EMPLOYMENT TRIBUNALS

Heard at: Croydon (in person) **On:** 18 to 20 September 2023

Claimant: Mr Tawanda Howell

Respondent: Pace Security Services Limited

Before: Employment Judge E Fowell

Mr M Cronin

Ms T Williams

Representation:

Claimant In Person

Respondent Mr Paul Bradley, HR Consultant

JUDGMENT

1. The claim of discrimination on grounds of race is dismissed.

2. The claim of unlawful deduction from wages in respect of the reduction in the number of working hours is dismissed.

3. The claim of breach of the Working Time Regulations 1998 in respect of annual leave is upheld and the claimant is awarded compensation in respect of

   (a) 13 days' pay for the holiday year from 1 October 2020 and

   (b) 19 days' pay for the holiday year from 1 October 2021

4. Payment for the second of these holiday years was made during the course of the hearing. The net sum due for the outstanding 13 days is a further £984.10.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given earlier today. As usual some editing has taken place to avoid repetition and these written reasons stand as the final version.

2. By way of background, Mr Howell worked as a Security Patrol Officer on London's South Bank. It is a well-known area, popular with tourists, and his role involved making sure that there was no anti-social behaviour or anything else that might need to be reported to the police. The client, who needed these security services, was the South Bank Employer's Group (SBEG), a partnership organisation representing and supporting businesses in that area such as the Shell headquarters or the National Theatre.

3. In April 2021 there was a small protest by Extinction Rebellion in Jubilee Gardens. SBEG was unhappy at the failure of Mr Howell and his colleague to move the protesters on, and insisted that they be taken off the contract. Mr Howell was then off sick for nearly a year, and during that period he brought this claim. His employment came to an end on 4 August 2022 when he was dismissed over his unauthorised absence. By then his sick notes had ended and he had not been in contract for several months.

4. However, that dismissal plays no part in his claim, which began about a year earlier, on 14 August 2021. His claim form set out claims of race discrimination, unlawful deduction from wages and for holiday pay. The race discrimination claim concerns two allegations:

   (a) that he was not furloughed in 2020, and

   (b) that he was not contacted when he was off sick to enquire about his welfare.

5. The wages claim related to his working hours, which had been reduced during lockdown. He says that he was transferred to Pace from another company, and that he had a right to 40 hours work per week.

6. The holiday pay claims relate to the amounts accrued while he was off sick and before he was dismissed.

Procedure and evidence

7. The first two of these issues were identified at a case management hearing on 1 July 2022, which also noted that there was a time limit issue with regard to the furlough claim.

8. Various case management orders were given with a view to a hearing on 14 December 2022 but it appears that Mr Howell failed to comply with any of them. At a further case management hearing on 14 February 2023 the hearing was put back and further directions given. The issues were reconsidered and the claim for holiday pay was added.

9. Further directions were given, including one that Mr Howell provide a witness statement, but he failed to do so. Mr Bradley, on behalf of the respondent, did not make any particular objection, on the basis that Mr Howell was proposing to rely simply on the facts set out in his claim form, which in turn reflected his grievance, raised on 21 June 2021. On the second morning of the hearing Mr Howell did in fact provide a typed statement, of about the same length.

10. In our initial discussion on the first morning, I went through with the parties the issues set out in the case management orders, and Mr Howell said that he did not agree with the way the race discrimination claim was set out. The second issue - about not being contacted while off sick – was, he said, much broader and he was complaining about being overlooked generally by the company while he was off sick. On that basis we were happy to allow evidence about his general treatment while off sick, up to the time of the claim form.

11. Another specific point which he wanted to raise was new, although it had been mentioned in his schedule of loss. He alleged that the respondent had a practice of dividing up the two-man patrols on racial lines, with what he described as a Caucasian Team, known as the snowflake patrol, an Asian Team and a Black Team.

12. The respondent had seen the schedule of loss but this had not been raised or mentioned in Mr Howell's grievance or claim form, or at the preliminary hearings, and they had not come prepared to deal with it. We therefore declined to allow Mr Howell to amend his claim to add this further complaint of race discrimination. However, for completeness, having heard his own evidence about the relevant working arrangements we conclude simply that the make-up of the patrols varied from time to time and the company had no reason to arrange things on ethnic lines, or any wish to do so.

13. We should record that the hearing had a somewhat delayed start since one member of the original panel was unavailable. Mr Cronin had to join us remotely, using the large screen in the hearing room.

