Respondent to offer work or obligation on the Claimant to accept and do it, so there is no basis in law for claiming pay for the period referred to

10 The Claimant signed off a number of shift record sheets which he accepted on the face of them. I am completely unmoved by his argument that he was only signing to signify acceptance of the payments to be made to him since the form clearly says it shows he signs to confirm he accepts the records of hours worked. Any other interpretation would do violence to the language used which any reasonable reader can see refers to the distinction between hours worked and hours set aside as rest and other breaks. The Claimant says he wasn't able actually to take breaks but shows no evidence that this is because this was a state of affairs forced on him by the Respondent.

Application of the Law

11 The contract is a zero hours contract based on the mutual presumption that the Respondent can offer work to be done but the Claimant needn't accept it and he is only bound by contractual terms when he does so. There is a complete absence of mutuality of obligation necessary to confer any rights over than those of a Worker as distinct from an Employee.

12 Accordingly in the absence of evidence that the claimant was offered and agreed to do work between June and September 2018 I cannot find but his claim to the right to be paid for that period is in anyway established and it therefore fails and is dismissed.

13 In the absence of evidence from the claimant as to what holiday he took at any stage of the period of him working for the respondent and similarly in the absence of any evidence he was not paid for any absences although there is any shortfall between what he was paid and to what he was entitled, I cannot find that he has established his case under this head which also fails and is dismissed

14 Regulations 30 and 35 of the NMW Regulations provide as follows: -

"30 - Time work is work other than salaried hours work in respect of which a worker is entitled under the contract to be paid by reference to the time worked by the worker –

35(3) - The hours of work a worker spends taking a rest break are not hours of time work"

Thus I find on the evidence of this case that time treated in the records as being rest or break times is not work time and is therefore not to be aggregated with working time for the purposes of calculating the hourly rate of the claimants pay so as to ascertain whether he was paid more or less than the national minimum rate. The claimant's complaint that he was not paid in excessively prevailing national minimum wage rate is not established and therefore fails and is dismissed.

15. As indicated in the judgment above, the Claimant's complaint that he sustained a withholding of accrued pay in the sum of £1,180 (gross before deduction of tax) was not contested by the Respondent which has indeed proffered cheques for payment of this sum. Therefore I find that the Claimant is entitled to this sum which the Respondent shall pay forthwith subject to clearance of relevant checks and thus and in this respect I grant Judgment to the Claimant in that sum, but find that the balance of his claims are not proved and therefore they fail and are dismissed.

Employment Judge R S Drake

Date 11th September 2019