Case Number: 2202302/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. D Waugh	**v**	Mitie Limited

Heard at: Central London Employment Tribunal **On: 11 November 2019**
Before: Employment Judge Nicolle

Appearances
For the Claimant: In person
For the Respondent: Ms. R Barrett, of Counsel

RESERVED JUDGEMENT

I. The claim for unauthorised deduction from wages under s.13 of the Employment Rights Act 1996 (ERA) fails and is dismissed.

II. The claim for the failure to provide a statement of changes to written particulars of employment under s.1(1) ERA and (4) (b) for the intervals at which remuneration is paid fails and is dismissed.

III. The claim that the change to payroll dates and calculation period is legally void under Regulation 4 (4) of TUPE fails and is dismissed.

IV. The claim for an uplift in any award of compensation pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 fails and is dismissed.

REASONS

The Hearing

1. A hearing took place on the afternoon of 11 November 2019 and lasted for approximately 3 hours. I was presented with an agreed bundle comprising 180 pages shortly in advance of the hearing. Mr Waugh provided a further page which represented a colour coded version of what would have constituted his shift pattern on the pre-transfer shift system for the period from April – December 2019.

2. Mr Waugh produced a witness statement in his own name and Martin Howes, Senior HR Business Partner gave evidence on behalf of the Respondent.

The Issues

3. Under a claim form received by the Employment Tribunal on 13 June 2019 Mr Waugh seeks a declaration as to his pay date under s.1(1) and (4) (b) of the Employment Rights Acts 1996 (the **ERA**) and a determination from the Tribunal as to what particulars should apply regarding his pay dates and calculation period under s.11 of the ERA. He claims that the failure to make payment on the payroll dates that applied prior to his employment transferring from Vision Security Group Ltd (**VSG**) to Mitie Limited (**Mitie**) on 1 April 2019 (the **Relevant Transfer Date**) under Regulation 4 (1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) gave rise to unauthorised deductions from his wages under s.13 of the ERA. He relies on the failure to make payments on 10 May and 10 June 2019 which would have been the monthly payroll dates with VSG prior to the migration to the rolling 28 day pay period with Mitie. Mr Waugh is unable to say whether at 10 May and 10 June 2019 he had in fact received less pay than he would have done with VSG and confirmed that as at the date of the Hearing he had received the same pay for the same hours as he would have done at VSG.

4. Mr Waugh argues that the change made to the payroll dates that applied prior to the Relevant Transfer Date is void under Regulation 4 (4) of TUPE as being an attempted variation of his contract of employment, where the sole or principal reason for the variation, is the relevant transfer under TUPE from VSG to Mitie. The Respondent's position is that the change made was necessary for business operational reasons and not one where the sole or principal reason for the variation was the relevant transfer of an undertaking and further one that it was entitled to make under Mr Waugh's contract of employment with VSG dated 20 November 2015 (the **VSG Employment Contract**) under which clause 30 entitled VSG to make reasonable changes to any of the terms of his employment.

Ms Barrett conceded on behalf of the Respondent that it did not seek to place reliance on the existence of an economic, technical or organisational reason and therefore was relying solely on Regulation (5) (b) of TUPE and not (5) (a).

Fact Finds

5. Mr Waugh was employed by Securitas Services (UK) Ltd with effect from 1 May 2015. His employment subsequently transferred pursuant to TUPE to VSG with effect from 12 February 2018.

6. Mr Waugh is engaged as a member of the security staff with Mitie (and previously VSG) and currently is assigned to a site on Fenchurch Street where the client is AIG. Mr Waugh indicated that he is one of nine security staff assigned to this particular contract.

7. VSG operated a monthly payroll system for its hourly paid staff, and this included Mr Waugh.

8. Mitie acquired VSG from Compass Group UK & Ireland Ltd ("Compass") in October 2018.

9. Mitie employs over 16,000 employees within its security sector. The acquisition of the VSG business resulted in the transfer of over 5,000 employees from VSG to Mitie the overwhelming majority of whom constituted hourly paid employees.

10. As a result of the provision of Employee Liability Information as a part of the TUPE process it became apparent to Mitie that VSG operated a monthly payroll system. This contrasted with Mitie's operation of a payroll system of for hourly paid employees based on a 28-day cycle.

11. Mr Howes gave evidence that VSG employees were previously paid via the Timegate system which was owned by Compass. He stated that Mitie was unable to retain this system under the terms of the purchase of VSG and as such it was necessary to change from the Timegate system to Mitie's Workplace plus system. Further, he gave evidence that it would not have been practicable or cost effective for Mitie to replicate the VSG payroll periods and then have 2 different sets of pay calculation periods and pay dates. I find that this was the case based on the evidence given.

12. Collective consultation took place with appropriate employee representatives with meetings on 11 ,17 and 28 January 2019. Mr Howes gave evidence that changes to pay frequency and the change to Mitie's Workplace plus system were discussed at the meetings. He said that discussions regarding these matters were communicated to Mr Waugh.

