



EMPLOYMENT TRIBUNALS

Claimant: Mr D Renford

Respondent: MITIE Ltd

v

Heard at: Hearing via CVP

On: 22 September 2020

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In person assisted by Ms John

For the Respondent: Mr S Way (Counsel)

RESERVED JUDGMENT

1. The respondent did not make an unauthorised deduction from the claimant's wages.
2. The claim of unauthorised deduction from wages fails and is dismissed.

RESERVED REASONS

Claims and Issues

1. This case was listed for a two hour full merits hearing, conducted via CVP, in order to consider a claim of unauthorised deduction from wages. The other claims advanced in the ET1 had already been struck out at an open preliminary hearing before EJ Warren on 28 July 2019. However, the claim of unauthorised deduction from wages was permitted to continue on condition of payment of a deposit. It was common ground between the parties that the claim was filed in time, so that the Tribunal had jurisdiction to hear it, and that, were the claim decided in the claimant's favour, any award could only cover arrears of pay over the two years preceding the date of the claim.
2. The issues for determination were as follows:
 - a. What wages were properly payable to the claimant under his contract of employment with the respondent in respect of work done at TNT Thetford?
 - b. Has the claimant been paid less than the wages properly payable to him and, if so, by how much?

It was also common ground that the dispute between the parties centred on whether the claimant's contract with the respondent entitled him to the rate of pay payable to a Relief Officer (latterly £9.75 per hour) rather than the rate payable to a member of staff based at TNT Thetford (currently £8.89 per hour). The claimant's case is that he was entitled to the higher rate at all times, irrespective of the location at which he worked, on the basis he was a Relief Officer who had not been allocated to work at any specific site. The respondent's case was that the claimant's normal place of work was TNT Thetford and, when working at that site, he was entitled to the applicable hourly rate for that site. If he worked elsewhere then the respondent accepted that he was entitled to be paid the Relief Officer rate for that work. (The parties appeared to use the terms "Relief Officer" and "Support Officer" interchangeably, but for clarity I shall stick to the term "Relief Officer").

The hearing

3. I received written statements and heard oral evidence from the claimant, from his partner, Penny John, and from Paul Wiggins, the Senior Operations Manager at the respondent. I also received a 355 page bundle of documents.
4. The parties were all able to participate in the hearing using the technology without any particular difficulty. I explained to the parties the steps that they should take if they experienced any technological issues. I reminded the parties that, although the hearing was being conducted via CVP and they were participating from their homes, it nonetheless remained a formal process. I explained that it was very important that an individual giving evidence must do so without being prompted, or assisted, in any way by any third party. The claimant and Ms John both gave evidence in support of the claimant's case. It was clear that they had strong feelings about the dispute and that they had spent a great deal of time and effort on preparing the case for hearing. At the start of the claimant's evidence, it became apparent that Ms John found it difficult not to prompt him from the side lines. I therefore directed that she should leave the room during his evidence and the claimant observed the same discipline whilst Ms John gave evidence. The claimant envisaged that both he and Ms John would cross examine the respondent's witness, Mr Wiggins. I was concerned that questioning from two individuals might lead to a confusing and disorderly process. I therefore directed that one person should put questions. The claimant agreed that he would put questions but I allowed some time for him to consult with Ms John at the end of his cross examination, just to check whether there were any additional points that she considered need to be raised. When the time came for closing submissions, at the claimant's request, the closing submissions for the claimant were made by Ms John.

Facts

5. The respondent provides facilities management and security services to a number of clients. The claimant was employed by the respondent as a security officer. His employment began on 6th February 2013 at which point he was issued with a contract of employment [pp51-58] which provided as follows.

"2. Pay

(a) *You will be paid only for those hours that you actually work;*

(b) You will be paid at the prevailing rate of pay for the assignment/site at which you work, or where different as outlined in your offer letter which takes precedent over this contract. Should you be required to work at a different assignment/site, the prevailing rate of pay for the assignment/site will apply."

3. Working hours and location of duties

(b)....Due to the nature of the Company's business, the Company reserves the right to vary your working hours and location of duties to meet the needs of the business at any time. You will be required to work at any place nominated by the Company within a reasonable travelling distance. If there is a change in your normal place of work, the Company will inform you with as much notice as is possible of the change of assignment, together with the hours and location of duties applicable to that arrangement...."

6. The contract was accompanied by a statement of terms and conditions of employment which was signed by the claimant on 7 February 2013 [p60]. That statement records :

*"Place of work : Support 241351 or as directed by management
Pay: your pay is at the basic hourly rate of £7.00 for the above named site. Should you transfer to another site you will be paid at that site's rate."*

The statement also reiterated the respondent's right to change hours or place of work.

