



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104966/22

Hearing on the Merits held on the 22 and 23 March 2023 in Edinburgh

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Employment Judge Porter

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Mr M Diop

**Claimant
assisted by:
Ms Capoulade
Interpreter**

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Kingdom Services Group Ltd

**Respondents
Represented by:
Mr Cater, Peninsula**

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REASONS

Introduction

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1. The claimant was employed by the respondents as a Door Supervisor between the 4 August 2021 and the 23 September 2021. He was employed on a zero hours contract. In these proceedings he raises claims of race discrimination, unpaid wages, holiday pay and failure to provide a written pay statement. The claimant's claims are resisted, and there were Preliminary

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Hearings ("PHs") in the case on the 2 September 2022 and the 6 January 2023.

2. At the PH on the 6 January 2023 the case was listed for a Hearing on the Merits on the 22,23 and 24 March 2023 to take place in person at the Edinburgh Tribunal Office, 54-56 Melville St Edinburgh EH3 7HF. In advance of the Hearing on the Merits, the parties intimated a Joint List of Issues, Joint Statement of Facts and Statement of Disputed Facts and Joint Bundle of Documentation . The Joint Bundle of Documentation was numbered **1-135**.
3. The claimant's claim of failure to provide a written pay statement was not referenced in the parties' Agreed List of Issues. This claim was treated as withdrawn and was dismissed.
4. The Hearing on the Merits commenced on the 22 March 2023. The Tribunal heard evidence from the claimant and from Allan Jones the respondents' Regional Operations Director in Scotland. The parties referred to the productions in their evidence.
5. In the course of the Hearing on the Merits the respondents conceded that they owed the claimant the sums of £522.50 gross holiday pay and £97.50 gross unpaid wages. The claimant accepted that the sum of £522.50 was the correct sum due to him as holiday pay.

Findings in Fact

6. On the basis of the evidence before them, the Tribunal made the undernoted essential Findings in Fact.
7. On or around the 4 August 2022 the claimant agreed with Stewart Duncan, his Line Manager that he would be paid £11 an hour for all security work in the pubs and clubs sector. This agreement was reflected in the email exchange **79-80**. The claimant was thereafter **(85-86)** paid £11 per hour for his work for the respondents in the pubs and clubs sector with the exception of the Genting Casino where he was paid £10 an hour. The respondents accept there was a £1 shortfall in his hourly rate and for this reason acknowledge that £97.50 is due to the claimant as unpaid wages. The Tribunal did not accept (as the claimant alleged) that the claimant had agreed

with Stewart Duncan that he would be paid £11 an hour for all work carried out by him for the respondents.

- 5 8. The reason for this Finding is that Tribunal accepted the evidence of Allan Jones that Line Managers have a discretion to set the hourly rates for workers such as the claimant in the pubs and clubs sector. The Tribunal accepted the evidence of Allan Jones that this was not the case for the construction industry as the construction industry is very competitive and rates are fixed at a low level for security services. Accordingly the hourly rate for workers such as the claimant is always less than for providing security services in the pubs and clubs sector. Further, the Tribunal accepted the evidence of Allan Jones that security services in the pubs and clubs sector requires more skill.
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- 15 9. The Tribunal accepted the evidence of Allan Jones that the claimant would have signed the Statement of Terms and Conditions of Employment **(48-55)** around a week before his first shift on the 14 August 2022. The Tribunal noted that the claimant's own evidence was that he signed the Statement of Terms and Conditions of Employment during his employment but that he disputed the date of signing, being 4 August 2022. The Statement of Terms and Conditions of Employment provides: *"Remuneration 7.1 Payment of wages is calculated, normally, hourly and depending upon the prevailing hourly rate for the respective site(s) worked. You agree and accept that the hourly rates payable can vary from site to site and are also dependable upon experience and ability."* **(49)**
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10. The claimant's first shift was on the 14 August 2022. The claimant was placed on jobs by both his line manager Stewart Duncan and by the respondents' centralised system. The respondents' centralised system placed individuals on jobs on an anonymous basis.
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11. The Tribunal accepted that the respondents produced an Equality and Diversity Report **(102-108)**.

12. The Tribunal accepted the uncontested evidence of Allan Jones that at the material time Stewart Duncan was running his own company SD Maintenance Ltd which provided security services. The Tribunal accepted the uncontested evidence of Allan Jones that the respondents were unaware of this and that it would have been a disciplinary matter had they been so aware. Tribunal accepted the evidence of the claimant that he had worked a shift for SD Maintenance Ltd, at the Black Rose Tavern in Rose St which had been arranged by text exchange between himself and Stewart Duncan. The claimant was paid £66 for this shift by SD Maintenance Ltd. The payment of the sum of £66 to the claimant can be seen on his bank statement **(117)**. The Tribunal concluded that given the shift had been arranged by Stewart Duncan directly with the claimant by text message, and given that the claimant was paid by SD Maintenance Ltd it must have been apparent to the claimant that the shift was for a company other than the respondents.

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Observations on the Evidence

13. The Tribunal noted that, despite questioning from the Employment Judge, the claimant was unable to name a comparator in respect of his allegations of race discrimination.

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The Law

14. In these proceedings the claimant brings claims of Direct Discrimination under s13 of the Equality Act 2010.

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15. S13 of the Equality Act 2010 provides: *“13 A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*

16. Accordingly, an employer directly discriminates against a person if they treat that person less favourably than they treat or would treat others,, and the difference in treatment is because of a protected characteristic.

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17. The terms of s13 of the Equality Act 2010 and the words 'would treat others' point to the need for a comparator in cases of direct discrimination. However, in the case of **Shamoon v Chief Constable of The Royal Ulster Constabulary 2003 ICR 337, HL** the House of Lords took the view that rather than tying themselves in knots on the comparison exercise a Tribunal should focus on the primary question which is why was the complainant treated as he or she was?

10 **Submissions**

The undernoted is a summary of the parties' submissions.

The claimant

- 15 18. The claimant submitted that agreement had been reached with Stewart Duncan that he would be paid £11 an hour for all jobs for the respondents.
19. He submitted that being sent to the Black Rose Tavern in Rose Street was a discriminatory act on the part of the respondents.
- 20 20. The claimant submitted that he was mistreated during the jobs at Cruden Homes in that no hard hat was supplied and there were not enough fellow security guards and supervisors on site. The claimant submitted that Cruden Homes was an unsafe site. He submitted that he was sent to the site at
- 25 Cruden Homes because of the colour of his skin.

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The respondents

21. For his part, Mr Cater submitted that the burden or proof lay on the claimant to prove his claim. He submitted that the claimant has not discharged this burden, given the documentation coupled with the evidence of Allan Jones.
- 5 22. Mr Cater invited the Tribunal to accept that it was agreed between the claimant and Stewart Duncan that the claimant would be paid £11 an hour for all jobs in pubs and clubs but that the claimant would be paid the prevailing rates for other jobs according to the particular sector and agreed to this by signing the Statement of Terms and Conditions of Employment. In the case
10 of the construction industry, the rates were low due to the sector being very competitive.
23. Mr Cater submitted there was no evidence to support the contention that the claimant was placed on lower paid jobs because of his colour or race. Mr
15 Cater referred the Tribunal to the fact that workers such as the claimant were placed on jobs through their line manager and also by the centralised booking system on an anonymised basis. To this end Mr Cater referred to the Tribunal to the ET1 where it is stated that the claimant wanted to work many hours per week and therefore, by inference, wanted to cover any shifts that were on
20 offer.
24. Mr Cater submitted that the shift worked by the claimant at the Black Rose Tavern was for Stewart Duncan's company and that this was evidenced by the payment for the shift being paid by Stewart Duncan's company. He
25 submitted that there was no evidence that there was a racial motivation on the part of Stewart Duncan for placing the claimant on this shift and that in fact it demonstrated that Stewart Duncan considered the claimant highly in that he wanted to employ him in his own company. Mr Cater submitted that, further, Stewart Duncan acted outwith his contract of employment by placing
30 the claimant on this shift and that therefore the respondents have no liability for his actions in this respect.

Discussion and Decision

25. In their deliberations in this case the Tribunal turned to the List of Issues as agreed by the parties.

5 **(i) Holiday Pay-Is the Claimant entitled to holiday pay and if so how much?**

26. The Tribunal noted that the claimant accepted the sum of £522.50 admitted by the respondents was the correct sum due to him as holiday pay.

10 **(ii) Unlawful Deduction of Wages – Was the claimant underpaid wages by the following sums? £95 in September 2021 and £301.95 in October 2021?**

15 27. The Tribunal noted that the respondents acknowledge the sum of £97.50 is due by them to the claimant as unpaid wages.

20 28. There was no evidence upon which the Tribunal could make a finding that further sums were due to the claimant as unpaid wages. To this end the Tribunal did not accept that there was an agreement between the claimant and Stewart Duncan that he be paid £11 an hour for all shifts, only for shifts in pubs and clubs.

(iii) Race Discrimination- Was the Claimant treated less favourably because of his race?

25 **(a) Was the claimant entitled to an hourly rate of £11 an hour and did the respondent fail to pay this hourly rate because of his race?**

30 29. The Tribunal finds that the Claimant was paid an hourly rate of £11 an hour for his work in pubs and clubs, as agreed by Stewart Duncan. The respondents acknowledge that they are due to pay the claimant the shortfall for his work in the Genting Casinos where he was paid £10 an hour.

30. The Tribunal noted that the claimant's Statement of Terms and Conditions of Employment provide that employees such as the claimant accept that hourly rates would vary from site to site.

5 31. The Tribunal found that the reason why the claimant was not paid £11 an hour for his work on the Crudens sites was because of the competitive nature of work in the construction industry where rates are much lower.

10 32. In these circumstances the Tribunal found no evidence to substantiate this claim of race discrimination. This claim is accordingly dismissed.

(b) Did the claimant's line manager place the claimant on jobs that paid less than £11 an hour because of his race?

15 33. The Tribunal noted firstly that the claimant was placed on jobs both by the respondents' centralised system and by his line manager. The respondents' centralised system placed workers such as the claimant on jobs on an anonymised basis.

20 34. The Tribunal found that there was no evidence, aside from the claimant's own assertions, that could lead them to find that the respondents had placed the claimant on jobs (such as at the Cruden Homes) because of his race. The list of jobs that the respondents placed the claimant on **(85-86)** showed a mix of pubs and clubs (where the higher rate of £11 an hour was paid or admitted) and shifts with a lesser hourly rate such as the shifts at Cruden Homes.

25 35. For these reasons it is the decision of the Employment Tribunal that this claim cannot succeed. This claim is accordingly dismissed.

30 **(c) Was the claimant assigned to work on a site that was not as described and had more than one access point because of his race?**

36. The Tribunal found that there was no evidence to support the assertion that the claimant had been placed on jobs at the Cruden Homes site because of his race. For this reason alone this claim must fail.

5 37. The Tribunal observed that it was not within the ambit of their remit in this case to comment upon the working practices at the Cruden Homes site.

(d) Was the claimant allocated work at sites not owned (controlled) by the respondents for which a separate payment regime was operated because of his race?

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38. The Tribunal finds that the claimant's shift at the Black Rose Tavern in Rose St was organised and instigated by Stewart Duncan without the knowledge of the respondents. The claimant was paid by Stewart Duncan's company SD Maintenance Ltd as shown on the claimant's bank statement at **117**.

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39. There was no evidence whatsoever to support the contention that the offering of this shift (and the payment of it) to the claimant was racially motivated by Stewart Duncan. Further and in any event it must have been clear to the claimant, at least by the time of payment, that the shift was for SD Maintenance Ltd and not for the respondents. For these reasons this claim cannot succeed and is dismissed.

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40. It is for these reasons that it is the judgment of the Employment Tribunal to order the respondents to make payment to the claimant of the sums of **£522.50** gross holiday pay and **£97.50** unpaid wages. All other claims are dismissed.

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Employment Judge: Jane Porter
Date of Judgment: 23 March 2023
Entered in register: 23 March 2023
and copied to parties

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