EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. A. J. Garay Vargas	**v**	**Crystal Services plc**

Heard at: London Central **On**: 14 June 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr Finnian Clarke, trade union representative (UVW)

For the Respondent: Mr Jeffrey Underwood, respondent's general manager

JUDGMENT having been announced to the parties and the reasons having been given orally at the hearing and the judgment having been sent to the parties on 14 June 2021, and written reasons having been requested by the Claimant on 14 June 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 27 October 2020 the Claimant brought a claim for unauthorised deduction from wages in respect of his pay between 6 July 2020 and 28 September 2020 in the total sum of £645.

2. The Claimant claims that the Respondent has made an unauthorised deduction from his wages by paying him during that period only for 3 hours a day when his normal working hours were 4 hours a day. The Claimant claims that he did not agree to the change in his working hours, and the Respondent had no right to vary his working hours unilaterally without consultation. The Claimant accepts that during that period he worked only 3 and not 4 hours a day.

3. The Respondent accepts that prior to being placed on furlough on 6 April 2020 the Claimant worked 4 or more hours a day. The Respondent also

accepts that the Claimant was asked to return from furlough to work 3 hours a day. However, the Respondent contends that the Claimant had no fixed guaranteed minimum working hours, and therefore it was entitled to vary his working hours based on business requirements. The Respondent further contends that the Claimant agreed to return from furlough to work 3 hours a day.

4. At the hearing Mr Finnian Clarke appeared for the Claimant and Mr Jeffrey Underwood for the Respondent. The Claimant gave sworn evidence via an interpreter and was cross-examined. Mr Alex Meehan (Respondent's Reginal Manager), Mr William Andino (Respondent's Area Manager) and Mr Jeff Underwood (Respondent's General Manager) gave sworn evidence for the Respondent and were cross-examined. I was referred to various documents in a bundle of documents of 85 pages the parties introduced in evidence.

Findings of Fact

5. The Respondent is a provider of cleaning services for corporate clients. The Claimant works for the Respondent as a cleaner at Berenberg Bank, Threadneedle St. London from 28 March 2016 to present, with a four months' break from 13 August 2017 to 27 December 2017.

6. His contract of employment contains the following terms:

"PAY

…….
2. You will be paid for your contracted hours actually worked.

HOURLY RATE & WORKING HOURS

……. The Company may at it's (sic) discretion amend your hours of work in accordance with client requirements"

7. From December 2017 until March 2018 the Claimant worked 3 hours a day. His hours were then increased to 4 hours a day. In October 2018 he worked for two weeks 10 hours a day, and from 22 October 2018 until 6 May 2019 he worked 7 hours a day. From 7 May 2019 until he went on furlough on 6 April 2020 the Claimant worked 4 hours a day.

8. On 2 July 2020, Mr Andino called the Claimant and told him that he could come back to work from furlough but working 3 hours a day. The Claimant agreed and went back to work on 6 July 2020.

9. On 8 July 2020, the Claimant sent an email to Mr Meehan, which read as follows:

"…….. I am sending this email because my contract is for 4hrsa day, William the manager contacted me and told me to go back to work from the 6th of July 2020, but he told me to only work 3hrs a day instead of 4hrs.

When I signed the furlough, it said that I get to choose whether to go back before October or not

As I said to William, am happy to go back to work as long as i work my 4 hours a day like I normally do……..”

10. For some unexplained reason Mr Meehan did not receive that email.

11. In August 2020, the Claimant raised the issue of his working hours with Mr Andino, first on the phone and then by a WhatsApp message.

12. On 28 September 2020, following a discussion between the Respondent and its client, on which site the Claimant worked, the Claimant’s hours of work were increased to 4 hours a day.

The Law

13. Section 13 of the Employment Rights Act 1996 (ERA) prohibits an employer from making 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.

14. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion (section 13(3) ERA).

15. In New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA the Court of Appeal held that in order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question.

16. For the present purposes, the law on construction of contractual terms and on implying terms can be summarised as follows:

    a. Construing the words used in a contract and implying additional words are different processes governed by different rules. Only after the process of construing the express words is complete, the issue of an implied term falls to be considered. (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*)

    b. When interpreting express terms of a contract, the aim is to give effect to what the parties intended. In ascertaining that intention, the words of the contract should be interpreted in their grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party’s intentions. (*Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL*)

    c. Implied terms can supplement the express terms of a contract but cannot contradict them (*Johnson v Unisys Ltd 2001 ICR 480, HL*). However, in certain circumstances, implied terms may be used to qualify express

terms, or at least restrict the way in which they are applied in practice (*Johnstone v Bloomsbury Health Authority 1991 ICR 269, CA*).

d. A term could only be implied if, without the term, the contract would lack commercial or practical coherence. A term should not be implied into a contract merely because it appeared fair or because the parties would have agreed it if it had been suggested to them. (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*)

17. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. Regardless of whether an employee's statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case (see *Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT*).

Analysis and Conclusions

18. Mr Clarke for the Claimant submits that there are two issues I need to decide:

    a. whether the claimant consented to a reduction in his working hours on or around 2 July 2020;

    b. if not, whether the respondent could unilaterally alter the claimant's working hours under his employment contract.

