



EMPLOYMENT TRIBUNALS

Claimant: Mr P Kirby

Respondent: G4S Secure Solutions (UK) Limited

Heard at: Leeds by CVP

On: 31 July 2020

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person

Respondent: Mr N Sheppard, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unauthorised deduction of wages and non-payment of holiday pay fail.

REASONS

Background

1. The claimant made claims of unauthorised deduction from wages and non-payment of holiday pay in an ET1 that was presented on 7 January 2020, following a period of early conciliation that had begun on 9 November 2019 and ended on 9 December 2019.
2. The claimant remains employed by the respondent as an Events Security Steward. It was agreed that his employment commenced in 2010 and that there have been no breaks in his service. He also agreed that he was provided with a

statement of terms and conditions of employment in a document dated 29 October 2010, which he signed on 5 October 2010.

3. In evidence, he agreed that the clause headed "Pay" in the statement of terms and conditions stated that:

"You will be paid for the hours that you actually work. Your rate of pay for any work performed will be the rate applicable to the role as offered to you before you undertake the work. Your rate of pay on all events will not fall below the National Minimum Wage."

Housekeeping

4. The hearing was conducted by video on the CVP platform. After a few early problems with frozen screens and connectivity, the hearing progressed smoothly.
5. At the outset of the hearing, I introduced myself and the parties to one another. Everyone confirmed that they could see and hear everyone else. Mr Kirby confirmed that his claims were of unauthorised deduction of wages and non-payment of holiday pay. The holiday pay element was entirely reliant on his unauthorised deduction of wages claim succeeding, because it consisted of the holiday pay element of the back pay he was claiming.
6. I discussed the issues (questions that I had to find the answers to) with the parties and agreed the following list with them:
 - 6.1. Mr Sheppard agreed that the claimant was a worker at all material times;
 - 6.2. He also accepted that the claimant's claim was in respect of "wages" as defined by the Employment Rights Act;
 - 6.3. The respondent accepted that the claim was presented in time when I went through the issues, but Mr Sheppard made submissions at the end of the case that the claimant's claim had been presented out of time and that it had been reasonably practicable for it to be presented within the statutory time limit;
 - 6.4. The key issue was whether the respondent had made an unauthorised deduction from the claimant's wages;
 - 6.5. I would have to determine if any deduction had been authorised by statutory authority;
 - 6.6. I would also have to determine if any deduction was exempt;
 - 6.7. If the claim succeeded, I would have to decide if the claimant had sustained financial loss which was attributable to non-payment of wages;
 - 6.8. I would then have to decide what amount, if any, it was appropriate in all the circumstances for the respondent to pay the claimant, and;

6.9. In respect of the holiday pay claim, if the wages claim was successful, what holiday pay was he owed?

7. The respondent had prepared a bundle of 68 pages. If I refer to any pages, the will be in square brackets.
8. Neither side had prepared a witness statement. The respondent brought no witnesses. At the end of the hearing I reserved my judgment.

Hearing and Evidence

9. Mr Kirby gave evidence by reference to his ET1 [page 10], where he had stated that he had been employed by G4S Events, but the company had obtained a contract for the Ministry of Justice (MoJ) and were short of security guards, so the Events arm had provided personnel to bolster numbers. At that time, the claimant says that Events staff were paid £8.50 per hour when performing security work on Events. He said it was agreed that the hourly rate for Events staff working on the MoJ contract would be £8.50.
10. He says that the hourly rate for Events staff working on the MoJ contract increased to £9.30 with effect from 1 June 2019 without any explanation or warning. On 10 August 2019, he discovered that the Events staff had been paid £9.30 per hour since 1 April 2019.
11. His argument is that the decision by the respondent to pay him the Events rate was a tacit acceptance that he was entitled to the Events rate for the whole of his contract of employment. The Events rate had first gone above £8.50 on 1 April 2016 and had increased in every subsequent year.
12. In answer to questions from me, Mr Kirby said that he assumed that it had been agreed that his rate of pay would be the same as the SIA rate for the respondent's Headingley stadium contract. He says that the SIA Events rate increased to £8.67 per hour on 1 April 2016 and had increased on the same date in 2017 and 2018, although he did not know what the figures were. The increase was to £9.30 per hour on 1 April 2019.
13. In answer to cross-examination questions from Mr Sheppard, Mr Kirby agreed that the contract dated 5 29 September 2010 [pages 27 to 30 was his only contract with the respondent. He accepted that he had signed it and that he was a casual worker employed on a casual basis. He agreed that the clauses headed "Appointment & Location" [27] and "Pay" [28] were an accurate statement of his terms and conditions. He agreed that that the Pay clause said that his rate will be at a rate applicable to the role as offered to him before he undertook the work. (I have reproduced the entire clause at paragraph 3 above).
14. Mr Kirby accepted that there were no separate agreements on pay between him and the respondent and no indication that his pay rate would rise from £8.50 until June 2019. He had never been given any information about pay.
15. I asked Mr Kirby a few more questions, in answer to which, he said that his contention is that when the SIA Events rate increased, he'd be paid the same rate as staff working at Headingley. I asked why his rate would be tied to the SIA rate

