Of the claimant's contract of employment

EMPLOYMENT TRIBUNALS

Claimant: Mr T Saccoh

Respondent: Atalian Servest Security Limited

Heard at: London Central (Remotely by CVP)
On: 27 September 2021

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: Mr J Bryan (Counsel)

JUDGMENT

The claimant's claim for unauthorised deductions from wages is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 22 of July 2020, following ACAS early conciliation commenced on 8 June 2020 and concluded on 29 June 2020, the claimant claimed unlawful deductions from wages in relation to the fact that he had no shifts between 23 October 2019 to his resignation which took effect on 21 July 2020.

The issues

2. The issues were agreed to be as set out at paragraph 6 of the respondents skeleton argument, and were:-

    a. What were the dates of the payments of wages from which the alleged deductions were made?

    b. On each of those occasions, what was the total amount of the wages properly payable to C by R?

c. On each of those occasions, was the total amount of wages paid less than the total of the wages properly payable and, if so, by how much?

d. In respect of each such deduction, has the complaint been presented within the primary three-month time limit?

Procedure

3. I was supplied with a 113 page bundle, the claimant produced a witness statement and a series of documents, and for the respondent, Mr Harre produced a witness statement. Both gave evidence. The respondent produced a skeleton argument and the claimant and respondent's counsel made oral closing submissions.

The facts

4. The respondent supplies support services including security. The claimant was employed as a security officer from 29 September 2017. The contractual documentation is fairly sparse, but there was in the bundle what is expressed to be the first page of the claimant's contract of employment, which sets out that the claimant would work 12 hours per week at an hourly rate. The contractual documentation does not set out any requirement to work hours or provide any guarantee of hours. This was, as the respondent described it, a "pay as you work contract". It provided flexibility to the worker and to the respondent.

5. In July 2018 the claimant was assigned to provide security at the construction site of one of the HS2 terminals in Euston. This was referred to as the CSJV contract. On 30 July 2018 Mr Harre wrote to all workers on this contract to say "*90% of officers on CSG are contracted to work on a four on four off shift pattern or something similar. This is your base roster and you are entitled to this shift pattern. If you have been working this pattern for more than 12 weeks and you are in a base roster rolled out to October then you are contractually entitled to these hours under implied terms (no matter what your actual contract of employment says) we cannot change your roster without your agreement and you are expected to complete the shifts without fail. When we roll out the next rosters from October 2018 to February 2019 we will be rolling out your shifts confirmed as you should be more than aware of what your shifts are and we don't feel that asking you to confirm your contracted shifts is a productive use of anyone's time*".

6. This set out the terms applicable to workers on the CSJV contract, and this communication was largely to regularise the position of workers on this contract who had been picking and choosing their hours. Mr Harre said that this represented a guarantee in respect of the hours to the employees whilst working on.

7. On 23 October 2019 the CSJV contract manager, Mr Walker, wrote to the workers on that contract and said "*As you are aware St James' Garden [the site the claimant worked on] has now been completely down manned. We have also reduced the Piazza we will also shortly be reducing NTH but I will keep you all updated when this happens.* ***Solutions****. There are 3 solutions that are available if this reduction does*

affect you directly. Please email me or Samantha direct with the solution you would like to take. 1. Bench team- This is a temporary solution until I find you a permanent 4 on 4 off. 2. You will be priority for all overtime shifts. 3. If ATC or BFK please get in touch and I will arrange this for you. I apologise for the short notice, however I will do my very utmost to ensure you still receive a decent volume shifts".

8. The claimant did not receive this email before he went to work, and he went to work as usual that day. When he got to work he was told by the scheduler that he had had his shifts removed and was told that he should have been informed of this. He tried to speak to a supervisor and then spoke to a duty manager and was sent from pillar to post to try and work out what to do. He was eventually sent home, and when he got there he discovered Mr Walker's email.

9. The claimant emailed the scheduler and others to say that he had been treated unfairly and he should have been given priority over others when decisions were to be made about down-manning. On 28th of October he asked to be transferred to the ATC contract. On that day he was told that ATC had agreed to his transfer subject to him passing and induction process. He did not put himself forward for the Bench Team, which is essentially a pool of workers who covered sicknesses and other ad hoc manning requirements. Also, from this point the scheduler was not sending him over-time requests because of his transfer to the ATC contract.

