EMPLOYMENT TRIBUNALS

Claimant: Mr A Arroyo

Respondent: ECMS Services Ltd

Heard at: Central London Employment Tribunal
On: 2 August 2022

Before: Employment Judge Keogh

Representation
Claimant: Mr M Torkain, union representative
Respondent: Ms J Cantwell, Head of Human Resources

JUDGMENT

1. By consent the name of the respondent is amended from ECMS Facilities Support Limited to ECMS Services Limited.

2. The claimant's claim for unlawful deductions from wages is successful. The respondent shall pay to the claimant the gross sum of £720.50.

3. The claimant's claim for holiday pay is successful. The respondent shall pay to the claimant the gross sum of £123.63.

4. The claimant's claim for wrongful dismissal is successful. The respondent shall pay to the claimant the net sum of £2,687.50.

5. The claimant's claim for redundancy payment is unsuccessful and is dismissed.

REASONS

1. The claimant brings claims of unlawful deductions from wages, holiday pay, notice pay and redundancy pay. I received and reviewed a bundle of documents and a witness statement from the claimant together with a witness statement for Mr Morrison for the respondent. I heard oral evidence from both. The claimant gave evidence with the assistance of an interpreter. This included translating his witness statement to him paragraph by

paragraph to ensure he agreed with its contents. The claimant was represented by Mr Torkian of CAIW Union and the respondent was represented by Ms Cantwell, Head of Human Resources for the respondent.

2. At the outset of the hearing it was noted that the bundle of documents contained without prejudice correspondence from both sides. Neither party objected to the inclusion of such material.

3. During the course of the hearing it became apparent that the claimant had sent to his trade union representative various documents which had not been disclosed. It was agreed that these documents should be provided to the Tribunal and considered.

4. The issues in this matter were set out at a preliminary hearing on 27 April 2022 before Employment Judge Walker. That hearing was listed to be a final hearing but was converted to a preliminary hearing because the claimant required an interpreter. However, it was confirmed that for the purpose of the hearing the claimant's representative, Ms Quintero-Paulsen, Head of Legal Department at CAIW Union, could translate for the claimant. Unusually for this type of case therefore a full list of issues was agreed.

5. It was only at the end of the hearing before me today and in closing submissions that Mr Torkian for the claimant indicated for the first time that he considered this hearing to relate to a claim of unfair dismissal. I referred Mr Torkian to the agreed list of issues and the ET1 which only refer to payment claims. Mr Torkian did not have the list of issues before him so it was sent and time given for him to consider it.

6. After receiving the case management order Mr Torkian made a very late application to amend the claim to include a claim for unfair dismissal. He referred to the overriding objective and the need to deal justly with the case and to have the parties on an equal footing. He noted that CAIW is a small union and the claimant should not be prejudiced by its actions. It was submitted that there was very little prejudice to the respondent as he had been speaking to them about why the dismissal was unfair. If unfair dismissal was not pleaded the claimant would have to bring another claim for unfair dismissal or constructive dismissal which would be a waste of time and resources when it could be dealt with today. Mr Torkian considered the prospects of success were very good. He blamed the respondent for not putting the list of issues before him.

7. Ms Cantwell for the respondent objected to the application. Both parties had received the case management order and the respondent had followed the procedure set out within it, including preparing the bundle in the way required by the order. The ET1 referred only to payments and that was in the bundle.

8. I considered the timing and nature of the application, its merits and the prejudice to the respondent in allowing the application to proceed. The application was made extremely late in the day, during the course of

submissions. No explanation was given by Mr Torkian as to why he considered this to be an unfair dismissal case in circumstances where the ET1 clearly refers only to claims for payments. A claim for unfair dismissal is a different cause of action entirely to a claim for payments and requires different evidence. A claim would be significantly out of time, given the claimant's case that he was dismissed in September 2021. The claimant was represented at the preliminary hearing by the same union as represented him at the final hearing. There was obvious prejudice to the respondent in that it had prepared for the hearing and had proceeded on the basis of a claim for payments only. If the application was granted the hearing would have to be adjourned for fresh evidence to be adduced as to the fairness of any dismissal and there would effectively need to be a fresh hearing on the matter. Both parties must be placed on an equal footing and it would be unfair to the respondent to move the goal posts so late in the day. I did not make any findings as to the prospects of success as I did not have evidence before me from the respondents to address that point, save to note that the claim is likely out of time. In the circumstances I did not consider it would be fair or just to allow the amendment to the claim and the matter proceeded on the basis of the existing claim form and issues agreed before Employment Judge Walker.

