THE EMPLOYMENT TRIBUNALS

Claimant: **Mr R Fulcher & Others**

Respondent: **Opsec Security Limited**

Heard at: Newcastle Hearing Centre via CVP

On: 4 & 5 January 2021

Before: Employment Judge Jeram

Representation

Claimant: Mr Brien of Counsel

Respondent: Ms Hogben of Counsel

JUDGMENT having been sent to the parties on 19 January 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

1. By a claim presented on 18 June 2020, Mr Fulcher and 6 other claimants pursue a claim of unauthorised deduction from wages pursuant to Section 13 of the Employment Rights Act.

The Issue

2. After discussion with the parties at the outset of the hearing, the single issue in this case is whether that which was paid to the claimants in respect of the week commencing Monday 23 December 2019 was less than was properly payable to them. Specifically, the claimants allege that the hours worked on Monday 23

December 2019 should have been paid at the overtime rate of time and a half.

The Evidence

3. I had before me a bundle comprising of 138 pages.

4. I heard evidence from:
   a. Mr Gibson, who commenced employment as a Production Operative in 2015 and became the Unite the Union trade union representative in approximately 2018
   b. Mr Stephen Roberts, claimant
   c. Mr David Bowden, Operations Director of the respondent.

5. In addition to the statements of the witnesses above, I also read the witness statements of the following claimants:
   d. Peter Rackstraw
   e. James Little
   f. David Howells
   g. Anthony Henderson
   h. Michael Fulcher
   i. Jonathan Snell

Findings of Fact

6. The claimants work as Production Operatives for the respondent. The respondent designs and manufactures security devices such as foil holograms for bank cards. Its plant in Washington is the respondent's sole UK manufacturing plant.

7. Historically the respondent's production staff worked a 40-hour week over 5 days from Monday to Friday. It had operated on a two-shift system: early shifts (6am to 2pm) and late shifts (2pm to 10pm). It later introduced a night shift requiring staff to work from Sunday night to Thursday morning from 10.00pm to 6.00am. The vast majority of Operatives (some 80%-90%) work a three-shift system.

8. The parties agree that there was a subsequent change to the working pattern, so that the shift on Sunday night to Monday morning was removed and only 4 shifts (or 32 hours) were therefore worked by Production Operatives when rostered on the night shift.

9. The respondent recognises and negotiates its employee terms and conditions of employment with at least one union, Unite the Union ('Unite').

10. Revised standard terms and conditions of employment were agreed with Unite in

or around 2010/2011. One revision was the reduction in the shift premium which had been 32.5% to 25% in recognition of the reduction of shift hours worked when on the night shift; significantly, however, the definition of standard working hours remained at 40.

11. All the claimants in this case commenced employment after that renegotiation and are therefore employed on terms and conditions agreed with Unite.

12. The claimants' statement of main terms and conditions contain the following provisions:

6. Hours of Work
6.1 "your normal working hours are 40 hours per week. You shall be required to work in accordance with a shift pattern to be notified to you from time to time by your line manager. The company reserves the right to change shift patterns in line with the needs of the business."

...

6.5 "employees required to work in addition to the normal working hours mentioned will be entitled to receive overtime payments at the following rates:

Monday to Saturday inclusive: 1.5 times basic hourly rate for the first 4 hours of any shift, thereafter 2 times.

. . .

8. Holiday pay and Entitlement
8.1 The holiday year runs from 1 January to 31 December

...

8.4 You shall be required to take some days from your annual holiday entitlement as required by the Company during the period between Christmas and New Year to coincide with the closure of the company's facility."

(emphasis applied)

13. Since 2010/2011, pursuant to clause 8.4 of their contract, employees would be notified, approximately one year in advance, of the dates on which they would be required to take annual leave for the following Christmas closure period.

14. Between 2011 and 2018, the respondent's Christmas closure meant that employees were directed to take a Friday as holiday in all save one of those eight years. Whilst in the first few years, the respondent's plant was closed for five days over Christmas, since around 2013, it closed for a four-day period.

15. Where a direction is made to employees to take a Friday as a holiday, it has an adverse effect on those employees who happen to be working a night shift, since they would be required to use an annual leave day in respect of a day when, had the plant been open, they would have been on a non-working day in any event.

16. No issue was taken by any employee or by Unite about this consequence until 2019. Mr Gibson was unaware of whether and if so, what arrangements had been made in previous years with other staff or indeed other members of his union in previously affected night shift groups. Mr Roberts, too, was unaware of how his colleagues were affected in previous years and what, if any, arrangements had been made with them. Despite having worked approximately 7 Christmases, he had not been directly affected by this arrangement before.

17. I accept the unchallenged evidence of Mr Bowden that in previous years (such as 2014 and 2015), when a night shift would be due to finish at 6am on Christmas Eve, in theory, if an employee who wished to work those hours they would be entitled to so, but that in practice an alternative arrangement, no doubt far more attractive to all concerned, would be made to finish much earlier than that and certainly by midnight. Agreements to this effect also explain the lack of any previous issue having been raised with management by employees or their union.

