



EMPLOYMENT TRIBUNALS

Claimant: Mr Fiaz Shah

Respondent: POD Group Services Ltd

Heard at London Central (by CVP)

On: 24 November 2023

Before Employment Judge Shukla (sitting alone)

Representation

Claimant In person

Respondent Dr Hill

JUDGMENT

1. The respondent did not cut the claimant's overtime or sick pay, or holiday entitlement, when the claimant's contract of employment was transferred to the respondent on 1 January 2023. The claimant's complaint of unfair dismissal (constructive dismissal), and of breaches of the Transfer of Undertakings (Protection of Employment) Regulations 2006 arising from these alleged cuts is dismissed.

WRITTEN REASONS FOR JUDGMENT

2. I gave judgment and oral reasons at the hearing. As requested by the claimant at the hearing, I set out written reasons below. Unless otherwise stated, page references are to pages in the 214-page hearing bundle.

Background

3. The claimant began employment on 23 October 2017 with Lee Baron Group Limited ("Lee Baron"), as a night concierge at Sovereign Court. His employment was transferred to the respondent on 1 January 2023, and TUPE consultations began towards the end of 2022. On 28 November 2022, the respondent emailed to the claimant a "measures letter", setting out the effect of the transfer on his employment. This included a salary increase to £27,000, which the claimant said he would also have received under Lee Baron. On 29 November 2022, a letter was sent to the Sovereign Court team inviting them to a meeting on 5 December 2022 (see page 40 of bundle for 27 June 2023 hearing). There is a conflict of evidence as to what occurred at the meeting. The claimant says he was told that,

following the transfer, there would be cuts to his overtime and sick pay, and his holiday entitlements. The respondent says there were no such cuts, and the respondent's employees did not say at the 5 December meeting there would be such cuts.

4. The claimant attended work early on 4 January 2023, for training on a new ticketing system (an IT system for managing resident issues). However, the claimant did not work out his shift, and instead verbally resigned and left the premises. There is a conflict of evidence about exactly what happened on 4 January 2023. The claimant says he asked questions about his pay, but Ms Horwitz (an employee of the respondent, and witness at the hearing) did not respond to his questions. The respondent's witnesses said (a) the claimant became agitated about the ticketing system, and left his shift because of that; and (b) the claimant did not raise any points on 4 January about cuts to overtime or sick pay, or holiday entitlements.
5. There was an exchange of emails on 5 January 2023 (pages 107-110) in which the claimant sought a copy of his contract "with handbook attached in particular sickness and overtime pay", and then confirmed his resignation. The reasons given by the claimant in this email exchange for his resignation are cuts to overtime and sick pay. The respondent's reply (date and time unclear) said (a) "thank you for confirming", and that (b) it was clear from the 5 December meeting that "all your current benefits such as sick pay and over time etc would remain in place as part of the TUPE transfer process".
6. There was another exchange of emails on 9 January 2023 between the claimant and the respondent (pages 113-115), in which the claimant said he would be prepared to return to work, if the respondent confirmed that his overtime, sick and holiday pay would remain the same as before the transfer. The respondent replied that (a) he had been given such assurances at the 5 December meeting; (b) his resignation had already been processed; and (c) the claimant could re-apply for a position if he wished to return to Sovereign Court.
7. The claimant said at the hearing that the main reason he resigned was the cuts to his overtime and sick pay, and holiday entitlement. The ticketing system was a secondary reason for his resignation, together with a lack of positive or welcoming attitude to him. The respondent submitted that the claimant "seemingly resigned of his own accord on 4 January 2023, for entirely separate reasons, before seeking after the event to re-manufacture his resignation based on alternative reasons" (para 37(d), skeleton arguments).

Proceedings up to the hearing

8. There was a preliminary hearing on 27 June 2023, which was not attended by the respondent, and for which the respondent says it did not receive an invite. A record of the preliminary hearing was drafted by Employment Judge Ord, containing a case management summary, case management orders, and an Annex with Complaints and Issues (the June order). The copy of the June order in the tribunal's files states the order was sent to the parties on 27 June 2023, but the respondent says it did not receive it. The tribunal sent standard directions to the respondent (and the claimant) on 10 August 2023.

