EMPLOYMENT TRIBUNALS

Claimant: Mr Aiman Melhem

Respondent: Alpha Omega Securities Limited

Heard at: Birmingham **On:** 29 & 30 June 2022

Before: Employment Judge J Jones (sitting alone)

Representation

Claimant: In person
Respondent: Mr Alf Murphy (consultant)

JUDGMENT having been sent to the parties on 1 July 2022 and written reasons having been requested by the claimant on 10 July 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By claim form presented on the 21 August 2020, the claimant brought a number of claims following his dismissal by the respondent on 30 March 2020 after a period of less than two years' employment as a security guard.

2. The claims he brought were:

   2.1 automatic unfair dismissal for assertion of a statutory right - section 104 Employment Rights Act 1996 ("ERA");
   2.2 underpaid holiday pay;
   2.3 wages for a shift worked on the 23 December 2019;
   2.4 wages for hours he should have been allowed to work in the week commencing the 20 January 2020;
   2.5 notice pay (one month).

3. There was a Preliminary Hearing for case management before Employment Judge Kelly on the 4 October 2021 when directions were given for the preparation of the case. This led to the creation of a joint file of documents

running to 249 pages. The claimant submitted some additional documents with his statement to which no objection was taken by the respondent. References to page numbers in these reasons are references to the pages of the joint file of documents, unless otherwise stated.

4. The claimant gave evidence himself and called Ms. Adrena Clarke, his trade union representative, who gave evidence by remote video link. The respondent called the Operations Director, Mr Andrew Taylor, and the Finance Controller, Mrs Jeanette Blatherwick, to give evidence.

5. The issues in the case were not separately set out or agreed by the parties but the live issues can be summarised in this way:

   5.1 What was the reason, or principal reason, for the claimant's dismissal? Was it because he had asserted his statutory right in relation to pay?

   5.2 Was the claimant paid for his shift on 23 December 2019?

   5.3 Was the claimant paid correctly for January 2020 and in particular was he entitled to be paid for the week commencing 20 January 2020?

   5.4 Was the claimant's holiday pay correctly calculated?

   5.5 What rate of pay should the claimant have received? Was he entitled to the living wage rate of £9.30 per hour?

   5.6 Was the claimant entitled to any additional holiday pay accrued but not taken at the date of the termination of his employment?

   5.7 Was the claimant entitled to a judgment in relation to unpaid notice pay? The respondent accepted that the claimant should have been paid for a month's notice and wasn't. Attempts had been made to put that right but the claimant wished to wait for this hearing rather than accepting any sums of money proffered by the respondent shortly beforehand.

6. Based on the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

7. The Claimant commenced employment with the respondent on the 10 April 2019. He worked under the terms of a written employment contract (page 41). The contract included the following terms. In relation to remuneration, the unnumbered clause simply stated (top, page 42) "*your salary is paid in accordance with the rates notified to you with your shift pattern*". In relation to holiday pay, the contract stated "*we calculate your holiday pay using your normal contractual weekly hours as your basic pay"* (page 43). The termination provisions (page 44) provided for the employer to give a month's written notice to those with under 5 years' service.

8. The claimant's employment proceeded without incident and he generally performed 4 shifts per week on Mondays, Thursdays, Saturdays and Sundays. The site at which he normally worked was a construction site for a national house builder. His duties were to watch the site and maintain its security. There was no issue with the claimant's performance or his conduct at work in any respect until January 2020.

9. In or about November 2019, the claimant applied to take some annual leave. His entitlement to annual leave was 28 days per annum. The claimant asked to take 20 days leave because he wanted to travel to visit family overseas. Mr Taylor, the respondent's Operations Director, responded to this request on 2 November 2019 by email (page 85). He granted the Claimant's request to take leave from the 18 November to 13 December 2019 but explained that only 12 of those days could be taken as paid holiday. This was in accordance with the respondent's policy relating to the taking of holiday leave. On the understanding that the claimant would come back and work over the Christmas period, Mr Taylor said the claimant could take the balance of the additional 8 days as unpaid leave. The Claimant replied to that email immediately with the words "*yes, I agree, please proceed, thank you for your help*".

10. The claimant came back from his leave and, in accordance with his agreement with the respondent, carried out shifts over the Christmas and New Year period 2019/2020. This included a shift which the claimant worked on 23 December 2019. He conducted a 15 hour shift on that day.

11. The claimant was paid a month in hand. He therefore received his pay for December 2019 at the end of January 2020, accompanied by his December pay slip (page 169). The pay slip showed that the claimant had been paid for 171 hours worked in December 2019. Mrs. Blatherwick, the respondent's Financial Controller, told the Tribunal, and the Tribunal accepted, that this included pay for the shift on the 23 December 2019 and that this was explained in the payroll document extracted at page 239. Rather confusingly, the respondent's payroll printout showed hours before and after midnight as 2 separate entries, but it was clear to the Tribunal that the Claimant was paid from 4.30pm until midnight on the 23 December 2019 and then midnight until 7.30am the next day (24 December 2019) at his hourly rate of £8.21.

12. The claimant carried out a shift in keeping with his normal practice commencing on Sunday 19 January 2020. This was a nightshift. Following that shift, a concern was raised about the claimant by another member of staff who was referred to before the Tribunal only as "Sarah". Sarah was a manager who visited the site in order to carry out a routine data collection activity during the course of the claimant's shift on the 19/20 January 2020. Following her visit, Sarah produced a statement which she submitted to the respondent stating that when she had got to the site, she had seen a silver car parked outside with someone lying back in the passenger seat with the engine of the car running and something purple over their face. The person's face could not be seen in this position and they were lying far enough back that their clothing could not be identified either. Sarah said she took 2 pictures on her phone then got out of her car, closing the door loudly. At this point Sarah said she observed the

claimant emerge from the vehicle, at which point she could see he was the security guard supposed to be on duty. She said the claimant put on his jacket and unlocked the parameter fence to allow her access to the premises. The 2 photographs taken by Sarah were produced with her statement. The Tribunal had copies. They showed somebody lying back horizontally in the passenger seat of the vehicle with their arms above their head and their face covered.

13. As a result of this incident, the claimant was told the following day not to go to his normal shift but to go to the office on 20 January 2020 and be interviewed by Mr Sant who was carrying out an investigation into the incident. That week, the Claimant was rostered to work his normal Monday and Thursday shifts as well as Saturday and Sunday - a total of 54 hours.

14. The claimant was interviewed by Mr Sant. He denied having been sleeping in his car whilst on duty and referred to the fact that the heating wasn't working and it was cold in the office and therefore he needed to be in his car to keep warm. After the meeting with Mr Sant, the claimant was told to go home and not to go to his place of work. Mr Sant explained that he would be in touch and it was the claimant's unchallenged evidence that he was told not to come to work until he had heard further from the respondent.

15. The claimant chased up the position by telephone on the Tuesday and Wednesday of that week, but was not given any further information about whether to go to work. By letter of 21 January 2020 the claimant was invited to a disciplinary hearing to be held at 8am on Thursday 23 January 2020. The allegation under consideration was described as "*allegedly being found asleep on the Somerford Reach site on Sunday 19 January 2020*". Sarah's statement and photographs were enclosed with the letter (p104). The claimant wished to be accompanied by his trade union representative to the disciplinary hearing and it was therefore postponed to accommodate her availability.

16. On the Thursday of that week (23 January 2020) the claimant was rung by Ashley House, a supervisor, and asked why he was not at work. The claimant explained that he had been told to await confirmation that he should come to work. He offered to go in but was told not to and he therefore missed his Thursday shift. The claimant's trade union representative made enquiries the following day to find out whether the claimant was meant to be going to work on Saturday and Sunday. The HR representative she spoke to said yes. The claimant therefore attended for work on Saturday 25 January 2020, only to find that he was not on the rota, somebody else had been put in his place and he was told by the manager that he could not work and should go home. Likewise on Sunday 26 January 2020 the claimant had been replaced on the rota and he did not work.

17. The claimant's disciplinary hearing took place on 31 January 2020 before Mr Ken Lawton, the respondent's Managing Director. The claimant was supported by Mrs Andrena Clarke, a full-time officer of Unite the Union. During the meeting the claimant disputed sleeping at work on the 19 January 2020 and did not accept the voracity of the photographic evidence from Sarah, which he said had been doctored. He reiterated that the office was cold so he had to sit in his car

to keep warm. Mr Lawton nevertheless found that the allegation of misconduct was proven. He issued the claimant with a 12 month final written warning on 3 February 2020 (page 124).

18. The claimant appealed against the final written warning on 11 February 2020 and an external consultant, Mr Scoon, was appointed to hear the appeal. An appeal meeting took place on the 26 February 2020 when the claimant was again supported by Mrs Clarke. Mr Scoon rejected the claimant's appeal and upheld the final written warning which Mr Lawton had imposed, in an appeal outcome letter issued on the 9 March 2020 (page 143).

19. Meanwhile, the claimant had been in correspondence with the respondent's HR and finance teams to try and understand his pay for the months of December 2019 and January 2020. As well as the query about his pay for 23 December, the claimant had by this time received pay for February 2020 in relation to which he didn't understand the explanation in his pay-slip (page 168). That pay-slip, which should have detailed his pay for January 2020, only referenced pay for 54 hours' work. On 23 March 2020 Mrs Blatherwick set out a response to the claimant's pay queries in table form (p230). She explained that the Claimant had been paid 54 hours for the week commencing 13 January 2020 but had not been paid anything at all for the week commencing 20 January 2020 because she didn't have him down as working any hours for that week.

20. The claimant replied by email of 24 March 2020 (page 214) pursuing his queries about his pay. He said "*the week commencing the 20 January is not paid at all. However, I attended my duty on Monday 20 January on time and had been asked to go to the office which I did*". He went on to explain what happened on the Thursday and the following Saturday and Sunday of that week.

21. The respondent accepted that even prior to this complaint, the claimant had been raising queries about his pay for December 2019 and that he did so on at least one occasion prior to him receiving the invitation to attend the investigatory meeting on the 20 January 2020. The claimant listed the date and time of a number of telephone calls in his witness statement the substance of which he said, "*probably related to queries about pay*, *although he couldn't be sure*". The claimant relied instead on the emails which he could be sure were about the pay starting on the 21 February 2020 (p219).

22. The Tribunal heard from Mr Taylor that he was extremely unhappy that the claimant had only been given a warning following the allegation of sleeping on duty and was still in the respondent's employment. He told the Tribunal that he believed that the evidence was incontrovertible, that the claimant had been sleeping on duty and that this was wholly unacceptable conduct for an individual who was trusted with the security of a site overnight. He explained that his primary concern as Operations Director was the provision of a good service to the company's clients and that it was key to him on a site where there were nightshifts, that the individual could be trusted not to sleep on duty. He was unhappy with Mr Lawton's decision and had believed that there was a possibility it would be put right, when the independent employment law consultant, Mr

Scoon, considered the matter on appeal. Mr Taylor was therefore disappointed and somewhat baffled when Mr Scoon upheld Mr Lawton's decision.

23. The claimant had a period of annual leave in March 2020, needing to take his remaining leave before the end of the financial year. He returned to work for the last 2 weeks of March 2020. During this time, Mr Taylor became increasingly disgruntled with the claimant. There was a telephone conversation between Mr Taylor and the claimant during which the claimant used the opportunity to rehearse again his disquiet with the decision that had been taken about the alleged sleeping on duty incident. The Tribunal was not satisfied that the Claimant was rude or aggressive during this phone call, as the respondent alleged, but he did reiterate to Mr Taylor in no uncertain terms that he thought the photographs submitted by Sarah had been doctored. This conversation and the claimant's ongoing (and in Mr Taylor's view wholly misplaced) indignation reminded Mr Taylor just how unhappy he was that the claimant had escaped with no more than a written warning. Mr Taylor took the opportunity to take professional advice and was given to understand that because the claimant had less than 12 months' service with the respondent, he could take steps to terminate the claimant's employment lawfully notwithstanding the fact that the claimant had only received a warning about the incident in January.

24. So it was that, on the 20 March 2020, the Claimant was invited to a further disciplinary hearing (page 246) to take place by telephone on 30 March 2020. The letter said that "*the purpose of the meeting is to discuss your suitability for continued employment with the organisation and to provide you with an opportunity to present your explanation for the following:- performance.*" It was plain from the evidence the Tribunal heard that in fact Mr Taylor had made up his mind to dismiss the claimant prior to this meeting and that his intention was to convene a meeting merely to tell him so.

25. Mrs Clarke and the claimant both dialled in to the call with Mr Taylor on 30 March 2020. The conversation was a brief one. With little, if any, preamble, Mr Taylor told the claimant that he was dismissed. Mrs Clarke was not impressed. She made valiant attempts to try and explain to Mr Taylor that her Member should have a right to state his case. However, Mr Taylor would not let the claimant put forward any arguments to the contrary and he closed down Mrs Clarke's efforts to speak on the claimant's behalf.