6. It appears that, in April 2013, the claimant was advised that his CRB check did not satisfy the requirements of the client for a particular site. The bundle contains two letters dealing with this [pp61 and 62]. In a letter of 19 April 2013, the claimant was informed *"....you will be reallocated to the relief team with effect from Monday 22 April 2013. Your rate of pay will be £7.50 an hour and this rate will be applicable whilst you are employed in this position..."*. A letter dated 23 April states *"I confirm your pay will now change to £7.50 an hour and relief officer with effect from 23 April 2013..... This pay rate is applicable to your position at your present site only and would be amended accordingly should you transfer from this site for any reason."*
7. The rate of pay for individuals who are permanently based at a particular site is set following negotiation between the respondent and the relevant client. Accordingly, the rates of pay vary according to the site. The Relief Officer rate of pay is dealt with differently. Mr Wiggins' evidence, which I did not understand the claimant to dispute, was that a Relief Officer is someone who works at a location which is not a site at which they are permanently based. When an individual works as a Relief Officer, they are entitled to a higher rate of pay. This reflects the fact that there is no guarantee of any work in that capacity and that they are expected to work at short notice and to travel further. The rate of pay for Relief Officers in a particular geographical area is set by the Regional Manager for that area.

8. An employee calendar in respect of 2015-2016 [p237] indicates that the claimant worked in a number of locations and on a variable working pattern until January 2016. No evidence has been produced by the respondent to show that the claimant was informed in writing that he had been formally transferred to TNT Thetford as his place of work. However, it is also clear that by spring 2016 Thetford had become his normal place of work and that he worked there regularly every Saturday and Sunday night. Occasionally he worked additional hours there, occasionally he did some work at other locations, but such work was on top of his regular weekend shift at TNT Thetford. He was paid £7.50 an hour for his work at Thetford at this time.
9. The claimant now states that he was not transferred to Thetford and that he was throughout a Relief Officer and entitled, therefore, to be paid at the Relief Officer rates. However, that stance is inconsistent with the way in which the claimant has described his position over the years in the various pay related grievances that he has raised. The claimant first began to raise issues regarding his pay in May 2017 when he wrote, on behalf of himself and Alan Hill (another Thetford based employee of the respondent's) asking that both should have a pay rise as the rate of pay was not good [p63]. An email from Stuart Brough (his manager at the time) records that "*when you moved to the TNT site at Thetford, you moved on your historic rate which currently matches that of the NMW*" [p68]. The claimant replied to this email but did not dispute the assertion that he had moved to the Thetford site. He also made no suggestion that he should be on the "Relief Officer" rate of pay for his work at that site. Rather his grievance at this time was that staff based at Thetford were underpaid by comparison with staff based at other sites in the area.
10. A further grievance arose later in 2017. Although the claimant had worked part time for several years, he had taken holiday equivalent to the entitlement of a full time member of staff. When this came to light, the respondent wished to correct the position and the claimant raised an objection to the attempt, as he saw it, to reduce his entitlement. During his email exchanges with the respondent the claimant again requested that management attempt to renegotiate the Thetford pay on the basis that he considered it to be unfairly low.
11. This dispute culminated in a grievance appeal hearing before Bradley Thurston on 20 November 2017. On 22 November 2017, the claimant sent Mr Thurston an email following the hearing [pp82-83]. The email records that he was grateful for Mr Thurston's efforts in "*getting me a pay rise of £9.75 on standby*" and recording his acceptance that from April 2018 his holiday entitlement would be pro rata'ed. The email also records that the claimant was aware that Mr Wiggins was due to discuss the rate of pay at TNT Thetford with the client, that he recognised that nothing may come of those discussions but that he was grateful for Mr Wiggins' efforts.
12. On 15 December 2017, the respondent produced a letter recording the outcome of the meeting [pp92-93]. It states, "*I am writing to confirm that as from the 1 April 2018, the following changes to your terms and conditions of employment. Your*

position will be a security officer based at TNT Thetford (214830) and your rate of pay will be £7.65 for this site. Should you work on any other site your rate of pay will be paid at the support officer rate of £9.75, effective from 1 December 2017. This rate will be paid to you when you work on other MITIE sites.... Your holiday entitlement will be prorata'd based on the hours you work in line with legislation....you will be entitled to 11 days per annum as from 1 April 2018". The claimant was asked to sign and return a copy of the letter to indicate his acceptance. No signed copy has been located and the claimant denies ever having received the letter. Mr Wiggins recalls that he attended for part of the meeting with Mr Thurston and that the letter was shown to the claimant at the meeting and signed by him. He has been unable to locate the signed copy and Mr Thurston no longer works for the respondent. The claimant disputes this account and points to the fact that the meeting occurred before the date of the letter. The claimant has asked to see the "properties" file of the letter and considers that I should draw an inference from some oddities in the properties file that the letter is not genuine.

