EMPLOYMENT TRIBUNALS

Claimant: **Mr D Mitchell**

Respondent: **G4S Secure Solutions (UK) Limited**

On: **9 May 2023**

Before: **Employment Judge McAvoy Newns**

At: **Watford Employment Tribunal**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr Clark, Solicitor**

WRITTEN REASONS

Form of hearing

1. This was a remote hearing which was not objected to by the parties. The hearing took place via CVP, the Tribunal's video conferencing platform.

Background

2. During the hearing on 9 May 2023, I gave oral judgment that the Claimant's claim was not well founded and was dismissed.

3. On 29 June 2023, I received an email from the Watford Tribunal stating that, on 24 June 2023, the Claimant had written to the Tribunal and requested written reasons for this decision.

4. These written reasons have been provided as soon as practicable following this direction, bearing in mind my other judicial and non-judicial commitments.

Issues

5. In respect to the Claimant's employment status, the Respondent's position was that the Claimant was presently engaged on a zero hour contract basis. The Claimant was confused as to whether his employment or engagement was ongoing and had received advice that his employment ought to be ongoing.

6. The Claimant's claim was that there had been unauthorised deductions from his wages as follows:

    1. 16 hours work for February 2021; and

    2. 1,120 hours work for the period between 5 July 2021 and 9 May 2023.

7. In respect to (2), the Claimant accepted that he was paid for all of the work he undertook. His claim was that he was entitled to receive pay for this work, even if he had not carried it out, because he was working pursuant to a guaranteed work and pay contract.

8. The Respondent resisted the claims. A key point from the Respondent's perspective was their assertion that, in November 2021, the Claimant transitioned from being an employee, entitled to guaranteed work and pay, to a zero hours worker, with no entitlement to any guaranteed work.

9. A further key point from the Respondent's perspective was that, if they were correct about the above, the last unauthorised deduction from the Claimant's wages must have occurred in November 2021 and the claim was therefore prima facie out of time (subject to my discretion to extend time).

10. The issues therefore were as follows:

    1. From November 2021, was the Claimant employed/engaged pursuant to a guaranteed hours contract?; and

    2. If so, what wages were properly payable from February 2021? What wages were received? What was the shortfall (if any)? Did such shortfall(s) amount to unauthorised deductions? Are the claims in respect to any of these deductions in time?; or

    3. If not, the Claimant would have no entitlement to pay in the circumstances that have been claimed by the Claimant from November 2021 onwards. Therefore, the issues would be:

        i. Are the Claimant's complaints in respect to alleged deductions preceding November 2021 in time? If not, should discretion be exercised to extend time?;

        ii. If so, what wages were properly payable between February and November 2021? What wages were received? What was the

shortfall (if any)? Did such shortfall(s) amount to unauthorised deductions?

11. Despite there being events after 14 December 2022 which the Claimant seemed to be relying upon, there was no application for permission to amend the claim. The issues were therefore confirmed to be those set out above.

12. Additionally, the Claimant initially mentioned that his main claim was unfair treatment at the hands of his line manager. However the legal claim being pursued and considered at this hearing was limited to the claim that he had been subjected to unauthorised deductions from his wages. During submissions the Claimant confirmed he was happy to put aside his complaints about his manager and continue to raise those internally with the Respondent.

13. Although there was a reference in the Claimant's submissions to a holiday pay claim, he confirmed that it was not mentioned in his ET1 or his witness statement. After asking the Claimant whether he wished to make an application for permission to amend his claim, he agreed this claim was not being pursued.

Legal title of the Respondent

14. The Respondent confirmed, and the Claimant agreed, that the correct legal title of the Respondent was G4S Secure Solutions (UK) Limited. The Respondent took no issue with the description provided by the Claimant. The name of the respondent was therefore amended accordingly.

Evidence

15. The Claimant served a witness statement and was cross examined on that statement. Despite the issues in the case being relatively narrow, the Claimant's witness statement was lengthy and contained a significant amount of irrelevant evidence including evidence pertaining to matters after 14 December 2022, when the claim was presented to the Tribunal. I have read the Claimant's witness statement in full but focused on the evidence relevant to the issues in the case.