10. On 2 December 2019 the claimant was notified that he failed the induction for the ATC contract. I find, based on the totality of the evidence, that at this point he began to seek other work. He was clearly upset at being moved from Euston; he felt that he had given exemplary service and been something of an ambassador for the project for the respondent. Secondly, the ATC contract had not worked out for him.

11. Additionally, in his claim form at paragraph 7 the claimant indicated that he had started another job on 19 December 2019. Also, in the bundle was a request from another security firm on 16 November 2020 which gave the dates of employment with the respondent, which must have been supplied by the claimant to that security company, as running to 31 December 2019.

12. The claimant said in evidence that he had joined an agency in December 2019 and being given around four shifts. The likelihood is, in my judgment and based on the evidence I have heard, that the claimant may have formed an impression that he was guaranteed a 4 on 4 off shift pattern by the respondent and that he would not work for it unless this arrangement was honoured.

13. On 13 December 2012 the claimant but in a grievance which was heard by Mr Cambo, in which he complained about the removal of shifts and the fact that he had been targeted by the supervisor. Mr Cambo found that the claimant should be paid for the full shift on 23 October 2019, and not the four hours that he had been paid, and found that he had not been targeted by his supervisor.

14. The claimant appealed, and his appeal was heard by Mr Harre on 13 January 2020. The claimant said he should not have been selected for removal from Euston as he was more senior to others. Mr Harre found that length of service was not a factor in decisions relating to the Euston placement and did not uphold that part of the grievance and did not uphold allegations of victimisation against the supervisor.

15. On 7 January 2020 the claimant was offered by email a 4 on 4 off engagement in Uxbridge. He did not refer to that offer in his reply to this email, but did almost certainly make reference to the offer in a phone call, and he refused it. The claimant, who lived in south London, considered that Uxbridge was too far from home and that his commute to work would take far too long.

16. On 28 January 2020 Mr Harre emailed the claimant saying "*As discussed we cannot pay you if you do not work by requesting not to return to Euston and refusing the [opportunities] to work elsewhere on different shift you have severely limited our options with regard to offering you work as a result of which we cannot pay you as you have caused the situation*".

17. Also on 28 January Mr Walker offered the claimant a 4 on 4 off shift pattern opportunity with the Bench Team at Euston, which the claimant refused the following day.

18. In late January 2020 the claimant was put forward for an opportunity at the Foreign and Commonwealth Office, but nothing materialised as the claimant did not possess a UK passport.

19. In February 2020 the respondent offered the claimant the opportunity to work on a 4 on 4 off shift pattern on a contract called the BFK contract near Euston. He passed an induction in relation to this post. The operations manager responsible, Mr Cartey, set out in an email dated 29 June 2020 that the claimant was "*extremely elusive and was never answering his phone*" and that the claimant had "*the appearance to want and then having no intention of accepting once the options became available*". The claimant, on the other hand, gave evidence that he completed his induction but was never contacted by Mr Cartey.

20. Mr Cartey did not give evidence, but on balance, the "grain" of the evidence is that the claimant had alternative employment opportunities from December 2019 onwards and was being highly selective about what he would consider with the respondent.

21. On 16 March the claimant was offered a shift which did not accept because he had not had an induction on the site, and because of the Covid pandemic.

22. On the 23 to 26 March 2020 the respondent's systems show the claimant was offered shifts that he did not accept. The claimant said that he was telephoned on the 25 March 2020 by the respondent and he suggests that shifts were backdated on the system to make it appear as if he has been offered shifts that he was not in fact offered. I accept Mr Harre's suggestion that it is hard to see why the scheduler would chosen to do this. The more likely explanation which fits in with the general trend

of the evidence is that that the claimant was offered work and did not accept it. Essentially, I find that there would have been nothing really acceptable to the claimant at this point in time other than a guaranteed 4 on 4 off shift pattern which he believed he was entitled to.

23. On 2 June 2020 the claimant was offered a 4 on 4 off shift pattern at Euston, but he declined. The claimant says that at this point that he had no trust in the scheduler, the supervisor and the contract manager.

24. On 22 July 2020 according to the claimant's claim form his employment ended. In October 2020 the claimant started a social work course in Manchester.

The law

25. Section 13 of the Employment Rights Act 1996 ("the ERA") provides: -

(1) An employer shall not make 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.

[…]

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

26. Section 23 sets out the right to present a complaint to the tribunal, and provides: -

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

[…]

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made

[…]

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions

[…]

the references in subsection (2) to the deduction […] are to the last deduction […] in the series […].

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

27. The tribunal has jurisdiction to determine questions as to whether a sum is "properly payable" under section 13 ERA (*Agarwal v Cardif University* [2019] ICR 433.)

28. In *Miles v Wakefield Metropolitan District Council* [1987] AC 539 it was held: -

"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work. Different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom".

29. In *Gregg v North West Anglia NHS Foundation Trust* [2019] ICR 1279 that consideration of whether the employee was "ready and willing" arises only after consideration of the contractual terms.

30. The editors of Harvey on Industrial Relations and Employment Law (Div BI) [10.08] : –

Whilst the precise scope of the phrase 'willing to work' remains uncertain, it has long been established that employees who deliberately or unreasonably refuse to do any work – and so are clearly not willing to work – are not entitled to be paid: see Cuckson v Stones (1858) 1 E & E 248, [1843-60] All ER Rep 390; Marrison v Bell [1939] 2 KB 187, [1939] 1 All ER 745, CA; and Miles v Wakefield [1987] IRLR 193, [1987] ICR 368, HL. In that situation the application of the co-dependency principle (ie no work no pay) is much more straightforward.

Conclusions

31. As I have observed, the contractual documentation here is sparse. But I do accept that there was no guarantee of hours in the contract. The email from Mr Harre on 30 July 2018 sets out that 90% of officers on the CSJV contract were contracted for a 4 on 4 off shift pattern. Mr Harre accepted that there was a guarantee of that shift pattern while on that contract, but there was no guarantee that any worker would stay on that contract.

32. There was nothing to stop the respondent from moving the claimant on from this contract. It was obviously unfortunate that the claimant, having chosen to move on to the ATC contract was not successful in his induction.

33. This being a pay as you work contract, there is no entitlement to payment in the event of the claimant not working.

34. It follows, that on a proper interpretation of the contract the claimant was not entitled to wages for periods where he was not working. For this reason the claim fails.

35. However, I go on to consider the situation if I am wrong.

36. This is a curious case, but the impression that I have formed from the evidence that I have heard is that the claimant stuck to his assertion that he was guaranteed 4 on 4 off and would not accept anything he saw as an erosion from that proposition. He was given options on 23 October 2019 and he chose to move forward to the ATC contract. He could have accepted bench work but he did not. I would have been surprised, on the evidence that I have heard, if the claimant would have accepted overtime work had been offered at this stage. I find that he pursued the ATC contract as he would have found its shift pattern acceptable.

37. When it became clear that the ATC route was closed to him I find that he joined an agency. My conclusion is that the claimant would have only worked for the respondent if had he been offered a 4 on 4 off shift pattern which he found acceptable.

38. I find from this time onwards that he did not engage with his employer as he was not interested in what they had to offer. From December 2019 onwards he had at least access to alternative employment through his agency. The evidence from the document sent by another employment agency in November 2020 would suggest the claimant saw himself as no longer working from at least December 2019. This is supported by how the claimant filled in his claim form, when he set out that he had another job from 19 December 2019.

39. The claimant has not discharged the burden that he was ready and willing to work on anything but his own narrow terms. That is not a reasonable approach.

40. I have found as I have primarily on a construction of the contract itself, but would have found against him on the “ready and willing to work” issue in the alternative.

41. It follows that the claimant’s claim for unauthorised deduction from wages is not upheld and is dismissed.

Employment Judge **Heath**

25 October 2021_____

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/10/2021.

FOR THE TRIBUNAL OFFICE