13. I consider it unnecessary, for reasons that I will explain, to make findings on whether this letter was indeed provided to the claimant at the time, whether at the appeal hearing or subsequently. What is clear is that the arrangements between the claimant and the respondent as to place of work and rate of pay are reflected in the terms of the letter: the claimant continued to have Thetford as his normal place of work, continued to receive the Thetford rate of pay unless working elsewhere (when he received £9.75 an hour). It is also clear that the claimant raised no objection any of this until over a year later.
14. In his evidence, the claimant suggested that he understood it to have been agreed, following the grievance appeal hearing, that he was going to be treated as a Relief Officer. He maintained that this was why he emailed thanking Mr Thurston for getting him a rate of £9.75 on standby. However, I find that this was a reference to the rate that he would be paid when working as a Relief Officer at locations other than TNT Thetford and that the respondent had not agreed that the claimant was to be paid at the Relief Officer rate at all times. Nor do I consider that the claimant believed that to have been the agreement reached at the time. If so, there would have been no need to make reference to the rate being whilst "on standby". Nor would it have made sense to refer to negotiations ongoing between Mr Wiggins and the client about the TNT Thetford rate, for any such negotiations would have been irrelevant to the claimant if it had been agreed he would be paid at the Relief Officer rate. Furthermore, the position now adopted by the claimant as to the outcome of the grievance appeal hearing is wholly inconsistent with the emails that he sent subsequently.
15. In February /March 2018, further exchanges occurred between the claimant and Mr Wiggins regarding pay and other matters. In an email dated 24 February 2018, the claimant wrote *"there needs to be a discussion about wages etc. As the minimum wage goes up to £8.21 per hour from 1st April 2019 I am on £7.99 an hour and would like this to go up to £9.00 per hour as I am the only permanent person at Thetford and all the other guys you send and don the shift are on £9.75*

an hour that is well more than me and I know they are not permanently there etc". Mr Wiggins replied indicating that he doubted that a pay rise of that order would be possible and explaining the reasons why relief officers received a different and higher rate of pay. The claimant replied *"I am not asking for there rate as I know what they get each and every one of them, I am just asking for a near rate to them as a permanent part time security officer that is all..."*. Mr Wiggins replied by offering to find the claimant some relief work in addition to his Thetford work if the claimant wished to take it on.

16. Various other pay queries were raised by the claimant during 2019. In one exchange, he requested to be paid at £9.75 an hour for work done at Thetford because he had done more than his usual hours and considered that anything extra should be paid at the higher rate. The respondent agreed to this. The claimant again asked whether the TNT Thetford rate could be further increased as he considered it to be too low. Mr Wiggins replied to explain that the rate was set in national negotiations.
17. In July 2019, the claimant raised a further grievance on the basis that he considered his pay was unfair because he should receive the same rate of pay as other MITIE staff at other TNT sites outside the M25. The grievance is not entirely easy to understand. At one point the claimant asserts that he should have stayed as a Relief Officer and that HR and management had simply "assumed" him to be a permanent part time security officer at TNT Thetford. The grievance concluded *"..now that has happened to which I accept that I am a permanent part time security officer at TNT Thetford, but I should be entitle to the same wages as other TNT sites"*
18. The claimant later sent a further email, by which time his position had clearly shifted and he was arguing that he should receive the pay of a Relief Officer. He stated that he never agreed to have a permanent part time role at Thetford and he therefore considered that he should have remained on the Relief Officer rate. Mr Wiggins obtained a copy of the claimant's original contract and of the letter recording the variation of his terms and conditions dated 15 December 2017. He asked the claimant to produce any evidence that he relied on to show that he was entitled to be paid at the Relief Officer rate. The claimant declined to do so maintaining that Mitie had his contractual documents.
19. For completeness I should record that Ms John's witness statement contained some complaints or queries regarding matters such as fuel bonuses, travel allowances and uniform cleaning charges. The evidence in relation to these matters was unclear, fell outside the scope of the dispute as summarised in the list of issues and appeared to be out of time and to fall outside the two year arrears period. For that reason, I have made no findings in relation to these matters.

Law

20. S13 of the Employment Rights Act 1996 provides:

“13(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.*

13(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.”

21. When resolving a claim of unauthorised deduction from wages, the Tribunal is required to determine what sums are “properly payable”. Properly payable means that there is a legal obligation to pay, the legal obligation will usually arise under the contract or employment. If there is any dispute as to the terms of the contract, or the meaning of the contractual terms, than that dispute is to be resolved by the Tribunal as part of its determination of the claim of unauthorised deduction from wages (**Agarwal v Cardiff University** [2018] EWCA Civ 2084).