16. The Respondent served a witness statement for Stephen Allen. He was cross examined on that statement by the Claimant.

17. I also had sight of a small bundle of documents. I informed the parties that I would only be reading those documents that were specifically brought to my attention during the evidence, which the parties acknowledged.

18. There had been issues between the parties in respect to the preparation of the bundle that do not require detailed exposition here. I asked the parties whether the updated version of the bundle provided by the Respondent contained all of the Claimant's documents. The Respondent's representative confirmed that he believed that it did. The Claimant was unsure. I agreed to consider both versions of the bundles.

Conduct during the hearing

19. The Claimant repeatedly failed to answer questions directly during the hearing. I informed the Claimant that I had read and understood his claim, his witness statement and his skeleton argument. The Claimant told me that he had a medical condition which was preventing him from following what I was saying and told me that he may need to ask me to repeat my questions. I asked him whether he had alerted the Tribunal to this medical condition before, so that reasonable adjustments could be considered. An example of an adjustment could have been a longer hearing, bearing in mind that this hearing had only been listed for one day. He told me he had not. Nevertheless, I told him it was important for him to be able to follow everything that was said during the hearing and, therefore, if repetition was needed, he should request it. He also informed me that I was speaking too quickly for him to process what I was saying. I made an effort to ensure I was speaking more slowly throughout the hearing. I highlighted that if the evidence was not concluded in time, the hearing would go part-heard and continue on another day. It was obviously more important that the Claimant was able to engage in the hearing and understand and process all that was being said.

Findings of fact

20. Having considered the evidence, both oral and documentary, I made the following findings of fact on the balance of probabilities.

Events up to November 2021

21. On 31 July 2020, the Claimant commenced employment with the Respondent as a Security Officer at Little Barford Power Station.

22. The Respondent provides security related services and products to customers at a variety of different locations.

23. The Claimant's contract of employment provided an entitlement to an average of 12 hours work, taken over a period of several weeks, which equated to 52 hours per month.

24. By way of further explanation, the Claimant was entitled to be offered 52 hours of work per month but if he was not offered these many hours, he would be paid for 52 hours of work in any event. The balance was referred to as 'red hours'. For example, if he was only offered 30 hours work per month, 22 hours would be 'red hours' and he would be paid for these.

25. However, if the Claimant was offered 52 hours of work and did not work some or all of the hours offered, he would not be paid for them. For example, if he was offered 52 hours of work but only worked for 30 hours, he would only be paid for 30 hours of work.

26. In order to be offered work, the Claimant was required to provide information regarding his availability to the Respondent. The Respondent would use such availability information to offer the Claimant work.

27. The Claimant's contract of employment also contained a mobility clause entitling the Respondent to require the Claimant to work at different locations within an operating area. The Respondent said this flexibility was needed given that the Respondent may lose and gain customers and therefore it may not be the case that Security Officers would generally be guaranteed an ability to work from a set location exclusively.

28. In cross examination with the Respondent's witness, the Claimant raised the fact that one of his colleagues was only required to work at Little Barford. The Respondent agreed, explaining that this colleague was assigned to this site following a TUPE transfer. Their situation was therefore different to the Claimant's.

29. Save for the issues he had regarding his pay in February 2021, the Claimant said he had no issues with the pay he received up to June 2021.

30. From July 2021 onwards, the Claimant did not contact his line manager nor G4S NCC Controllers with his availability to work nor did he highlight his availability to work on Javelin. The Respondent's evidence was that these were the three points of contact/notification that the Claimant was expected and trained to use in order to notify the Respondent of his availability.

31. The Respondent's evidence was that, at this time, the Respondent had available work at sites within the operating area but that the Claimant would only work at Little Barford, would not work nights and was selective about his availability.

November 2021 onwards

32. On 10 November 2021, the Claimant's line manager contacted the Claimant to let him know that he hadn't received any work arrangement from him. He suggested that he and the Claimant speak in person the following day. Bearing in mind the lack of availability received from the Claimant since July 2021, he also stated: "If you wish to me on a more flexible contract – I will process this".

33. The Claimant replied stating that he was filming all week. He went on to state: "After 26yrs of commuting to London im really only interested in occasional local work". In the same email he stated that when he applied for the job it was advertised as being based at Little Barford. He also said this was discussed during his interview. The Respondent disputed this and referred the Claimant to his contract, as summarised earlier.

34. The Claimant was questioned about this during the hearing and said: "Yes I was open to be on a more flexible contract provided it would be at that location only. Didn't want to commute anymore. I wasn't a job closer to my house". However,

he went on to say that he was only expecting there to be a change in his location in the amended contract.

35. On 10 November 2021, his manager replied: “That’s not a problem. I will arrange a contract amendment so you can be left for adhoc work – when it suits you”. The Claimant did not reply.

36. On 23 November 2021, the Claimant was issued with a new contract headed Zero Hours / Casual Staff Working Agreement. In the cover email the Respondent referred to the recent discussions between the Claimant and his line manager.

37. The Claimant accepts that he received this contract.

38. The Respondent accepts that the Claimant did not sign this contract.

39. The Respondent’s evidence was that the Claimant did not object to the provision of such contract at time and before raising a complaint in September 2022 (considered later).

40. The Claimant said that he called HR to object to this but accepts that there is no objective evidence before me of him having done so. He accepted that the attempts he had made to obtain this evidence post-dated the date for disclosure in these Tribunal proceedings.

41. The Respondent’s representative put to the Claimant that it would have been much simpler to respond to either his line manager’s email or HR’s email to say that he objected.

42. I then asked the Claimant whether, if the new contract referred to Little Barford as the place of work but had all of the zero hour type of provisions in there, would he have signed it. The Claimant replied: “Yes, I was happier with a more flexible contract but just wanted a guarantee that I would only work at Little Barford”.

43. This contract stated that there was no obligation on the Respondent to provide work and no obligation on the Claimant to do work.

44. The exception to this was that the Claimant would need to work at least one shift per month, otherwise his file would be closed and he would be removed from the Respondent’s bank of casual workers.

45. From this point onwards, the Respondent perceived the Claimant to be a casual worker.

46. The Claimant did not make himself available to work as a casual worker and therefore on 4 January 2022, the Claimant’s line manager contacted him to discuss his plans, bearing in mind the above mentioned requirement to undertake one shift per month.

47. The Claimant responded stating: “Had you arranged my contract to be on a more casual, zero hours type until a more mutually proximity vacancy may arrive?” The Respondent interpreted this as the Claimant querying why he had a minimum commitment to work, given that he had been moved to a zero hours contract.

48. On 25 January 2022, the Claimant emailed the Respondent stating that he preferred to work on his own and asking if there were any “dead sites” which required occasional weekend cover.

49. On 27 February 2022, the G4S Ops Support team messaged the Claimant to let him know that there was a shift available that evening. It stated that, if the Claimant wished to cover this shift, he should call a designated number.

50. On 1 March 2022, the Claimant confirmed that he was not available to work as he was completing route 66 in America.

51. On 20 March 2022, G4S Ops Support team messaged the Claimant to let him know that there was a shift available. It stated that, if the Claimant wished to cover this shift, he should call a designated number.

52. On 18 May 2022, the Claimant’s line manager emailed him to let him know that he had some work available from the following day until September 2022 and asked the Claimant for his availability during this period. He said that he could be free outside of his filming commitments and usually knew the dates of these on the Friday of the preceding week.

53. In respect to this, the Respondent’s representative noted that the Claimant sought to negotiate a higher rate of pay for this work. This was a higher rate of pay applicable to the site. He put to the Claimant that this doesn’t suggest that the Claimant had a contractual obligation to work, as was the case when he was employed pursuant to a guaranteed hours and pay basis. The Claimant replied: “It had been so long since I had been given any work. Had a meeting with and site lead what the current rate of pay was. Now would be the time to negotiate whatever I could”.

54. On 14 August 2022, G4S Ops Support team messaged the Claimant to let him know that there was a shift available. It stated that, if the Claimant wished to cover this shift, he should call a designated number.

55. On 9 September 2022, the Claimant submitted a complaint largely in respect to the Respondent’s failure to offer him work from May 2022 onwards.