14. We heard evidence from Mr Howell and from his former colleague, Mr Jon Baxter. On behalf of the company we heard from Mr Grant Read, his line manager, and Mr Paul Bradley (HR Consultant), who advised on dealing with the grievance, as well as representing the respondent at this hearing. A witness statement was also supplied from Ms Holly Burt, Finance Manager, dealing with the holiday pay issues. She was not able to attend but her statement was not controversial. It

confirmed that Mr Howell had accrued 13 days leave in the holiday year from 1 October 2020 and then 19 more days in the following year, up to his dismissal in August 2022. The company relies on the "use it or lose it" rule for the first year's holiday pay, and no explanation was given for the failure to pay for holiday accrued in the final year, except that Mr Howell had not been keeping in touch. When we asked about this, Mr Bradley took it on himself to arrange payment, which was made on the second day of the hearing. It only remains to deal with the previous year therefore.

15. Relations between the two sides were clearly strained at the outset, and it had not been possible even to agree a common bundle of documents. We were given two bundles, with very similar contents, amounting to 369 pages in total. We will therefore refer to page numbers with the prefix C and R for the claimant and respondent respectively.

16. Mr Howell did not find this an easy process. He is naturally very talkative, and clearly felt a keen desire to explain himself throughout, rather than, for example, asking questions of the witnesses. Efforts on my part to deflect him, to turn his comments into a question or to let the witness answer were often unsuccessful. At times he did not seem able to restrain himself. However, we did not form the view that he was causing difficulties deliberately, and was often apologetic. Overall we are satisfied that both parties were able to set out their case in full, although the process took rather longer than it might have done.

17. Having considered this evidence and the submissions on each side, we make the following findings of fact, which are confined to those which are necessary to support our conclusions. Many points of detail will have to be omitted since we have to focus on that agreed list of issues.

Findings of Fact

18. For the first three years of his contract Mr Howell was working for Corps Security (UK) Limited. He and Mr Baxter worked together on a pattern of two early shifts, then two late shifts, then a few days off. The TUPE transfer took place on 1 April 2019 and, in accordance with those regulations, their existing terms and conditions of employment transferred with them to the respondent (Pace).

19. Having worked such a regular pattern for such a long time, Mr Howell understood that he was on a contract for fixed hours. The claim form says that he worked 40 hours a week. However, he has not been able to supply his original contract of employment and neither has the respondent. In the course of these proceedings he wrote to Corps Security for a copy and they did not have one either, but they did supply a copy of their standard terms. That does not have any fixed hours. It states at clause 10 (Hours of Work) [C2] that

> "There are no normal hours of work. You are required to work as and when the Company notifies you of a Placement."

20. That is the best evidence we have of the contractual position. With the Employee Liability Information provided at the time, there was a form from Corps Security which recorded that he worked 42 hours a week (not 40) but that cannot displace the terms of the contract. On that basis therefore, we will simply record that Pace ultimately did have the contractual right to change his hours and so the claim of unlawful deduction from wages cannot succeed.

21. As well as Mr Howell and Mr Baxter, two other members of staff from Corps transferred, Tony and Raf. But they had previously worked for another company and had transferred to Corps, so they retained those terms at Corps and then later with Pace; they had a clause providing for 45 hours work a week. There was no reason why Mr Howell would have been aware of this at the time but that later became significant.

22. In late 2019 Mr Baxter took a sabbatical for a few months and so Mr Howell was assigned a new partner. We did not hear detailed evidence about the various changes but Mr Howell has supplied some of the old monthly rosters for the team and in some months he was working with a Charles and at other periods with an Alan. In March 2020, when the first lockdown began, there were seven members of staff in all. The roster only gives their first names, but they were [C106] Tony, Raf, Tawanda (the claimant) and Jon (Baxter), Usbon, Alan and Omer, with Charles and two others listed as providing cover.

23. At the start of the first lockdown period there was a reduced need for security patrols. Many of the businesses were closed. The population at large was initially kept at home, subject to one hour's exercise a day. SBEG was under financial pressure, as was the respondent. The client wanted fewer patrols but some were still needed. Hours were then cut for those whose contracts allowed, placing Mr Howell (and the others) under financial pressure.

24. It was a difficult time for other reasons too. On one occasion Mr Howell was spat at by a homeless person, and thought he might have got Covid as a result. That led to a period of time off sick. The shift rotas were reorganised and for a time he was doing very tiring 12 hour shifts. There had been a role for a supervisor, whom they reported to during their shift but this was removed. From then on they had more direct contact with the manager at SBEG, Ms Valenzuela.

25. The loss of hours created a situation in which some members of staff could be furloughed but some needed to be kept on. Mr Read elected to furlough Tony and Raf, who were on the 45 hour per week contracts. That meant that there were more hours for the others. Their contract made it easier to qualify for furlough, as there was no issue over them having a zero hours contract and there

were also personal factors. Tony was about 70, and so at greater risk from Covid. Raf had a young son at home.

26. Both Tony and Raf were white, and at the time that left four remaining members of staff, only one of whom was white – Mr Baxter. Whatever the other four members of staff made of this, there does not seem to have been any formal complaint at the time.

27. During the summer months of 2020 Mr Howell was working with Charles, and then from August to October 2020 he was back with Mr Baxter (Jon). From November onwards he was working with Alan. That carried on until March 2021, when he was back with Jon again. They had therefore only been together for about seven shifts at the time of the Extinction Rebellion protest on 15 April.

28. They were protesting about one of their number appearing in court that morning. There was a small gathering of people in Jubilee Gardens including a team of drummers, making a noise to draw attention to themselves. Mr Howell and Mr Baxter went over to observe and report, as usual. The police were called. Ms Valenzuela was also closely involved and was in contact with the two men by WhatsApp. It seems from these messages that the crowd had mostly dispersed by 11.30 am but a group of five drummers stayed on until about 12.30. This was reported to Ms Valenzuela at about 2 pm.

29. From those messages she was clearly unhappy about the fact that the protesters stayed so long but it is not clear to us what she expected Mr Howell and Mr Baxter to do about the situation. They had no powers of arrest and they were not allowed to use force. The police were there and did not intervene either.

30. The next morning Mr Howell reported sick, as did Mr Baxter, perhaps in response to the criticisms they had received the previous day. It seems that at that point Ms Valenzuela intervened to say that she did not want either of them working on the contract any more. The reasons she gave to Mr Read, their line manager, included poor timekeeping and “not following procedures.” Again, it was not clear to us what in particular they are supposed to have done wrong, nor was it to them.

31. That criticism was very hurtful for the claimant. He took great pride in his work and absolutely denied (in his evidence to us) being late on any occasion. He felt that Mr Read should have stood up for him more and that the company had a policy of just saying yes to the client in all circumstances. In fact he went further and suggested that Mr Read had conspired with Ms Valenzuela to remove him.

32. There is no real basis for that conclusion. We heard from Mr Read that he had a long conversation with Ms Valenzuela about this but she was adamant, from which we take that he tried to dissuade her. He then tried to call Mr Howell during the day to explain things to him but had no reply. He then sent an email to Mr Howell, which was short and to the point, to say that he had been removed from

the contract. It did not say that he had been dismissed but it did not provide any reassurance either. We do not know Mr Baxter sent a similar message but he too remained off sick and in fact he resigned about a month later.

33. We are not however dealing with a claim of unfair dismissal. Had Mr Baxter simply been dismissed at that point it would be relevant for us to consider whether or not Mr Read made appropriate representations to the client about their decision to remove him from the contract. It is not enough simply to say that they have to do the client's bidding.

34. There was at that stage no such prospect of dismissal. As already mentioned Mr Howell remained off sick for some time. His medical certificates refer to stress at work. We have no other information about his health during the next few months, or about any treatment or referrals made. The last one we have is dated 1 December 2021, after the claim was lodged, and signed him off for three months to 1 February 2022. At that point, they simply stopped. He was invited in January to a meeting to discuss his absence, described as a capability evaluation meeting, but failed to respond.

35. His main point of contact at the company during this period of absence was Mr Bradley, an HR Consultant who had been involved with the business for several years and was called in for advice as required. He became actively involved at the time of Mr Howell's grievance in June 2021. Since the grievance was mainly about Mr Read and his decision to remove Mr Howell from the contract, Mr Bradley undertook the investigation and handled things himself from then on.

36. Mr Howell had one long phone conversation with Mr Howell and both parties viewed it as a very positive discussion. Mr Bradley expressed his concern about the way the two men had been treated and said he would look into it as part of the grievance process.

37. Such processes normally involve having an initial meeting to discuss things, whereas this telephone conversation was just a preliminary discussion. Things never progressed to a formal investigation meeting as Mr Howell remained off work.

38. It might have been better if Pace had put forward some solution to Mr Howell, such as explaining what other contracts or work was available, but it may also be that there was nothing suitable to suggest at the time. It is not necessary to detail all of the exchanges between Mr Howell and Mr Bradley during this period. Mr Howell accepted that at no point did he ever ring Mr Bradley or anyone else at the company. Mr Bradley rang him from time to time and got no answer so he resorted to communicating by email, but usually got no response. It seems that Mr Howell's sick pay had expired by the end of his last sick note, after which communication effectively lapsed. Some months then passed before the

company took steps to address his absence, ending in the dismissal on disciplinary grounds.

39. Overall however, over the period with which we are concerned, which ends when the claim form on 14 August 2021, the level of engagement that Mr Bradley had with Mr Howell seems entirely appropriate and it was Mr Howell's failure to respond for whatever reason – he referred to difficulty with accessing him emails - that was the main difficulty.

Applicable Law

Direct discrimination

40. The test under section 13 Equality Act is as follows:

> (1) 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.

41. The question here is whether the company, in:

> (a) not putting Mr Howell on furlough in 2020 and
>
> (b) not contacting him while off sick to see how he was, and generally ignoring him

treated him *less favourably* than it treated or would have treated someone else in the same circumstances apart from his race. Although Mr Baxter was not put forward expressly as a comparator, his situation was very similar.

42. As noted at the first case management hearing, there is a time limit issue here. For claims of discrimination, the relevant test is set out at section 123 Equality Act 2010, which provides that claims have to be brought within three months of the act in question. Section 140B then extends that period to allow for early conciliation. The relevant date here is 3 months before early conciliation started (on 7 July 2021), so anything which occurred before 8 April 2021 is outside that normal time limit.

43. That is subject to two exceptions set out in section 123. One is where it is just and equitable to extend time, and the other is where there is "conduct extending over a period." If so, it is treated as done at the end of that period. Furlough however was for a limited period, and so was not continuing as at 8 April 2021.

44. The fact that time can be extended where it is just and equitable to do so, but that does not simply mean that it should be extended whenever an employee has a good case. This was considered in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, where Lord Justice Auld held that:

> "25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

Conclusions

Race discrimination

45. Dealing with that time issue first, it is not clear when the decision was taken to furlough some staff and not others, but it must have been about a year before the deadline, and no explanation has been given for the delay in bringing the claim. It appears to be a typical case is which no thought is given to such issues until the employment relationship ends and then a number of allegations are raised, some going back several years. That is not generally a sufficient excuse. In the absence of any other explanation for the delay there is simply no basis for us to conclude that an exception should be made in this case.

46. In any event we are satisfied the decision not to furlough Mr Howell was not because of his race. The fact is that a choice had to be made. Not everyone could be furloughed. Raf and Tony were on a separate contract. That made their selection a logical choice. Mr Howell seems to have regarded furlough as a right which he was denied but that is not the case. The need for his duties continued but at a reduced level and his situation was no different from his colleague Mr Baxter.

47. As to the second allegation of discrimination, the lack of contact and support during his absence, we have already found the company was not at fault there, and there is no basis to conclude that another employee in the same circumstances, including the lack of engagement and response while signed off sick, would have been treated any differently.

48. Section 136 of the Equality Act 2010 sets out detailed burden of proof provisions to apply in discrimination cases, but the reason for the events in question is sufficiently clear cut that there is no need for us to set those out and apply them mechanically.

49. Although it is not strictly necessary for us to deal with, we also reject the suggestion that patrol teams were deliberately made up on ethnic lines. Mr Howell worked for the most part with Mr Baxter, including for about six months after the transfer. This was interrupted when Mr Baxter was on sabbatical, then later by Covid when shifts were being reorganised. There is no suggestion that the company was unwilling for him to work with his white colleague. It may be that pairings of officers with the same ethnicity emerged from time to time, but if

any comments or labels were applied to them, we have not heard any evidence to suggest that this was done by management, let alone that this was a policy decision.

50. The main fact which Mr Howell has complained about however was the decision to take him off the South Bank contract. That never featured in the list of issues, presumably because of the obvious fact that Mr Baxter was removed at the same time.

51. The final claim is for holiday pay. Taking Ms Burt's calculations, Mr Howell had accrued 13 days holiday in 2020/21. There were just over 6 months from the start of that holiday year to the decision to remove him from the contract and his going off sick, so just under six months from then to the end of the holiday year. Since we heard no evidence to suggest that he took any holiday during that period of sickness absence, this 13 days was, we conclude, all accrued while he was off sick, in the period from April 2021 to 30 September 2021, just as the subsequent 19 days were in the next holiday year. Although as a general rule sick leave has to be taken in the relevant holiday year, there are exceptions, where, for example, an employee is pregnant and unable to do so. In those circumstances it is well-established that they are entitled to defer their leave to the next holiday year.

52. The Court of Appeal, in **Smith v Pimlico Plumbers Ltd** 2022 IRLR 347, held that a worker must be encouraged to take paid annual leave before the end of the holiday year. Allowing the worker to take unpaid leave is not sufficient, and, following earlier cases in the European Court of Justice, a worker can only lose the EU-derived right to paid annual leave if the employer can show that it:

    (a) gave the worker the opportunity to take paid annual leave

    (b) encouraged the worker to do so, and

    (c) informed the worker that the right would be lost at the end of the relevant leave period.

53. Although Mr Bradley mentioned that there was an annual reminder of some sort, we have not seen it, and it is not clear whether he had either. There is no documentary evidence that Mr Howell was given this advice. The burden of proof here is on the respondent. Given that he did not attempt to claim any holiday before the end of the holiday year, we are not satisfied on balance that he was given this advice, or any, and so he did not lose his right to paid annual leave for that year.

54. Otherwise, and for all of the above reasons, the other claims are dismissed.

Footnote

55. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent the decision / these written reasons.

56. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent the decision / these written reasons.

57. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell

Date 20 September 2023