22. Where a contract authorises the employer to make changes to the terms of employment such changes can be made without the employee’s express consent, because they are made in accordance with the contract, rather than amounting to variations of the contract. However, contractual terms authorising the making of changes to the terms of employment will usually be given a narrow construction and their application may be constrained by the implied terms of the contract such as the duty of mutual trust and confidence. Where a change in the terms of employment is not authorised under the contract then the employee’s agreement to the change is required. Such agreement may be implied where an employee continues to work under the changed terms without raising any objection to the change.

Conclusions

What wages were properly payable to the claimant under his contract of employment with the respondent for his work at TNT Thetford?

23. I have concluded that, for such time as he performed work at TNT Thetford, the claimant’s entitlement under his contract of employment was to receive the normal rate for the job at TNT Thetford and not to receive the higher Relief Officer rate. I have reached this conclusion for the reasons set out below.

24. The claimant cannot point to any evidence that it was agreed that he should be paid as a Relief Officer at a rate of £9.75 an hour for his ordinary hours of work at Thetford. All the evidence is to the contrary.
25. When the claimant was originally appointed his contract provided that he was entitled to be paid the rate of pay at the site at which he worked and that if he changed locations the rate would change. The contract also provided the respondent with flexibility to redeploy him to other sites provided that these were within a reasonable travelling distance and provided that the respondent gave as much notice as possible.
26. The respondent exercised that flexibility to redeploy the claimant in April 2013 when he was assigned to the Relief Officer team. For the next few years, the claimant performed the role of Relief Officer and worked at a number of different sites, on different shifts, with variable hours from week to week being paid a rate of £7.50 an hour.
27. By early 2016, I have found that the respondent had redeployed the claimant to TNT Thetford and that the claimant retained the rate of £7.50 an hour on his redeployment. Whilst there is no letter that formally records the transfer but I have concluded that such a transfer had taken place. By early 2016, the claimant was working a regular weekend shift at Thetford. Although he occasionally worked elsewhere that work was done on top of his regular hours at Thetford.
28. Such a redeployment fell within the contractual flexibility accorded to the respondent under the contract. Alternatively, the claimant agreed to the change by working a regular weekend shift at TNT Thetford for the next three years on the Thetford rate. It is clear from the way in which the claimant put matters in his pay grievances between 2017 and early 2019 that he himself explicitly accepted that he was permanently based at Thetford. His grievances at this time were put on the basis that the Thetford rate of pay was too low rather than on the basis that he should not be on the Thetford rate at all. In particular, it was not until July 2019 that he asserted that he had not been allocated to work at Thetford but had remained a Relief Officer throughout.
29. Given my conclusion that the claimant had already been deployed to work at Thetford on a permanent basis by early 2016, I do not consider that it is necessary for me to place any particular reliance on the letter of 15 December 2017. In particular, I do not consider that it effected a change to his terms and conditions in recording that Thetford was his normal place of work or that such work attracted the Thetford rate. The letter merely reflected what was already the contractual position.
30. Ms John pointed to the fact that the claimant was paid at £7.50 per hour when he first worked at Thetford, although Thetford was a "minimum wage site". She argued that given that the claimant was paid above the minimum wage this indicated that he was working at Thetford in the capacity of a Relief Officer. It is not clear whether the claimant did transfer at above the existing Thetford rate as

at 2016. However, even if he did, I do not consider that the fact that the claimant was allowed to retain his existing rate of pay on transfer undermines my conclusions that he was transferred to Thetford and that his contractual entitlement thereafter was to receive the Thetford rate of pay, once this rate outstripped his pay on transfer. It is not uncommon for employers to adopt a “mark time” arrangement when transferring a member of staff to a location attracting lower pay. It ensures that the individual suffers no immediate loss of pay and is helpful in avoiding legal risk and employee discontent. Ms John also pointed to the fact that there was no letter recording the change in place of work (save for the disputed 15 December letter). It would have been good practice for such a letter to be issued (not least in order to comply with the obligation under section 4 of the Employment Rights Act 1996). However, the issuing of a letter was not a pre-requisite for a transfer. For the reasons that I have given above, I find that such a transfer did occur, that the claimant agreed to it and had explicitly accepted that he was a permanent member of staff at Thetford properly paid at the Thetford rate until this dispute emerged in July 2019.

Has the claimant been paid less than the wages properly payable to him and, if so, by how much?

31. It follows, in light of the conclusions that I have reached in relation to the first issue, that the claimant has not been paid less than the wages properly payable to him and that there has been no unauthorised deduction from wages.

Employment Judge Milner-Moore

Date: 30 September 2020...

Sent to the parties on:

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For the Tribunals Office

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