56. The Claimant started the ACAS early conciliation process on 5 October 2022 which concluded on 16 November 2022. He presented his claim on 14 December 2022.

The Law

Unauthorised deductions from wages

57. Pursuant to section 13(1) of the Employment Rights Act 1996 (the "ERA"):

> *"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."*

Time limits

58. Section 23(2) ERA states that in respect of a complaint for unauthorised deductions from wages, the Tribunal:

> *"shall not consider a complaint under this section unless it is presented to the tribunal—*
> *(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.*

59. Section 23(4) of the ERA states that where the 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.

60. Section 207B of the ERA states:

> *(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*
> *(2) In this section—*
> *(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
> *(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*
> *(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
> *(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

61. Following *Porter v Bandbridge 1978 ICR 943*, the Claimant has to satisfy the Tribunal not only that she did not know of her rights throughout the period preceding the complaint and there was no reason why she should know, but also that there was no reason why she should make enquiries. In this regard, the burden of proof is on the Claimant.

62. Following *Palmer v Southend-on-Sea Borough Council 1984 ICR 372,* the term 'reasonably practicable' means something like 'reasonably feasible'.

63. As Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

Submissions

64. Both parties provided oral and written submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

Conclusions

Current status of employment/engagement

65. The parties agreed that the Claimant's employment with the Respondent commenced on 31 July 2020 as a Security Officer.

66. There was however uncertainty regarding whether the Claimant's employment was presently ongoing.

67. The Respondent's position was that the Claimant remained engaged on a zero hour contract. It acknowledged the uncertainty regarding this given the contents of the ET3 stating that the employment was no longer continuing however they say this arose because of an automation error arising from submitting the online version of the ET3 form. I too have experienced that error in my practise as a solicitor.

68. The Claimant accepted when clarifying his claim this morning that he had not received a termination letter nor had he submitted a resignation. He also said that he had been advised that he remained an employee. He did not put forward any positive case that his employment had terminated.

69. Consequently, I have found that he is presently either employed or engaged by the Respondent, the issue of his 'status' as an employee or a worker being irrelevant to the issues I have to determine today.

70. As a result of the above, the Claimant's claim is limited to a claim for unauthorised deductions from wages. A breach of contract claim can only be pursued where employment has terminated.

Contractual status from November 2021 onwards

71. The first finding I have had to make concerns the type of contract the Claimant was either employed or engaged under from November 2021 onwards.

72. The Respondent accepts that, prior to 23 November 2021, the Claimant was employed on a guaranteed hours contract. He would generally be entitled to 52 hours of work, and pay, per month, subject to him accepting jobs offered to him. If he was not offered work, he would be paid for these 52 hours. This was subject to the Claimant providing the Respondent with his availability to work.

73. However, the Respondent's position was that, from 23 November 2021, the Claimant's status changed such that he became a casual worker, working pursuant to a zero hour contract.

74. Therefore, from 23 November 2021 onwards, the Respondent's position is that the Claimant had no reasonable expectations regarding a minimum level of hours of work or pay.

75. There is support for the Respondent's position in the correspondence between the parties from November 2021 onwards. The Respondent asked the Claimant to provide a work schedule and, because of the Respondent's perception of the Claimant's unavailability to work, offered him the option of a more flexible contract. The Claimant confirmed that he was interested in occasional local work following which the Respondent agreed to arrange a contract amendment, providing for ad hoc work for the Claimant, when it suited him. An amended contract was sent to the Claimant on 23 November 2021. It was referred to by HR as a Zero Hours / Casual Staff Working Agreement. The Claimant was given 7 days to return a signed version. The contract wording makes it clear that the Respondent was under no obligation to provide the Claimant with work at any time.

76. There is no written evidence of the Claimant objecting to this change in his work status which the Claimant accepts. Also, in evidence the Claimant accepted that he was looking for more casual work but objected to the new contract because it did not say that his work location had been restricted to Little Barford, which the Claimant had believed had been agreed with the Respondent. As the Claimant had requested occasional local work it can be understood why the Claimant had believed that this had been agreed.

