Case Number: 3303048/2018
3307212/2018
3330799/2018
3335636/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W Adelaja	**v**	**Atalian Servest Group Ltd**

Heard at: Watford

On: 5 & 6 November 2019 & 7 November 2019 (for deliberation and announcement of the judgment)

Before: Employment Judge Andrew Clarke QC (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Mr K McNerney, Counsel

JUDGMENT

1. The claims for unfair dismissal and for unpaid wages (under part II of the Employment Rights Act 1996) are dismissed.

REASONS

Background

1. Sufficient of the procedural history of these four cases appears in my reasons for refusing the adjournment sought by the claimant at the start of the first day of this hearing.

2. The claimant commenced employment with the respondent in February 2014 as a security officer. The parties entered into a written contract of employment at that time. The respondent is a company which, amongst other things, provides site based security services to its clients. The claimant was dismissed by letter of 18 October 2018.

3. The claims before me are for unfair dismissal and for unlawful deductions from wages under part II of the Employment Rights Act 1996. There are four claims because they cover different periods of time in respect of allegedly unpaid wages and one also brings the claim for unfair dismissal.

The claimant's attendance at the tribunal

4. The claimant attended on the first day and made an application to adjourn pending the outcome of his appeal recently lodged with the Employment Appeal Tribunal against the Deposit Order, his non-compliance with which led to his race discrimination claim being struck out.

5. That application was heard and in circumstances described in the reasons attached to the judgment dealing with it, the outcome was to be announced at 10am on the second day of hearing, Wednesday 6 November. The claimant did not attend. He was contacted and I proceeded to hear the case after allowing him approximately two hours to attend. He still did not and the case proceeded in his absence. Full details of all relevant matters are set out in the earlier judgment and reasons.

The evidence

6. The claimant provided to the tribunal a witness statement and a document described as containing skeleton arguments. There was some overlap between the two. Some aspects of each were concerned with the struck out race discrimination claim and those I have ignored, save to the extent that they appeared to me to provide possibly relevant background to the claims before me.

7. I heard from the following witnesses on behalf of the respondent:

    7.1 Mr Sam Butcher, the Security Business Director, who heard the claimant's appeal against dismissal.

    7.2 Mr Martin Harre, a Regional Operations Manager, who dealt with the claimant in respect of work on the HS2 site at Euston.

    7.3 Mr Alfie Cartey, an Account Manager, who undertook the disciplinary investigations in relation to the claimant's alleged refusals to work. There were two such investigations in January and July 2018.

    7.4 Ms Samantha Powell, a Scheduler, who dealt with the claimant on many occasions whilst offering him work.

8. I also read the witness statement of Mr James Mayes (a former employee of the respondent), who as a Key Account Manager conducted the two disciplinary hearings related to the claimant in February and October 2018 and who took the decision to dismiss.

9. I was provided with two bundles of documents. I read those referred to in the various witness statements and I read around those documents having regard to the absence of the claimant. So far as I could, I sought to put to the respondent's witnesses the relevant points made in the claimant's statement and submissions and not otherwise dealt with in their witness statements. Mr Butcher's witness statement attached a schedule dealing with the whole period covered by the alleged non-payment of wages on a week by week basis. With him (principally) and other witnesses I sought to reconcile that schedule to the contemporaneous documents in the bundle. This led to a particular focus on the weeks of 12 and 19 February 2018.

10. I am satisfied that each of the respondent's witnesses was doing their best to assist me. I am also satisfied that in their dealings with the claimant each did his, or her, best to assist the claimant by investigating his concerns and persuading him that in order to be paid wages he needed to do work which was reasonably offered to him.

The facts

11. The claimant was a Relief Security Officer on a 48 hour a week contract. He was paid the National Minimum Wage, or when in London, the London Living Wage. In October 2017 the site on which he was then working was completed. His last day of work there was 20 October 2017.

12. Although a relief officer, who could be moved around, the respondent offered him a permanent placement on the HS2 site at Euston. Mr Harre made the offer on 23 October and repeated it on 7 November 2017. The claimant refused that work. He maintained that the facilities on the site were very poor and (latterly) that it was too cold and he could not undertake work where he was required to be on his feet all the time as, so he maintained, was the case at Euston.