13. Mitie was conscious of the potentially disruptive effect that a change to the existing payroll system and dates may have on transferring employees. Mr Howes referred to the provision of bridging loans to those employees raising concerns that their existing payment obligations maybe adversely affected by the migration to Mitie's payroll system. From approximately 5000 employees transferring 429 (including Mr Waugh) requested bridging loans ranging from £200 - £2,500. Mr Waugh received a loan of £600 following his signing and return of a Loan Request Form dated 16 March 2019 to be paid back at 3100 per month over a period of 6 months and he confirmed that this loan had now been repaid in full.

14. Mr Waugh's VSG Contract of Employment included a clause enabling VSG to make "reasonable" changes to his terms of employment and that Mr Waugh would be notified of any change as soon as possible and in any event within one month of the change (clause 30). The Respondent's position is that this included the date upon which payment would be made. Mr Waugh contends that Mitie would not have been aware of this right to change terms at the date changes were made and that this particular clause would only have come to Mitie's attention following the disclosure of documents for the purposes of this hearing. I find that this contractual provision existed, that it provided Mr Waugh's employer (now Mitie) with the right to make changes and that this included a change to the payroll date and calculation period i.e. the move from a monthly to a 28 day pay cycle.

15. As a result of his concerns regarding the change to payroll dates and arrangements Mr Waugh initiated a grievance regarding the change to his pay date and period over which pay was calculated i.e. a 28-day cycle in substation for the previous monthly period. He complains that the Respondent unreasonably delayed the handling of his grievance. Whilst he highlighted his concerns regarding the imposed change initially in an email dated 6 December 2018 it was not until his email of 26 December 2018 that the Respondent formally acknowledged that he had raised a grievance. He

attended a grievance meeting on 27 February 2019 and received a grievance outcome letter on 7 March 2019. He then appealed in a letter dated 15 March 2019 and a grievance appeal was heard on 25 March 2019. He was sent an appeal outcome letter dated 27 March 2019. The Respondent rejected his grievance.

16. Mr Howes gave evidence that the reason for any delay in the handling of the grievance was as a result of the ongoing process of collective consultation. He stated that it would have been inappropriate to reach a decision in relation to an individual grievance whilst the issue was part of a generic process of collective consultation. Mr Waugh contended that the collective consultation process was in relation to a matter which was already concluded as right from the outset Mitie's position had been that there was no alternative other than for all transferring employees to migrate to their Workplace plus system. Mr Waugh therefore considered that the process of collective consultation was in effect futile in this respect. I find that it was reasonable for the Respondent to defer the grievance whilst the process of collective consultation was ongoing but do consider that there was a delay, but not unreasonable length of delay, after the final collective consultation meeting on 28 January 2019.

17. Mr Waugh considers he has suffered hardship as a result of the migration to the Workplace plus system. He did, however, acknowledge when I questioned him on this particular point that at the date of the hearing he had not suffered any financial loss; in other words he had been paid the same amount for the same number of hours that he would have been in an equivalent period prior to the Relevant Transfer Date. It was rather a case that in a given 28 period he may need to work additional shifts to ensure that he received an equivalent payment to that which he would have received under the previous system for a full month one period. For example, he referred to possibly having to work as many as 16 shifts as opposed to 13 to receive an equivalent payment. I find that at the date of the hearing he has suffered no financial loss and has not worked more hours for less money.

18. The Respondent's position is that the Workplace plus system is broadly advantageous as far as employees are concerned in that it accelerates the payment of wages from when work is undertaken as opposed to the VSG monthly payment system. Whilst it was acknowledged that in any given 28-day period there may be occasions where Mr Waugh (and other hourly paid employees) receive less than they would have done under the VSG system these would balance out with occasions when it would be advantageous and that overall the payments received would be the same as under the VSG system. I did not have the evidence to determine whether at what would have been the VSG monthly payroll dates on 10 May and 10 June 2019 there would have been a deduction. I find that Mr Waugh has suffered no financial disadvantage and no deduction from wages in the period from the relevant transfer date up to the date his ET1 was received by the Tribunal on 13 June 2019.

19. Of nearly 5,000 transferring employees approximately 90% did not request bridging loans and all with the exception of Mr Waugh did not pursue grievances and Employment Tribunal claims

The Law

20. Under regulation 4 (2) (a) of TUPE all the transferor's rights, powers, duties and liabilities under or in connection with any contract of employment shall be transferred to the transferee.

21. Under regulation 4 (4) “any purported variation of a contract of employment that is, or will be, transferred by paragraph (1) is void if the sole or principal reason for the variation is the transfer.

22. Regulation 4 (5) provides that paragraph 4 does not prevent a variation of the contract of employment if –

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
(b) the terms of that contract permit the employee to make such a variation.

