EMPLOYMENT TRIBUNALS

Claimant: Mr Bilal Miah

Respondent: London Ambulance Service NHS Trust

JUDGMENT

On reconsideration, the Judgment dated 24 July 2022 is confirmed. The Judgment of the Tribunal therefore remains that:

1. The Respondent has made an unlawful deduction from the Claimant's wages and is ordered to pay the Claimant the gross sum of £473.93 in respect of the amount unlawfully deducted.

2. The Respondent is entitled to make appropriate deductions for tax and national insurance contributions on the above payment before it is paid to the Claimant.

REASONS

Claims and parties

1) By a claim form presented on 22 February 2022, the Claimant brought a claim of unlawful deductions from wages. Judgment was promulgated on 24 July 2022.

2) The Claimant's claim succeeded insofar as it related to unsocial hours payments. The Claimant's claim was unsuccessful insofar as it related to "disruption payments" payable pursuant to a "Bulletin" of the Respondent.

3) The Claimant applied for reconsideration of the Judgment in respect of disruption payments.

The relevant rules on reconsideration

4) Applications for reconsideration are governed by Rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013.

5) Rule 70 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is "necessary in the interests of justice to do so". Following a reconsideration, a judgment may be confirmed, varied or revoked (and, if revoked, it may be taken again).

6) Rule 72 describes the process by which an application for reconsideration should be determined. The application should, where practicable, first be considered by the Employment Judge who made the original decision or who chaired the full tribunal that made the original decision. Rule 72(1) requires that judge to refuse the application if he or she "considers that there is no reasonable prospect of the original decision being varied or revoked". If the judge considers that there is a reasonable prospect of the original decision being varied or revoked, the Rules go on to provide for the application to be determined with or without a further oral hearing.

7) In this case, I determined that there was a prospect of the original decision being varied or revoked. The Respondent's comments were therefore sought, following which I determined that the interests of justice did not require a hearing to determine the reconsideration application. No new evidence was required and the parties had provided their detailed submissions on the points raised.

The Claimant's application

8) The Claimant's application for reconsideration is detailed and runs to 13 pages, and has been considered in its totality. For the purposes of explaining this decision, the Claimant's application is briefly summarised as follows:

    a) The Claimant asserts that the issue for determination by the Tribunal in relation to the disruption payments was "wrongly perceived to be the interpretation of the bulletin as opposed to the fundamental issues of contractual formation and variation as expressed by the claimant within the hearing".

b) The Claimant submitted that the "primary legal issues for determination" are:
   i) Whether the Christmas disruption bulletin amounts to a valid contract between the parties?
   ii) Whether the claimant's email to the respondent, dated 24th January 2022, amounts to a lawful variation of the contract in accordance with the established common law rules of contract under which the parties are bound?

9) The Claimant set out his arguments in relation to the above in detail in his application. He summarises his position as follows:

   a) a valid contract existed between the parties under which the disruption payment was due to the claimant whether formed after the completion of the shifts or the submission of the GRS claim form.

   b) no valid variation of the existing unilateral contract occurred, thus rendering the existing contract to remain in force under which the sum of £1050 is due to the claimant, in addition to any other payments associated with the classification of the shifts.

   c) The claimant submits that non-payment of the disruption payment subsequently amounts to an unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996, in addition to a breach of contract.

10) The Claimant's claim was not a claim of breach of contract, and the Tribunal has no jurisdiction to hear such a claim, the Claimant still being an employee of the Respondent. The Tribunal can therefore only consider the Claimant's application for in relation to his claim for unlawful deduction from wages.