13. The claimant complains of non-payment of wages for the weeks of 23 and 30 October 2017. In fact, he was paid for each of those weeks. However, I am satisfied that were that not to have been the case, he would not be entitled to be paid because an offer of suitable work had been made to him and he had refused it. Indeed, it was the only suitable work that the respondent had to offer at that time.

14. I consider the work to have been suitable having regard to the following:

    14.1 The Euston site consists of 15 different locations and duties. The work varies location to location. Some patrol work was involved, some static guarding in cabins (with power, light and heat) and some work in larger buildings containing, or close to, extensive welfare facilities. Guards would move between the duties over a 12 hour shift, spending no more than one hour at each. The welfare facilities were those used by the construction and other workers on site (some 2,000 of them) and no-one else of the 170 guards had raised any complaint.

14.2 The respondent referred the claimant to its occupational health professionals, in circumstances described below. Having interviewed the claimant they reported that a job with a mix of duties, such as those at the Euston site, was suitable for him.

14.3 The claimant later did agree to work at the Euston site and his reason for ceasing that work was his allegation that he was owed wages. He refused to resume work (there or anywhere else) until they were paid.

15. I now turn to look at the claimant's working and non-working over the further periods covered by his claims.

16. From the week of 6 November to that of 4 December 2017 the claimant declined all work offered to him. In the week of 11 December he worked a 12 hour shift, but declined all other work. In the weeks of 18 and 25 December the claimant worked, respectively, three and two such 12 hour shifts. In each of those weeks from 6 November onwards, the claimant was offered various shifts which would, in the case of each week, have taken him to or above the 48 hours which his contract entitled him to. In any event, then and thereafter he was still able to accept the permanent role at Euston.

17. In the weeks up to that of 12 February a slightly different pattern emerges. The claimant accepted occasional shifts, but in each case then used the respondent's electronic systems to decline them. He also declined other shifts offered to him. Those shifts, if accepted and worked, would have taken him to or beyond the 48 hours work to which he was contractually entitled each week. In addition, the contemporaneous records show that there were several instances in this period where the respondent tried to contact the claimant to offer work, but he could not be contacted. Having looked at the relevant documents and heard the witnesses, I find that these were not instances of the claimant being phoned once or twice, but of repeated efforts being made to contact him. The claimant was also offered the prospect of work by being alerted (together with others) by email to available shifts at various sites.

18. By January 2018 the respondent was becoming concerned about the claimant and Mr Cartey was asked to investigate his continuing failure to accept work. Mr Cartey met with the claimant on 3 January and although the claimant indicated a willingness to work, it was subject to his being satisfied with the kind of work he was offered and the environment. He also complained of the failure previously to pay him 48 hours each week. He objected to standing and to working in the cold. He said that he had bad knees. It was pointed out to him that he had said that he had no physical disabilities in his health questionnaire and that whilst he had told the respondent of a medical procedure carried out abroad, he had said he was now fully recovered. After initially saying that he wanted a "better" site than Euston he said that he was prepared to go there if (as he was assured was

the case) the work was a mixture of patrolling and static work with a change of work location every hour.

19. Mr Cartey looked at the claimant's work record in detail after the meeting and informed HR of what the claimant had said about his knees and concerns about the cold. HR referred him to occupational health and the outcome is as recorded above. In all the circumstances, Mr Cartey concluded that there was a disciplinary case to answer.

20. A disciplinary hearing was to take place on 26 January 2018. The claimant was advised of this by letter which attached relevant documents together with a copy of the respondent's disciplinary procedure. This hearing was rescheduled, at the claimant's request. It was to take place on 7 February 2018 but was again rescheduled (this time because of the respondent's difficulties) and took place on 13 February.

21. The notes of that meeting show a rather different attitude on the part of the claimant to that which he had displayed in his meeting with Mr Cartey. He explained that on the one shift that he had worked at Euston, the heater in one location had gone off at 1am, but he claimed to like the work. He confirmed that there was a canteen there, that he had taken his breaks and that he was able to do the required patrols. He told Mr Mayes that he could see himself working there in the long term. He did not complain about non-payment of wages or of bullying, or race discrimination. He signed a copy of the minutes of that meeting on each page, as did Mr Mayes.