when he was working on an MoJ contract. His reply was that the MoJ guards got different hourly rates for every different court. They had decided he would get £8.50 an hour.

16. I explained to Mr Kirby the concept of express agreements and implied agreements. He said he understood. He said there had not been an express agreement between him and the respondent on what his hourly rate should be at any time.
17. In closing, Mr Sheppard submitted that the respondent's position was as set out in its ET3: the claimant is a casual worker who is engaged from time to time. There was no evidence of any express or implied terms that tied his hourly rate to anyone else. The fact that his pay rate had increased in 2019 was not evidence of a retrospective claim. To succeed in his claim, the claimant must show an entitlement under a contract and an unauthorised deduction. If the hourly rates weren't tied to another worker, then the holiday pay claim must also fail.
18. In his closing remarks, Mr Kirby said that the fact he was given a pay rise on 1 June 2019 to the same rate as SIA Events staff, that raises suspicions. When he had made enquiries, the respondent had not responded. His holiday pay claim follows the wages claim.
19. Mr Sheppard then asked to address the time point I referred to above. He said that if the claimant was relying on a pay rise on 1 June 2019, then he was out of time because ACAS early conciliation had not begun until 9 November 2019. I looked at the ACAS certificate and confirmed with Mr Kirby that he had decided he had been underpaid on 10 August 2019, which was the relevant date.

Decision

20. I find that there was no evidence that met the balance of probabilities test that showed that there was an express or implied term of the claimant's contract that linked his rate of pay to any other worker at G4S. The height of his evidence was a suspicion that the rate of £9.30 was the same as SIA Events staff at Headingley and an assumption that the two were linked. He accepted that there was no express agreement between him and the respondent on how his hourly rate were to be calculated other than the words in his contract. That does not come anywhere near establishing an entitlement to a higher rate of pay that that which he was paid between 2010 and 2019.
21. There is also insufficient evidence to establish an implied agreement to pay him the SIA Events rate. Such a term was:
 - 21.1. Not necessary to give business efficacy to the contract;
 - 21.2. Not so obvious that the parties must have intended it;
 - 21.3. Not adopted by custom and practice – it clearly had not been between 2016 and 2019;
 - 21.4. Not demonstrated by the parties to be their intention, or;

21.5. Not central to the employment relationship.

22. I therefore find on the issues that:

- 22.1. Mr Kirby was a worker at all material times;
- 22.2. Mr Kirby's claim was in respect of "wages" as defined by the Employment Rights Act;
- 22.3. The claim was presented in time because the relevant date for starting the clock was when the claimant becomes aware of the deduction, which was on 10 August 2019. It is also a continuing alleged deduction;
- 22.4. I find that it has not been shown on the balance of probabilities that the respondent had made unauthorised deductions from the claimant's wages;
- 22.5. The other four issues identified on the wages claim do not need to be decided, and;
- 22.6. In respect of the holiday pay claim, as the wages claim was unsuccessful, that claim also fails.

Employment Judge S A Shore

Date 31 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON:

Date: 4 August 2020