



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Mario Areal

v

United Guarding Services Limited

Heard at: Watford by CVP

On: 5 May 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Greg Morganti (Customer Service Director for the respondent)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

JUDGMENT

The judgment of the tribunal is that:

1. The respondent has made unauthorised deductions of the claimant’s wages and is ordered to pay him the gross sum of £9.08.

REASONS

1. The claimant was employed on 7 July 2019 as a security officer. His employment ceased on 9 April 2020.
2. By a claim form presented on 2 July 2020, the claimant claims unauthorised deduction of wages and for accrued holiday entitlement not taken at the date of termination of his employment.

Holiday pay

3. I have been shown a copy of the claimant's contract of employment. This provides as follows:

“7.2 The holiday year commences on 1 January and finishes on 31 December each year.

....

7.6 All holiday must be taken in the year in which it is accrued. In exceptional circumstances you may carry forward up to three days untaken holiday entitlement to the next holiday year. This applies for one year only, and holiday may not be carried forward to a subsequent holiday year”

4. The claimant's claim for holiday pay relates to the holiday years of 2019 and 2020.
5. As regards 2020, in its' response form the respondent accepted that it had made an error and should have paid the claimant his holiday entitlement. The claimant confirms that he has been paid for his 2020 holiday entitlement. Accordingly, that claim goes no further.
6. As regards the 2019 holiday entitlement, the claimant confirmed that he had not requested or taken any holiday in 2019. The claimant told me that when he was promoted, or asked to act as a temporary supervisor in or around October 2019, he stated to Mr Morganti that he wanted to apply for a couple of weeks in November or December so that he could obtain the extra SIA badge for close protection. He told me that Mr Morganti asked him to apply for holidays in the beginning of 2020.
7. Mr Morganti told me that he had no recollection of this conversation and it is not something that he would have said. He has a large workforce (200+) and does not allow holiday entitlement to be carried over. In addition, the claimant has referred to asking for holiday in late December and being told he was too late to apply. The contract of employment required holiday dates to be proposed in advance by using Webex.
8. The claimant did not apply for any holiday to do his SIA qualification in early 2020. This suggests to me that he had no expectation of his holiday entitlement being carried over and that he could take 2019 holiday entitlement at that time. I do not accept the claimant's evidence that Mr Morganti allowed him to carry over his 2019 holiday entitlement. Accordingly, pursuant to the terms of his contract of employment, his holiday entitlement was lost and so his claim fails.

Unpaid Wages

9. The claimant has claimed for one hour's pay on 27 October 2019 when the hour changed, going back. Mr Morganti accepted that the claimant was not paid for that hour and stated that it was not the respondent's practice to adjust earnings to take into account the hour change, either in the spring or

the autumn so that it evened itself out. However, Mr Morganti accepted that the claimant had not worked a shift over midnight for the spring hour change and accordingly the claimant's claim for unauthorised deductions in relation to one hour succeeds. There will be judgment for the claimant for the sum of £9.08 gross.

10. The balance of the claimant's claim for unpaid wages is on the basis that his contract of employment required him to work 36 hours per week. The claimant claims that for a number of weeks, he did not work 36 hours and consequently claims for the shortfall.
11. During the course of this hearing the claimant provided a spreadsheet setting out his weekly hours based on a week ending on a Sunday. This shows that for the 17 weeks between 1 December 2019 and 29 March 2020 the claimant worked less than 36 hours on ten of those weeks. By my calculation he worked 121 hours less if one were to calculate the shortfall of those ten weeks based on 36 hour weeks.
12. Mr Morganti told me that the 36 hour working week did not sit that happily with the actual working pattern of security guards. Often they would be working 12 hour shifts, either by day or night. The shifts offered would sometimes go over from one week into another and a distorted picture of the hours worked. Mr Morganti calculated that averaged out for the same period December 2019 to March 2020, the claimant worked 38 hours a week and on another average calculated by Mr Morganti, 42 hours a week.
13. Be that as it may, I take as a proposition of law that an employee's right to remuneration depends on his or her doing or being willing to do the work that he or she is employed to do; if he or she merely offers to perform some of that work (or indeed declines to do any of it), then an employer who makes it clear that he will not accept partial performance is entitled to withhold wages Miles v Wakefield MDC1987 ICR368, HL.
14. It is the respondent's position that the claimant was offered work at a number of sites that he turned down, either due to travelling distance, a perception of poor working conditions or having to work alongside other agency workers.
15. I have seen an e-mail exchange from 6 December 2019 wherein the claimant was offered work at a site in Uxbridge. The claimant refused saying it was out of his way. Mr Morganti told me that the job in Uxbridge was offering a number of 12 hour shifts, day and night, and lasted for months.
16. I have been shown an e-mail on 29 January 2020 stating that the claimant had failed to confirm his next days' shift at Park Heights. That e-mail goes on to state:

"If you keep refusing to work on assigned shifts we are unable to provide you with your contracted hours."

17. On 31 January 2020 the claimant responded confirming that he would not work at Park Heights.
18. On 19 March the claimant sent an e-mail in response to the Coronavirus emergency indicating that he would only really work in two locations, that he would not use public transport and would not work with certain people in certain locations, for example Peppermint Heights.
19. I find that the respondent was very selective as to where he would work and with whom he would work. I find that the respondent was offering the claimant at least 36 hours per week employment for the whole of this period and that the claimant was declining to do some of this work. I have seen no contemporaneous complaints of him complaining about the work offered, other than in terms of travel time and the other people on site. Those were not legitimate grounds for him to refuse the work in my judgment.
20. Accordingly, the rest of the claimant's claim for unpaid wages fails.

Employment Judge Alliott

Date: 19 May 21

Sent to the parties on: 18 June 21

For the Tribunal Office