77. In response to questions from me, the Claimant confirmed in evidence that all other aspects of the contract were acceptable and, had it stated that his work location would have been limited in this way, he would have signed it. He says he phoned HR to discuss this with them but no objective evidence of this conversation has been put before me. However, unless that evidence was the Claimant's refusal to accept a Zero Hours contract, which it doesn't appear from

the Claimant's evidence today that it would be, such would have provided limited assistance to the Claimant with his case.

78. On the balance of probabilities, and for these reasons, I have concluded that, even though he did not sign the new contract, the Claimant had agreed to becoming a Zero Hours worker with effect from November 2021 onwards.

79. Furthermore, the relationship between the parties has been consistent with this arrangement ever since. The Claimant has not undertaken 52 hours of work per month, nor has the Respondent offered it. Indeed, in January 2022, when the Respondent informed the Claimant that he was required to complete at least one shift per month in order to remain in the bank of casual employees, the Claimant asked whether his contract was not "a more casual, zero hours type, until a more mutually proximity vacancy may arrive". Although this suggests that the Claimant saw the zero hour contract as a stop gap until a permanent position, based only at Little Barford, became available, it does support the proposition that the Claimant was aware that he was working pursuant to a Zero Hour contract from this point.

80. The Claimant asked me to consider his request to work every Sunday. There is a message in his bundle with his site manager from July 2022 saying "Even if you gave me every Sun would've been a start". However the fact that the Claimant has not been given this work is indicative of the relationship that the Respondent perceives it has with him, namely that he is a zero hour worker and there is no obligation on it to provide the Claimant with work.

81. As the Claimant has been on a zero hour contract from November 2021 onwards, he has had no reasonable expectation of work from the Respondent from this point onwards. Therefore, there is no reasonable expectation of pay. This is not a case where the Claimant is saying that he has worked but hasn't been paid for it; it's a case of the Claimant saying I ought to have been provided with work and therefore I ought to be paid for the work not provided to me. As the Respondent has no contractual obligation to provide the Claimant with work, such argument must and does fail.

Pre-November 2021

82. In respect to matters pre-dating November 2021, assuming that the last deduction was on 30 November 2021, the Claimant was required to start the ACAS process by 28 February 2022 at the latest. The Claimant did not do so until 5 October 2022, almost 10 months later.

83. As this claim has been presented out of time, I have to consider whether time should be extended. The test is whether it was not reasonably practicable for the Claimant to present his claim and, if it was not, whether the claim was presented within a reasonable period of time thereafter. In this regard, the burden of proof is on the Claimant. Reasonably practicable ought to be interpreted as whether something is 'feasible'. Whilst a liberal interpretation, in favour of the Claimant, ought to be given, the cases acknowledge that the threshold applied to this test is a high one.

84. The Claimant did not address the reasons for his delay in starting this process in his claim, his witness statement or his written submissions. Appreciating that the Claimant is a litigant in person, I therefore asked him some open questions regarding this when he was giving evidence. Having done so, he did not appear to have any good reason for not starting the process earlier, save that there was a suggestion that he may not have known about ACAS or the Employment Tribunal system until his first call to ACAS, which took place on 18th August 2022.

85. The law states that a claimant's complete ignorance of his right to claim may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. The correct test is not whether the claimant knew of his rights but whether he ought to have known of them. The law also states that where the claimant is generally aware of rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his rights will generally be taken to have been put on inquiry as to the time limit.

86. The Claimant studied law at A level, albeit many years ago. He has prepared his case well and been conscious of the Tribunal's deadlines and case management orders. At the relevant time he had access to the internet and accepted that he was competent in undertaking research. He had access to legal advice and has subsequently learned about the ACAS and Tribunal processes.

87. If the Claimant genuinely believed that he had suffered deductions from his wages from February 2021 onwards, it is reasonable to expect him to have raised it, via ACAS or the Tribunal, in good time prior to October 2022. Consequently, I have concluded that it was reasonably practicable for the Claimant to present his claim in time and, therefore, I do not exercise my discretion to consider his claim out of time.

88. As a result, all of the Claimant's claims are not well founded and have therefore been dismissed.

Employment Judge McAvoy Newns

22 August 2023

Sent to the parties on: 23 August 2023

For the Tribunal: