Case Number: 1600018/2021
1600019/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs L. V. Jones (C1)
Mrs A. D. Owen (C2)

Respondent: Kingdom Services Group Ltd.

HELD AT: Mold **ON:** 16th December 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mrs Owen represented herself and Mrs Jones (her sister)
Respondent: Ms Evans-Jarvis, Solicitor/Senior Litigation Consultant

RESERVED JUDGMENT

The judgment and declaration of the Tribunal is that the respondent made unauthorised deductions from each of the claimants' wages in the period 1st September 2020 – 16th December 2021 and shall pay to each of the claimants respectively the sum of £6,728.42 subject to the usual statutory deductions (tax and NI), quantum (the size of the award) having been conceded by the respondent subject to liability (that is dependent on the claimants succeeding with their claims).

REASONS

The Issues:

1. In a situation where:

    1.1. the claimants say that they were employed by the respondent to work 21.5 hours per week and

1.2. where the respondent says that they were contracted to work 10 hours per week plus overtime, AND

1.3. the claimants claim that the respondent has made, and continues to make, unauthorised deductions from their wages in respect of 11.5 hours per week since August 2020, and

1.4. the respondent conceded at the outset of the hearing (and confirmed at its conclusion) that if the claimants were to succeed with their claims, they would be entitled to awards from the tribunal amounting to £6,728.42 each in respect of such claimed deductions

the agreed issues are as follows, as in the minutes of a preliminary hearing on 21 July 2021 by Employment Judge Moore at paragraph 2.1 – 2.6 and as summarised by me at the commencement of the hearing at 2.7:

2. The issues:

2.1. were the wages paid to the claimants on and since September 2020 less than the wages they should have been paid?

2.2. Was any deduction required or authorised by statute?

2.3. Was any deduction required or authorised by a written term of their contracts?

2.4. Did the claimants have a copy of their contracts or written notice of the contract terms before the deduction was made?

2.5. Did the claimants agree in writing to the deductions before they were made?

2.6. How much are the claimants owed?

2.7. Were the claimants employed by the respondent to work 21.5 hours per week from January 2019 onwards, or were they they employed to work 10 hours per week plus overtime and have they been paid in full for the contracted hours or are they entitled to receive £6,728.42?

The Facts:

3. The respondent (R) is an industrial cleaning and security company. It has a HR Department and I understand that the head of HR is Karen Kelly (Ms Kelly was not a witness at the hearing); she advised Mr Parry the grievance officer and Mr Burton the grievance appeal officer, writing the appeal outcome letter in the first person. R has contracts with its clients such as educational establishments, to provide services, and in this case Coleg Menai, Llangefni where the claimants (C1 and C2, collectively referred to as the Cs) were both employed to work as cleaners.

4. R has line managers for its operatives and supervisors. The line managers agree contractual hours with operatives, amongst other things, and in liaison with HR fill vacant hours by offering over-time, additional contracted hours, or external recruitment advertising to fill vacancies. Payment for an employee's contracted hours is shown on individual's monthly wage slips as "salary" (without calculation or reference to rate of pay or hours), and payment in respect of overtime worked by an employee is shown likewise on wage slips but as "overtime" (see hearing bundle page 94/218 to which all page references refer unless otherwise stated).
5. In this case Laura Ward was the Cs' line manager and it was Miss Ward who appeared, to all intents and purposes, to have authority to enter contracts with the cleaning operatives, including the claimants, to offer additional contracted hours or overtime hours and to fill vacancies by external recruitment.

6. R's cleaners' hours were annualised and "equated" meaning that they were averaged out over a year (as the hours would vary according to academic terms and the cleaners were not required 52 weeks per year). This made payment easier in that a regular payment could be made each month; it made holiday calculations easier too. HR, with Payroll, did the calculations of holiday entitlement and wages on this annualised basis.

