EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Carr

Respondent: DS Smith Paper Ltd

Heard at: London South Croydon (by CVP, in public)

On: 18 January 2022

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: In person
Respondent: Ms T Hand, Counsel, Ms A Clements, Instructing Solicitor

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Claimant's complaint is unfounded and is claim is dismissed.

REASONS

The claim

1. By a claim form received by the Tribunal on 22 February 2021, following a period of early conciliation between 31 January and 10 February 2021, the Claimant brought a claim of unauthorised deductions from wages against his ex-employer, the Respondent.

2. The Claimant is employed as a Logistics Shunter Loader and commenced his employment on 14 September 2017. His claim is essentially in respect of unauthorised deductions from wages in respect of hours worked but not paid for the period November 2017 to November 2020.

3. There was no suggestion that the Claimant was not referred to ACAS and then submitted to the Employment Tribunal within the requisite time limits.

4. In its response, the Respondent denies that the Claimant is owed any wages in respect of hours worked.

5. The claim was originally listed for a 1 hour hearing. In an order sent to the parties on 13 September 2021, Employment Judge Martin varied this to 3 hours and made a number of case management orders, namely that on certain dates: the Claimant provide answers to the Respondent's request for further particulars of his claim; that the Claimant provide a schedule of loss; that the parties exchange documents relevant to the claim and to the matters in dispute; that the parties agree a hearing bundle; and that the parties exchange witness statements.

Documents

6. I was provided with electronic documents. These consisted of a Final Hearing Bundle consisting of 174 pages (which I will refer to as "B" followed by the relevant page number where necessary); a bundle of witness statements consisting of 27 pages. The Claimant's witness statement attached documents printed from the Gov.UK website: Employment contracts: Written statement of employment particulars; and Payslips: employees rights. In addition, I was provided with an email dated 7 September 2017 between Glenn Gibson and Vanessa Lacey; the Claimant's monthly pay statement from the Respondent dated 21 March 2018 and the 2019 Shunter Shift Rota. Ms Hand also provided me with a skeleton argument.

Evidence

7. I heard evidence from the Claimant, and on behalf of the Respondent from Glenn Gibson, Justin Hake, Stephen Maxwell and Terry Dooley, by way of written statements and in oral testimony.

Conduct of the hearing

8. The hearing was conducted by video link using HMCTS Cloud Video Platform (CVP). Whilst at times there were connectivity issues, these were resolved and I was able to conduct a fair hearing.

9. The hearing had been listed for 3 hours in the morning but it was clear by early afternoon that we were not going to finish. However, I was able to rearrange my afternoon cases and so we continued into the afternoon. We were able to finish evidence and submissions but unfortunately there was insufficient time for me to reach a decision. I therefore indicated that I would give a reserved Judgment.

10. I must apologise to the parties for the length of time it has taken to finalise and send this Judgment. This was due to volume of work, my part-time sitting days and, latterly, ill-health.

Findings

11. I set out below the findings of fact I considered relevant and necessary to determine the issues that I am required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.

12. Where individuals have been referred to who did not give evidence at the hearing, I have chosen to use their initials.

13. The Claimant was employed by the Respondent as a Logistics Shunter Loader from 14 September 2017 onwards at the Respondent's Kemsley Mill site. He remains in the Respondent's employment. He was initially employed via a temporary work agency as an agency worker. He was subsequently employed directly on fixed term contracts in September 2017 and latterly on a permanent contract.

14. I was referred to his contract of employment of September 2017 at B47-55 which includes the following terms;

> 4.1. Your core salary is £24,565.06 and the consolidated element is £4,335.01 which means your total package is £28,900.07 per year less any deductions for tax and employee National Insurance Contributions. Deduction for loss of shift through illness will come from the consolidated element of your pay.
>
> 5.1 You are employed to work on a shift system basis. You are required to work in accordance with the shift rota notified to you by the Company no later than 7 days prior to the start of each shift rota.
>
> 13.1 There is a national trade union collective agreement which directly affects your employment.

