EMPLOYMENT TRIBUNALS

Claimant: Miss S Shah

Respondent: Total Security Services Ltd

Heard at: London South **On: 11 and 12 August 2020**

Before: Employment Judge Khalil sitting with members
Mrs J Bird
Ms L Hanks

Appearances

For the claimant: in person
For the respondent: Mr Howson, Senior Litigation Consultant (Peninsula)

JUDGMENT WITH REASONS

Decision (Unanimous)

The claim for unauthorised deductions under S.23 Employment Rights Act 1996 is not well founded and is dismissed.

The claim for Harassment contrary to s 26 of the Equality Act 2010 is well founded and succeeds. The Tribunal awards £2,000 for injury to feelings.

Reasons

Appearances, claims and documents

1. This is a claim for unauthorised deductions under the Employment Rights Act 1996 ('ERA') following a Transfer of Undertakings Regulations 2006 ('TUPE') transfer and for Sex Discrimination (Harassment) under the Equality Act 2010 ('EqA').

2. The claimant appeared in person; the respondent was represented by Mr Howson, Senior Litigation Consultant at Peninsula.

3. The Tribunal had an agreed Bundle of documents though the claimant had a few additional documents which were admitted by the Tribunal.

4. The claimant had prepared a witness statement and gave evidence. The Respondent called two witnesses, Mr Penton, Operations Manager and Ms Blake, HR Business Partner.

5. The Tribunal identified a need for the claimant to make an amendment application to cover alleged losses (under her unauthorised deductions claim) post-dating the date of her Tribunal and to include allegations of Harassment which also post-dated her ET1. The application was made and was unopposed. The balance of justice was in favour of granting the amendment.

6. The Tribunal identified and announced what it understood to be the issues particularly with regard to the unauthorised deductions claim, namely:

    - Was there a contractual or discretionary benefit relating to travel to and from work and if so, what was it?

    - Did it transfer under Regulation 4 of TUPE?

    - If contractual, could it be varied – is any change prohibited by Regulation 4 (4) TUPE?

    - If discretionary, is Regulation 4 (4) TUPE engaged?

    - If Regulation 4 (4) TUPE is not engaged or the transfer was not the reason for the change, were any sums properly payable to the claimant not paid and consequently unlawfully deducted under s.13 ERA?

Relevant findings of fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

8. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

9. The claimant was employed by Cordant Security ('Cordant') from October 2018 as a security guard.

10. The claimant was deployed to various sites between October and December 2018.

11. In December 2018, the claimant was deployed to work at Morrisons in Crawley. The claimant lived in Croydon.

12. An arrangement was reached with the claimant to cover her travel to and from Crawley. This was because the claimant's then employer, Cordant, was having difficulties in securing recruitment of a local security guard. It is because of these operational difficulties that the claimant was deployed there with a travel subsidy. The Tribunal had regard to the email from Cordant dated 11 June 2019 at page 31 of the bundle.

13. The Tribunal finds that this was a temporary arrangement. It was in place until Cordant were able to recruit a local security guard. The claimant accepted at her grievance appeal with the respondent that this was a temporary arrangement (page 82 of the bundle). She confirmed this in her evidence to the Tribunal too. Her challenge however, which the respondent disputes, was whether she was expected on site for 6 months (Cordant terms) or 12 months (respondent). The Tribunal did not reach a finding on this point as the Tribunal found that the deployment was terminable upon the condition being satisfied – namely when a local security guard was or could be recruited.

14. The Tribunal thus finds that there was a contractual arrangement for the claimant to be subsidised for her travel to and from Crawley for the duration of her deployment there, an arrangement terminable once a local security guard could be recruited.

15. Following a TUPE Transfer to the respondent, the claimant's employment transferred to the respondent on 22 April 2019.

16. The respondent was unaware of the claimant's travel arrangements, no information about this had been provided through the TUPE due diligence process.

17. Upon making enquiries with Cordant, the respondent was informed that the arrangement was informal and not contractual and subject to being able to recruit locally.

18. Whereas Cordant had not been able to do so, the respondent was able to recruit locally.

19. This was discussed with the claimant. She objected and insisted on her right to stay and work at the Crawley store on the agreed terms relating to travel. An offer to work at a store local to her home was also discussed with her which she did not take up. The evidence of Mr Penton and Ms Blake was corroborative. The Tribunal also noted the discussion Ms Blake had with Mr Okedigun, Operations Manager, on page 80 regarding the claimant being offered work at nearer sites which she declined.

20. The claimant raised a grievance dated 26 May 2019 which was rejected. The claimant appealed (undated in June 2019) which was also rejected.

21. The claimant was given a 3 weeks 'cushioning' payment to offset the loss of her travel subsidy. This was by way of increment to her hourly rate of pay.

22. A morning shift security guard started at Morrisons on 23 April 2019 whose employment ended on 26 July 2019. Following some temporary labour replacement, a permanent security guard was recruited thereafter. The claimant remained working on the late shift.

23. The claimant was addressed as 'Mr' on several occasions via telephone and on at least 5 occasions in writing: 1 May 2019, 3 August 2019, 9 August 2019, 6 September 2019 and 18 September 2019. The documents were in the bundle. The verbal occasions were referenced in paragraph 26 of the claimant's witness statement.

