



EMPLOYMENT TRIBUNALS

Claimant: Mr B Cunningham

Respondent: Sainsbury's Supermarkets Limited

Heard at: Reading Tribunal

On: 25 April 2022

Before: Employment Judge S. Matthews

Representation

Claimant: Mr Cunningham (father of Claimant)

Respondent: Mr Liberadski (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of overtime wages due from 1 November 2019 to 7 February 2021 and is ordered to pay to the claimant the sum of £1870.08 being the total gross sum deducted.

REASONS

Claims and Issues

1. The claimant claimed unauthorised deduction of wages and breach of contract for failure to pay him the full wages to which he alleged he was entitled for overtime carried out between 1 November 2019 and 7 February 2021.
2. The issue for the tribunal to decide was whether the respondent made unauthorised deductions contrary to s.13 of the Employment Rights Act 1996.
3. The tribunal needs to decide whether the overtime pay was properly payable. The respondent's case is that the overtime worked was not agreed in advance and therefore was not properly payable.
4. It was agreed that the amount of overtime payment due to the claimant if it had been properly payable was £1870.08.
5. The respondent's assertion in the Response that the tribunal does not have

jurisdiction because the claim for unauthorised deduction of wages was made after the expiry of the three month time limit was withdrawn.

Procedure, Documents and Evidence Heard

6. I heard evidence from the claimant (who attended by CVP as he had recently tested positive for Covid) and from managers on behalf of the respondent, Martin Bell, Karen Foggo and Daniel Stillwell. Their statements were accepted as evidence in chief. There was an electronic bundle of 246 pages. References in brackets below are to numbers in the bundle.

Fact Findings

7. I made the following findings of fact. Where there was a conflict of evidence I resolved it, on the balance of probabilities, to arrive at the findings of fact set out here.

Overtime worked

8. The claimant worked for the respondent at its Calcot store in Reading as a general assistant/driver from 31 October 2019 to 4 June 2021. His role included delivering groceries to customers and loading delivery vans.
9. In the period leading up to Christmas 2019 the demand for online deliveries increased. From February 2020 the Covid pandemic led to a significant further increase in demand for delivery services. As a consequence, the claimant (who usually arrived early for work) began to be asked by his on-duty managers if he could start his shift early and stay late.
10. The claimant started to work many hours a week over his basic contracted hours of 30.67 (these contracted hours were increased to 45 hours in May 2020).
11. The claimant explained in evidence how overtime was not usually planned in advance of each day in his department. The overtime was undertaken by arriving early or staying late on his shift in response to immediate demand. He was not asked to work extra days as he was already working six days a week.
12. The claimant's total overtime amounted to over 667 hours in the period to which the claim relates. He was paid for 465 hours, initially leaving 202 hours unpaid. Sixteen of these hours were paid prior to his resignation, leaving 186.3 unpaid. This calculation is accepted by respondent.

Contractual entitlement to pay for overtime

13. The claimant's terms and conditions of employment (58) state that an employee will be able to apply for overtime. The policy 'Rates premiums and allowances' (48) (the Policy) provides that all overtime is paid at the single rate and 'is to be agreed in advance by line managers'. The Policy specifically deals with the situation where an employee clocks in early or clocks out late, stating that any extra time 'will be paid to the minute but needs to be agreed with a manager' (49). It gives the example of an employee clocking out late if they are helping a customer stating that 'they need to inform their manager'.

14. Martin Bell (MB), Operations Manager, stated in evidence that an employee who is clocked in is not necessarily working. He said that in his experience employees clock in without authority on their way through to the canteen and wait there until they start work. I find that this did not apply to the claimant. I accepted the claimant's evidence that he asked on each occasion if he was required to start work before clocking in and he informed a manager on each occasion when he did not clock out on time. MB did not manage the claimant, although he worked in the same store. I do not consider that his impression about some of the employees in the claimant's department outweighed the claimant's evidence that he was diligent about ensuring he had agreement to start work early and finish late.
15. The claimant gave evidence that his requests to start work early or leave late were never refused. There was always a store manager on duty as it was a very busy department. He had seven or eight managers. He would make his way into work early and would have a discussion with the line manager about whether he could start work. It was never refused; if it had been he would have had a coffee in the canteen first. When he was out in the delivery van he had a handset to make contact with the manager on duty. He can also remember using own mobile phone on occasions where that failed to work.
16. I find that it was the expectation of the claimant that he would be paid for the overtime hours he was working by arriving early or staying late. When asking if he could come in early or stay late he was not offering to do the work unpaid. By agreeing the manager was implying that he agreed to the overtime being paid. This is consistent with the example given in the Policy (49).

Monitoring of employee working time

17. The respondent uses a software system called Kronos. This records the clock in and clock out times of employees. The basic contractual hours are recorded as scheduled hours and set about 3 weeks in advance on the basis of an availability schedule completed by the employee. Kronos highlights when employees have worked times outside the scheduled hours with a red clock. A line manager logs onto the system and is required to click on the red clock. If the time has been agreed as overtime the line manager approves it on Kronos and the employee is paid overtime. If it has not been agreed the line manager is required to select a comment stating that it is unauthorised and the employee is not paid (208).
18. The claimant was unaware that the managers needed to complete this process on Kronos before his overtime was approved and assumed that all the time he had agreed outside his scheduled hours would be paid as overtime. He did not keep his own record of the overtime he had agreed with his line managers.
19. MB explained in evidence that it would not necessarily be the manager who agreed to an employee starting early or staying late who confirmed the authorisation on Kronos. The authorisation was not entered at the time the overtime was agreed. It was good practice to authorise it on Kronos the following day, although sometimes it was not recorded until days later. The claimant had seven or eight different managers who had the authority to agree overtime and who could record agreement on Kronos. There was no

prescribed way of keeping a contemporaneous record of overtime agreed. MB said he might make a handwritten note or put it in his phone. However, he did not know how the practice worked in the claimant's department, only in his own department. If the manager reviewing the time on Kronos did not know whether overtime had been agreed by another manager MB would expect them to send an email to the manager who had been on duty to check. Karen Foggo (KF), manager of Broad Street, Reading said it could be verbal or handwritten in a diary, but it was 'down to communication' and she could not comment on the practice in the Calcot store, only in her own store.

20. I prefer the claimant's evidence that the overtime was agreed as none of the respondent's witnesses could give evidence of the practice of communicating agreement in the claimant's department. I find it likely that a system where a different manager to the one who agreed overtime completed authorisation on Kronos and where there was no consistent system of recording or communication between managers is likely to give rise to errors or inconsistency in the recording.

Respondent's investigation

21. In January 2021 the claimant noticed for the first time that his pay was lower than he expected on the basis of the overtime he could recall working over the busy Christmas period. He examined the Kronos data available to him and noted that the hours marked as unscheduled going back to November 2019 had been unpaid.
22. He raised the matter informally with his line manager Faye Brooker (FB) and MB. It was agreed to pay him sixteen hours from the most recent period but not for the time from previous months. This led to him raising a formal grievance using the respondent's procedure named 'Fair Treatment Concern' (FTC). The first FTC meeting was held with KF and the FTC appeal was heard by Daniel Stillwell (DS), manager of the Winnersh store.
23. Their investigations concluded that there was no evidence that the unscheduled hours had been agreed by the line managers. The evidence given to the investigation by the line managers is set out below.
24. KF spoke to two of the claimant's line managers (Dylan Stevens and Adam Weatherly) who stated that the claimant had done agreed overtime which they believed he had been paid for.
25. Monika Prus sent an email to DS, stating that she had asked the claimant to stay late on occasions for which he had been paid but denying that she ever asked him to come in early (150).
26. Ira Steele (IS) sent an email to MB on 6 March 2021 (147/148) in which he said that he had spoken to the claimant in September 2020 and told him that he was concerned that he was working outside his contractual hours and he made it 'explicitly clear' that he would not be paid for working overtime that was not requested by a manager. He said he was satisfied that the claimant understood that he was not going to be paid for hours that he decided that he would do additionally and he told the line managers not to ask the claimant to 'stay on' over his 45 hour contract.

27. The claimant denied that the conversation with IS took place both at the initial investigation hearings and in evidence to the tribunal. I prefer the claimant's evidence on this to the evidence in the email from IS. The alleged conversation was not documented or followed up in writing. IS stated the claimant knew that he was working for free and that the overtime was voluntary. I find it implausible the claimant would have continued to work extra hours if he knew he was not going to be paid. As soon as the claimant realised he was not being paid he raised the matter culminating in the FTC and ceased working overtime. IS said that he told line managers not to give the claimant any more overtime but this is undermined by the fact that the claimant did continue to work and be paid overtime.
28. Three other managers were not interviewed for the investigation. None of the line managers gave evidence to the tribunal.
29. The investigation accepted the line managers' explanation and the data on Kronos. The managers were not questioned about the Kronos system and there was no evidence before the tribunal that the investigation had considered whether there had been a failure to authorise overtime that had in fact been agreed by another manager. It did not ask managers how they communicated with each other when overtime was agreed to ensure that it was correctly credited on Kronos. A time sheet was obtained for the period from January to July 2020 (64-70) but the names of those who had declined to approve the overtime were redacted and those managers do not appear to have been questioned about their recollection of their reasons for refusing the overtime. Their evidence was not before the tribunal.
30. The respondent's decision was influenced by the fact that the claimant was not able to give specific examples of which managers had agreed overtime and then failed to approve it on the system. I find that it was not surprising that the claimant could not point to specific examples as agreement to overtime was always given and the period in question went back over many months.
31. There was also a misunderstanding in the investigation where the claimant had told MB that he remembered once staying late and not expecting to get paid. MB thought this was evidence that he did expect to get paid for time that had not been agreed. This was corrected by the claimant in subsequent meetings (87,121) and in evidence to the tribunal. It was an example which the claimant had offered in order to show that he fully understood that he needed to get authorisation if he was to be to be paid. He remembered the incident because it was so unusual in that he made a conscious decision to stay late and was the only one in the department and did not obtain agreement beforehand.
32. I found the claimant an honest and credible witness. The reason for this is that he was consistent throughout the investigation meetings and when giving evidence. I preferred his evidence to that of the respondent's witnesses. There was no evidence before the tribunal on the practices of the claimant's department and none of his line managers who were directly responsible for agreeing or refusing the overtime gave evidence.
33. In summary I find that the claimant did get agreement for all the hours he was

clocked in but that this was not correctly recorded on the Kronos system. This was because it was not done contemporaneously and often a different manager would review the hours on Kronos. The claimant's department was a busy one with seven or eight managers and there was no set system or policy for them to communicate with each other when overtime was agreed.

Law

34. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.
35. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable 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.
36. The question of what is properly payable requires interpretation of the relevant terms of the contract and a factual analysis of the claim.
37. Counsel for the respondent referred me to the case of Blair v Hotel Solutions Limited UKEAT/0412/11/DM. In that case the Employment Appeal Tribunal upheld the tribunal's decision that the overtime worked was entirely voluntary.

Conclusion

Contractual entitlement

38. The starting point is the terms of the contract. The terms and conditions provide that an employee can 'apply for overtime'. The Policy provides that overtime will be 'paid as long as it is agreed in advance.' The Policy gives the example of staying late and specifies that a manager is to be informed. It is clear that if an employee is staying late and informs their manager they will be paid overtime. This is what is meant by 'agreed in advance'. This can be distinguished from Blair v Hotel Solutions Limited where there was no such clause and it was merely stated that overtime was voluntary. In contrast to this respondent's terms and conditions provided that overtime was payable as long as it was agreed in the manner described above.

Factual dispute

39. It is not disputed that the claimant was clocked in for the hours for which the overtime is claimed. The dispute is whether he had obtained agreement in advance to work those hours. That is a matter of fact. I have found that he did expressly obtain agreement as I accept his evidence that he always obtained agreement before clocking in early and before clocking out late. The terms and conditions and the Policy make it clear that agreement was required in advance and the claimant was aware of this and obtained agreement. His line managers failed to record the agreed overtime correctly on Kronos.

Costs

40. The claimant has indicated that he will be applying for a Time Preparation Order (TPO) under Rule 77 of the Employment Tribunal Procedure Rules.
41. Rule 76 provides as follows:
- “A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
- a) A party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or
- b) any claim or response had no reasonable prospect of success....”
42. If the claimant intends to pursue an application for a TPO he is to confirm in writing to the tribunal and the respondent within 28 days after the date this Judgment was sent to the parties and include:
- 42.1 a breakdown of time spent in bringing the proceedings up to the date of the hearing;
- 42.2 written representations setting out why he alleges the respondent’s conduct entitles him to a TPO and/or the response had no reasonable prospect of success;
43. The respondent is to respond within 28 days of receiving the claimant’s written representations with written representations setting out why the respondent does not agree to a TPO.
44. A determination will be made on the basis of the written representations by the Employment Judge under rule 60 of the Employment Tribunal Procedure Rules.

Employment Judge S. Matthews

Date: 26 April 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 May 2022

FOR THE TRIBUNAL OFFICE