# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr. Q. Ali | AND | Atalian Servest Security Services Limited |

**HEARD AT: Watford Tribunal** **ON:** 26 January 2023

**BEFORE:** **Employment Judge Douse (Sitting alone)**

**Representation**

**For Claimant:** In person

**For Respondent:** Mr Francis, Counsel

# RESERVED JUDGMENT

1. The Claimant's claim for a redundancy payment is not well-founded and accordingly fails;
2. The Claimant's claim for holiday pay is not well-founded and accordingly fails;

# REASONS

**Claims and Issues**

1. The Claimant, by way of a claim form presented on 16 June 2022, brought complaints of:

1.1 Redundancy

1.2 Holiday pay

**Procedure, documents and evidence heard**

2. The case was listed for a 3-hour in person hearing. With the Claimant unrepresented, and two witnesses for the Respondent, this was unlikely to allow sufficient time for deliberation and delivery of an oral judgment.
3. There was an electronic bundle, totaling 135 numbered pages, provided by the Respondent. My attention was taken to a number of these documents as part of me hearing evidence - I refer to this bundle by reference to the relevant page number within [ ].
4. After dealing with preliminary matters regarding additional documents – emails from the Claimant (which were largely in the bundle already) and more payslips from the Respondent - evidence started just before 10.30am. I committed to the parties that we would at least complete all evidence in the allocated time, but that judgment would likely be in writing at a later date. As evidence continued until 12.50pm, I also invited parties to provide submissions in writing by 5pm on 17 February 2023, which both did.
5. The Claimant had submitted an email dated 10 October 2022 [128 – 129], which stood as his written witness statement, and gave sworn oral evidence.
6. On behalf of the Respondent, I was provided with witness statements from Emma Craig - HR Business Partner for the Security Division [130-131] - and Allan Morrice - Planning and Support Manager for the Security Division [132-134], who also gave oral evidence.

## Facts

*Contract and redundancy*

7. The Claimant was employed as a relief security officer from 17 October 2019, on a 5-hour pw contract [29]. Ms Craig's evidence [130] was that he was initially employed by ISS, and then transferred to the Respondent under TUPE on 19 November 2020. The Claimant disputes the existence of ISS and raised, in submissions that Mr Morrice says he was employed directly by the Respondent [132]. I am unclear what point the Claimant is making here as the dates for employment by the Respondent are consistent between the 2 witnesses – 19 November 2020. Additionally, the Claimant's Access HR record [38]., shows employment from that date, with an additional entry for continuous service from 17 October 2019, which is indicative of a TUPE transfer.
8. For the majority of the time, the Claimant worked at the Addison Lee site in Hayes. That site closed at the end of March 2022.
9. The Claimant relies on his long working at the Addsion Lee site in Hayes to support his position that upon this site closing in March 2022 he should have been offered redundancy.
10. In an email dated 26 April 2022 [41-43], the Claimant raised a number of grievances. He says that prior to the site closing, he sent emails to his manager "Pebs", on 20 February 2022 and 26 March 2022, about this - I was not provided with copies of these emails.
11. Within the grievance he outlines the difficulties he has had getting shifts since the Hayes site closed, and also details the efforts he has made to find work at other sites.
12. Most of this email deals with allegations of favouritism regarding shift allocation. There is passing reference to not getting full holiday allocation, but no detail as to how much the Claimant says he was entitled to versus how much he has been permitted to take, or why he says there has been an incorrect calculation.
13.

14. The Claimant refers to other staff having been offered redundancy and/or being transferred to other sites. Ms Craig explains [130-131]that this was indeed the case for permanent employees, but not for the Claimant who was a relief worker.
15. The Claimant also raises issues with bank holiday shifts on 2 and 3 June 2022 having been cancelled after they were booked for him.
16. At the end of the grievance email, the Claimant states that he has taken legal advice [43].
17. The Claimant remains employed by the Respondent. The Respondent's position is that he remained on a relief worker contract until September 2022.
18. The Claimant alleges that his contract actually changed in October 2021, whereby he went to 2 days per week. This was two 12-hour shifts, totaling 24 hours.
19. The sole supporting evidence of this is an email from payroll dated 7 September 2021 [99/101], which states:

*"Hi Ali,*

*You are contracted to 2 days a week (weekends) so your holiday entitlement is 11 days a year, that's why it shows you have overtaken your holiday entitlement.*