7. It was not R's practice to discuss its contract with the college with the cleaning operatives and it did not do so with the Cs. All conversations with the Cs about contracted hours related to the hours that the Cs had contracted to provide their service as employees to R, and that R contracted to pay for. This was the Cs' understanding and we accept their evidence, and that of their colleague SH who gave evidence, that in the context of their discussions and messages (texts, emails or WhatsApp messages) with Ms Ward this was the only sensible and logical interpretation. R's witnesses, Mr David Parry (Grievance Officer) and Mr Lloyd Burton (Appeal Officer), gave evidence that Ms Ward discussed the contract between R and the college with the Cs and that most, or all, references to contracted hours were references to the hours R contracted to provide operatives to clean the college. For the reasons stated below in my judgment I do not accept either that Mr Parry and Mr Burton believed this to be the case or that it made any sense, commercially, practically or in the context of all communications I heard about or saw in the hearing bundle.

8. This cleaning contract at Coleg Menai was one that had been TUPE transferred to R, and the Cs' contracts of employment had so transferred to it. At that time the Cs were employed as cleaning operatives working 10 hours per week and those hours were worked in the mornings. From 2014 until December 2019 the C's supplemented their working day by working 10 hours cleaning at a local school in the afternoons. The local school contracts were to make up for previously lost hours in the afternoon at Coleg Menai.

9. Coleg Menai opened a new three-storey engineering block in January 2019. In anticipation it reviewed its cleaning requirements and negotiated a revised contract

with R, the terms and details of which were not disclosed to the Cs at any time just as they have not been disclosed to the Tribunal as part of this litigation.

10. In December 2018 Ms Ward met with the Cs and their colleagues to explain that additional hours work would be available in the afternoons cleaning the new block and to offer additional contracted hours to the staff, saying that if the available hours were not taken up, she would recruit externally. She did not describe these additional hours as overtime or say that the hours would be available "as and when". There was no mention of an overtime rate. Because they had already for some years been working in the afternoons cleaning at a local school the Cs were wary of accepting any offer of additional hours unless and until it was clarified that what was being offered was 11.5 contracted hours, meaning that they would be employed by R at Coleg Menai for 21.5 hours per week working mornings and afternoons. The Cs, in particular C2, expressly explained that they would not give notice to terminate their employment at the school unless they were assured that the additional 11.5 afternoon hours at Coleg Menai were contracted hours. Ms Ward gave that assurance and confirmation. Out of an abundance of caution, and to protect her sister's position also (C1), C2 asked the same question repeatedly and was repeatedly assured by Ms Ward at the meeting that they were being offered employment as afternoon cleaners working a permanent contract of 11.5 hours per week in addition to their morning job cleaning at the college for 10 hours per week. On being convinced of this the Cs accepted the offer and gave notice to terminate their jobs at the local school.

11. R's HR department failed to document the new agreement. R failed to issue written particulars of the revised 21.5 hours, or new 11.5 hours, contract of employment to the Cs. By the same token neither did R inform the Cs that their afternoon work was overtime (if that is what it had seriously thought it was), or was paid at an overtime rate, or that it was to be treated in any way other than how it was described by Ms ward and agreed by her with the Cs.

12. In January 2019 the Cs commenced working the newly added 11.5 contracted hours as above. From that date they received payment of salary for 21.5 hours per week paid monthly. Their holiday entitlement and holiday pay calculations were based on their each working 21.5 contracted hours per week, and annualised or "equated". The work was regular and frequent, expected by both parties without request or further offer; it was supervised and controlled by R; it was performed as required by R; the Cs were paid regularly at the agreed rate without request or further offer. This situation was established and continued until September 2020 without interruption, question, challenge or uncertainty. R expected the Cs to work 11.5 hours cleaning the new block in the afternoons in addition to their 10 hours per week cleaning in the mornings. The Cs expected to have to do it; they did it; they expected to be paid; they were duly paid.

