



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr Evanson Mbugua**

**v**

**Digitalis Group Limited**

**Heard at:** Watford

**On:** 9 January 2020

**Before:** Employment Judge Alliot sitting alone

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr J Roddy (Paralegal)

## **JUDGMENT**

1. The claimant's claim for unauthorised deduction of wages and/or breach of contract for non-payment of bonus is well-founded and the respondent is ordered to pay him the gross sum of £217.50 (subject to tax and National Insurance).
2. The rest of the claimant's claims are dismissed.

## **REASONS**

1. The claimant was employed by EE on 24 September 2011. In July 2015 the claimant was TUPE transferred to the respondent. The claimant resigned with effect from 31 May 2018. The claimant presents claims for:
  - 1.1 Working an extra half an hour per day since July 2015.
  - 1.2 An unpaid bonus for April 2018.

### **The evidence**

2. I heard oral evidence from the claimant. In addition, I had witness statements and heard oral evidence from Ms Henna Khalid, Risk Manager of the respondent, Mr Ammer Siddique, a Director of the respondent and Mr Mohammed Ruben, a Director of the respondent. In addition, I have been provided with a 53-page bundle.

### **The facts**

3. As recited, the claimant was employed by EE on 24 September 2011. I have been provided with a copy of his contract of employment which, where relevant, provides as follows:

**“Hours of work**

You are required to work a 39-hour week, 5 days out of 7.

You will be required to work such reasonable hours as your position requires and this may include Sundays and Bank Holidays on a rota basis.

The company reserves the right to change your working pattern in order to meet the needs of the business. This will mean that the shifts which you work will vary from week-to-week. Rotas will reflect trading peaks and troughs. You will be given as much notice as is reasonably practicable.”

**“Salary**

£24,000.00 per annum, payable in arrears in 12 equal payments.

...

You are not entitled to be paid for overtime”

**“Bonus**

You will be eligible for on target earnings as detailed in your bonus plan which will be provided by your manager when you join. Please note that your bonus plan is not a contractual entitlement under your terms and conditions of employment. The company reserves the right to amend this scheme annually to reflect the needs of the business giving reasonable notice.”

4. In July 2015 the claimant TUPE transferred to the respondent.
5. The claimant was the Manager of the Amersham branch where three other employees worked. At the time of the TUPE transfer the claimant was on holiday in Kenya.
6. Mr Siddique met the three other members of staff and explained to them his business decision that the shop should remain open an extra half an hour a day between 5.30 and 6pm. This was in essence, to catch the returning commuter trade. It is common ground between all parties that the claimant and the other employees at the Amersham branch were required to work an extra half an hour a day, five days a week and they were going to receive no increase in their pay as a result.
7. In his oral evidence Mr Mohammed Ruben told me that, on transfer, the commission or bonus plan changed in that Digitalis imposed their own commission agreement. Mr Ruben suggested that this commission agreement was better than the EE one. I have no knowledge of the EE bonus or commission scheme and consequently cannot compare the two. This case has never been presented as involving TUPE issues of changes in the contract of employment.
8. It was common ground that on his return from Kenya the claimant discussed the situation with Mr Siddique. The claimant told me that Mr Siddique explained to him that as he was on a salary he should look at his contract and it was possible for the respondent to impose the extra half an hour under the clause requiring the claimant to work such reasonable hours as his position required. The claimant told me that he discussed the issue on

various occasions and was told words to the effect that the respondent would sort it out.

9. The evidence on behalf of the respondent was that on being told that the extra half hour would be required to be worked there was no protest from any of the employees.
10. The claimant has produced to me some documents purporting to be statements made by the other employees. However, these are not in statement format, they are not signed and I place little or no reliance upon evidence produced in that way.
11. Be that as it may, I find that the claimant probably did discuss with Mr Siddique the fact that he was having to work an extra half an hour a day and that he was exploring whether he could have an increase in pay as a result. I find that Mr Siddique's response was that he was entitled to require the extra half an hour a day under the claimant's contract of employment and that he would not be paid.
12. In my judgment, the claimant's contract of employment did make him a salaried individual and he was not paid on an hourly basis. I find also that his contract of employment did provide a flexibility clause such that he could be required to work such reasonable hours as his position required. In combination with the clause saying he would not be entitled to be paid for overtime, I conclude that the contract did provide sufficient clarity such that the claimant could be required to work an extra half an hour a day for no more pay.
13. Having said that, even if this were a variation of the contract of employment unilaterally imposed upon the claimant by the respondent, I find that he accepted the variation and carried on working. As such, as a matter of law, I find that the claimant acquiesced in the change of his employment and, consequently, is bound by the requirement to work the extra half an hour without any increase in his pay as he affirmed the variation.
14. In any event, in May 2017, the claimant's salary was raised from £24,000 per annum to £27,978.12 per annum. By my calculation that is a rise of just over 16.5%. The claimant readily accepted that was a very good rise. This was said to be due to his performance and I have no doubt that that is why he was given the raise. However, it is impossible to divorce from consideration that that large increase in salary may well have taken in to account the fact that the claimant was being required to work an extra half an hour a day. In short, the claimant told me that he had been told repeatedly that the matter would be sorted out and it could fairly be said that in May 2017 it was sorted out with a considerable pay rise.
15. I find that there was no agreement or contractual right for the claimant to be paid for the extra half an hour a day worked since July 2015. Consequently, I find that this claim is misconceived and, accordingly, I dismiss it.

The April Bonus

16. There was some confusion at the outset of this hearing as to the nature of the bonus scheme that the respondent operated. Two documents reflecting the bonus payable in February and March 2018 had been produced in the bundle before me. The relevant equivalent document for April 2018 was only shown to me on Miss Khalid's mobile phone.
17. It is common ground that the claimant earned a gross bonus in April 2018 of £870 (subject to deductions). The bonus was 2.5% of gross profit for the month. The claimant accepted that his gross profit target for April was £40,000 and the April figure given to me by the respondent was £34,781. Whilst the claimant asserted that this was a reduced figure from the real figure I have absolutely no evidence to support that contention and accept that the gross profit figure for April 2018 was £34,781. On that basis the claimant had not met the KPI for the gross profit figure and, accordingly, his bonus stood to be reduced by 50% on that ground.
18. The second deduction made in relation to the April bonus payment was in the sum of £434.76, in effect the other 50% of his bonus. This was as a result of failing a monthly audit. The only document that has been shown to me that reflects the respondent's bonus agreement indicates that the audit would be undertaken monthly and if it was failed then the manager's bonus would be reduced by 25%.
19. Mr Siddique sought to justify the 50% reduction on the basis that the audit had been failed twice in April. I have been shown no documentary evidence to support the suggestion that the deduction from the manager's bonus would rise to 50% if the audit was failed twice in one month. Accordingly, I reject that evidence and find that the respondent did deduct 25% of the claimant's bonus from April without authority and/or at the time of the termination of his contract the claimant had a valid contract claim for that sum. Accordingly, I give judgment in the sum of £217.50 as representing 25% of the claimant's earned bonus for April 2018.

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Employment Judge Alliot

Date: .....16/01/2020.....

Sent to the parties on: ..31/01/2020

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For the Tribunal Office