15. I note that this contract has been signed by the Claimant and is dated 14 September 2017 (at B 54).

16. The Claimant's role was initially to last three and a half months. However this was extended to 30 March 2018 (at B56) and then the Claimant accepted a permanent role as a Shunter Loader working a shift pattern. I was referred to a letter to the Claimant from the Respondent dated 15 February 2018 at B58-59 which attached a copy of the new contract of employment(at B 60-67). The contract contains the exact same terms as before, albeit a higher course salary and it again stated at clause 5.1:

> *"You will be employed on a shift system basis. You are required to work in accordance with the shift rota notified to you by the Company no later than 7 days prior to the start of each shift rota."*

17. This was also highlighted in the letter of 15 February 18 underneath the heading Key Information:

> *"Hours of Work Your working hours will be as dictated by the shift Rota."*

18. The Claimant's position in evidence is as follows. In July 2017 he was interviewed by Mr Terry Dooley, the Logistics Operations Manager at Kemsley Mill, for the position of Waste Clamp Truck Driver. At that interview, Mr Dooley advised the Claimant that if he was not successful in getting the position, he should not be disheartened because there was another position

available as a Shunter. This followed from the Claimant telling Mr Dooley that he had an HGV Class 1 licence. Approximately one week later Mr Dooley telephoned him that he was unsuccessful for the position of Waste Clamp Truck Driver role but within the next couple of weeks he would be offering him the position as a Shunter. The Claimant further states that Mr Dooley had told him that his shift pattern would be working Monday to Friday 5.30 am to 5.30 pm (12 hour days) followed by Monday to Saturday 5.30 pm to 5 am (12 hour nights) followed by a week off. He stated that this shift pattern was called the Shunter shift. When the Claimant commenced work on 14 September 2017 he had yet to receive a contract of employment or his shift rota and so assumed that his shift pattern was as Mr Dooley told him. He went further in his oral evidence and stated that Mr Dooley had told him his annual hours would be 1760.

19. In evidence, Mr Dooley denied saying this to the Claimant and further stated that the Respondent was unaware of this allegation until reading it in the Claimant's witness statement received on 10 January 2022.

20. Mr Dooley's position is that at interview he would have discussed the shift pattern that was applicable to that particular role, the five-shift pattern, but not the specific number of hours that that it would represent. He just discussed what the pattern would look like, that is 4 on, 4 off. He would not have discussed the Respondent's other shift patterns, nor the number of hours in the five-shift pattern, because they are variable, and certainly not the number of hours in the Respondent's other hybrid and three-shift patterns.

21. His further evidence is that he telephoned the Claimant to tell him he was not successful in his application for the Waste Site role and asked him if he was still interested in a short-term position more suited to his HGV background and he said he was. He did not offer the Shunter role to the Claimant because he was not the hiring manager and did not tell him anything about what hours in another role might look like. He told the Claimant that someone would get back to him, hopefully in the next few weeks. He then passed the Claimant's details to Mr Glenn Gibson (the Warehouse Manager working in the Respondent's Site Logistics Department) to take forward. That was the end of his involvement in the matter of the Claimant's recruitment.

22. Mr Gibson stated in evidence that he offered the Claimant the role as Shunter by telephone and subsequently when the Claimant attended the workplace for his induction. He is adamant that whilst he went through the hours and gave the Claimant a copy of the shift rota for 2017 (at B93), at no time did he tell the Claimant that his number of hours was the same as the four on, four off (five-shift) pattern. He is also clear that he told the Claimant that no weekend work was required but asked him if over time was offered would he be prepared to cover it, to which the Claimant answered yes.

23. The Claimant was referred in cross examination to an email from Mr Gibson dated 7 September 2017 in which he told the recipients that he has spoken to the Claimant and he will attend the workplace for a medical/induction, etc on the following Tuesday and would start on the following Thursday.

24. The Claimant accepted that he may have been mistaken as to who telephoned him to offer him the job. He had thought it was Mr Dooley. However, he was adamant that he had been told about the working pattern and hours.