*Thanks,*

*Aneta"*

20. The Claimant gave oral evidence that a new contract started around that time. He says that he had a conversation with his manager, Pebs Cambell, 3 or 4 weeks before this, and also with HR because his visa was running out so he needed proof of his work status for immigration purposes. He says that the official nature of the communication being used for immigration purposes means it must be accurate.
21. The Claimant did raise issues about not being given work within his grievance of 26 April 2022, particularly when others have been offered work above him, but at no point does he refer to being on a 2-day per week contract.
22. There is no reference to a conversation with Mr Campbell prior to the payroll email within the Claimant's witness statement, or in any of the internal grievance

procedure with the Respondent. Internal emails from Mr Campbell [66] show that his position was that the Claimant was on a 5-hour contract.

23. The dispute over the Claimant's contract was not raised in his tribunal claim, and therefore not addressed in the Respondent's grounds of resistance [24-25].
24. The Claimant sent a further email on 12 May 2022 [48-49], refers to issues over 5 days holiday booked and taken 4 – 8 April, 2022 which the Claimant was only paid 1 day off [113].
25. Within this email, the Claimant refers again to the issue with bank holiday shifts. He also refers to the Respondent receiving correspondence from the tribunal or "his solicitor" [49].
26. A grievance meeting took place with Gavin Elmy - Security Regional Operations Manager - on 23 May 2022. Mr Elmy states that the email from payroll was mistakenly based on hours worked, rather than contracted hours. He agreed to honour the annual leave entitlement for 2021, if provided with the email, which the Claimant agreed to forward. An internal email from Mr Elmy on 14 June 2022 [64] confirms that resolution to the 2021 annual leave complaint is to *"pay him for the holiday that he would have been entitled to in 2021 based on the information he was given and allow him to carry into 2022."*

27. Mr Elmy further agreed that having been booked for the June bank holiday shifts, the Claimant would either get shifts on those dates or be compensated for them.
28. In relation to the shift allocation generally, Mr Elmy refers to the Claimant having a lesser contractual entitlement than other staff. The Claimant says that his position is he was on a 2-day per week, weekend, contract.
29. In relation to the status of the Claimant's contract, because of the email from payroll, Mr Elmy says this was mistakenly sent based on the average hours the Claimant had been working, rather than what he was contracted for.
30. The minutes of the grievance meeting record that the Claimant advised Mr Elmy that the holiday information came from payroll because he had queried how much holiday he was entitled to, and they advised 11 because he was on a 2-day per week contract [59].

*31.* The second part of the email states "s*o your holiday entitlement is 11 days a year, that's why it shows you have overtaken your holiday entitlement.*

32. I was not provided with a copy of any email(s) that immediately preceded this, but there were internal emails in August 2021 [107] querying the Claimant's holiday entitlement.
33. In all the circumstances, I find that it is more likely than not that the payroll email was generated in response to a query regarding annual leave entitlement. I also note that it is incredibly unlikely that a short email of this sort would be accepted for something as formal as an immigration/visa process.
34. I do not accept that there was any discussion between the Claimant and his manager about a contract variation prior to the payroll email, or even after it was received.
35. In relation to closure of the Hayes site, Mr Elmy agreed that the Claimant should have been consulted at the time. The Claimant interprets this statement to support that he should have been specifically consulted in relation to redundancy. The Respondent's position is contained within the grievance outcome letter [81] which states *"I believe that regardless of whether you were part-time or full time, you should have been part of the discussion".*

36. My interpretation of the concession that the Claimant should have been consulted is in line with the Respondent's - that he should have been included in discussions/provided with information.
37. On 14 June 2022 the Claimant emails Mr Elmy [63] - seemingly responding to an email of 26 May, which I have not been provided with. Within this email he maintains his position regarding the 2-day contract, and states if there is no site where he can work this then he is happy to take redundancy.
38. A letter outlining the outcome of the grievance was issued on 24 June 2022 [80-83]. This included reference to what the Claimant could do if he wished to take voluntary redundancy. He replied on the same day, stating that he did not want voluntary redundancy [84].

39. On 28 June 2022, the Claimant emailed Emma Craig referring to a phone call with her that day [88]. Within this email he refers again to being on a 2-day per week contract, and for the first time asserts that he should have been paid for these shifts even if there was no work for him.
40. Considering the Claimant's work record [39], after October 2021, he tended to work at least 24 hours each week, but there are a number of weeks where he worked just 12 hours (1 shift) - weeks commencing: 7 November 2021; 12 December; 20 February 2022; 27 February; 6 March; and 12 June. There are also a number of weeks where he did not work at all – weeks commencing: 21 November 2021; 27 March 2022 through to 25 May inclusive.
41. The Claimant has not brought any wages claims in relation to the weeks where he was given less than 2 shifts per week. He only selected redundancy and holiday pay at section 8.1 of the claim form [7], and only referred to these claims at section 8.2 [8].
42. Internal emails that followed the grievance meeting [64-66], show that the payroll email was issued by mistake based on the hours that the Claimant had generally worked/been paid for.
43. For the reasons already outlined above, I find that the email from payroll does not amount to a variation of contract, and that what happened in practice supports the respondent's position that the Claimant was a relief officer on his original contract.

*Holiday pay*

44. The leave year for the Claimant ran from 1 January until 31 December each year. In line with the facts found above, the Claimant's holiday was calculated on an accrual basis at the relevant time.
45. Considering the Claimant's holiday record [39], in 2020 the Claimant worked 252 hours and accrued 27.14 hours of holiday. He took no holiday in 2020, so his accrued holiday was carried over to the 2021 holiday year.
46. It is unclear on what basis the Claimant asserts that he was given less holiday than he was entitled to for 2020, as even on his evidence any change to contract - and therefore entitlement calculation - did not occur until October 2021.

47. By the end of December 2020, the Claimant was aware of any discrepancy with his 2020 holiday entitlement. In cross examination, he said that he had raised an issue with his manager around that time but did not get a reply. There was no documentary to support this being raised.
48. The Claimant did not raise a grievance about his 2020 holiday entitlement, and did not bring an employment tribunal claim, before the 2022 complaints. He said that there was no particular reason he did not do this until then.
49. In 2021 the Claimant worked 864.88 hours and accrued 93.14 hours. He took (and was paid for) 144 hours of holiday.
50. By the end of December 2021, the Claimant was aware of any discrepancy with his 2021 holiday entitlement. He did not raise a grievance about his 2020 holiday entitlement, and did not bring an employment tribunal claim, before the current (2022) complaints.
51. In the 2022 leave year, up to 16 June 2022, the Claimant had worked 384 hours, accrued 47.82 hours of holiday, and taken (and been paid for) 12 hours of holiday.
52. As the Claimant's employment continued beyond the date of his claim to the Tribunal, his accrual and ability to take leave also continued.

**Law**

53. Section 135 Employment Rights Act 1996

**— The right.**

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).

54. Section 147 Employment Rights Act 1996

**— Meaning of *"lay-off"* and *"short-time"* .**

(1) For the purposes of this Part an employee shall be taken to be laid off for a week if—

(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but

(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

(2) For the purposes of this Part an employee shall be taken to be kept on short-time for a week if by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for the week is less than half a week's pay.

55. Section 148 Employment Rights Act 1996

**— Eligibility by reason of lay-off or short-time.**

(1) Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—

(a) he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (referred to in this Part as *"notice of intention to claim"* ), and

(b) before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.

(2) This subsection applies if the employee has been laid off or kept on short-time—

(a) for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or

(b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.

56. Section 150 Employment Rights Act 1996

- **Resignation**

(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period.

(2) The period of notice required for the purposes of this section—

(a) where the employee is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give, and

(b) otherwise, is one week.

(3) In subsection (1) *"the relevant period"* —

(a) if the employer does not give a counter-notice within seven days after the service of the notice of intention to claim, is three weeks after the end of those seven days,

(b) if the employer gives a counter-notice within that period of seven days but withdraws it by a subsequent notice in writing, is three weeks after the service of the notice of withdrawal, and

(c) if—

(i) the employer gives a counter-notice within that period of seven days, and does not so withdraw it, and

(ii) a question as to the right of the employee to a redundancy payment in pursuance of the notice of intention to claim is referred to an [employment tribunal][1] ,

is three weeks after the tribunal has notified to the employee its decision on that reference.

(4) For the purposes of subsection (3)(c) no account shall be taken of—

(a) any appeal against the decision of the tribunal, or

(b) any proceedings or decision in consequence of any such appeal.

57. Regulation 14 Working Time Regulations

Compensation related to entitlement to leave

(1) [Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(A x B) - C

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

[(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the

worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.]

58. Section 112 Employment Rights Act 1996

**— Complaints to [employment tribunal][1] .**

(1) A complaint may be presented to an [employment tribunal][1] against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section][2] , an [employment tribunal][1] shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

**Submissions**

59. Both parties provided written submissions as requested.

*Claimant*

60. The Claimant's submissions focus on what he says are discrepancies between the statements of the Respondent's witnesses, and says that these have the effect of discrediting their evidence.
61. He also repeats his assertion that the email from payroll was as an official document for immigration purposes.
62. I have already dealt with these points in my findings of fact.
63. The Claimant also queried the accuracy of a 5-hours per week contract when all shifts were for 12 hours each. This is not relevant to the issues in the case.

*Respondent*

64. The Respondent's submissions are, in summary:

64.1 There was no change to the Claimant's contract

64.2 The Claimant was not dismissed, so is not entitled to a redundancy payment

64.3 The Claimant did not comply with the NIC provisions for short-time lay off, so is not entitled to a redundancy payment

64.4 The Claimant's holiday was accurately calculated based on accrual

**Conclusions**

65. I applied the relevant legal tests to the findings of fact that I have made, to reach my conclusions on the issues for determination. I have set my conclusions out in the same order as the list of issues.
66. Having found that the October 2021 email from payroll does not amount to a variation of contract, I conclude that at all relevant times the Claimant was employed as a relief security officer on the basis of 5 hours per week.
67. I make the following specific conclusions regarding the claims:

*Redundancy payment*

68. As the Claimant's employment is continuing there has been no dismissal, and he is not entitled to a redundancy payment on this basis.
69. In those circumstances, the only way the Claimant could be entitled to a redundancy payment is via the statutory provisions for lay off or short-time.
70. Based on my findings regarding the Claimant's contract, a short-time week in these circumstances can only be a week where no work was provided. The weeks where less than the 24 hours the Claimant asserts, are not counted.
71. The first period of 4 consecutive weeks of short-time/lay off therefore runs from 27 March 2022, until 23 April 2022.
72. The first evidenced contact from the Claimant regarding the issue of a redundancy payment is 26 April 2022. This is within the required 4-week period for written notice

of intention to claim (NIC), if the Claimant was intending to rely on the first 4 consecutive weeks of no work.

73. However, I do not consider this email to be NIC. It is clear from this communication the Claimant is complaining about not having been given a redundancy payment previously, rather than indicating a wish to be considered redundant at this time.
74. I have considered whether the statutory provisions are something that the Claimant may not have known about so would not have necessarily been able to follow the full correct procedure. However, in the 26 April email he says that he has taken legal advice – and references a solicitor again in correspondence in May - if that is the case I would expect that he would have been advised on the various options and would have specifically referred to
75. My conclusion that the Claimant was not invoking the NIC provisions is further supported by his communications that follow – he wants to work, and explicitly objects to any inference that he wants to be voluntarily redundant. Even when he expresses an interest in redundancy on 14 June 2022, by 24 June he is again rejecting any idea that he wants redundancy.
76. The Claimant's claim for a redundancy payment is not well-founded and accordingly fails;

*Holiday pay 2020*

77. Any claim in relation to the 2020 leave year should have been made by 30 March 2021.
78. The Claimant's claim for accrued but untaken holiday in the 2020 leave year is out of time. It was reasonably practicable for him to have brought a claim by that date, because he was aware of any issues before that date, and gave no reason why he did nothing about it.
79. In any event, the Claimant's annual leave entitlement for 2020 was carried over into 2021.

*Holiday pay 2021*

80. Any claim in relation to the 2020 leave year should have been made by 30 March 2022.
81. The Claimant's claim for accrued but untaken holiday in the 2021 leave year is out of time. It was reasonably practicable for him to have brought a claim by that date, because he was aware of any issues before that date, and gave no reason why he did nothing about it.
82. In any event, the Respondent committed to giving the Claimant his 2021 holiday entitlement based on the miscommunication from payroll, and to allow it to be carried into 2022. On that basis appears to be no claim

*Holiday pay 2022*

83. The Claimant was still employed by the Respondent at the point of his claim, and remains so.
84. There was still around half of the 2022 holiday year remaining at the point the Claimant brought his Tribunal claim.
85. This claim was therefore made prematurely.
86. Additionally, as I found he was not on 2-day pw contract, and has taken 1 day off, unlikely to be any accrued unpaid leave even at the point of claim.

87. The Claimant's claims for holiday pay are not well-founded and accordingly fails;

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Employment Judge K Douse

Dated: 6 April 2023……

Sent to the parties on: 21/4/2023

NG

For the Tribunal Office