EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000331/2023

Held in Edinburgh on 4 and 5 December 2023

Employment Judge M Sutherland

Members J Lindsay

T Lithgow

Wojciech Debek	**Claimant** **In person**
Allander Security Ltd	**Respondent** **Represented by** **Mr T Muirhead,** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaints of race discrimination and unlawful deduction from wages do not succeed and are dismissed.

REASONS

Introduction

1. A final hearing was listed to determine the Claimant's complaint of race discrimination and unlawful deduction from wages which were resisted by the Respondent.

2. His claim had originally included a complaint of failure to pay holiday pay but that complaint was withdrawn and dismissed upon payment.

3. The Claimant appeared on his own behalf. The Respondent had professional representation.

4. The Claimant gave evidence on his own behalf. The Respondent called Jim McMullen, Managing Director and George Williams, Area Manager to give evidence.

5. Parties lodged a joint bundle of documents to which additional documents were added during the hearing.

6. Parties made brief oral submissions. The Respondent who had professional representation agreed to give submissions first to enable the Claimant as a litigant in person to respond.

7. The issues to be determined in this case were as follows –

Race Discrimination

a. Did the Respondent treat the Claimant who was Polish less favourably than it treated others by allocating him constantly (or mainly) night shifts when his Scottish colleagues Kevin McBay and Owen Ritchie (his comparators) were allocated constantly (or mainly) day shifts?

b. Did the Respondent subject the Claimant to this less favourable treatment because of his Polish nationality?

Unlawful deduction from wages

c. Did the Claimant undertake 3 hours safety training on 24 March 2023? Was the sum paid in respect of that training less than the sum properly payable?

d. Was the complaint made within 3 months of the date of the deduction or if that was not reasonably practicable, within such further reasonable period?

Findings in fact

8. The Tribunal makes the following findings in fact:

9. The Respondent provides security services to clients including shopping centres and business premises. They employ around 110 staff (including

around 100 Security Operatives) who are assigned to client premises. The security operatives report to an east or west coast area manager.

10. On 10 March 2023 the Claimant was interviewed by George Williams, Area Manager in respect to his application for the role of Security Operative. (The Claimant and GW knew each other having previously worked together and had a good working relationship.) The Claimant understood from the advertisement that the role would be a combination of day and night shift. At interview GW had noted that the Claimant worked night shift in his current position. His place of birth was noted as Poland for the purposes of the right to work checks. The Claimant was offered the role and a statement of terms and conditions (and company handbook) was issued to him. The Claimant advised never having received those documents.

11. The shifts are allocated by the control room based in Glasgow according to client need and employee hours. The allocated hours are noted on the net roster system which was then viewed by staff. The net roster is relied upon to calculate staff pay. A number of clients require 24 hour security cover which means some staff have to work night shift. Most staff would prefer to work day shift. Some clients express a preference for a particular Security Officer to work day shift because they want continuity during times of increased contact. Longer serving members of staff have a greater opportunity to be selected for day shift by a client.

12. The Claimant started work on 18 March 2023 and was allocated to work in the Forbo factory in Kirkcaldy. The client required 24 hour security cover. The Claimant was allocated mainly night shifts. He worked occasional day shifts to provide holiday or sickness absence cover.

13. Kevin McBay, who is Scottish, was employed by the Respondent as a security operative from 16 August 2021. Significantly prior to the Claimant's appointment he worked wholly day shift at the Forbo factory and continued to do so after the Claimant's appointment.

14. Owen Ritchie, who is Scottish, was employed by the Respondent as a security operative from 9 January 2014. Significantly prior to the Claimant's appointment he worked a combination of day and night shift at the Forbo factory and continued to do so after the Claimant's appointment.

15. Hugh Hunter, who is Scottish, was employed by the Respondent as a security operative from 14 October 2022. Prior to the Claimant's appointment he worked predominantly night shift at the Forbo factory. The Claimant was hired as his replacement.

16. There were other Scottish security operatives who worked predominantly night shifts.

17. Jakub Gajewki, who is a Polish national, was employed by the Respondent as a Security Operative since 10 June 2010. He worked exclusively day shifts at another site.

18. In March the Claimant worked night shift (1900 to 0700) on 18, 19, 20, 21, 22, 30 and 31 March 2023. He undertook on site training on 18, 19 and 27 March. The training on 27 March was rostered from 0700 to 1300 (6 hours) but finished around 1000 (3 hours). The Claimant was paid for 6 hours. The Claimant did not undertake training (and did not work) on 24 March 2023.

19. Staff are paid monthly in arrears on the last Thursday in each month. The cut off day is the Sunday before the last Thursday. Accordingly days worked after that Sunday are paid in the following month. The cut off date for March was Sunday 26 March.

20. On 17 March the Claimant texted GW asking him what is my rota, is it 3 on 3 off days and nights or is it different. GW did not text a reply.

21. In March GW advised him of a day shift opportunity for another client but that it required CCTV training. The Claimant had texted him on 24 March to confirm he had booked onto that training but ultimately he did not pursue that opportunity.

22. On 2 May 2023 the Claimant emailed GW about working hours and shift scheduling advising he would like to opt out of working 48 hours, asking for the shift scheduling to be more fair as some are working weekends and some work weekdays dayshift only, and asking about public holiday payments. On 2 May GW replied acknowledging his concerns which he raised with the control room and finance.

23. The Claimant was struggling with a lack of sleep from working night shifts and did not see a prospect of it changing. In early May he started to look for work elsewhere.

24. On 9 May 2023 the Claimant texted GW asking him to get a few free weekends. GW replied advising he would speak with Glasgow and get something sorted out.

25. On 15 May 2023 the Claimant emailed GW intimating his resignation. He stated "Hi George, I would like to give my notice as I'm going to work off shore. The last day off my work will be 25.5.23. Thanks for everything, Wojciech Debek". GW replied thanking him for his hard work and dedication and noting that it had been a pleasure having him as part of their team. At no point during his employment did the Claimant assert that he was allocated predominantly night shifts because of his race.

26. The Claimant started alternative employment in the Netherlands on 6 June 2023 earning £195 a day. That work was temporary and on 28 June the Claimant asked GW if he had any dayshifts available.

27. On 1 July 2023 the Claimant emailed GW making a complaint that he had not received his holiday pay. GW replied that he would find out if he was entitled to any but he doubted it given the hours he worked and that he sometimes didn't turn up. The Claimant chased for an update on 3 and 5 July. The Claimant raised a grievance in respect of failure to pay shifts in May and for holiday pay.

28. From 5 to 7 July 2023 the Claimant engaged in ACAS Early Conciliation. The Claimant lodged his tribunal claim on 7 July 2023.

29. On 19 July 2023 the Claimant received an email from Jim McMullen setting out in detail the hours worked (including training undertaken) and the amount paid. He asked the Claimant to advise whether there were any discrepancies so that this could be resolved. The Claimant did not reply. He also noted and apologised that no holiday pay was included in the final wage and he arranged for immediate payment.

Observations on the evidence

30. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

31. The Claimant and the Respondent witnesses came across on the whole as credible and reliable in their testimony which was for the most part fair and measured, and consistent with the other evidence. The Claimant's evidence was on occasions unreliable for the reasons noted below.

32. His claim form contained no details of the race discrimination or unlawful deduction from wages. Although it is not the Claimant's first language he has a reasonable command of spoken and written English.

33. The Claimant asserted he was the only Polish worker. He was not. The Respondent has employed Jakub Gajewki who is a Polish national as a Security Operative since 10 June 2010. The Respondent has employed staff from different ethnic backgrounds including the Claimant's line manager George Williams who is black.

34. The Claimant asserts that he was spoken down to and not treated with respect by George Williams. It was apparent that the Claimant and GW had a good working relationship although at times GW failed to take steps regarding the issues that the Claimant was raising.

35. The Claimant asserted that the rotas were determined by George Williams. The Respondent witnesses asserted that the rotas were determined by central control and there was documentary evidence to this effect. It was considered more likely that the rotas were determined by central control and not by GW.

36. The Claimant asserted that he frequently raised his concerns with GW that he was not being given day shifts. GW asserted that he did not. The emails and texts sent by the Claimant raised the issues of weekend working and holiday pay and on only one occasion mentioned the unfair allocation of day shifts. It was considered more likely that the Claimant did not frequently raise his concerns regarding the allocation of day shifts.

37. The Claimant asserted that he undertook 3 hours fire safety training on Friday 24 March. The Respondent asserted that he did not. The Respondent's net roster showed that the Claimant attended training on Monday 27 March from 0700 to 1300 and not on Friday 24 March. The net roster is viewed upon by the Respondent as "their bible" and it is expected to be uptodate at all time. Security operatives are expected to complete a training record. The Claimant's training record did not show that he had completed training on either 24 or 27 March. Security operatives are expected to complete a guard log book. The guard log book did not show the Claimant had attended site on either 24 or 27 March. The Claimant did not produce any personal record of the hours he worked.

38. The Claimant was not confident in his evidence that he had undertaken the training on 24 March. He was however clear in his evidence that the training had lasted 3 hours, that GW had given him a lift home after the training, that they discussed a day time shift opportunity for another client but that it required CCTV training, and that the Claimant had texted him on 24 March to confirm he had booked onto that training. The Claimant exhibited a copy of text to that effect from 24 March. The Claimant believed that the Forbo training manager would be able to confirm the date of the training but he had not confirmed this with him and he had not called him as a witness.

39. GW was clear in his evidence that the Claimant was scheduled to undertake 6 hours fire safety training on Monday 27 March 2023 from 7 am to 1pm and that he did not undertake this training on 24 March; that this was standard training; that when he GW arrived on site at 10am it was apparent that the Claimant had completed the training in 3 hours; that he gave him a lift home; and that the Claimant was paid for the 6 hours which had been scheduled. GW asserted that he had first told him about the opportunity to work day shifts for another client on or before 24 March hence the sending of that text that day.

40. In these circumstances, and given that records were kept by the Respondent and not by the Claimant, it is considered more likely than not that the Claimant did not attend training on 24 March and instead attended this on 27 March.

Relevant Law

Direct Discrimination

41. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 Equality Act 2010).

42. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

43. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. "It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why" *(Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337*).*

Less favourable treatment

44. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

45. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the Clamant and their comparator. The comparison must be like with like (*Shamoon*).

46. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

47. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).

48. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (*Shamoon*).

Burden of Proof

49. Section 136(2) EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions".

50. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

51. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

52. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).

53. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".

54. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.

55. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases

may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal" (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA).

56. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation *(Laing v Manchester City Council* [*2006] ICR 1519, EAT and Efobi)*. (The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (*Madarassy*). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" *(Igen v Wong* [2005] ICR 935*; Hewage)*.

Stage 2 – rebutting inference

57. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).

58. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima*

facie case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).

59. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Unlawful deduction from wages

60. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker so employed unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

61. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

62. Under Section 23 a complaint for unlawful deduction from wages must be made within 3 months of the date of the payment of wages from which the deduction was made or, if it was not reasonably practicable to do so, within such further reasonable period.

Submissions

63. The Respondent made brief oral submissions which were in summary as follows –

    a. His comparators were not in the same circumstances because they had longer service and a client had requested they provide day shift cover. Accordingly the burden of proof does not shift.

    b. In any event the reason for the allocation of day shift was not race but client request and length of service

c. During his employment the Claimant considered the allocation of shift was unfair but he did not consider it was because of his race – he mentioned unfairness but not race

d. The net roster was the work bible and is a reliable proof that he worked 27 March and not 24 March

e. The Claimant sought compensation in the middle of the lower band and not the middle band when he lodged his claim. The Claimant gave no evidence of any injury to his feelings, he did not go to his GP and he had no time off before his next job

64. The Claimant made very brief oral submissions in response which were in summary as follows –

a. The Claimant considered it completely unfair that he'd only been paid his holiday pay once he had raised tribunal proceedings.

b. He also considered it completely unfair that a client could express a preference as to which security officer worked day shift and the day and night shifts should have been distributed more fairly. That it's the same duties day and night and he's competent to provide cover for the day shift. They shouldn't just accept the client preference.

c. That his text on 24 March is proof that he attended the training that day. Its not likely they would have paid him for 6 hours if he only worked 3.

Discussion and decision

Direct race discrimination

65. The Claimant is Polish. He was predominantly allocated night shifts at the Forbo factory by the Respondent. The Claimant's comparators were both Scottish. They were both predominantly allocated day shifts at the Forbo factory. The Claimant and his comparators were not in the same

circumstances because they were hired at materially different times and had been allocated those shifts for a significant period prior to his appointment.

66. The Claimant was hired to replace a Scottish colleague who had been predominantly allocated night shifts and that was the reason why he was predominantly allocated night shifts rather than day shifts. That explanation was fully adequate and cogent. There was no reasonable basis upon which it could be inferred that the reason for him being predominantly allocated night shifts was his race: the Claimant was not the only the only Polish employee - another Polish employee was predominantly allocated day shifts; there were other Scottish employees who were predominantly allocated night shifts; the Claimant did not frequently raise concerns which were ignored; the Respondent advised the Claimant of a day shift opportunity which he did not pursue.

67. The complaint of direct race discrimination does not succeed and falls to be dismissed.

Unlawful deduction from wages

68. The Claimant did not undertake 3 hours training on 24 March 2023 and accordingly the amount of wages paid to him was not less than the amount properly payable.

69. The complaint of unlawful deduction from wages does not succeed and falls to be dismissed.

Employment Judge: **EJ Sutherland**
Date of Judgment: **12 December 2023**
Entered in register: **18 December 2023**
and copied to parties