26. The telephone call was followed up with a letter of dismissal dated 2 April 2020 (page 152). Mr Taylor did not see or approve this letter before it went out in his name. The letter set out a whole series of reasons for the claimant's dismissal which, Mr Taylor accepted in evidence, bore little resemblance to the real reason for dismissal that Mr Taylor gave to the Tribunal. For example, it included as a reason the suggestion that the claimant had accused the company of doctoring the photograph which showed he was asleep on the job. At the heart of the decision was simply this, however. Mr Taylor believed that the claimant had been caught sleeping on duty and, as far as he was concerned, for a security guard working alone on night shifts, that was the end of the matter and the claimant could no longer be trusted to do his job. The fact that the claimant continued to protest his innocence when, as far as Mr Taylor

was concerned he had been caught red-handed, annoyed and further aggravated the position as far as Mr Taylor was concerned.

27. The claimant appealed against his dismissal on the 8 April 2020 to Mr Lawton, as he was instructed to do. Mr Lawton did not deal with the letter as an appeal, however, and the claimant was thereby deprived of his right to an appeal.

28. The only other issue of fact that required a finding by the Tribunal was an issue that arose during the claimant's employment about the living wage. At some point the client of the respondent, Barratt Homes, which operated one of the sites where the claimant worked, decided it was going to pay the living wage to its staff and suppliers. The living wage was £9.30 per hour at the time. A notice was put up at the premises where the claimant worked which asked staff to let Barratt Homes know if they were not being paid at £9.30 per hour whilst working for a supplier or sub-contractor of the company (p215). There was a "Safecall" hotline number given on the notice which was said to be confidential. The claimant telephoned this number because he was not being paid £9.30 per hour. His call was towards the end of March 2020 but the Tribunal found it was not until the 31 March 2020, the day after the claimant's dismissal, that Barratt Homes wrote to the respondent to say that they had received communication from the claimant indicating that the National Living Wage was not being paid to staff of the respondent (page 243). This email was wholly inappropriate on the part of Barratt Homes because the claimant had reported the matter in confidence, only to find that his confidentiality was here being breached and he was being named in an email to his employers. Be that as it may, this issue was swiftly resolved because Barratt Homes agreed to pick up the additional cost so that the respondent could pay its staff the living wage forthwith, which it then did from the following day, 1 April 2020. There was no adverse financial impact on the respondent from this change. It came too late for the claimant to benefit.

The law

29. The Tribunal went on to consider the relevant law. Section 104 of the ERA, states as follows:

"104 Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4)The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal]"

30. The claimant's case was that his complaints to the respondent about his pay in December 2019 and then January 2020 being incorrect, from at least 21 February 2020 onwards, were assertions of a statutory right within the meaning of this section. The statutory right was the right not to suffer an unlawful deduction from wages in section 13 ERA.

31. An unlawful deduction from wages is defined as including a non-payment of wages owing to an employee under his/her contract of employment for a particular pay period. This provision formed the legal basis for the claims the claimant brought to recover his pay for 23 December 2019 and for the week commencing 20 January 2020.

32. The claimant's claim to holiday pay was founded on Regulation 14 Working Time Regulations 1998, which provides for employers to provide compensation to workers who have accrued annual leave that they have not yet taken when their employment ends part way through a leave year.

33. The claimant also claimed that the holiday pay he had received had been incorrectly calculated and should have been worked out by reference to the average of his pay over the full period of his employment, not just the preceding 12 weeks.

34. On this issue, the Tribunal consulted the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018. This provision amended the definition of a "week's pay" for the purpose of calculating holiday pay. Previously, holiday pay was to be calculated based on a reference period of 12 weeks prior to the date of the holiday, whereas this set of regulations changed that definition so that the reference period would be 52 weeks, not 12. Although this provision was laid before Parliament in December 2018, it did not, however, come into force until 6 April 2020 and had no retrospective effect.

Conclusions

35. Applying the law to the facts, the Tribunal came to the following conclusions.

Unfair dismissal

36. Rightly, the respondent did not seek to deflect from the obvious fact that, if the claimant had had 2 years' continuous service, as a matter of law his dismissal would have been adjudged to have been grossly unfair. However, that was not a matter for the Tribunal to decide. As the claimant did not have 2 years' continuous employment at the date of the termination of his employment, the fairness or otherwise of his dismissal was not a matter for the Tribunal.

37. The Tribunal's sole focus was to determine the reason for dismissal and whether it was the reason put forward by the claimant, namely his assertion of a statutory right. This was especially so as the respondent accepted that the claimant had asserted a statutory right in relation to his pay within the meaning of section 104 ERA prior to the decision to dismiss him. Its case was just that this had no bearing on the reason for dismissal.

38. The Tribunal was able to discern the reason for dismissal based on the documentation and Mr Taylor's evidence, which the Tribunal found to be extremely candid. It was not in dispute that Mr Taylor was the relevant and only decision-maker in relation to the dismissal itself. Mr Taylor spoke very plainly to the Tribunal and his evidence was reliable as a consequence. Whilst Mr Taylor confessed that he remained of the view that he had made the right decision for the respondent in dismissing the claimant, he could accept with hindsight that he may well have gone about it the wrong way. Indeed, he resolved to do better if there was a next time with another employee, regardless of their length of service.

39. The reason for dismissal was the claimant's conduct on 19 January 2020 which Mr Taylor believed was sufficiently serious to merit his dismissal, even though Mr Lawton had made a different decision. Mr Taylor was not influenced by the claimant's complaints about his pay and had not taken any interest in these. He was, in the Tribunal's judgment ,unlikely to have been aware of some, if not all, of the concerns that had been raised by the claimant, which had gone straight to payroll and been handled by the very competent Mrs Blatherwick.

40. It was true that Mr Taylor was not happy with the claimant following his conclusion (wrongly) that the claimant was telling the respondent's clients that the company was not paying its staff the minimum wage. Mr Taylor did not know about the living wage until Barratt Homes raised it and he conflated this with the statutory minimum wage. However, Mr Taylor's unjustified anger against the claimant in that respect did not ignite until after the claimant's dismissal when he received notification from Barratt Homes on the 31 March 2020 that the claimant had been in touch with them about his pay.

Wages, Notice and Holiday pay

41. Taking the money claims in turn, the Tribunal concluded as follows. The respondent did pay the Claimant on the 23 December 2019. The claimant was

paid correctly for December 2019 in that he had agreed that 8 of his days' leave would be unpaid.

42. In relation to his pay for January, the Tribunal found that the claimant should have been paid for the week commencing the 20 January 2020. He attended for work on 20 January 2020 but was invited to an investigatory hearing, which he attended. He offered to go site thereafter but was sent home. He should have been paid for that shift.

43. The claimant had a reasonable expectation of work on Tuesday, Saturday and Sunday the same week. This was his normal shift pattern and the hours for which he was rostered to work. He was told by the respondent to await instruction and not to attend for work in the interim. Whether it was called a "suspension" or not, it was in the Tribunal's judgment a de facto suspension from work pending a disciplinary hearing and should have been on full pay. There was no contractual or statutory entitlement on the part of the respondent to deduct the claimant's pay during that period. The claimant was in fact advised to attend work on the Saturday and did so but was prohibited from working. The claimant should have been paid in full for that week which equated to 54 hours' pay at a rate of £8.21 per hour. This means that he suffered an unlawful deduction from wages in the gross sum of £443.34, from which the respondent will need to deduct tax and national insurance at the appropriate rate.

44. Turning to the rate of pay that the claimant should have received, it was common ground that the claimant was paid the National Minimum Wage of £8.21 per hour throughout his employment, as provided for in his contract of employment. The respondent agreed to increase all staff wages to £9.30, but not until after the claimant had been dismissed i.e. with effect from the 1 April 2020. This was not therefore something which the Claimant could benefit from. His rate of pay was correct during his employment.

45. The Claimant was paid his holiday pay at the correct rate because the correct reference period for the determination of a week's pay was 12 weeks, not 52 weeks, at the material time, as a matter of law. The Tribunal is satisfied that the way the holiday calculations were done, as set out in the bundle and explained by Mrs Blatherwick, was therefore correct at the time they were carried out. However, the Claimant is owed ½ a day's holiday accrued but untaken at the end of his employment, as the respondent accepted. This amounts to £44.17, gross of tax and national insurance.

46. The Tribunal also found that the Claimant's claim to notice pay was well founded. He was entitled to be given a month's notice of termination or paid in lieu of that notice. The fact that the Respondent has subsequently tried to put that right - very late in the day - does not alter the merits of the claim. The claimant has not had the money and it is therefore still owing to him.

Employment Judge J Jones
5 August 2022