



EMPLOYMENT TRIBUNALS

Claimant: Mr Anamul Hoque

Respondent: Total Security Services Limited

Heard at: East London Employment Tribunal (by Cloud Video Platform)

On: 31 March 2021

Before: Employment Judge Barrett

Representation

Claimant: In person

Respondent: Miss Jainika Patel, solicitor, Peninsula

JUDGMENT having been sent to the parties on 6 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mr Anamul Hoque, has worked for the Respondent, Total Security Services Ltd, as a Security Officer since 21 December 2011. He remains a current employee.
2. On 12 November 2019, the Claimant notified ACAS and received an Early Conciliation Certificate on the same day. On 16 November 2019 he presented an ET1 claim form claiming arrears of pay, holiday pay and other payments.
3. On 20 April 2020 at a Telephone Preliminary Hearing before Employment Judge McLaren, it was clarified that the claims proceeding related to:
 - 3.1. Holiday pay for 50 hours the Claimant said was due to him for 2019; and

- 3.2. Non-payment of wages in respect of a period the Claimant said the Respondent had failed to provide him with work since October 2019.

The hearing

4. The Claimant represented himself and also gave evidence.
5. The Respondent was represented by its solicitor Miss Jainika Patel. Witness evidence was given by the Respondent's HR Business Partner Mrs Carly Essoulami.
6. There was an agreed bundle of 124 pages.

Factual background

7. The Claimant signed his Statement of Main Terms of Employment the day before he started work. The relevant clauses provided:

'HOURS OF WORK

Your hours of work consist of variable shifts each week (Monday to Sunday), which will be advised to you in advance by Control and will be determined by operational requirements. You will receive appropriate paid rest breaks for each shift worked and daily and weekly rest periods as per the current legislation in force. You may be required to work additional hours to those previously agreed as and when necessitated by our operational requirements. The Company does not guarantee a minimum number of hours in any given period. You will be paid for the actual hours of work undertaken.

...

ANNUAL HOLIDAYS/PUBLIC HOLIDAYS

Your holiday year begins on 1st January and ends on 31 st December each year. You will receive a paid holiday entitlement in line statutory requirements. This is pro-rata to the hours worked. For part years of service your entitlement will be calculated as 1/12th of the annual entitlement for each completed month of service during that holiday year. Your holiday pay will be based on your average earnings over the previous 12 weeks. Any one leave period may not exceed 2 working weeks. Leave of more than 2 weeks will only be considered in exceptional circumstances and if you have given 6 months notice. In the event of termination of employment, holiday entitlement will be calculated as 1/12th of the annual entitlement for each completed month of service during the holiday year. Conditions relating to the taking of annual holidays are shown in the Employee Handbook to which you should refer.'

8. The Statement of Main Terms of Employment made reference to the Respondent's Employee Handbook, which further provided that:

'It is our policy to encourage you to take all of your annual leave entitlement in the current holiday year. However, at the end of your annual leave year, if you have any remaining accrued annual leave (up to a maximum of 60 hours), this will automatically be carried forward into the following holiday year. Any annual leave that has been accrued and not taken which exceeds 60 hours will be lost.'

9. The Claimant's evidence was that his contract of employment was not renegotiated after 2011 although his rate of hourly pay has increased.

10. On 5 April 2019, the Respondent issued the Claimant with a letter “*To whom it may concern*”, such as might be requested for a tenancy application or similar. The letter confirmed the terms of the Claimant’s employment were as follow:

‘Mr Hoque holds a permanent full time position within the Company and currently has a variable hours contract. Additionally, I can confirm Mr Hoque’s current rate of pay is £10.50 per hour. For actual working hours and monthly pay details please refer to the individual’s payslip where this information is itemised.’
11. The Claimant’s payslips from October 2018 to November 2019 show that he did work variable – though usually lengthy – hours. He was paid in respect of the hours he worked. During months when the hours worked were under 72 hours per week (the hours the Claimant contends he was contractually entitled to), his pay was not made up to any minimum salary.
12. The Claimant knew how to and was able to request holiday using the Respondent’s HR system. During the 2019 holiday year, the Claimant took and was paid for 285.54 hours’ holiday. He accrued but did not take a further 51.68 hours’ holiday.
13. Under the provision of the Respondent’s policy referred to at paragraph 8 above, those accrued but untaken hours were rolled over to 2020. They have now been rolled over again into the 2021 holiday year.
14. Until October 2019, the Claimant worked most of his shifts at a site on Sedley Place. He also worked some shifts on other sites. In October 2019, the client at the Sedley Place site requested that the Claimant not return to the site. Thereafter, the Respondent offered the Claimant shifts at different sites, but the work made available to the Claimant was less regular.
15. From the time the Claimant presented his Employment Tribunal claim in November 2019, he ceased to log into the Respondent’s ‘My Work’ portal to respond to shift bookings or mark his availability. The Claimant’s erroneous but genuinely held belief was that he could not carry out work for his employer while proceedings were ongoing.
16. The Respondent made repeated attempts to contact the Claimant by telephone and email to offer work and invite him to update his availability, including on 8 January, 10 January, 13 March, 31 March and 2 June 2020.
17. The Claimant confirmed by email of 31 March 2020 that he did not wish to resign. However, he has refused to work while Employment Tribunal proceedings were outstanding. The Respondent has not dismissed the Claimant for his non-attendance although it has issued him with a disciplinary warning.
18. The Claimant has not undertaken work or been paid in respect of work undertaken since 7 November 2011.

The law

Unauthorised Deductions from Wages

19. Part 2, ss.13 to 27B of the Employment Rights Act 1996 Act (‘ERA’) set out the statutory basis for a claim of unauthorised deduction from wages.

20. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.
21. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay.

Holiday Pay

22. Holiday pay is "wages" within the definition in the ERA, so a failure to pay holiday pay can be brought as a complaint of unauthorised deduction from wages, whether the right to holiday pay comes from the contract of employment or under the Working Time Regulations 1998 ('WTR').
23. The WTR give workers the entitlement to 5.6 weeks' leave each leave year (including any bank holidays the worker is entitled to take). 4 weeks of this was to implement European law (reg. 13) and the further 1.6 weeks' leave is a matter of domestic law only (reg. 13A).
24. Employees are entitled to be paid in lieu of holiday accrued but untaken during their final leave year on termination of employment. If there is no express contractual right to payment in lieu of accrued leave, the claim would be under the WTR, for leave calculated in accordance with the statutory formula (reg. 14).
25. If a worker is still employed, there will have been no unauthorised deduction from wages in respect of accrued but untaken leave which the worker is able to take. Regs. 30, 13 and 13A WTR allow a worker to bring a complaint that the employer has refused to permit the worker to exercise their right to annual leave.

Conclusions

Wages

26. The key issue between the parties is what wages were 'properly payable' to the Claimant. The Claimant does not contend that the Respondent failed to pay him in respect of shifts he actually worked. He says that for weeks where he worked fewer than 72 hours, or not at all, he was still entitled to be paid a contractual salary in respect of 72 hours per week.
27. The Respondent's position is that the only wages properly payable were in respect of shifts worked, under the terms of the Claimant's contract.
28. I find that the Claimant's contract of employment did provide that wages would vary in accordance with hours worked and there was no contractual minimum. Therefore, the Claimant was not entitled to be paid wages over and above the wages due in respect of the shifts he actually worked. The Respondent paid the Claimant in accordance with his contractual entitlement and did not make any unauthorised deductions from the Claimant's wages.

Holiday pay

29. I find the Claimant was paid for all the holiday he booked as leave and he was not prevented from taking further holiday if he wished to.
30. The Claimant has accrued 51.68 hours outstanding from his 2019 leave entitlement. As a result of the Respondent's holiday roll-over policy, the Claimant is still entitled to book those hours as leave and be paid for them.
31. As the Claimant has not yet booked these hours as holiday, entitlement to be paid for them has not yet arisen. Therefore, the Respondent has not made any deductions from the Claimant's wages in that regard or breached the WTR.
32. For these reasons I have concluded that the Claimant's claims are not well founded and are dismissed.

**Employment Judge Barrett
Date: 28 April 2021**