The Respondent's reply

11) The Respondent submitted its detailed reply, which (in summary) submitted the following:

   a) That the Claimant's allegations regarding the disruption payment centred on the fact that the Claimant believed the disruption payment should have applied to core shifts, rather than just overtime and that this was reflected in the issues to be determined as recorded by the Tribunal.

b) That the Claimant's position in the reconsideration application has changed, as he now requiring the Tribunal to determine if the Bulletin amounts to a contract between the parties and if the Claimant's email to the Respondent dated 24 January 2022 amounts to a lawful variation of the contract.

c) That the Claimant's employment is governed by his employment contract, which provides for overtime to be offered, subject to the needs of the service and that the Bulletin does not create a separate legal contact between the parties. The Claimant had the ability to select shifts, but also to cancel or alter them without any consequences (mutual agreement and consideration would not have been needed, nor execution of a deed). Given the Respondent submits the Bulletin did not create a legal contract between the parties, the Respondent submits that the email of 24 January 2022 from the Claimant to the Respondent was not capable of amounting to a variation of the alleged contract.

d) In the alternative if the Bulletin is deemed to amount to a contract between the parties, the Respondent submits … that the contract was varied when the Claimant requested to have the shifts on 25, 26 and 27 December 2021 changed from overtime to core shifts.

e) That even if the reconsideration is allowed, it would not change the original decision that the Claimant was not entitled to the disruption payment and as such, no unlawful deduction has been made.

The issues and Judgment

12) The issue recorded in the Judgment, relevant to this application for reconsideration, was as follows:

Does the disruption payment referred to in a bulletin of 2 November 2021 apply to core shifts that are not worked as overtime? If so, it is agreed that the Claimant has suffered an unlawful deduction.

13) The key findings of fact in relation to the above issues were as follows:

28 The Claimant booked shifts on 9, 18, 19, 21, 22, 23, 25, 26, and 27 December 2021, and originally requested to work these shifts as

overtime. However, on 24 January 2022 the Claimant emailed the Respondent requesting that the above December shifts be changed from overtime shifts to core shifts. The Claimant acknowledged that the shifts had not yet been submitted on "GRS" (the Respondent's Global Rostering System). In making this change, the shifts therefore counted towards the Claimant's annualised hours requirement. As at 24 January 2022, the shifts had not been processed for payment and therefore the Claimant submitted his shifts as core shifts and the changes were implemented the same day by the Respondent.

29 The Claimant submitted a claim for the disruption payment in relation to shifts worked on 25, 26 and 27 December 2021, believing that the disruption payment was payable to him.

30 The Respondent did not pay the disruption payment amounting to £1,050 for working on 25, 26 and 27 December 2021 because the shifts were not recorded as overtime shifts and therefore the Respondent determined that the disruption payment was not payable.

The submissions on behalf of the Claimant in relation to this matter are recorded as follows:

50 Ms Jain submitted that at the time he asked that the shifts in question be changed from overtime shifts, the Claimant had understood that a disruption payment was payable in respect of all 12 hour shifts worked on the days in question. Ms Jain submitted that in relation to the attendance payment (another bonus also provided for in the Bulletin), the Bulletin refers to "core and/or overtime", but that it does not say this in relation to disruption payments, which the Claimant says indicates that core shifts (on specified days) attract disruption payments

14) There was no submission made on behalf of the Claimant that a new contract was created in relation to disruption payments or shifts to which the Bulletin applied. Neither was this dealt with by the Respondent.

15) However, when the issues were discussed at the start of the hearing, it was discussed that the Claimant had originally booked shifts on 25, 26 and 27 December as overtime shifts, but changed his mind to record the shifts as

core shifts, and subsequently wanted to change it back, after being paid the for the shifts as core shifts. The Respondent said that there was a "question" as to when the pay crystallised. The Respondent said that it was too late to make a change once payment was made. The question of when pay crystalised was not recorded as a separate issue, but it was discussed at the outset of the hearing and therefore should be considered.

16) Relevant conclusions from Judgment are as follows:

> *61 The Claimant originally sought to work on 25, 26 and 27 December as overtime. However, he subsequently contacted the Respondent and asked that these shifts (along with shifts he worked on 9, 18, 19, 21, 22, and 23 December) be recorded as core shifts for him (which meant that they counted towards his annualised hours tally). The consequence of that was that the Respondent did not pay disruption payments because the shifts were not recorded as overtime.*
>
> *62 The Claimant requested that this change be made prior to the shifts being submitted on GRS. In requesting the change he noted "The above shifts have NOT been submitted on GRS" (the Claimant's emphasis), indicating that the Claimant knew the significance of whether a shift had been submitted on GRS. The Respondent acted on this request and then payment was authorised for standard hours. The Respondent determined that no disruption payments were due as the Claimant had not worked the shifts on 25, 26 or 27 December 2021 as overtime. The Respondent avers that once payment for a shift is authorised, an employee cannot change that shift from overtime to non-overtime or vice versa. There has to be a cut off at some point. The Respondent having agreed the initial change was under no obligation to reverse the change after the shifts were paid. Whilst this results in an unfortunate outcome for the Claimant, in my conclusion the Bulletin as a whole was clear and annualised hours employees were specifically referred to as having to work overtime to receive a disruption payment.*
>
> *63 The Claimant elected not to have these shifts recorded as overtime. He recorded them as core and non-overtime shifts, and was paid accordingly. He was therefore not entitled to the disruption*

payments. It follows that there was no unlawful deduction in relation to disruption payments.

Conclusion

17) Insofar as there was an issue relating to when the amount of pay and/or obligation to pay crystalised, the Judgment concluded that the Claimant was paid at the correct rate of pay, having himself elected to have shifts worked on 25, 26 and 27 treated as core shifts under his contract of employment, and that the Respondent having agreed the initial change was under no obligation to reverse the change after the shifts were paid.

18) The findings of fact and conclusions in the original Judgment dealt with the issue of what pay was due to the Claimant, taking into account the evidence before the Tribunal, the arguments raised by both parties and the way in which the issue was addressed.

19) However, I have considered whether the Claimant's argument that his initial request that the shifts be recorded as overtime should stand on the basis that this formed a contract with the Respondent and the Claimant's subsequent email request of 24 January 2022 to change the shifts to "core shifts" did not amount to a valid contractual amendment due to lack of consideration.

20) As a starting point, assuming that a contract was formed between the parties on the basis of the Claimant accepting an offer from the Respondent to pay disruption payments in respect of specific overtime shifts works, the Claimant requested to vary that contract and the Respondent agreed. The Claimant does not dispute this. The Claimant disputes that that variation was valid because he says that there was no consideration for the variation.

21) Common law in England and Wales requires any agreed variation to a contract to be supported by consideration, meaning that there must be some benefit passing from each of the parties to the other. I find as a fact that there was a benefit to the Claimant in recording these shifts as core shifts, namely that that reduced the outstanding number of hours that the Claimant would have to work to fulfil his annualised hours obligations. The Claimant clearly considered there to be a benefit to him in allocating his shifts as core shifts, notwithstanding that overtime would not be payable (and even though he believed the disruption payments remained payable). I find that the benefit to the Respondent was that they did not have to pay overtime rates for these

shifts (whether or not “overtime” includes the disputed disruption payments). In addition, and in any event, as referred to in *GAP Personnel Franchises Ltd v Robinson UKEAT/0342/07*, the EAT held that it is "accepted law" that consideration for a variation in the contractual terms of employment is mutually provided by the employer continuing to employ the employee and the employee continuing in employment. That case concerned a reduction in mileage rates to be paid to the employee, and the lack of specific consideration did not help in determining whether there was a consensual variation.

22) The Claimant subsequently sought to reverse the allocation of the shifts as core shifts, and asked for them to be recorded and paid as overtime. There is no dispute that no agreement was reached to any such amendment.

23) Even on the Claimant’s argument in respect of contractual formation, the Claim fails because any such contract was validly amended so that the Claimant was only entitled to be paid the shifts worked on 25, 26 and 27 December as core shifts, not as overtime, and disruption payments were only due in respect of overtime shifts.

24) Accordingly, if the Claimant's acceptance of shifts pursuant to the Christmas disruption bulletin amounts to a valid contract between the parties, the Claimant’s email to the Respondent, dated 24 January 2022, amounted to a lawful variation of the contract.

25) Accordingly, the findings of fact and the conclusions in the Judgment are amended to include the conclusions in this decision. The Claimant is not entitled to payment of disruption payments.

Employment Judge Youngs
20 October 2022

JUDGMENT SENT TO THE PARTIES ON

27/10/2022

FOR THE TRIBUNAL OFFICE