22. Mr Mayes was pleased that the situation appeared to be resolved and decided to take no further action regarding the claimant's past failures and refusals to work. Mr Mayes' witness statement does not refer to the occupational health report and, as he was not present, I was unable to establish whether he then knew of its contents. Of course, the claimant would have known what he told occupational health as to his ability to do the kind of work available at Euston and he was now asserting that he was capable of doing it.

23. On the same day as his meeting with Mr Mayes (13 February) the claimant sent an email complaining that he had not been paid for attending the investigation meeting with Mr Cartey in January. He said that if he was not paid "tomorrow" he would refuse to work.

24. Against that background I return to the pattern of the claimant's working (and non-working) beginning with the week of 12 February. The claimant worked the night shift from 13-14 February. He was rostered to work on the three succeeding night shifts. So far as the respondent's staff is concerned, the HS2 site works on a four-on, four-off, shift pattern and after that meeting with Mr Mayes the claimant had been rostered on such a pattern.

25. Having worked that first shift, the claimant called in to say that he would not be available to work the shift on 14-15 February as "something had come up". This could have been a reference to his email of 13 February, but the

email was sent to payroll and various managers and the call was made to the schedulers and his own documentation suggests that he was moving house that day. I note that he was paid for his attendance at the meeting with Mr Cartey at the end of the next pay period.

26. The schedulers tried to contact the claimant to establish whether he intended to work the two remaining shifts in his shift pattern. They were unable to contact him. Hence, in accordance with the respondent's standard procedure, they took him off the roster. In fact, the claimant turned up to work the next shift. He did not work it as he had been replaced. However, the respondent subsequently decided that, in the circumstances, it would pay him for that shift and the next (for which he had also been replaced and did not work). This was despite the fact that he was offered (and refused) work on the Saturday and Sunday following to replace those two non-working days. I note at this point that the claimant habitually worked night shifts. That was of his choosing. The respondent made clear that it was prepared to offer him day work.

27. The following week (19 February) the claimant worked three out of four rostered shifts. He informed the respondent that he was unable to work the other shift and was replaced. He was not paid for the shift he did not work.

28. The following week (26 February) he was again offered four shifts in accordance with the roster pattern used at Euston. He worked one shift, refused to work two others and took the fourth shift as annual leave. The claimant was then on holiday in Nigeria.

29. The claimant's first shift back should have been on 25 March 2018, but he failed to attend. During his absence abroad he had contacted the respondent to complain that he had not been paid for 48 hours a week in his last pay packet. I am satisfied that he was paid for the hours that he had worked, plus an appropriate sum for his attendance at the January meeting referred to above. He had been offered work at Euston which would have led to his working 48 hours a week. He had either refused it, or having accepted it had then announced that he would not attend. Whether or not he was entitled to be paid for them, he was paid for the two shifts in February referred to above which he did not work, albeit that those shifts were not paid until the next pay round.

30. Thereafter, until the second disciplinary procedure was begun, the claimant was offered work which, if accepted, would have led to his working 48 hours a week. By using the term "offered" I mean to encompass two situations. Firstly, that he was periodically reminded that regular work was available at Euston on a four-on, four-off shift pattern. Secondly, he was also offered work at other sites, both by being called and by being sent general emails (sent to all potentially available employees), asking for expressions of interest in work the respondent needed to cover. In most instances the claimant declined the work offered. In the case of one shift in the week of 16 April he was uncontactable. In the case of four shifts at Euston in the

week of 7 May, the claimant initially accepted the offer of work, but later contacted the respondent and said that he would not work those shifts.

31. Several of the offers of work were made by Ms Powell. The only reason that he gave to her for refusing work was that he was owed money by the respondent. During a conversation which she cannot date accurately, but which she is satisfied took place around May time, the claimant became very irritated and told her to stop contacting him to offer shifts until he had been paid what he had been owed. She did not call him thereafter, but still sent him the general emails. The examples of such emails I have seen show a considerable volume of available work. On balance it appears to me that from that work alone the claimant could have been provided with 48 hours work a week.

32. By the time of his conversation with Ms Powell, the claimant's position was clear. He was refusing to work until he was paid all arrears of pay to which he considered he was entitled. That was pay at 48 hours per week, regardless of whether he had worked those hours or not. He made that position clear to everyone with whom he had a conversation regarding available work. The respondent (by its HR department, its payroll department, Mr Cartey, Mr Harre and Mr Mayes) all checked to see whether he had been paid what he was owed and all concluded that he had been. I am satisfied that they were correct.

33. In July 2018 Mr Cartey was asked to conduct a further investigation into the claimant's refusal to work. They met on 23 July and each signed every page of the notes of that meeting. The claimant's response to the allegation that he was refusing work was that it was the respondent who was in breach of contract, namely in breach of the duty of care owed to him by not paying him. He pointed to various calls and emails in which he stated that he had not been paid. He said he could not afford to come to work as he had not been paid. It was pointed out to him that he had been paid some monies (for example in April), but he said that he had needed those monies for "other things".

34. Mr Cartey asked that a further check be made to ensure that the claimant had been paid what he was owed. Again, it showed that he had. Then Mr Cartey asked the claimant to attend a further meeting. It was delayed, but eventually took place on 10 September 2018. As before, both parties signed each page of the minutes.

35. Initially the claimant was reluctant to discuss why he was not working, as he said it was because he had not been paid and that was being dealt with by the employment tribunal to which he had made claims. He again said that he could not get to work as he could not afford to do so, but also made abundantly clear that he would not work at all until he was paid what he was owed. Again, he accepted that he was continually refusing shifts, but denied that he was in breach of contract.

36. Mr Cartey again recommended that a disciplinary procedure should commence. The claimant was sent a disciplinary letter on 5 October inviting him to a hearing on 12 October, again before Mr Mayes. The disciplinary offence was put in various ways. It was said that the claimant had breached his contract of employment by not attending and/or by refusing to attend work in accordance with his contract. It was said that he was in breach of the company's absence policy, because he did not notify a period of absence, rather simply refused each individual request. Finally, it was said that he had failed to follow a reasonable management request, namely to work. However described, the point at the heart of the respondent's concerns was clear; the respondent was offering work and the claimant was refusing to undertake any. Among the accompanying documents on this occasion was a witness statement from Mr Harre which explained the circumstances of the offers made to the claimant by him and others from late October onwards and why the respondent considered that the claimant was not owed any money.

37. The notes of the meeting on 12 October are signed on each page by the claimant and Mr Mayes. The claimant was clear that he would not work until paid his arrears. He again also said that he could not afford to get to work, but accepted that he had driven himself to that morning's meeting. At times he complained that when paid he only received some 65% of what he was owed. It was pointed out to the claimant that the respondent had to deduct tax and that the most recent deduction (in respect of the April payment) had been at an emergency rate. The notes show that the meeting went around in circles. The claimant refused to accept that he was obliged to work until paid at the rate of 48 hours work per week, including for all the times he had not worked. This was so (he said) because he had not been paid arrears of wages.

38. Mr Mayes announced his decision by letter of 18 October 2018. He concluded that the claimant had been paid all that he was owed. He found the claimant to be in serious breach of contract by refusing to work, he considered this to be gross misconduct. Hence, he summarily dismissed the claimant.

39. The claimant appealed by an email of 23 October 2018. He complained principally about Mr Cartey and Mr Mayes, but in very general terms and stated that the decision to dismiss him was a pre-meditated one. He reiterated that he was owed money and would only work if he was paid that money. In circumstances of the claimant's non-attendance at the appeal meeting, Mr Butcher teased out some 11 points from the appeal email.

40. Mr Butcher wrote to the claimant introducing himself as the person to hear the appeal and inviting him to a hearing on 5 November 2018. The claimant responded saying that he was to be out of the country (in Nigeria) until 7 December and could not attend.

41. The respondent offered to move the meeting back a few days, but would not wait until after 7 December. It invited the claimant to put anything he wanted to say in writing.

42. The claimant put in no more submissions, so Mr Butcher dealt with the various matters in the appeal email. He set out his findings in a letter of 23 November 2018. He rejected each of the claimant's points. Each is dealt with in detail in his letter. That and his oral evidence satisfied me that he looked at the matter afresh, taking great care to consider each of the points made by the claimant. He found no substance in any of them. In particular, he carried out a careful examination of the respondent's work and payroll records in order to satisfy himself that no monies were owed. He considered that it was appropriate to dismiss an employee who was persistently refusing to do any work. Had there been a legitimate dispute as to whether monies were owed, he considered that the proper course would have been for the claimant to work until this was resolved (either internally or by the tribunal process which the claimant had instigated), but he found that there was no legitimate dispute. The claimant appeared to him to think (as Mr Butcher told me in evidence) that he was entitled to be paid whether or not he worked and it was not enough that appropriate work was offered to him.

The law

43. The respondent must satisfy me as to the reason or principal reason in the mind of the person taking the decision to dismiss and, if that is a statutorily permissible reason, that dismissal fell within the range of reasonable responses and, if so, that a reasonable procedure was adopted. The relevant statutory provisions are set out in s.98 of the ERA 1996 and I do not repeat them here.

44. A failure to pay wages amounts to an unlawful deduction for the purposes of part II of the ERA 1996 (see s.13(3)). The key issue here is what the claimant was entitled to be paid. A contract of employment is essentially a wage work bargain. To be entitled to be paid an employee has to work or be ready, willing and able to undertake work reasonably offered to him.

Application of the law to the facts

45. I turn first to the claim for unfair dismissal:

    45.1 I am satisfied, having looked at his witness statement, the various contemporaneous documents including the notes of the disciplinary hearing and his dismissal letter, that the reason for the claimant's dismissal in the mind of Mr Mayes was the claimant's refusal to work. That is a reason related to the claimant's conduct and, as such, a statutorily permissible reason.

45.2 The respondent followed a reasonable procedure which enables it to satisfy the requirements set out in BHS v Burchell. An investigation was carried out with care by Mr Cartey. The claimant was told of the nature of the case against him and given an opportunity to answer it. Mr Mayes believed that the claimant was guilty of the misconduct alleged and had reasonable grounds upon which to sustain that belief.

45.3 Dismissal was within the band of reasonable responses. The claimant's refusal was persistent. It had continued since, at least, his return from holiday in March 2018 and he was adamant that he would not work until paid sums which the respondent was reasonably entitled to conclude were not owing.

46. I now turn to the claim for unpaid wages. I am satisfied that:

46.1 The claimant was paid at the correct hourly rate for all work that he actually performed for the respondent.

46.2 The claimant was offered sufficient suitable work each week from late October 2017 onwards to enable him to have worked at least 48 hours each week had he accepted it. For long periods the claimant was neither ready, nor willing to do that work. He was able to do it. At all material times, the fact that he had not been paid at the rate of 48 hours times the appropriate hourly rate in the past, regardless of whether he had worked or not, was a factor behind his refusal to work. Whether, until February 2018, that factor was the sole (or principal) factor behind his refusal is less clear. He claimed that his refusal to work at Euston was motivated by the nature of the work and the lack of appropriate facilities. In all the circumstances, on balance I find that these were never significant factors in his mind. I reach that conclusion having regard to the true situation at Euston with regard to work and facilities, the occupational health report and the claimant's willingness to work there from February 2018 onwards, if paid his alleged arrears of pay.

46.3 In those circumstances the respondent did not fail or refuse to pay wages due to the claimant and there was no unlawful deduction by non-payment.

47. I note one potentially complicating factor. The claimant was contractually entitled to 48 hours work a week. The four-on, four-off shift system at Euston had the potential to make such a calculation inappropriate: there could be weeks when the claimant would only work three shifts (being 36 hours). Of course, there would then be other weeks where he worked more than 48 hours. Clearly an averaging exercise would have had to be undertaken. However, as the claimant never regularly worked that shift pattern, it happens that that problem never arose in practice.

Conclusion

48. In all of the circumstances, both the claim for unfair dismissal and that for unlawful deductions from wages are dismissed.

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Employment Judge Andrew Clarke QC
19 November 2019
Date: ……..
19 November 2019
Sent to the parties on: .....

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For the Tribunal Office