25. Mr Gibson's further evidence is that he did not tell the Claimant that his hours of work would be the same as 4 on, 4 off (five-shift) and that the Claimant would have later received his temporary extension of his contract and then his permanent contract. By this time, the Claimant would have been aware of his three-shift rota for over 5 months and by then would have been working the 2018 rota (at B94). He further states that the Claimant had been provided with the 2019 shift rota in approximately October 2018 and the 2020 shift rota in approximately October 2019. The 2019 rota was provided as a separate document to the bundle.

26. The Claimant left the Shunter Loader role on 31 October 2020 and move to a Site Logistics Operator role on the five-shift pattern from 1 November 2020.

27. The Respondent had a Collective Agreement ("the Agreement") with Unite the Union ("the Union") (at B68-76). This is referred to at paragraphs 13.1 of both contracts of employment (at B53 and 65 respectively). It covers all employees (at paragraph 1 at B70). The Claimant is a member of the Union.

28. Appendix 2 (at B77-92) and Appendix 4 (at B93-96) of the Agreement are the annual collectively negotiated pay rate schedule, and the shift rotas which applied to the Claimant's contracts of employment.

29. Clause 9.3.1 of the Agreement as to working arrangements and hours of work states as follows:

> *"The contractual hours of work for annualised hours employees are between 1776 and 2062. There is a requirement to operate the mill for 362.25 days per year, ETP and F&S to operate for 365.25 days per year. If there is an emergency need to operate through Christmas each individual is contractually committed to work an additional amount of hours.*
> *(See Christmas Payments Appendix 5)."*

30. Mr Steve Maxwell is a Senior HR Business Partner for the Respondent. He gave evidence as to the Claimant's rostered hours of work at paragraphs 15 and 16 of his witness statement. The table at paragraph 16 (page 22 of the witness bundle) sets out details which correspondent with the rotas at Appendix 4 of the Agreement. These rotas show a three-shift system, shifts A, B and C. Whilst it is not readily discernible it was explained that one could calculation the number of 12 shifts worked and when they were worked and from that the total number of hours.

31. I note that in 2017 the Claimant worked only Shift A, in 2018 he worked 3 months on Shift A and 9 months on Shift C, and in 2019 and 2020 he worked Shift C.

32. The Claimant did work overtime and accepted in cross examination that he was paid for this. I was referred to a table setting out overtime paid to the Claimant between November 2017 and December 2020 (at B172-173).

33. Mr Maxwell confirmed in oral evidence that he had compiled the information at paragraph 16 his witness statement from the raw information and that he simply took the number of days that the Claimant had worked and multiplied it by 12.

34. Mr Justin Hake is a Fire Operator/Maintainer working for the Respondent and also the senior representative of the Union at the Kemsley Mill site. He gave evidence that his predecessor in the Union role, who left about four years ago, told him that in 2013 an agreement was reached between the Respondent and the Union following consultation, in respect of a restructuring exercise for those in the Shunter role to work outside of the limits set out in clause 9.1.3 of the Agreement. The change to the Agreement was notified to staff at the time. This change was of course made before the Claimant commenced employment with the Respondent.

35. The Respondent had nothing confirming this change to the Agreement in writing.

36. In 2019, the Claimant raised his concerns that Dispatch Controllers worked fewer hours than he did but were paid more. The Claimant had the assistance of Mr Hake in exploring this matter and it was dealt with informally by his manager, TA, in October 2020. TA explained to Mr Hake that the difference was to do with the Dispatch Controllers working weekends, and the Shunter role being a different role (at B115-116).

37. The Claimant raised a grievance on 30 November 2020 (at B97-98). This letter identifies his grievance as working 400 hours a year more than Dispatch Controllers he worked alongside, his payslips stating he worked 37.5 hours per week , the same as Dispatch Controllers and his contract not stating the number of hours that he was required to work. He further stated that he believed that TA had missed the point in his response to his initial concerns the previous year.

38. A grievance meeting was held on 19 January 2021, the minutes of which are at B118. The meeting was conducted by LP, the Respondent's Financial Controller and the Claimant attended with a representative, SH. At the meeting, the Claimant repeated his concern that his payslip showed his weekly hours as 37.5 and that when calculating back his hours worked as part of the shift he has worked approximately 400 more hours a year then his contracted hours. Further he stated that he did not believe his contract to be legal because it does not state his hours of work. In addition he stated that he had been advised of his shift pattern upon commencement of employment, and that the shift pattern for the Shunter role did not differ from that of the Dispatch Controller role.