24. The respondent explained that this was an oversight/error caused by an administration error during the claimant's on-boarding process. In addition, when the claimant was addressed as Mr on the portal queries (used by the claimant), this was because the portal did not provide a gender identity of the enquirer. That evidence was accepted.

25. The claimant gave evidence that one of the people who had addressed her as Mr had apologised (Andre Crous who worked in Data Protection) and thereafter addressed her correctly as Ms. However, she also said she was addressed as Mr again afterwards on 2 occasions by him. This was not challenged by the respondent. Her evidence was accepted in this regard. Ms Blake's witness statement only referred to the written occasions though she did amend her statement to say there were more than 2 occasions.

26. The claimant said she did raise this in a phone call with Andre Crous, and Carly Essoulami (HR). Neither were present to give evidence. The Tribunal finds it was raised with Carly Essoulami.

Applicable law

Right not to suffer unauthorised deductions

S.13 ERA says:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

27. By Regulation 4 (4) of the TUPE Regulations 2006:

Subject to regulation 9, 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.

And by Regulation 4 (5):

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 employer to make such a variation

28. S.26 EqA says:

<u>Harassment</u>

(1) A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

29. The general burden of proof is set out in S.136 EqA. This provides:

"*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

30. S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

31. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

32. If discrimination is found to have taken place, an injury to feelings award can be made. There are well established 'bands' in relation to the Tribunal's discretion regarding the amount of any award which may be made from the case of ***Vento v Chief Constable of West Yorkshire 2002 EWCA Civ 1871*** as modified by Employment Tribunal Presidential Guidance. For a claim presented on or after 6 April 2019, the bands are: lower band (£900 to £8,800), middle band (£8,800 to £26,300) and higher band (£26,300 to £44,000).

Conclusions

33. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion

below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

34. The claimant had a contractual not discretionary benefit in relation to travel. It was a temporary arrangement. The limiting event was recruitment of a local security guard.

35. The Tribunal concludes that it would make no sense for such an arrangement to be of an indefinite nature having regard to the time and cost of travel and the pay rates for the job being undertaken.

36. The claimant accepted it was a temporary arrangement. That was the understanding of Cordant which was conveyed to the respondent.

37. That is the arrangement which transferred to the respondent.

38. The triggering event for the cessation of the arrangement occurred – that the respondent could recruit a local security guard. The TUPE transfer provided the back- drop and context only. It was not the reason for the change. The reason for the change was because the respondent could recruit a local security guard. That was not disputed or challenged by the claimant.

39. The respondent was thus entitled to bring the arrangement to an end. They could have done so immediately. In fact, the arrangement ceased on 16 May 2019. From 22 April 2019 to 16 May 2019 the respondent reasonably offered a cushioning payment which was close to and comparable with the claimant's travel subsidy. There was no unauthorised deduction.

40. The Tribunal noted the contractual freedom enjoyed by the respondent having regard to the claimant's contract of employment. No change in location was enforced. The claimant opted to stay at Morrisons Crawley but without her travel subsidy.

41. In relation to the harassment claim, the Tribunal concluded there was unwanted conduct related to sex which did violate the claimant's dignity. That was not intended. In considering whether it was reasonable to have that effect, the S. 26 (4) EqA factors as follows were considered:

- The perception of the claimant
- The other circumstances of the case
- Whether it is reasonable to have that effect

42. The Tribunal noted that the claimant did not raise this issue as part of her written grievance; neither did she raise this as part of her grievance appeal. The claimant raised many other issues (beyond her travel payment issue) as part of her grievance. In evidence however, the claimant explained she was more focused on the travel/money issue. In addition, the Tribunal has found she did raise it verbally with 2 people including Carly Essoulami (HR), the grievance decision maker. Her witness statement set out that she had been upset.

43. The claimant was referred to as Mr on several occasions in writing and verbally. Very surprisingly, the error was even present in 2 separate paragraphs in Mr Penton's witness statement and in Ms Blake's witness statement. The claimant was also referred to as 'Shaw' rather than 'Shah'.

44. That the respondent operates in a male dominated sector would suggest that even more attention ought to be paid to avoid discriminatory assumptions.

45. The Tribunal accepted the respondent's explanation that the root cause was an administration error.

46. The Tribunal assessed the claimant as being or remaining very agitated in her evidence by the Mr reference.

47. The claimant was referred to as Sarwat in the portal. An instruction could have been given to refer to her as Sarwat or Ms.

48. That this happened repeatedly in writing and verbally rather than on an isolated occasion or two is relevant.

49. The Tribunal was satisfied that the claimant had proved facts from which the Tribunal could conclude harassment was made out. She was repeatedly referred to as Mr. The burden shifted to the respondent to provide an explanation. That explanation absolved the respondent from culpability in relation to the 'purpose' part of the test. However, it did not in relation to the 'effect' of the conduct. It was reasonable for the claimant to be offended.

50. The harassment claim is thus well founded. The Tribunal determined, unanimously, that an award in the lower end of the low band of ***Vento*** should be made. This was assessed at £2,000. The claimant did provide evidence about the effect on her in her witness statement in paragraph 26. She referred to the increase in her anxiety and stress, that she found this extremely upsetting and that she did cry on a few occasions.

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Employment Judge Khalil

6 November 2020