19. He argues that the Claimant did not consent to a reduction in his working hours. He relies on 8 July 2020 email and August 2020 WhatsApp message. In the alternative, Mr Clarke submits, that if it is found that the Claimant has accepted reduced hours in his telephone conversation with Mr Andino on 2 July 2020, he withdrew his consent by the email of 8 July 2020, and therefore the Respondent cannot use the Claimant's "*perceived initial acquiescence*" as justification for subsequent deduction from the Claimant's wages.

20. Mr Clarke further argues that the Respondent was not entitled to unilaterally vary the Claimant's hours of work without (a) a consultation meeting; (b) evidence of the client requirements being provided and/or (c) a written statement of the changes to the contract.

21. He submits that these conditions should be "*read into*" the term in the Claimant's contact allowing the Respondent to vary the Claimant's hours of work at its discretion. He relies on the dicta by Lord Woolf MR in Wandsworth London Borough Council v D'Silva [1998] IRLR 193 at para. 30 (*his emphasis*):

> *"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court*

> *is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which **that** party is required to comply. If, therefore, the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the court in construing a contract of employment will seek to avoid such a result"*

22. I do not agree with Mr Clarke's analysis of the issues in the case. In my judgment, the first and the key issue I need to determine is whether the wages claimed by the Claimant were "*properly payable*" to him within the meaning of s13(3) ERA.

23. The Claimant admits that he did not work more than 3 hours a day in the period for which he makes his wages claim. His contract of employment does not say that the Claimant is guaranteed any minimum number of hours for which he will be paid irrespective of whether he worked those hours. On the contrary, it states that he will be paid for "*hours actually worked*."

24. Therefore, in my judgment, the contract does not give the Claimant the right to be paid for 4 hours when he actually worked only 3 hours. Although a legal entitlement to wages "*properly payable*" does not necessarily need to arise from a contract, in the circumstances of this case, I do not see any other alternative legal source from which such legal entitlement could arise.

25. Mr Clarke argues that because the Claimant always worked at least 3 hours a day, when his hours were increased to 4 hours a day in March 2018, the Claimant became contractually entitled to work and be paid for at least 4 hours a day. I do not agree. There is nothing in the contract or any other evidence before me which could support that contention. During his employment with the Respondent the Claimant's working hours varied from 10 to zero (when he was placed on furlough) depending on the Respondent's client's requirements. I see no legal basis for Mr Clarke's contention that every time the Claimant was asked to work more hours that automatically became his minimum guaranteed hours of work for which he was entitled to be paid irrespective whether he actually worked those hours.

26. For these reasons I find that the Claimant did not have any legal entitlement to the wages claimed and therefore they were not "properly payable" to him. It follows, that by not paying these wages to the Claimant the Respondent has not made an unauthorised deduction from his wages.

27. If, however, I am wrong on this, and the Claimant did have some legal entitlement to work a minimum of 4 hours a day, based on the evidence I heard, I am satisfied that in the telephone conversation with Mr Andino on 2 July 2020 he has freely accepted to vary his hours to 3 hours a day, and on 6 July 2020 he returned to work on that agreed basis.

28. I reject Mr Clarke's argument that because the telephone conversation lasted only a minute and 15 seconds it was insufficient for the Claimant to express his views or signify his agreement to the change. It was more than enough. The Claimant agreed to return to work on that basis and did not ask any questions. Further, based on the evidence I heard I reject the contention that the Claimant was in any way pressured to accept the change. If the Claimant did not wish to come back from furlough to work 3 hours a day, he could have said that to Mr Andino, but he did not. The Respondent had other cleaners on furlough it could have asked to return instead of the Claimant, and therefore it had no reasons to put pressure on the Claimant to come back to work. Finally, in accepting to come back to work from furlough, the Claimant was not agreeing to a reduction of his working hours from 4 to 3 a day, but to an increase from zero (furlough) to 3 hours a day.

29. The Claimant's subsequent email to Mr Meehan and WhatsApp message to Mr Andino are irrelevant, as by that stage he had already accepted working 3 hours a day and to change his hours back to 4 hours a day required the Respondent's agreement.

30. I do not accept Mr Clarke's argument that the clause in the Claimant's contract allowing the Respondent at its discretion to vary the Claimant's hours of work should be read as making the exercise of that right by the Respondent subject to the Respondent satisfying three conditions, namely consultation meeting, evidence of client requirements and a written statement of changes to the contract. I see no legal basis to imply such a term. The clause, as written, is clear and does not require any term to be implied to make it commercially or practically coherent.

31. Finally, I do not see how Wandsworth London Borough Council v D'Silva could assist the Claimant. In that case the employer changed expressed contractual terms governing sickness benefits and relied on a clause in the employment contract stating that variations to contract terms could occur. In the present case, the Respondent did not make any changes to the express terms of the Claimant's contract. It did not need to make any such change. It simply operated the existing express term of the contract to tell the Claimant how many hours a day were available for him to work if he wished to come back from furlough.

32. For these reasons I find that the Claimant's claim must fail.

Employment Judge P Klimov
14 June 2021

Sent to the parties on:

15/06/2021.

For the Tribunals Office

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