9. The claimant sent a schedule of loss as at 17 August 2023. A hearing listed for 13 September 2023 was postponed by Judge Akhtar on 11 September 2023, at the claimant's request: see email dated 11 September 2023 from the tribunal (page 58), and postponement order at page 60. The 11 September email continued as follows: "The Claimant is reminded he must comply with the standard track directions of 10 August 2023. If he has not complied with these directions he must do so as soon as possible but in any event no later than 25 September 2023."
10. On 24 September 2024, the claimant sent an email to the tribunal (page 61) in which the claimant did not file any witness statements, but:
 - a. Attached screenshots of whatsapp messages;
 - b. said he was happy to provide his phone "for forensic".

11. The claimant also said in that email:

I am requesting Tribunal Court to bring Lee Baron to provide witness statement from those who were present on the day of meeting which took place on Monday 5th December 2022 at 17:31 below are their details [emails and phone numbers provided].

HR: Rebekka Channen

HR: Sheena Kotecha Email:

Senior Property Manager: Zen Shaban Rogers

12. The respondent emailed the tribunal on 26 September 2023 (pages 63-4), saying the case management orders had not been complied with, and asking for the case to be dismissed unless the orders were complied with in 7 days.
13. On 2 October 2023, the tribunal wrote to the parties, saying EJ Stout had reviewed the claimant's email of 24 September 2023, and was unclear as to the order sought by the claimant. The tribunal's letter (pages 65-6) said that if the claimant wished to apply for a witness order, he needed to make a further application. The claimant did not make any further applications.
14. The respondent renewed its application on 3 November 2023 for the claim to be dismissed unless the claimant complied with the case management orders within 7 days (page 67). The tribunal sent a letter dated 9 November 2023, stating the following (page 69):

Employment Judge Stout notes that the existing orders required a bundle to be agreed by 27 October 2023 and witness statements to be exchanged by 10 November 2023. The parties are reminded that they must comply with those orders, if they have not already done so. If either party fails to provide disclosure or witness statements as required, their case may be struck out at the hearing.

15. The respondent notified the tribunal on 22 November 2023 that it wished to make a strike-out application at the hearing, on the grounds that:
 - a. It has no reasonable prospects of success;

- b. Further/alternatively, the manner in which the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious;
- c. Further/alternatively, the claim has not been actively pursued;
- d. Further/alternatively, the Claimant has not complied with an order, namely to provide a witness statement(s) and full disclosure of documents (or confirmation that there are no further documents to disclose).

Proceedings at the hearing

- 16. The respondent provided written skeleton arguments about its strike out application, and the substantive case.
- 17. Having established that the respondent had not seen the June order, I asked my clerk to forward the order to the parties. I gave the parties time to read the order, and checked with the claimant that the case summary, and claimant's case set out at pages 2-3 of the June order, were accurate. The claimant agreed this accurately represented his case.
- 18. The Annex of the June order sets out complaints and issues. These are, broadly,
 - a. Whether changes were made to the claimant's terms and conditions as a result of the transfer (specifically cuts to overtime and sick pay, and holiday entitlement – claims under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations", although the specific claims were not particularised)).
 - b. Whether those cuts were a breach of contract; if so was the breach fundamental, and did the claimant resign in response to the breach (claim for unfair dismissal).
- 19. The June order said Judge Ord and the claimant "discussed an alleged assault on the claimant by an employee of the [respondent on 4 January 2023]. However, the Claimant was not saying the assault was with regard to a protected characteristic. [Judge Ord] explained that the Employment Tribunal did not have jurisdiction to hear such claims and that he would need to proceed in the County Court:" (para 15 of June order, at page 3).
- 20. I dealt with the respondent's strike-out application as a preliminary issue. I rejected the respondent's application for the following reasons. First, the claimant's case concerned whether his contractual terms were changed as a result of the transfer. This required a consideration of what was said at the 5 December 2022 meeting, as well as contractual documentation. This issue required evidence from both parties. In the absence of such evidence, I rejected the respondent's submissions that the claim had no reasonable prospects of success. Second, the respondent agreed that the claimant's case, as set out at pages 2-3 of the June order (alleged cuts to overtime and sick pay, and to holiday entitlements), did not contain any surprises for the respondent. The issues raised by the claimant had been rehearsed in emails between the parties in January 2023, and the respondent's witnesses present at the hearing were in a position to respond to the claimant's case. Accordingly, the failure of the claimant to provide witness statements did not materially prejudice the respondent. I decided it was in accordance with the overriding objective for the case to proceed.

21. The claimant gave evidence at the hearing. The respondent provided witness statements from Ms Horwitz, Mr Buchanan, Ms Cebanenko and Ms Shahmiri. The respondent's witnesses, apart from Ms Shahmiri, gave evidence at the hearing.

Findings of fact

22. I make the following findings of fact. The claimant began work for Lee Baron as a night concierge on 23 October 2017. He would work 12-hour shifts, in a "4 days on, 4 days off" pattern. The statement of the claimant's terms and conditions of employment with Lee Baron, and salary increase letter dated 19 January 2022, are at pages 70-75. The terms and conditions provide as follows:
- a. [Clause 2] Your holiday entitlement will be 20 days per annum which includes the statutory bank holidays If you work on a statutory bank holiday, you will be given time off in lieu.
 - b. [Clause 3] Occupational Sick Pay (i.e. full pay) is payable for 8 working days in any twelve month period.
 - c. [Clause 18] Any changes to these particulars will be notified in writing within one month of the change. The Employer reserves the right to amend any condition contained herein to accord with changes in statute.
23. The claimant was paid approximately £120 for a standard shift, and approximately £185 for an overtime shift.
24. The claimant's contract of employment was transferred to the respondent on 1 January 2023, when the respondent gained the contract for Sovereign Court.
25. The measures letter (sent to the claimant on 28 November 2022, at pages 92-99), in relation to the claimant's transfer, stated as follows:

This letter will outline the differences in measures (the key terms and conditions of employment) between companies in order for you to prepare accordingly before the change takes place. Aside from the measures outlined below, all other terms and conditions in your contract remain in place . . .

[Your holidays]

From 1st January 2023 your holiday allowance per annum will be 28 paid days (20 plus 8 Bank Holidays). the Bank Holidays are considered a normal working day

Your Sickness & Absence Reporting Procedures:

POD's sickness and absence process is outlined in the policy which is included in this email.

26. The measures letter was accompanied by a document headed "Absence and Leave Management Policy" (pages 94-99). There is a section in that document headed "Sickness and Absence Reporting Procedures" (page 94). Paragraph 10

of that document refers to statutory sick pay, which could only be claimed from the 4th day onwards.

5 December 2022 meeting – conflicting evidence

27. There was a conflict of evidence as to what occurred at the 5 December 2022 meeting. The claimant's account is as follows:
- a. He attended the meeting with other colleagues (Edward, Abdul). Lee Baron employees (Rebekka, Sheena and Zen) were at the meeting, along with employees from the respondent (including Ms Horwitz). The claimant was given an envelope of documents.
 - b. In response to questions from the claimant's colleague called Edward, Ms Horwitz (or another of the respondent's employees) said the claimant's overtime pay would be cut (to standard rates as opposed to 1.5 rates); the claimant would no longer receive 8 fully paid sick days a year (and instead would receive only statutory sick pay); and the claimant would no longer be entitled to a day in lieu if he worked on a bank holiday.
 - c. The meeting was for about 15 minutes. The claimant was told to read what was in the envelope, and ask the respondent if he had any questions.
 - d. During the course of the meeting, the claimant wrote on the envelope he had been given: "breach of TUPE regulations, breach of contract". He also said CCTV footage would show him writing this on the envelope, and that he had been asking for the CCTV footage.
28. In support of his account, the claimant presented the following evidence:
- a. The claimant said Edward resigned a couple of weeks later, in response to the cuts.
 - b. The claimant filed screenshots of whatsapp exchanges. In an exchange with Abdul Manaf, the claimant sent a message saying he would need Abdul's witness statement about what was mentioned on 5 December 2022 (page 135), "to make it clear 185 overtime Lee Baron pod said no; sickness pay 8 day Pod said no; Bank holiday day in lieu pod said no". Abdul replied "Yes Lee Baron is different from POD and that's what they offer".
 - c. In a whatsapp exchange with Amna Yunos, Amna says "Abdul said that they used to pay standard rate. But now it's 185" (page 136). The claimant replies "they told us during meeting they will pay us standard overtime", to which Amna replies "Nah they changed it. . . no everyone paid 185".
29. Ms Horwitz' evidence was as follows:
- a. She gave a presentation at the 5 December 2022 meeting, in which she explained there was a discretionary sick pay policy. The presentation was followed by a question and answer session. There were no questions about sick pay or bank holidays.
 - b. There was a question at the meeting about overtime pay. Ms Horwitz answered that question by saying that, as salaries were going up, it may be financially beneficial for some employees to be paid standard rates for overtime (the standard rate being derived from new salaries), rather than

being paid their old overtime rates. This issue would need to be investigated for individual employees on a case by case basis.

30. Ms Horwitz said at the hearing that:
- a. By referring in her presentation to a “discretionary sick pay policy”, she meant that managers had discretion in relation to sick pay. The respondent operated a number of sites, with differing sick pay policies. There was never any intention to cut sick pay for employees (such as the claimant) who, prior to their transfer, received full pay for 8 days’ sickness absence in a year.
 - b. Had the claimant chosen to stay, he would have received his overtime and sick pay on the same terms as before the transfer, in the same way as other employees who stayed with the respondent.

Conclusions about 5 December 2022 meeting

31. I accept Ms Horwitz’ evidence as to what happened in the 5 December meeting, for the following reasons. First, Ms Horwitz’ evidence was consistent and detailed, whereas the claimant’s account shifted during the course of the hearing, with new points being raised during the course of the hearing and submissions. For example:
- a. The claimant said initially he had called Ms Horwitz twice about the alleged cuts (without leaving a voicemail) before his verbal resignation on 4 January, but he later said he called her “many times”.
 - b. The claimant’s evidence about the handwritten notes on his envelope was raised towards the end of the hearing, after the claimant had given his own evidence.
32. Second, it is clear from the measures letter that the claimant was entitled to 28 days’ paid leave during a year, including 8 days to cover bank holidays, even if the claimant had to work on the bank holiday itself. I see no reason why Ms Horwitz would have said otherwise in the 5 December meeting.
33. Third, I find the claimant’s account implausible. The claimant said that he raised these supposed cuts with Lee Baron employees who told him to raise it with the respondent. The claimant said he called Ms Horwitz “twice” (or “many times”) prior to his verbal resignation, without leaving voicemail. Ms Horwitz said she was unable to say at the hearing whether the claimant had called her without leaving voicemail, as she had not checked her phone records for the hearing, because she had not known this point would be raised. Even on his own account, the claimant did not send any text messages or emails, or leave voicemails on this issue of supposed cuts prior to his verbal resignation on 4 January. I find that had Ms Horwitz announced at the 5 December meeting cuts to overtime and sick pay, and holiday entitlement, as stated by the claimant, the claimant is likely to have protested immediately to the respondent.
34. Fourth, I do not accept the claimant’s evidence that he wrote “breach of TUPE regulations, breach of contract” on his envelope at the 5 December meeting; and that such writing was a result of (and evidence of) the respondent announcing at that meeting cuts to overtime and sick pay, and holiday entitlement. My finding is for the following reasons:

- a. The claimant did not make this claim while giving his own witness evidence, but later on in the hearing.
 - b. This claim was not mentioned at the 27 June 2023 tribunal hearing, or elsewhere during the proceedings.
 - c. The claimant did not send a copy of the envelope during disclosure, but thrust the envelope in front his web camera during the course of the CVP hearing.
 - d. I find it implausible that the claimant would have responded to hearing about cuts to his pay and holiday entitlement by writing down “breach of TUPE regulations, breach of contract” on his envelope. In such circumstances, I consider it much more likely that the claimant would have written words to the effect of “less overtime pay, sick pay and no bank holidays in lieu”.
 - e. While I accept that the claimant has referred to CCTV footage in his correspondence, those references have been in relation to the alleged assault carried out on the claimant, rather than what may have been written down on the claimant’s envelope. This alleged assault is not an issue for the tribunal.
35. Finally, the claimant asked repeatedly why Edward would have resigned, had the respondent not announced cuts to overtime and sick pay, and holiday entitlements at the 5 December meeting. However, the claimant could have called evidence about Edward’s resignation (eg directly from Edward, if Edward has indeed resigned), and did not do so. Although prompted to do so by the claimant, the whatsapp messages from Abdul and Amina do not contain any statements about what was said by the respondent at the 5 December meeting. Again, the claimant could have called Abdul and Amina as witnesses, but did not do so. Accordingly I attach little weight to the matter of Edward’s (alleged) resignation, or to Abdul and Amina’s whatsapp messages.

Claimant’s terms and conditions after the transfer

36. Holiday pay: I find that, following the transfer, the claimant was entitled to 28 days’ paid leave in a year, as set out in the measures letter. I find the effect of the measures letter (which said that bank holidays were normal working days) is that, if the claimant worked on a bank holiday, he would receive a paid day’s leave in lieu. In cross-examination the claimant was directed to the measures letter emailed to him on 28 November 2022, and the letter’s provisions about holidays. The claimant checked his emails during the hearing, and confirmed he had received this email. He said this information had not been in the envelope given to him at the 5 December meeting, and this point was completely new to him. I find that the measures letter was emailed to the claimant, but that the claimant either did not read it, or did not apply his mind to it.
37. I reject the claimant’s case that Ms Horwitz said at the 5 December 2002 meeting that the claimant would not be entitled to a day’s paid leave in lieu of bank holidays worked.
38. Accordingly, I find there was no cut in the claimant’s holiday entitlement as a result of the transfer. If anything, the claimant’s holiday entitlement improved. Before the transfer, the claimant was entitled only to 20 days’ paid holiday, together with a

day in lieu if he worked on a bank holiday (but presumably not if he did not work on a bank holiday).

39. Overtime pay: I find that, following the transfer, the claimant continued to be entitled to £185 overtime pay per shift. The measures letter did not mention overtime pay. I accept Ms Horwitz' evidence that the intention was that employees would not face a pay cut in relation to overtime pay, and that she explained this on the 5 December meeting. The respondent's practice after the transfer is consistent with this finding (see payslip at page 130, which shows overtime of £180). The claimant accepted in cross examination that the respondent was paying the previous overtime rate, but said this was since the claimant had brought tribunal proceedings. The appellant relies on Amuna's whatsapp messages set out above. While it is correct that Amuna's whatsapp message states "Nah they changed it", Amuna's message does not set out what was said at the 5 December meeting, what was changed, and when any change happened. Amuna was not present at the tribunal to give evidence about what was changed and when, and the respondent did not have an opportunity to test Amuna's evidence in cross-examination. I accordingly attach little weight to Amuna's messages. I also attach little weight to Abdul's text messages, for similar reasons (lack of detail about what was said at 5 December meeting; lack of opportunity to test evidence).
40. Sick pay. The documentation is not entirely clear on the claimant's sick pay after the transfer. The measures letter stated, under the heading "Your sickness & absence reporting procedures" that "POD's sickness and absence process is outlined in the [attached] policy". That policy referred to the payment of statutory sick pay. I accept Ms Horwitz' evidence that during her presentation, she referred to "discretionary sick pay policy", and was not asked questions about it. Dr Hill submitted for the respondent that the policy was about "reporting" of sickness rather than the amount of sick pay, and that the policy did not have the effect of cutting sick pay entitlements.
41. I accept the respondent's submissions that the policy did not have the effect of cutting the claimant's sick pay, and that employees transferred to the respondent continue to receive their previous sick pay entitlements. I also accept Ms Horwitz' evidence that the claimant was not told that sick pay would be cut at the 5 December 2022 meeting.

Conclusions on claimant's complaints

42. As set out above, I find that the respondent did not cut the claimant's overtime or sick pay, or holiday entitlements. Further, while there were changes to the claimant's contract following the transfer, they were beneficial changes (eg increase in salary, which the claimant said he would have received under Lee Baron in any event; and increased holiday). Accordingly, the respondent did not breach the claimant's contract in the manner alleged by the claimant, and the claimant's complaint of unfair dismissal is dismissed.
43. The claimant's claim under the TUPE Regulations were not particularised, but arose from the alleged cuts in overtime and sick pay, and holiday entitlements. Given my finding that there were no such cuts, the claimant's complaint of breaches of the TUPE Regulations is also dismissed.

44. Given these findings, it is unnecessary for me to resolve the conflict of evidence and submissions about (a) whether the claimant asked Ms Horwitz about his pay on 4 January 2023; or (b) the reasons for the claimant's resignation.

Employment Judge Shukla
08/12/2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11/12/2023

FOR THE TRIBUNALS