18. On 23rd November 2018 an email was sent by Sarah Heaney, HR officer, in relation to the 2019 Christmas shutdown. Ms Heaney stated:

    Dear all,

    Please note that our UK facilities will close for business on Monday 23rd December 2019; this will be a normal working day. This will mean that you will need to retain four days from your 2019 entitlement. The reservation of those four days will cover:
    Tuesday 24th December 2019
    Friday 27th December 2019
    Monday 30 December 2019
    Tuesday 31 December 2019.
    . . .

19. The respondent's plant was therefore open on Monday 23 December 2019; Wednesday 25th December and Thursday 26th December 2019 were bank holidays in any event.

20. Mr Roberts and others on his shift made enquiries of senior management. Those queries appear to have been made of two management staff in particular, Paul Johns and Nigel Bolam in early 2019 by Mr Roberts and perhaps Mr Gibson but

certainly of other staff.

21. Mr Gibson also made enquiries of Mr Johns (Operations Manager) in early December 2019. I received no evidence as to how that enquiry was put, or whether Mr Johns was referred to the email of Ms Heaney with a view to confirming the interpretation that the claimants subsequently sought i.e. that the night shift would not be required to work at all on Monday 23 February.

22. Mr Johns responded by confirming to Mr Gibson that staff rostered to work on the night shift in the week commencing Monday 23 December 2019 would not be working the night shift on the Monday. Mr Gibson accepted, subsequently to Mr Bowden at the grievance stage and also in his oral evidence that at no stage did Mr Johns or anyone else tell him that the night shift need not work at all on Monday 23 December 2019; in cross-examination, Mr Gibson accepted that he had misinterpreted Mr John's words.

23. In any event, and contrary to his evidence in his statement, Mr Roberts said in evidence that he had formed the belief that he and the rest of his shift group would not be working at all on Monday 23 December because of a collective view, formed after discussion with colleagues, and not because of anything said to him by Mr Gibson.

24. On 10 December 2019, Mr Johns wrote an email to Mr Gibson comparing the situation with previous years when the plant closed for 5 days and all staff were directed to take holiday for a 5-day break and so that night shift staff would always be affected by such arrangements, and stating the situation was no different now that the plant was closing for a 4-day break. He concluded: *"people working nights are able to work a days (sic) on the Monday".*

25. Those employees who were rostered to work on a 8-hour night shift on Monday 23 December 2019 were offered the opportunity to work the 8-hour late shift instead. All claimants took that opportunity, save for Messrs Roberts and Henderson who worked 4 hours and took 4 hours holiday. All claimants were paid for a standard 40-hour week; no claimant in fact worked in excess of 40 hours that week.

26. In early December Mr Gibson on behalf of his Unite members submitted a grievance. In that grievance he said *"as you're aware the problem is with the night shift have used a holiday that should not have been taken. The reason for this has been discussed numerous times throughout the year."*

27. The written grievance, as discussed in a meeting with David Bowden (Operations Director EMEA) on 13th January 2019 was said to be about the requirement imposed on night shift employees to take a day's annual leave on Friday 27

November 2019 when, ordinarily, those employees would be on a non-working day; it was said that Monday 23 December 'should have been the holiday as they were not meant to be in on the Friday'.

28. Thus, it was being argued that the non-working Friday should be transposed to the Monday. Had that contention had been accepted, the claimants would still have only received payment at the standard rate; instead, they would have saved one day of their annual leave entitlement. It was not being argued that the hours that had been worked on Monday 23 December 2019, should have been paid at overtime rates.

29. Mr Gibson confirmed that he was unaware that any the night shift employees had been told that they could take the Monday off.

30. In his response, discussed at a meeting on 4 February 2020, Mr Bowden pointed out that each of the three shifts worked 232 days, and that if the night shift this particular year had been provided with a non-working day on Monday 23 December 2019, that would be inequitable because they would have worked only 231 days. He accepted that enquiries about arrangements for the December closure had been made in January or February 2019 and that Mr Johns was likely to have made a comment 'along the lines of *"don't' worry, you won't be working the nightshift on the Monday before Christmas*"' which was intended to convey that adjustments to the hours would be made enabling the night shift to work either the early or the late shift instead. Learning outcomes were acknowledged in relation to the need for clearer written communication about the detailed arrangements closer to the relevant time; that measure was adopted the following year. The grievance was dismissed.

31. A subsequent appeal essentially repeated the same point i.e. that the Friday should not have been classed as a holiday. A few days later, on 11 February 2020, Mr Gibson wrote to say that those employees who accepted the offer to work an early or late shift on Monday 23 December 2019 should have been paid at overtime rates *"as this was an extra shift from the norm and we reserve the right to pursue this claim further".* At the appeal hearing on 25 February 2020, chaired by Michael Currie, Mr Currie confirmed that the night shift had been asked to attend an alternative shift, not an extra shift and that the contracted hours were 40. The appeal was dismissed.

The Law

32. Section 13(3) provides:
"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 wages properly payable

by him to a worker on that occasion (after deductions), the amount of that deficiency shall be treated of the purposes of this Part as a deduction made by the employer from the worker's wages on that occasions"

33. Section 23(1) provides a worker with the right to present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13.

34. The phrase 'properly payable' arose for consideration by the Court of Appeal in the case of New Century Cleaning Co Ltd v Church [2000] IRLR 27. Bedlam LJ at [62] noted that in the terms of Section 13 (3) the question to be determined was what were the wages properly payable to the claimant. In his view the phrase properly payable suggested that some legal but not necessarily contractual entitlement to the sum in question was required. This, he thought, was confirmed by Section 27 (1) which defines wages as *"any sums payable to the worker in connection with his employment….whether payable under his contract or otherwise".*

Discussion and Conclusions

35. The burden of proof is on the claimants to establish that the employer has failed to pay them wages that were properly payable.

36. Before turning to the claimants' arguments, it is useful to clarify what they do not argue. They explicitly do not seek to challenge the respondent's right to direct them to take annual leave on Friday 27 December 2018, in accordance with clause 8.4 of their contracts.

37. Nor do the claimants challenge the respondent's right to change shift patterns in line with business needs, in accordance with clause 6.1. There was no suggestion that the claimants sought, but were denied, the ability to work until 6am on Tuesday 24 December 2019. The unchallenged evidence was that they were given the opportunity to work the day shifts, and they agreed.

38. Furthermore, on the claimant's own case, the standard terms and conditions were renegotiated with Unite to reflect the loss of one shift on a Sunday night, by reducing the shift premium from 32.5% to 25%; the defining of standard working hours as 40 hours per week was nevertheless retained. There is no evidence to suggest that what is contained in the contract is not what the parties intended to agree. Furthermore, if that were the case, the intervening 8 years would have been ample time on the part of either the union or management to identify a problem and yet on the evidence before me not a single complaint was raised.

39. Instead, the claimants argue their claim on two bases.

40. First, Mr Brien on behalf of the claimants argues that the ordinary and natural meaning of the email from Ms Heaney is that the claimants were not required to work on Monday 23 December. There are difficulties with that argument. First, taken at face value, the email states that the day was a normal working day, not a non-working day; it says the opposite of what the claimants seek to argue. But, even the claimants' argument was correct so that the respondent reneged on the arrangements said to have been communicated in that email, they had not in fact worked in excess of the standard 40 hours that they were paid for that week; put another way, they were paid what they were contractually entitled to be paid pursuant to clause 6.1.

41. The second argument advanced is that the week in which a night shift is worked, any hours worked in excess of 32 should be paid at over time rates, i.e. time and a half.

42. The contract defines normal working hours at clause 6.1 as 40 hours per week. Those hours are the standard working hours of the employee and they are not qualified by being related to the shift worked. Second, nor could there be any such qualification by implication, since to do so would be at odds with the rest of clause 6.1 which permits the respondent to shift patterns in line with business needs.

43. Overtime is only paid, in accordance with clause 6.5, when hours are worked in excess of normal working hours. Thus, whether an employee works 40 hours (when working on either early or late day shift) or 32 hours (when working nights), there is explicitly no entitlement to overtime rates until an employee has worked the standard 40 hours.

44. Insofar as I understood Mr Brien to argue that clause 6.1 which defines the standard working hours as having been varied by subsequent custom and practice (so that 'normal working hours' in relation to those on the night shift have been varied to 32 hours), again there are a number of difficulties with that argument:
    a. The starting point is that the parties intended in 2011/2012 to retain the definition of normal working hours and that the reduction of shifts worked whilst on night shift was reflected in a reduction in the overall shift premium;
    b. As a matter of ordinary contractual principles, no term can be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least absent an intention to vary;
    c. Any argument is inconsistent with Clause 6.1 not just in relation to the definition of normal working hours, but is also inconsistent with the respondent's right to unilaterally change shift patterns, since the agreed facts are that the early and late shifts are worked over 40 hours;

d. No evidence was adduced, alternatively relied upon, to advance a case the parties intended to vary the express term at Clause 6.1.

45. Accordingly, there is no contractual entitlement to be paid at overtime rates when working less than 40 hours per week; no other basis of entitlement was advanced.

46. The claims are not well founded and are dismissed.

EMPLOYMENT JUDGE JERAM

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 29 May 2021

Covid-19 statement

This hearing was held via CVP which was not objected to by the parties. A face to face hearing was not held because of the Covid-19 pandemic and all issues could be determined at a remote hearing.

Claimants

2501176/2020	Mr Robert Fulcher -v- Opsec Security Limited
2501177/2020	Mr Anthony Henderson -v- Opsec Security Limited
2501178/2020	Mr David Howells -v- Opsec Security Limited
2501179/2020	Mr James Little -v- Opsec Security Limited
2501180/2020	Mr Peter Rackstraw -v- Opsec Security Limited
2501181/2020	Mr Steven Roberts -v- Opsec Security Limited
2501183/2020	Mr Jonathan Snell -v- Opsec Security Limited