39. LP wrote to the Claimant by letter dated 21 January 2021 with the outcome of his grievance (at B119-120). The letter advised the Claimant that his grievance had not been upheld on the basis that it was commonly accepted that the Shunter and the Dispatch Controller role were distinct and which was reflected in the respective of employment conditions. The letter pointed the Claimant to clauses 4.1 and 5.1 of his contract and that he would have accepted these terms and conditions at the point of accepting the

employment contract. The letter also stated that the Claimant's wages were those as agreed as part of a collective national wage negotiations. The Claimant was given the right of appeal to BJ, the Mill Manager, within 7 days of the date of the letter.

40. The Claimant appealed this decision on 3 February 2021 (at B121-122) This letter essentially repeated his initial grievance letter.

41. By letter dated 12 February 2021, Mr Maxwell wrote to the Claimant. This letter is at B123-124. Mr Maxwell stated in the letter that whilst the appeal had been received out of time, the Respondent was willing to consider it as a gesture of goodwill provided: a) the Claimant sent a letter outlining the reasons for his appeal over and above what he had previously set out in his grievance letter; and b) satisfied them that this was not a vexatious claim on his behalf, made with the sole intention of costing the company time and resources in dealing with the matter, having provided him with explanations on two separate occasions. His letter further stated that the Respondent was only prepared to enter into further discussions if there was new information which the Claimant wished to present to them.

42. The Claimant sent a further letter dated 21 February 2021 addressed to Mr Maxwell (at B 127). In his letter he stated that he it was not his intention to waste time and resources, he believed he had worked excessive hours for which he was not paid, was advised to contact ACAS but the Respondent refused to engage in talks with them. ACAS advised him that he would need to go to the Tribunal, he did not wish to go down that route and had hoped that them matter could be resolved internally.

43. The appeal hearing took place on 9 March 2021 and was conducted BJ. The handwritten notes of the meeting are at B 131-132. However, I was not taken to them. The Claimant attended alone without a representative and my understanding is that by this stage the Union were not supporting his case.

44. By a letter dated 16 March 2021, BJ wrote to the Claimant advising him that the grievance outcome had been upheld (at B 133-134).

45. His letter set out the documents he had looked at and further stated that following the appeal meeting, that he had examined the content of the site collective agreement and had spoke to Mr Hake in his capacity as the Senior Union representative. He further explained that he sought clarification from Mr Hake as to whether any consultation with the Union would have taken place when the Shunter shift rota was implemented as the annual hours for this rota did exceed those quoted in the site collective agreement signed in 2009. He also explained that Mr Hake confirmed to him that consultation would have taken place and he believed this to be in 2012/13. In addition, he advised the Claimant that the conclusion of that consultation process would have led to the creation of the set pay rate for that role and shift pattern as per the appendices previously supplied to the Claimant. The letter acknowledged that the reference in the Claimant's pay slips to a 37.5 hour working week would no doubt have added a layer of confusion. His letter ended by stating that he would be working with Mr Maxwell and the HR Shared Service Centre to alleviate this confusion going forward.

46. The Claimant accepted in cross examination that he did not mention that he had been told that his yearly hours would be 1760 either in his initial enquiry or during the grievance process.

47. The Respondent accepted that the Claimant's payslips from October 2017 to October 2019 incorrectly recorded 37.5 hours (at B135-158), and his payslips from November 2019 to November 2020 incorrectly recorded 32.89 hours (at B159-171).

48. Several of the anomalies in his monthly pay statements were put to the Claimant in cross examination. He was referred to the pay statement dated 21 November 2017 at B135. He was referred to the hours being recorded as 37.50 and that he had worked 12 hours overtime that month. The Claimant accepted that this was what the statement showed. He was then referred to the pay statement dated 19 January 2018 at B137. It was put to him that this one also recorded his hours as 37.50 and that he had not done any overtime that month. He accepted that this was what the statement showed. He was then asked if he accepted that clearly 37.50 could not be correct (given that one statement showed overtime worked and one did not and yet they both said his hours of work were 37.50).

49. His response was to question whether a pay statement is a legal document. I explained to him that whilst there was a right by law to receive itemised pay statements they were not legal documents as such. However, the Claimant responded that he believed pay statements to be legal documents and correct and that he did not check them each month.

50. He was then taken to his pay statement for 21 November 2019 at B 159 which records his hours as 32.89 and his assertion that these statements support 2160 hours worked per annum. It was then put to him if he could not accept that rightly or wrongly these figures on his pay statements should be correct but they are clearly not. He accepted this to be the case but stated that he based this information about the hours worked and not on the pay statements. He would not accept that the pay statements were confusing and had led him to a mistaken belief. His response was that they led him to seeing that he was incorrectly paid and added that they were deliberately misleading so that employees would not know what hours they were working.

51. The Claimant's case was difficult to follow. It appeared to rest on the alleged conversation with Mr Dooley, that he was only contracted to work 1760 hours annually although he accepted in evidence that nobody ever gave him this figure, that this was very difficult to work out from the documentation provided and was in breach of the written Agreement and what he referred to as the "government website", which states that employers are obliged to set out the number of hours worked. The Claimant has appended this to his witness statement at pages 8-12 of the witness statement bundle. The Claimant accepted that he was paid for the hours that he worked. His position is that he was not working the hours that he had been contracted to work.

52. When I asked him what he was claiming and for what period, he referred to 2 emails that he had sent to the Respondent's solicitors and that it was in the

region of £27,500 from his start date of employment until he moved to his current position, limited to two years (the two-year limitation arises under section 23(4A) of the Employment Rights Act 1996).

53. I believe that the 2 emails that the Claimant is referring to are one dated 3 September 2021 at B 38-39 and one dated 26 September 2021 at B 35-36 in response to the Respondent's solicitors' emails asking the Claimant to clarify his claim.

54. Dealing with the first of these emails. The Claimant goes further than he did in evidence and sets out how he arrives at a calculation of 1760 annual hours averaging 37.5 hours over the year. He appears to be saying he took the job on this basis but was surprised to discover that he was in fact working 2,160 hours per year. The email goes on to set out his attempts to resolve the matter up to the point of his rejected appeal and makes reference to breach of the Agreement. The second of the two emails goes into slightly more detail of the circumstances relating to his claim and ends with a schedule of loss. This quantifies the claim on the basis that he worked 400 hours per year in addition to his 37.5 hours per week and seeks to recover it at the overtime rate for each of the relevant years. I set this out below:

"2017-2018 overtime rate £237.60 per day totaling £7920.00 for the year
2018-2019 overtime rate £243.85 per day totaling £8128.33 for the year
2019-2020 overtime rate £250.73 per day totaling £8357.67 for the year
Last month on shift 3.108 days totaling £799.27

Total i believe not paid £25205.27 on average "

55. However, in his witness statement the Claimant put his case differently at paragraph 33.

"In summary, my complaint is that I was employed by DS Smith to a role where I was provided with incorrect information about the hours that I would be working at the interview stage. Upon accepting the job offer, I accepted the salary offered on the basis of working 1760 hours per annum, as per the job description of the initial job that I applied for. This would have placed me on an hourly rate of £16.28. Instead, I was working on an hourly rate of £13.26.

(a) As can be seen from the Annual Rota's provided, in 2017, the annual hours required to work for the Shunter position would have been 2100. Therefore, this is an additional 340 hours in excess of the 1760 hours I believed that I should have been required to work. This is also 38 hours in excess of the Collective Working Agreement.

(b) In 2018 the annual hours would have been 2100 Therefore, this is an additional 340 hours in excess of the 1760 hours I believed that I should have been required to work. This is also 38 hours in excess of the Collective Working Agreement.

(c) In 2019 the annual hours would have been 2112 this is an additional 352 hours in excess of the 1760 hours I believed that I should have been required to work. This is also 50 hours in excess of the Collective Working Agreement.

(d) In 2020 the annual hours would have been 2100 Therefore, this is an additional 340 hours in excess of the 1760 hours I believed that I should have been required to work. This is also 38 hours in excess of the Collective Working Agreement

(e) I accept these hours differ from the 400 hours i am claiming but my total of 2160 comes from HR computer."

56. Nevertheless, in hid oral evidence his claim appeared to proceed on the basis that his pay statements stated that he was to work 37.5 hours and his

calculation that he had worked an additional 400 hours per year which should have been paid at the overtime rate.

57. I heard submissions at the close of evidence. Ms Hand spoke to her skeleton argument and the Claimant gave oral submissions. I have taken these fully into account and will refer to them where it is appropriate to do so.

Relevant law

58. Section 13 of the Employment Rights Act 1996:

"13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

59. Section 23 of the Employment Rights Act 1996:

"23 Complaints to [employment tribunals]

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

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))…

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

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

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

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

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

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

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

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint."

Conclusions

60. The claim is for unauthorised deductions from wages going back to the start date of the Claimant's employment in 2017 until 20 November 2020, this representing the date of the last alleged unauthorised deduction (reference to his pay statement at B 171).

61. Section 23(4A) of the Employment Rights Act 1996, which was an amendment introduced by the Wages (Limitation) Regulations 2014 ,applying to claims brought on or after 1 July 2019, limits claims to any deductions made within the period of 2 years ending with the date of presentation of the complaint. This means that the claim is limited to any unauthorised deductions occurring between 20 November 2018 and 20 November 2020.

62. Having considered the evidence from the Claimant, Mr Dooley and Mr Gibson, I find on balance of probability that the Claimant was not provided with the details of the hours in which he was going to work as he alleges. It is unlikely Mr Dooley would have told him this, firstly because he was not in a position to offer the job of Shunter to the Claimant given that he was not the recruiting manager and secondly it is unlikely that Mr Gibson would have told him this, either on the telephone or when he attended the workplace, because it was totally at odds with the hours that a Shunter was required to work.

63. In addition, it was at odds with what was set out in each of the Claimant's contracts of employment which he signed, which stated in essence that he would be provided with a rota each year setting out his shifts and by reference to the yearly rotas that he was provided with.

64. Whilst the rotas might not be the easiest of documents to read and to readily calculate the number of hours worked, at a glance they clearly show 3 columns indicative of the three-shift system and not five. I come at this from a position of knowing no more about the operation of the Respondent's business than what was told to me by the parties and in the documents I was referred to but I can discern this much from the rotas. Further, when I was told how to calculate hours worked from the rotas, I understand how this could be done.

65. Each of the yearly rotas clearly shows the three-shift system and so it is simply not probable that either Mr Dooley or Mr Gibson would tell the Claimant that he was working a five-shift system or that his annual hours were only 1760.

66. I accept Mr Gibson's evidence that he gave the Claimant the 2017 rota during his meeting and explained how the shift pattern worked given that this is information that the Claimant would require on commencing his employment.

67. To give the Claimant the benefit of the doubt, it may be the case that the Claimant's recollection of these events is at fault. I say this because he confuses speaking to Mr Dooley on the two occasions rather than one by his own admission. Indeed, I would make it clear that on balance of probability I find that he only spoke to Mr Dooley to be told he had been unsuccessful in his application for the Waste Site role and asked if he was still interested in the Shunter role, and that he subsequently spoke to Mr Gibson who offered him the position and arranged for him to come into the worksite.

68. For the purposes of an unauthorised deduction from wages claim, under section 13(3) of the Employment Rights Act 1996, I have to determine what was properly payable to the Claimant and then what was actually paid. Any shortfall will represent a deduction and I would then have to determine whether it is authorised or not within the meaning of the Employment Rights Act 1996.

69. I was grateful to Ms Hand who in her skeleton argument referred me to relevant case law as to meaning of "properly payable". The Court of Appeal in New Century Cleaning Co v Church [1999] 3 WLUK 525 commented that the word "payable" clearly connotes some legal entitlement, although not necessarily limited to a contractual entitlement. In Weatherilt v Cathay Pacific Airways Ltd UKEAT/0333/16, the Employment Appeal Tribunal commented that it would be surprising if the Tribunal could not construe a provision of the contract to see whether it authorised a deduction when this question was central to the very operation of section13.

70. Ms Hand submitted that in the case before me, the Tribunal does not need to construe a provision of the contract given that the contract is so clear on the Claimant's working hours and pay.

71. It is clear to me that the Claimant is mistaken as to his belief that he has been underpaid. I do not accept that he was told that he would operate on the five-shift system. He was employed on the three-shift system and the documentation that I been referred to confirms this. Mr Maxwell's witness statement at paragraphs 15 and 16 helpfully provides an explanation of the Claimant's shift rotas and I have also been referred to the rotas at B93-96 and the one for 2019.

72. The Claimant's explanation within paragraph 33 of his own witness statement was not something he appeared to be pursuing before me and in any event on balance of probability I did not accept the calculations that he put forward given the clear explanation provided by Mr Maxwell.

73. I accept that the Claimant's hours of work were governed by the Agreement. I further accept Mr Hake's evidence as the Senior Representative of the Union that the Agreement was varied to remove the cap of 1760 hours per year in 2013. I also accept Ms Hand's point to the Claimant in cross examination that had any employees been working more than the agreed

level of hours per year, the Union would have been up in arms about it. It is of course unfortunate that there was no written record of this change. No doubt the absence of this also bolstered the Claimant in pursuing this matter and to his confusion and mistaken belief.

74. From the evidence that I heard, the questions put to the Claimant and his answers, I accept that his pay statements erroneously showed his weekly hours as 37.5 and then at a later date 32.89. This clearly added to the Claimant's confusion and mistaken belief. However, the pay statements were, as Ms Hand put it, a red herring because they do not go to establishing the number of hours that the Claimant was working or should have been working.

75. I therefore conclude that the Claimant was paid entirely in accordance with his contract of employment and the hours set out in the yearly rotas provided to him and that this was also in accordance with the Agreement negotiated by the Union as amended in 2012/13, a Union of which he is a member. Indeed, Mr Hake said in his witness statement at paragraph 12 that the Union was not supporting the Claimant's claim.

76. The burden of proof is upon the Claimant to show that there has been a deduction from the wages properly payable and he has failed to discharge this burden. Indeed, I do not find that there has been any deduction unauthorised or otherwise.

77. For the sake of completeness, I will deal with the document that the Claimant relies upon from the government website which is at pages 8-12 of the witness statement bundle.

78. This is a printout of information contained on the website GOV.UK and sets out the legal entitlement to a written statement of employment particulars. This arises under sections 1 and 4 of the Employment Rights Act 1996. I am grateful to Ms hand for dealing with this at paragraphs 29 to 31 of her skeleton argument.

79. In essence, an employer is required to provide employees (and more recently workers) with a statement within two months of commencement of employment, containing certain terms and conditions of employment. Any changes to those terms and conditions should also be notified within a month of those changes. This includes how much in how often an employee or worker will get paid and the hours and days of work and if and how they may vary (at page 9 of the witness statement).

80. Whilst of course, this is a legal requirement and is actionable in the Employment Tribunal if it is not provided in whole or part, by way of a declaration of any missing terms and condition, this is not a claim that the Claimant has brought. Whilst the Tribunal can award additional compensation if at the time of issuing his claim, the Claimant has not been provided with a compliant written statement, the Claimant has to succeed in his complaint in order for this award to be made.

81. The Claimant clearly misunderstands the nature of this obligation and places more reliance upon it than it actually has. This no doubt has also added his mistaken belief as to his claim.

82. In any event, again for the sake of completeness, I find that the Claimant's contract of employment at clause 5 of each (B49 and 62 respectively) complied with section 1 of the Employment Rights Act 1996.

83. In conclusion, I find that the Claimant's complaint is unfounded and I dismiss his claim.

Employment Judge Tsamados
11 August 2022