9. I reviewed all the evidence before the Tribunal in reaching my decision. Only the key facts are set out in this judgment.

Facts

10. The claimant was employed as a cleaner from 17 October 2010. His employment has undergone a number of transfers and at some point a reduction in hours from 40 hours to 25 hours. His employment transferred to the respondent on 17 August 2021. As at the time of transfer the claimant was working 5 hours per day 5 days per week at a site at Sherbourne House, Cannon Street, where he had worked since around November 2012.

11. The claimant's written contract with his initial employer could not be located. I accept the claimant's evidence that by the time of the transfer he had received at one point a written document stating that Sherbourne House was his place of work and that he was contracted to work for 25 hours per week.

12. On 11 August 2021 the client at Sherbourne House wrote to the respondent to say that it only required two hours of cleaning until around January 2022.

13. On 16 August 2021 the respondent wrote to the claimant informing him that the Sherbourne House site now only required a cleaner for 2 hours per day. The claimant was offered to undertake this work together with 3 hours at an alternative site in Queen Street, starting from Monday 23 August 2021. The claimant did not respond to this letter.

14. On 25 August 2021 the claimant was contacted by his supervisor who asked if he could undertake the work at Queen Street. It was agreed that he would start on 31 August 2021, working 3 hours from 9pm to 12am.

15. On 31 August 2021 the claimant was due to be collected by his supervisor and taken to Queen Street. She responded that she did not have the keys so could not take him. He arranged to go on 1 September 2021.

16. On 1 September 2021 the hours were cancelled because a cleaner had not passed over the keys.

17. On 5 September 2021 the claimant was asked to continue working at Sherbourne House and someone would be in touch to help with the other job. He agreed to continue working at Sherbourne House.

18. It was agreed that the claimant would start work at Queen Street on 14 September 2021. On that day or the next day the claimant handed back the keys to the site in Queen Street, saying the work was too much for him.

19. On 15 September 2021 the respondent wrote to the claimant to change his 2 hour shift at Sherbourne House to a 3 hour shift. The claimant was asked to clarify whether he was not happy to continue with the work at Queen Street.

20. On 16 September 2021 the client at Sherbourne House made a complaint about the standard of cleaning there. I accept the respondent's evidence that the client asked that the claimant be removed from the site, a request the respondent had to comply with. The respondent wrote to the claimant by email asking him not to attend the site. The claimant was again offered 3 hours at Queen Street.

21. On 17 September 2021 the respondent wrote to the claimant inviting him to a meeting to discuss the situation at Sherbourne House and the alternative work offered at Queen Street.

22. The claimant contacted his union and on 20 September 2021 his union representative offered to meet with the respondent.

23. On 29 September 2021 following the meeting, the respondent wrote to the claimant's union representative stating, "Further to our informal meeting yesterday, I can confirm we have decided the best outcome for Alejandro would be redundancy. Alejandro will receive his full redundancy pay of £2,015.60 on Friday's payment run."

24. The claimant's trade union representative replied that there was no agreement, and that the figures for redundancy were not agreed. The claimant was also owed notice pay, unpaid holiday and full wages up to the date he was to be made redundant.

25. On 29 September 2021 the respondent wrote to the claimant's union representative offering a redundancy payment of £2,015.60 alternatively for the claimant to return to work on Monday 4 October 2021 with 5 hours at an alternative site.

26. On 11 October 2021 the claimant's union representative emailed the respondent saying they had not contacted the claimant, that the claimant was available to work his contracted hours, and that his wages had not been paid based on his contracted hours. Legal proceedings were threatened.

27. The respondent replied the same day to repeat its offer of 5 hours at an alternative site. The respondent had contacted the union representative as previous correspondence had been with him, but they were happy to contact the claimant directly. It was noted the claimant had not replied to previous correspondence.

28. The claimant's representative emailed the respondent on 11 October 2021 stating that the claimant remained available to work. If wages were not paid then a legal process would have to be started.

29. The respondent replied on 13 October 2021 offering the claimant 7 hours per day from 5am to 12pm at a site at Condor House.

30. On 18 October 2021 the respondent wrote to the claimant's union representative noting no reply had been received to the offer of alternative work. The email stated, "If I have not received communications by 20/10/2021 I will take this as a refusal and that Alejandro does not wish to continue employment."

31. The claimant's union representative replied on 18 October 2021 that the offer made was not suitable as he had another job in the morning hours. He was still available for his contracted hours and was awaiting full payment of his salary.

32. The claimant gave evidence in cross examination that at this point he did not want to accept the offer made both because the hours did not suit him but also because he felt the respondent was 'playing him'.

33. The respondent replied on 18 October 2021 that it was happy to offer the 3 hours at Queen Street after 6pm and a further 2 hours at an alternative site.

34. The claimant's union representative wrote back on 25 October 2021 setting out a chronology of events.

35. On 28 March 2022 the respondent sent an email internally confirming the hours the claimant had been paid. This was a total of 5 hours for 4 days, then 2 hours. Although he did not in fact work at Queen Street payroll put him down as working there so he was paid a total of 24 hours over 8 days at £275.40.

36. The claimant contacted ACAS on 13 December 2021 and a certificate was issued on 23 January 2022. The claim form was lodged on 22 February 2022.

37. By email dated 7 January 2022 the respondent offered the claimant an immediate start for 5 hours per day at an alternative site in Birchin Court with an immediate start.

38. The claimant's payslip for 2 August 2021 to 29 August 2021 shows 4 days paid at 5 hours and 5 days paid at 2 hours at £10.75 per hour, a total of £322.50. His payslip for 30 August 2021 to 26 September 2021 shows 8 days paid at 2 hours and, from 15 September, 8 days paid at 3 hours.

39. The claimant confirmed in evidence that prior to the transfer to the respondent he was given one week of holiday every three months, which he took. It was not clear whether he additionally took bank holidays as leave, however he made no complaint about holiday prior to the transfer. After the transfer he did not take any holiday.

Issues and law

40. The issues agreed between the parties at the preliminary hearing are as follows:

1. Time limits

1.1 Was the claim of unauthorised deductions from wages made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:
1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made etc?
1.1.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.1.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.1.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unauthorised deductions

2.1 Were the wages paid to the claimant in August and September 2021 less
than the wages he should have been paid? The claimant says that the respondent failed to provide him with, and pay him for, his contractual hours during this period. The respondent says that no money is payable to the claimant as it offered the claimant his contractual hours at his original site and at alternative sites but the claimant either did not respond or refused their offers.

2.2 Was any deduction required or authorised by statute?
2.3 Was any deduction required or authorised by a written term of the contract?
2.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
2.5 Did the claimant agree in writing to the deduction before it was made?
2.6 How much is the claimant owed?

3. Holiday Pay (Working Time Regulations 1998)

3.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The claimant says that he is owed for holiday that he would have accrued in August and September 2021, had he been provided with, and paid for, his contractual hours.
3.1.1 Has the claimant's employment terminated?
3.1.2 What was the claimant's leave year?
3.1.3 How much of the leave year had passed when the claimant's employment ended?
3.1.4 How much leave had accrued for the year by that date?
3.1.5 How much paid leave had the claimant taken in the year?
3.1.6 Were any days carried over from previous holiday years?
3.1.7 How many days remain unpaid?
3.1.8 What is the relevant daily rate of pay?

4. Wrongful dismissal / Notice pay

4.1 Has the claimant's employment terminated?
4.2 What was the claimant's notice period?
4.3 Was the claimant paid for that notice period?

5. Redundancy payment

5.1 Was the claimant dismissed?
5.2 If so, was the reason for dismissal redundancy?
5.2.1 The claimant says that the dismissal was wholly or mainly attributable to the fact that the requirements of the respondent's business for employees to carry out work of a particular kind, namely as a cleaning operative, in the place where the claimant was employed, namely Sherbourne House, had diminished;
5.2.2 The respondent says that the claimant was not dismissed. The respondent says that the diminution in the work of cleaning operatives at Sherbourne House was only in the period 11 August 2021 to 15 September 2021 and that, by 15 September 2021, the requirements of the respondent's business for employees to carry out work of a particular kind, namely as a cleaning operative, in the place where the claimant was employed, namely Sherbourne House, was no longer diminished.
5.3 If claimant was dismissed and the reason was redundancy, does section 141 ERA apply to preclude the claimant from an entitlement to a redundancy payment:
5.3.1 Has the respondent proven that it made the claimant an offer of suitable alternative employment before the end of his employment?

5.3.2 If so, has the respondent proven that the claimant's refusal of the offer of employment was unreasonable?

41. Under Regulations 13 and 13A of the Working Time Regulations 1998 workers are entitled to 5.6 weeks of holiday per year.

42. Under section 86(1) Employment Rights Act 1996 an employee who has been continuously employed for two years or more but less than 12 years is entitled to one week's notice for each year of continuous employment.

Conclusions

43. I first considered the question of termination of the claimant's employment. The claimant contended that his employment was terminated on 16 September 2021 when he was told not to attend Sherbourne House. If there was no termination then, the relationship had subsequently irretrievably broken down. The respondent contended that the claimant was still employed by them.

44. If find that under the claimant's contract of employment at the time of the transfer his place of work was Sherbourne House. His removal from Sherbourne House constituted a termination of that contract, albeit the respondent had no choice in the matter. His employment might have continued had the claimant accepted an alternative place of work, however no agreement was ever reached. In the circumstances the claimant's contract of employment was terminated with an effective date of 16 September 2021.

45. Turning to unlawful deductions from wages, it was agreed between the parties that the claimant's claims were in time, the last payroll date from which deductions could have been made being 2 October 2021 and any deductions in August 2021 forming part of a series.

46. The question is whether the claimant ought to have been paid for 25 hours per week during August 2021 and September 2021. The claimant was contractually entitled to work 25 hours per week at Sherbourne House. While the respondent had no control over the removal of hours at Sherbourne House it remained contractually obliged to the claimant to provide him with work and to pay him for 25 hours per week. It was up to the respondent to find suitable alternative work for the claimant which he accepted, or to bring the contract to an end which it did not do until 16 September 2021.

47. The respondent did not contend that there was any provision of the contract which permitted it to deduct pay from the claimant. The respondent's position was that it was not practicable to pay the claimant for hours he was not working.

48. In the absence of any contractual provision entitling the respondent to make any deduction and in the absence of agreement from the claimant, I find

that the obligation to pay the claimant for 25 hours per week continued until the date of termination on 16 September 2021.

49. The claimant was paid for 25 hours in the week commencing 17 August. The following week he was only paid for 2 hours per week, a shortfall of 15 hours at £10.75 per hour = £161.25. During the following period to 16 September 2021 the claimant was paid for 30 hours instead of 70, a shortfall of 40 hours at £10.75 per hour = £752.50, making a total shortfall of £913.75. However, due to the payroll error the claimant was paid for 18 hours after 16 September 2021 as though he had been working at Queen Street, which comes to £193.50. The amount owing for wages in August and September is therefore £720.50.

50. The claimant did not take any holiday from 17 August 2021 to 16 September 2021, a period of 4.29 weeks. The claimant was entitled to 5.6 weeks of holiday per year, which pro rata for the period was 0.46 weeks. His weekly pay was £10.75 x 25 = £268.75. He was therefore entitled to holiday pay accrued at the date of termination of £123.63.

51. The claimant's employment commenced on 17 October 2010 and ended on 16 September 2021. He therefore had 10 years of continuous service and was entitled to 10 week's statutory notice to terminate his employment. The respondent terminated the claimant's contract without giving notice and was therefore in breach of contract. The claimant's claim for wrongful dismissal therefore succeeds and the claimant is entitled to £268.75 x 10 = £2,687.50. This is a gross figure however it appears from the claimant's wage slips he was at 0% tax, therefore this is also the net figure.

52. Turning finally to the question of redundancy payment, the first question is whether the claimant was made redundant. I find that he was not. There was no diminution in the requirement for the respondent to carry out the claimant's work as at 16 September 2021. Rather the claimant was removed because of a client complaint and an alternative cleaner had to be found to carry out the work. In the circumstances the claimant is not entitled to a redundancy payment.

Employment Judge Keogh

Date 4 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

04/08/2022

FOR THE TRIBUNAL OFFICE