13. In October 2019 Ms Ward asked the Cs to do overtime hours in addition to their contracted hours as a deep clean was required during half-term, when they would otherwise have been on holiday. Ms Ward offered them 11.5 hours overtime. They agreed to work these overtime hours and they did so. R paid the Cs for those 11.5

hours of overtime in the November pay and the payment is shown on the slip as "overtime 11.5" (p194). The rate of pay is shown as £8.21 (the then National Minimum Wage). The Cs' salary is shown above at £740.61 which represented the annualised salary for the Cs' 21.5 contracted hours per week.

14. When the college closed owing to the Covid pandemic and the Cs were furloughed, they were paid based on their 21.5 contracted hours.

15. The Cs communications with Ms Ward and her replies at the time, such as when they explained that they could not work their contracted hours over 3 days as opposed to 5, emphasised each parties' true understanding of the status of the afternoon work as contracted hours.

16. On 11th August 2020 Ms Ward emailed C2 and said that operations had been "reviewed" and I infer from this and R's witness evidence that this was a review between Coleg Menai and R which led to a revision to their contract (although no evidence of the contract changes were disclosed to the tribunal or to the Cs). The email is at p116/218. Ms Ward said that there would be no further "afternoon overtime" and that C2 would commence working contracted hours of 10 hours per week 07:00 – 09:00 after the summer holiday. Ms Ward notified C1 in the same terms. Ms Hughes remained working in the afternoons and mornings. The Cs were told that Ms Ward would "continue" to offer them "sickness and absence cover throughout the year when available". R unilaterally recalculated Cs' salaries and holiday entitlements, annualised, based on their having contracts to work 10 hours per week only, and they paid salary on that basis too. The claimants lost payment for their 11.5 hours per week afternoon jobs at the college.

17. The Cs queried their situation with Ms Ward and R's HR but were told that they were only contracted to work 10 hours per week and that the 11.5 hours per week afternoon job had in fact been overtime only, and it was no longer required.

18. The Cs presented formal grievances. Mr David Parry dealt with each grievance. There was a hearing; minutes were kept by R; outcome letters were sent to each of the Cs rejecting their grievances and re-iterating R's position that their contracts of employment were for 10 hours per week doing morning cleaning only, and that all else was overtime and not contractual. Mr Parry looked at the documents (emails and messages) provided by the Cs and heard from them. He said to C1 that he would review the documents. He told C2 likewise save that it would make no difference. In essence he did not investigate the matter. He did not consider the facts as set out above, all of which was self-evident from what the Cs said, the messages and payslips. He did not speak to Ms Ward. He asked Karen Kelly in HR how to deal with the matter and was advised to reject the grievance; he did. Mr Parry, having heard from the Cs, spoke to no one else apart from Ms Kelly as part of his investigation. He declined to speak to Cs' witnesses who were offered up. He re-iterated HR's stance without further investigation or consideration. He failed to scrutinise or understand the payslips (which he said in cross-examination he had not spotted, and which would require clarification by Payroll), and annualization of hours; he knew that Ms Ward advertised for external candidates to fulfil the

required afternoon cleaning duties with Ms Hughes, and that the recruitment was not for flexible workers who would work as and when required or as "overtime". Mr Parry considered, on HR advice, that the Cs' hours were dictated by the contract between Coleg Menai and R such that the Cs' hours would be reduced accordingly and regardless of any contract between R and the Cs. Mr Parry said in evidence that when Ms Ward spoke to the Cs about "contracted hours" it was a reference to the contract between R and the college although he did not know those contractual provisions and he had not made any enquiry of Ms Ward as to what she had said; this assertion by him was not given clearly, with apparent understanding, or any conviction. In giving his evidence I formed the view that he seemed to have little accurate and clear recollection of any "investigation" or to have grasped what ought to have been investigated and the matters in issue. I preferred the evidence of the Cs, in particular C2 who was cross-examined, which was focussed, clear, concise, coherent, credible and plausible; these are all features that Mr Parry's evidence lacked. Mr Parry's evidence of his role seemed to boil down to a referral to HR for HR to advise him how to reject all that was said by the Cs out of hand. That is what he did.

19. The Cs appealed. Mr Burton was the appeals officer. He did little, but a little, more than Mr Parry to give any engaged and objective consideration of the matter before, again on HR advice, rejecting the appeal out of hand. Mr Burton gave his evidence in a way that lacked engagement and appeared to show little grasp of the details of his task or any application to the proper implementation of the appeal process. Mr Lloyd said that he did not ask Ms Ward directly what she had offered and agreed with the Cs in December 2018, but that she gave him background in a conversation "not a formal meeting", at which he said he took notes which he had not disclosed and could not now "put his hand on"; he omitted all this from his written statement and he gave the impression that he was struggling to explain what he did and why other than to rely on HR's advice to reject the appeal because cleaners' hours were dictated by R's client, the college. I preferred C2's evidence for the reasons stated above in circumstances when I considered that Mr Burton's evidence, engagement and delivery was of a piece with Mr Parry and my criticism of them both is similar; they were both unconvincing that they discharged their duties as grievance and appeals officers with any real understanding, engagement with the Cs and the matters in hand, any application to their respective duties in these circumstances, or in any way conscientiously. They both conveyed the impression that all they did was rubberstamp HR's desire to unilaterally reduce the Cs' hours of work as R's client's requirements had changed, and to do so by calling the Cs' afternoon 11.5 hours per week "overtime" and denying they were "contracted".

The Law:

20. A contract exists where there is an offer, an acceptance of that offer, and there is valuable consideration (such as payment). An employer offers to provide work and to pay for it and an employee accepts the offer of work providing their service for that payment; they are thus mutually obliged to each other. A contract may be written or oral, expressed or implied. A contract of employment must have the said mutuality of obligation and usually carries with it a significant element of control by

the employer; at its most basic it is an agreement for an employee to do certain work for the employer for the agreed payment. A court or Tribunal ought not ordinarily imply terms into a contract save as is required to make the relationship work. In other words, an employment contract may be very simple and straightforward, and it depends not only on what labels are attached or what words are said to apply but also what in fact occurs and is expected by the parties.

21. Unless there is an agreed contractual term to this effect, one party to a contract cannot unilaterally vary its terms.

22. A contract of employment ought to include terms, (express/implied, oral/written), confirming the identity of the parties, the hours to be worked or units of work to be completed, the work to be performed and the rate and frequency of payment; s.1 ERA lists what ought to be included in a written statement of employment particulars.

23. Wages means any sum payable to a worker in connection with their employment (s.27 Employment Rights Act 1996 "ERA").

24. S.13 ERA confers on a worker with the right not to suffer unauthorised deductions from wages save in specified circumstances (none of which apply in this case).

Application of law to facts:

25. The Cs contract with R was to work for 10 hours per week, cleaning at Coleg Menai until that was changed by agreement and the contract was varied in 2019.

26. Ms Ward had ostensible authority to bind R; she was able to allocate contractual hours, to offer overtime hours and to offer additional contracted hours to employees, and to recruit new employees to work cleaning at Coleg Menai. She did so.

27. In December 2019 Ms Ward offered and the Cs accepted an amendment to their contracts increasing their hours from 10 per week to 21.5 per week, the new 11.5 hours being worked in the afternoon. Alternatively, the offer was for a second job as afternoon cleaner working 11.5 hours. Either way, from January 2019 both Cs were employed to work 21.5 hours per week cleaning at Coleg Menai, and their entitlement to payment and to paid holidays was annualised on this basis (although different calculations were used for the two daily sessions).

28. In addition to 21.5 hours per week the Cs worked overtime hours in October 2019 and were paid for 11.5 hours overtime that November; those hours were additional to Cs' contracted hours, and this was acknowledged by R on the payslips at the time.

29. The Cs made absolutely sure that the 11.5 hours offered were to be contracted and certain on a regular basis. They asked Ms Ward at the time and insisted on her assurances, which she freely gave. They made clear why they were insistent, namely that they would not leave certain afternoon employment at the local school otherwise. Ms Ward assured them that they were being offered contractual hours. They were offered work on that basis and accepted it likewise. They worked to this agreement and were paid accordingly by R until it sought to vary the contracts unilaterally for its own commercial reasons.

30. Calling the afternoon 11.5 hours overtime makes no sense commercially in the current context; R would not and could not have averaged out 21.5 hours per week and attributed pay and holidays over a 12-month period on that basis if it was overtime, as submitted “ad hoc”, or as and when required; it was required and worked daily when the college was open. The October 2019 overtime was separated out and paid apart, without credit going towards annualised holidays and pay; that makes sense; that is what happens with real overtime.

31. The parties varied their contractual relationship as to hours and payment effective January 2019. The contract was clear, understood, worked to and accepted. In August 2020 R sought unilateral variation by misdescribing the afternoon session as overtime to date; it was not; it had never been. The Cs were entitled to work and to be paid for 11.5 hours per week cleaning in the afternoons. R did not pay them for their availability and willingness to work their contract. The work was available and eternal recruits worked afternoon hours with Ms Hughes.

32. C2’s submissions on her behalf and that of C1 were clear and coherent, concise and to the point. They were convincing. The claimants put forward convincing evidence and arguments to support their claims. R’s submissions were anything clear and coherent. I understand that it was difficult for R’s representative in a situation where there was apparent lack of preparation for the hearing (for whatever reason, and I accept late instruction may have played a part), the main witness Ms Wade was absent, and the evidence of R’s witnesses was confused, confusing, vague and at times disingenuous. That said I thank Ms Evans-Jarvis for the e-bundle, cast list, proposed chronology and alternative list of issues.

33. I answered the agreed issues as follows:

    33.1. were the wages paid to the claimants on and since September 2020 less than the wages they should have been paid? Yes. They were only paid for 10 hours per week rather than 21.5 hours, a shortfall of 11.5 hours each week.

    33.2. Was any deduction required or authorised by statute? No, nor was that argued by R.

    33.3. Was any deduction required or authorised by a written term of their contracts? No. The additional 11.5 hours contracted hours agreed in 2018 were undocumented by R.

33.4. Did the claimants have a copy of their contracts or written notice of the contract terms before the deduction was made? Not in so far as related to the disputed 11.5 hours per week.

33.5. Did the claimants agree in writing to the deductions before they were made? No, on the contrary.

33.6. How much are the claimants owed? As agreed, subject to liability, which is now established, each is due £6,728.42 gross, that is subject to usual statutory deductions.

33.7. Were the claimants employed by the respondent to work 21.5 hours per week from January 2019 onwards, or were they employed to work 10 hours per week plus overtime and have they been paid in full for the contracted hours or are they entitled to receive £6,728.42? They were contracted to work 21.5 hours per week, and they are due payment for the disputed 11.5 hours per week for the period covered by the claim.

34. The Cs confirmed that they did not seek an uplift under 207A Trade Union & Labour Relations (Consolidation) Act 1992 for an alleged failure on R's part to follow the applicable ACAS Code of Practice on Grievances. There was a grievance procedure with an appeal; it was either ineptly or disingenuously handled but the Cs made no further submission as to the way they say the Code was not applied. C2 confirmed that she was not pursuing this argument for herself and for C1. I did not make any award of an uplift in all these circumstances and for these reasons.

Employment Judge T.V. Ryan

Date: 17.12.21

JUDGMENT SENT TO THE PARTIES ON 20 December 2021

FOR THE TRIBUNAL OFFICE Mr N Roche