EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J A Cook	**v**	Peterborough Winter Sports Club Ltd.

Heard at: Bury St Edmunds **On**: 12 December 2018

Before: Employment Judge KJ Palmer

Appearances
For the Claimant: In person
For the Respondent: Mr Flowers, Lay representative

JUDGMENT

1. It is the Judgment of this Tribunal that the Claimant's claim pursuant to section 13 of the Employment Rights Act 1996, for unpaid wages, fails and is dismissed.

REASONS

1. This case, in many ways is an unusual case, came before me this afternoon. The claimant who was employed by the respondents between 1 September 2014 and 30 November 2017, issued proceedings in this tribunal in February 2018.

2. In his ET1 the claimant refers to his claim as being a claim either for overtime / or time in lieu from time accrued.

3. The respondents filed an ET3 and the matter was listed for a half day hearing before me today.

4. Prior to the hearing taking place there had been some correspondence with the tribunal concerning the respondent's failure to comply with the orders of the tribunal in the production of witness statements and the issue was potentially one where I would have to determine today whether the respondents were entitled to call witnesses whose witness statements

they had produced. That did not become an issue before me because the respondents, who were represented by Mr Flowers, a lay representative, did not produce their witnesses today to give evidence. Having discussed that with Mr Flowers at the outset, despite the fact that those witnesses were not here to be cross examined on their evidence and to give live evidence, the respondents decided to proceed in any event and it was agreed that the case should go ahead.

5. The result was therefore, that I had before me, a well put together paginated and indexed bundle for which I am grateful and three witness statements produced by the respondents from Mr Mark Savage, Miss Karen O'Neil and Mr John Neville, a witness statement from the claimant and live evidence was heard from the claimant.

6. It emerged during the course of that live evidence that the claimant's case was not quite as put in his ET1. His case was that during the time that he worked at the respondent, he had worked many long hours. He had entered into a perfunctory statement of terms and conditions or contract of employment when he started and shortly thereafter in 2015 was given a fresh contract when he was promoted to the position of Duty Manager. In that fresh contract his salary was stated to be £15,000 a year and his hours of work fell under what one might regard as a relatively standard contractual clause which specified that,

   "your hours of work are as required to fulfil your duties to the satisfaction of the company and as necessitated by the needs of the business".

7. The contract was perfunctory and there were no other clauses in that contract which related to hours or pay. Fairly shortly thereafter he received incremental salary increases and as from 1 January 2016, he was paid £18,000 per year, arising to £18,300 per year at the time his employment ended in November 2017.

8. His claim is based on the fact that he says he worked many long hours and that is not disputed. We have seen evidence of the hours he worked in the documents produced before me and these, essentially, are records for which the respondents keep of hours worked to monitor holiday accrual and there is no doubt that the claimant's hours varied from as low as 20 hours a week right through to significant numbers of hours in excess of 50 and sometimes 60 hours.

9. The claimant's case is based upon the fact that he says there was an arrangement that he entered into with three former General Managers whom were his immediate line managers working at the respondent. These were Colin Sturgess, William Faye and Mark Savage. I accept the respondent's point that this is the first time this has emerged today, but it is the claimant's case that he had an arrangement with these three, that when he, or they, worked more than 40 hours a week any additional time could essentially be reclaimed by taking paid time off in lieu relatively shortly thereafter. I heard evidence from the claimant that all three of them

actually availed themselves of this loose arrangement and took time off and that a further individual, Stacey, also took time off in lieu. And in fact, some of the documentation before me illustrates the fact that Stacey, who worked as a receptionist, was enabled to take time off in lieu when she worked beyond what were deemed to be her normal contractual hours.

10. The difficulty for the claimant was that as he indicated in evidence, he never availed himself of that opportunity and did not take time off in lieu when he worked over 40 hours a week, and there is plenty of evidence to show that he worked over 40 hours a week on most weeks. I accept his evidence in that respect. It is clear that the claimant is an extremely diligent and hard working individual, as has been evidenced by the fact that he was also working for the Fire Service during the latter part of his time with the respondents and he came across as an entirely trustworthy individual in the giving of his evidence and I have absolutely no reason to doubt anything he told me at all. He is to be commended for his diligence and hard working nature.

11. I also accept that the claimant was taken advantage of by those others with whom he had the arrangement and when they were able to engineer and manipulate a situation where having worked extra hours they would take paid time off in lieu, he did not do so and that is unfortunate. The issue however before me, is whether this arrangement that he entered into takes the form of a contractual term which goes beyond the basic terms which I have seen in the written contract of employment which makes no mention of such an arrangement. In fact, the hours worked clauses as I have described is a fairly common one in salaried management employees.

12. In evidence, the claimant also confirmed that there was no arrangement as far as he was concerned that if someone did not avail themselves of the opportunity of taking time off in lieu when working over 40 hours a week, they could store that time up and expect to be paid at some point in the future, perhaps on termination or perhaps at some other time. He was very candid and I am grateful to him for that, in confirming that there was no such arrangement in those terms.

13. As time progressed he became disgruntled, not only with the way in which the business was run, but perhaps the way in which he was treated and without going into detail there was an exchange of emails towards the end of 2017 when the claimant started to assert that he had worked many hours beyond that which he had expected to and that the company owed him those hours.

14. This ultimately resulted in him leaving in November of 2017 and he has since taken up a full time employment with the Fire Service.

15. The position which I have to determine is however, a legal one. The claim he pursues is a claim based on section 13 of the Employment Rights Act 1996, or what lawyers sometimes call the ‘old wages act’. There has to be

in position a contractual term for a payment to be due and payable to an employee by an employer and there then has to be evidence that that has not been paid. I would have to determine that the arrangement between the claimant and his three former General Managers constituted a contractual binding term upon the parties. I would also have to determine that it went rather further than had been described by the claimant during the giving of his evidence in that it would, of necessity, have to be a term which indicated that in the event that someone could not take the time off in lieu, pursuant to them working lengthy hours, they could somehow cash that time in at a future date, perhaps on termination.

16. It is for the claimant to prove his case and in cases such as this is it is often very difficult for judges to make a determination, but the burden of proof is on the claimant and he has to convince me on the balance of probabilities that that contractual term was agreed. Whilst I have enormous sympathy for the claimant and as I have outlined, he clearly is a very hard working individual and is to be congratulated in that respect. I cannot in all honesty find that the evidence that I have before me takes me to the conclusion that there was a definitive contractual term which allows the claimant to claim a payment in respect of those untaken days or hours in lieu. I have no doubt that the arrangement that he has described was in place, but it does not in my judgment formulate sufficient for me to determine that it was a contractual arrangement entitling him to a payment in due course, should as he has described, his good nature be taken advantage of.

17. For those reasons, therefore I must dismiss the claimant's claim.

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Employment Judge K J Palmer

Date: ………5/1/21

Sent to the parties on: .....5/1/21..

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For the Tribunal Office