Conclusions

23. I address the various limbs of Mr Waugh’s claim separately.

Unauthorised deduction from wages

24. Given the acknowledgment by Mr Waugh that as at the date of the hearing he has suffered no financial loss it follows that there is no deduction from wages under s.13 of the ERA. In his closing submissions Mr Waugh referred to “deductions” from the pre-existing VSG payroll dates 10 May 2019 and 10 June 2019 on which he sought rulings. His argument being that as at these dates he did not receive pay as previously calculated by VSG. I find that given that he may well already have received full payment pursuant to the Mitie 28-day pay cycle in advance of these dates that there may well not have been a deduction and even if at the previous payroll dates he had received less than what would have constituted his full entitlement under the VSG system that any shortfall was subsequently made good as part of the new Mitie rolling 28-day pay cycle. I considered that it would constitute a wholly artificial exercise to determine that variable deductions could take place at different points in the 28-day payroll cycle where at the date of the hearing these deficiencies had been made good. In any event any adjudication that there had been a potential “deduction” was subject to the Respondent’s contention that it was contractually entitled to make the variation to the existing payroll system (see further below).

Claim for failure to provide a statement of changes

25. Mr Waugh seeks a ruling that his statement of employment terms should reflect the pay arrangements under his VSG contract of employment i.e. that he would be paid on a monthly payroll cycle. The Respondent’s position is that he was provided with a written statement containing the particulars of pay frequency in a letter dated 27 February 2019. This letter included reference to the hourly paid employees being paid on a new 28 - day cycle and set out the dates of the pay periods. I find that this letter constituted statutorily required written particulars of a variation to Mr Waugh’s terms and conditions relating to pay as required under s.4 of the ERA. I accept Ms Barrett’s submission that the statutory right to particulars of various terms and conditions of employment to include pay, constitutes a matter of form and not substance, in other words that it would not be open to the Tribunal to interpret the contractual effect of a particular provision but rather to assess the question of whether written particulars were provided and I accept that they were and I therefore reject this element of Mr Waugh’s claim.

Reference under s.11 ERA and effect of the TUPE transfer

26. The Respondent's position is that the reason for the change to the existing pay system was not for a reason where the "sole or principal reason" was the transfer itself. Ms Barrett referred to the 2014 amendment to TUPE which removed the previous wider language involving a change being "connected to" the transfer. She stated that the Respondent's position is that whilst the change to the payroll system may have originated subsequent to a relevant transfer that the reason for it was that it would not have been feasible to continue to calculate and make payments to hourly paid employees under the VSG Timegate system. Mr Howes gave evidence that the Timegate system was inherently flawed and would give rise to operational difficulties. Further, Mr Howes gave evidence that there was no general process of harmonisation of terms and conditions of employment. Indeed, he responded to a question I raised by stating that there constituted a wide variety of terms and conditions (to include hourly pay rates) for Mitie security staff operating on different contracts at different sites and other terms and conditions also varied widely to include the provision, or not, of benefits such as private medical insurance. The Respondent's position is therefore that the change to payment dates and calculation periods was not part of a post TUPE harmonisation.

27. Further, the Respondent contends that it had acquired the right as set out in Mr Waugh's VSG Contract of Employment to make reasonable changes to his terms of employment (clause 30). The Respondent's position is that this included the date upon which payment would be made. I find that this contractual provision provided Mitie with the right to make changes and that a change to the payroll date and period (following a process of collective consultation) falls within a "reasonable" change to his terms of employment.

28. In relation to the change to the pay calculation period and pay dates I accept that that Mitie did not have continuing access to the Compass Timegate payroll system. I find that the "sole or principal reason" for the variation did not constitute the relevant transfer under TUPE and therefore that the variation was not void under Regulation 4 (4) of TUPE.

ACAS uplift

29. Mr Waugh contends that as a result of a failure by the Respondent to conduct his grievance in a reasonable timescale that there should be an uplift to any compensation awarded. First, the claim to which the proceedings relate must concern a matter to which the relevant code of practice applies. Second, the employer must have failed to comply with the code in relation to that matter. Third, the failure must be unreasonable. Fourth, if this is established, and the tribunal considers it just and equitable in all the circumstances, an award may be increased by no more than 25%. Given that I do not consider that Mr Waugh was subject to an unauthorised deduction from wages and therefore there can be no financial award made to him this issue ceases to apply. In any event given the chronology and context during which the grievance process was conducted I do not find that the timescales were unreasonable and even if there had been an award of financial compensation, I do not find that the Respondent failed to comply with the ACAS Code and/or that any such failure was unreasonable.

30. I therefore conclude that the Respondent had acted in accordance with Mr Waugh's contract of employment and following reasonable notice and consultation made a legally effective change to his payroll dates and the period over which his pay was calculated. I therefore dismiss Mr Waugh's claims.

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Employment Judge Nicolle

20 November 2019

Sent to the parties on:

20 November 2019

For the Tribunal: