



EMPLOYMENT TRIBUNALS

Claimant: Mr S Digpal
Respondent: Wilson James Limited
Heard at: East London (in public; by telephone)
On: 17 February 2021
Before: Employment Judge Moor

Representation

Claimant: Mr S Gaikwad, solicitor
Respondent: Mr P Chadwick, consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that the complaint of unlawful deduction of wages is not well-founded and does not succeed.

The Claimant's rate of pay as a Security Officer while assigned to the Respondent's F100 Support Team was £10.55 regardless of the geographical location at which the Claimant works.

REASONS

1. The Claimant brings a complaint of unauthorised deduction of wages under section 23 of the Employment Rights Act 1996 ('ERA').

Postponement Application

2. After we identified the issues at the start of the hearing, Mr Gaikwad, the Claimant's solicitor said that he was not prepared for a full hearing. He had thought the hearing was a case management hearing. He confirmed he had seen both notices of hearing sent on 28 October 2020 and 30 December 2020 (the second extending the time estimate to 2 hours). The notices make it clear that evidence and final decision would be made at this hearing.

3. Mr Gaikwad sought a postponement on the grounds that he was not ready. The Respondent refused to consent. Mr Chadwick submitted that witness statements had been exchanged and a trial bundle prepared and provided to the Claimant, which should also have alerted Mr Gaikwad to the fact that this was a final hearing. What more did he think could be achieved at a case management hearing?
4. Under Rule 30A of the Employment Tribunal Rules 2013, where a postponement is sought less than 7 days from the start of the hearing, the Tribunal powers to grant it are limited. I explained to Mr Gaikwad that, unless there are exceptional circumstances, in the absence of the Respondent's consent, I had no power to grant a postponement. In my judgement his mistake as to the nature of the hearing was not an exceptional circumstance because both Notices of Hearing were clear.
5. Only at that stage did Mr Gaikwad add further grounds to his application to postpone: the Claimant's medical health, that he experienced anxiety and depression and was receiving therapy; and that, in the pandemic he was working at home with all the distractions that this brought and was therefore not prepared.
6. I refused a postponement on both of these grounds, neither of which were in my judgment exceptional, as Rule 30A requires. First, the Claimant was attending, had prepared a witness statement and, if he was too unwell to give evidence, an application should have been made about that with evidence about his ill health and why it prevented him from attending and giving evidence. Second, as for the impact of the pandemic upon preparation: I indicated that I understood that working life had become more challenging for many working at home, especially if there were young children requiring home education. Nevertheless, Mr Gaikwad is a professional representative, doubtless seeking a fee for his services. If that was not practicable for him personally during the pandemic restrictions, then he should not have offered his services to the Claimant or he should have made a much earlier application to postpone.
7. As it turned out, in giving evidence, the Claimant was able to give a clear account of the facts and answered Mr Chadwick's questions in a relevant, precise and intelligent way, referring to the relevant documents where necessary. The Claimant was also able to ask questions of Mr Evans, as I did, to ensure that his case on the facts was put. I sat late to hear evidence and submissions, and reserved my judgment. In order to ensure that the Claimant was on an equal footing so far as closing submissions were concerned, I gave the parties the opportunity to send in written legal submissions, if they wished to do so, by no later than 10am on Monday 22 February 2021. Both parties did so.
8. Mr Gaikwad gave the Claimant no assistance during the hearing: he did not ask questions in cross-examination and gave very limited closing submissions. It seems to me that it would not be in accordance with his professional obligations if he were to charge the Claimant any fee for his attendance or preparation for this hearing.

Issues

9. The sole issue between the parties is, what was their agreement as to the rate of pay the Claimant would receive while working on the F100 Support Team as a Security Officer from 2019 onwards.
10. The parties agreed I would make a decision on liability only and, if the Claimant succeeded, then it is likely they will be able to agree remedy without needing to revert to the Tribunal.

Findings of Fact

11. The Respondent provides, amongst other services, security to events at various locations across Greater London.
12. The Claimant has worked for it for several years as a Security Officer. He works on a zero-hours basis. The parties agree that the Respondent is not obliged to offer the Claimant work and, when work is offered, the Claimant is not obliged to accept it.
13. The Claimant argues he was not paid correctly in relation to shifts from October 2019 until November 2020.
14. The Respondent also assigns other Security Officers permanently to different locations. It does not pay them all the same rate of pay. This is because it must tender for the work, and the rate of pay at each location depends upon the price it has negotiated with the particular client. Very roughly speaking the rates of pay for the Respondent's Security Officers who work permanently at one location in London varied at the relevant time from between £9 per hour to £13.20 per hour.
15. The Respondent has a Support Team of Security Officers (sometimes known as the Bench Team). Those assigned to the Support Team are not assigned to a permanent geographical location. The Respondent sends members of the Support Team to different locations when it needs cover for the Security Officers who are permanently allocated to those locations, for example when they take holidays or are off sick. The whole point of the Support Team is that its members can be moved around to cover.
16. Prior to 2019 the Claimant did not have a written contract for a period. He raised a grievance because he had thought he was on the Support (or Bench) Team but it had turned out that he had been on the Events Team. The Claimant says that when he attended different geographical sites prior to 2019 he had been paid at the rate the security officer permanently assigned to that location was paid. The Respondent says those payments were discretionary and/or in error. Given my analysis of the later agreement between the parties, I do not need to determine the previous agreement between the parties.
17. Part of the outcome of the Claimant's grievance was that it was agreed he would be assigned to the F100 Support Team.

18. Mr Evans observed in the grievance outcome that the pay issues should therefore be easier in the future. He said this because he thought the Support Team had a base rate of pay which did not vary.

Respondent's Proposed Contract

19. The Respondent sent the Claimant a document entitled 'Contract of Employment' in early 2019 (at pages 64 – 79). This was not an 'umbrella contract' in the sense that, between jobs, there was no obligation at all between the parties: none to offer work or to take it. This document was intended to set out the agreement between them in respect of the periods of time when the Claimant actually did work for the Respondent. As there is a dispute about whether it is agreed, I shall refer to it as the 'Proposed Contract':
- 19.1. Clause 3.4 states 'You are currently assigned to F100-London Support Team'.
- 19.2. Clause 4.1 states that the rate of pay will be £10.50 per hour (since increased to £10.55).
- 19.3. Paragraph 4 of the Appendix states '*This rate of pay applies only to your current site assignment and is not transferable. Should you move to a new assignment you will receive the rate of pay applicable to that assignment and position. This contract will not necessarily transfer to a new site with you.*'
- 19.4. This was signed by Ms Swain on behalf of the Respondent on 3 March 2019. The Claimant has not signed it.
20. The Claimant first asked the Respondent what effect the proposed contract would have on his previous contract and he was told it would override it.
21. On 13 May 2019 in an email to Ms Swan the Claimant send signed copies of the proposed contract and appendix along with 'proposed amendments to both of the above'. He stated, '*Please note that my signature in the proposed amendments is a signature of agreeing to the Contract of Terms and corresponding Appendix. I look forward to hearing from you in lieu (sic) of the attached.*'
- 21.1. He did not make any proposed amendments to Clause 4.1 of the proposed contract.
- 21.2. As to the Appendix he proposed the following amendment.
'Paragraph 4.1 *If I move to a new assignment, and that assignment rate of pay is less than my "base rate" (as described by WJ in our Agreement at para 4.1 of THE CONTRACT), then as per our previous conduct and dealings, WJ agrees to pay at minimum the base rate described at para 4.1 of THE CONTRACT.*
22. The Claimant did not state in this amendment that he should be paid at a higher rate on sites where a higher rate was payable. I says he thought

this was the meaning of paragraph 4 of the Appendix.

23. The Respondent did not respond to the Claimant's amendments save that it continued to offer him work which he continued to accept.
24. I have not heard any evidence of which geographical site the Claimant was working at, if any, when he signed the contract.

Further Grievance

25. The Claimant worked as a Security Officer at a variety of different geographical sites but from 2019 onwards has been paid at the 'base rate' of £10.55. He raised a grievance about this making the same argument as he has made before me.
26. After a grievance hearing on 4 February 2020, Mr Griffin, the Respondent's museum consortium director, sent an outcome letter on 27 May 2020:

Mr Griffin acknowledged that the Respondent had failed to respond to the submission of the amended contract and recommended that the employee relations department engaged with the Claimant to resolve that issue.

He decided that where the Claimant had been paid the 'site rate' rather than his base rate, that was discretionary rather than a sign of contractual obligation.

He could find no written reference in the contract that suggests the site rate would be payable.

Mr Griffin allowed some back pay in respect of other incorrect payments.

27. The Claimant appealed Mr Griffin's decision, thereby maintaining his objection. The outcome on 14 August 2020 was again that the rate of £10.55 applied to all work on the Support Team.
28. On 21 August 2020, Mr Evans, events manager and the line manager of the Support Team, emailed the Claimant prior to his working shifts at Broadgate. *'Karim has asked we confirm your rate of pay for shift at Broadgate to avoid any confusion. As per F100 support team all officers receive a pay rate of £10.55 when deployed to core sites and Broadgate is a core site. Therefore you will be paid @ £10.55 per hour for all shifts at Broadgate. Hope that clears up any confusion.'* The Claimant accepted the shifts at Broadgate but continued to disagree about the rate of pay. He sent a reply to Mr Evans on 21 August 2020 referring to the dispute over the rate of pay. He referred to not accepting the new contract and sending a list of proposed amendments that were not acknowledged. He referred to his continuing to raise pay queries because he had not accepted the unilateral change in his contract. He made it clear he would continue to work under protest.
29. On 28 August 2020, Mr Evans sent an email to the London Support Team as a whole. He sought to make it clear again in this email that the

rate of pay was £10.55 saying '*The 'Home Rate' £10.55 will be paid for all shifts worked when deployed to site based contracts.*'

30. Mr Eves suggested to the Claimant that if he wished to work with a higher rate of pay then he should apply for jobs elsewhere. He wrote on 5 October stating that the rate was £10.55 and 'if you do not wish to accept this rate then you are not obliged to accept shifts as per the terms of your zero hours contract'. On 6 November 2020 again the Claimant replied to state that he did not accept the rate of pay and that he was still working under protest.
31. The Respondent informed the Claimant that further grievances about his rate of pay would not be dealt with because the matter had already been dealt with under the grievance procedure.
32. For all work the Claimant has taken on he has been paid at the rate of £10.55. He contends he should be paid at a higher rate on sites he has worked on where he is covering for security officers paid at that higher rate.

Legal Principles

33. In order for there to be a contract between parties there must be an offer that is clearly accepted.
34. Where a contract is varied, then the party to whom the variation is offered, ought unequivocally to agree the change. Sometimes it is possible to imply such an agreement by conduct but not always. In Abrahall v Nottinghamshire County Council [2018] ICR 1425 Underhill LJ: whether there has been agreement by conduct will very much depend upon the circumstances.
35. Where a party offered a contract makes a counter-offer, the same rules apply. It must be unequivocally accepted by the Respondent, but in some cases conduct will evidence acceptance.
36. The contract should be interpreted according to the natural meaning of its words and to ensure that it is internally consistent.

Submissions

37. I have read the parties' written submissions. I do not set them out in full here.
38. In essence, the Claimant argues that the Respondent has attempted to unilaterally to vary his contract. He says it is clear he has not agreed to this variation and has worked under protest since. He relies on Abrahall that his working alone is not enough to signify his agreement.
39. The Respondent argues there has been agreement here about the rate of pay and the issue turns on the meaning of the agreement reached.

Application of facts and law to issues

40. Here the Respondent proposed new terms and conditions of employment and the Claimant accepted them subject to some express amendments.
41. Plainly the Claimant accepted clause 4.1 of the proposed contract that his rate of pay was £10.55.
42. In my judgment, his proposed amendment to the Appendix added a paragraph 4.1 to the existing paragraph 4. This is because of his explanation that paragraph 4 had drafting that he wanted to keep and because he used a different numbering, 4.1. Thus, the Claimant agreed to paragraph 4 of the proposed Appendix and proposed an addition to it, his proposed paragraph 4.1. The Respondent did not object to paragraph 4.1 and does not do so at this Tribunal.
43. It seems to me, therefore, that the parties agreed clause 4.1 of the proposed contract and paragraph 4 of the proposed Appendix, with the additional paragraph 4.1 to the Appendix proposed by the Claimant. I therefore agree with the Respondent that the parties reached an agreement on pay.
44. The question for me is really what these clauses and paragraphs mean. In particular what does 'assignment' mean at paragraph 4 and 4.1 of the Appendix?
 - 44.1. Does it mean assignment to the Support Team, as the Respondent argues; or
 - 44.2. Does it mean assignment to a particular geographic location, as the Claimant argues?
45. The factors favouring the Respondent's argument are:
 - 45.1. The words in clause 3.4 'assigned to F100 London Support Team' are unequivocal. And 'assignment' in paragraph 4 should therefore refer to the same thing, namely to the Support Team. The same root word is used for both;
 - 45.2. the wording 'This contract will not necessarily transfer to a new site with you', would suggest that the words 'site assignment' do not relate to geographical site for the Support Team because the whole point of the Support Team was that they did not work in one geographical location but moved between them to cover for others;
 - 45.3. the wording 'current site assignment' must mean Support Team because this is a zero-hours contract and could be signed in between actual jobs and therefore could not mean geographical location because, at the point of signing, there need not have been one;
 - 45.4. it would have been pointless to state the rate of pay is £10.55 for the Support Team if the rate of pay was going to vary from

geographical location to location;

- 45.5. it was the Respondent's intention that the Support Team would simply have one rate of pay. That much is clear from the grievance outcomes; Mr Evan's view that pay would become easier once the move to the Support Team was agreed; and the August 2020 emails.
46. The factors favouring the Claimant's argument are:
- 46.1. the word 'site' at paragraph 4 of the Appendix is added to the word 'assignment'. This phrase more naturally refers to the geographical location of work rather than a Team assignment. He argues a Team is not a 'site';
- 46.2. the Claimant's additional paragraph 4.1 resolved the difficulty of the meaning of clause 4.1 by establishing £10.55 as a minimum rate.
- 46.3. That the Respondent stated 'this contract will not necessarily transfer' does not add meaning to the word 'site'. It simply raises the possibility of there being a new contract in the future;
- 46.4. it was the Claimant's intention to be paid differently as between sites subject to the minimum, that was why he raised his subsequent grievances and objections.
47. While the Claimant's arguments are weighty, in my judgment, the determining factor in favour of the Respondent's interpretation is that the words 'current site assignment' can have no meaning on the Claimant's argument. A zero-hours worker can sign this contract when he is not currently assigned to any geographical location (site on his contended meaning). The Claimant's amendment still makes sense: he will not accept less than £10.50 if he is moved to a new role or Team.
48. In my view, the meaning of the contractual terms as to pay, including the Claimant's additional paragraph 4.1 of the Appendix, is that a zero-hours worker assigned to the Support Team will receive the rate of pay of £10.55 regardless of the geographical location that he is assigned to and that this will only change if the role or Team he is assigned to changes. 'Assignment' and 'Site Assignment' at paragraph 4 of the Appendix mean assignment to the Support Team.
49. The Claimant relies on case law that concerns the attempt by an employer to unilaterally vary a contract. I allowed the parties to make submissions about this but ultimately I agree with Mr Chadwick that this is not a situation where there has been a unilateral variation but an agreement the meaning of which I must then interpret.

50. The Claimant has also relied on arguments about the meaning of dismissal but I do not regard these to be relevant. This is because I have found that the parties entered into a new agreement, which I have then interpreted.

Employment Judge Moor
Date: 22 February 2021