



EMPLOYMENT TRIBUNALS

Claimant: Mr BO Aro

Respondent: Total Security Service Limited

Heard at: Manchester **On:** 29 April 2022 & 12 May 2022

Before: Employment Judge Poynton
(sitting alone)

Representation

Claimant: In person

Respondent: Mr Burgess (consultant)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claim is dismissed on withdrawal.
2. The claimant's application to amend his claim to include a complaint that he was constructively dismissed is refused.
3. The claimant's application to amend his claim to include a complaint that the respondent breached the contract of employment by not providing shifts is allowed in relation to the period from 25 April 2021 to 22 May 2021. The complaint is not well founded and is dismissed.
4. The claimant's claim for notice pay is well founded. The respondent was in breach of contract by failing to pay the claimant sufficient full notice pay and is ordered to pay to the claimant the sum of £210.28. This is a net sum but has been calculated using gross figures to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.
5. The claimant's claim for breach of contract in relation to fuel subsidy is not well founded and is dismissed.

REASONS

Introduction

1. The claimant, Mr Aro, was employed by the respondent, Total Security Services Ltd, as a Security / Covid Officer from 27 March 2020 until his employment terminated on 22 May 2021, following his resignation on 11 May 2021.
2. ACAS was notified under the early conciliation procedure on 23 July 2021 and the certificate was issued on 27 July 2021. The ET1 was presented on 1 August 2021. The ET3 was received by the tribunal on 3 September 2021.
3. The claimant brought a claim for wrongful dismissal (notice pay) and breach of contract (non-payment of a fuel subsidy).
4. This was the final hearing of the claim. The hearing had been listed on 22 October 2021 but was adjourned due to lack of judicial resources. The final hearing was then listed for 20 June 2022 but was able to be brought forward to 29 April 2022.
5. The hearing on 29 April 2022 was listed via CVP before me. The claimant experienced difficulties in maintaining a stable connection to CVP. The hearing was adjourned several times to allow the claimant opportunity to attempt to reconnect to the hearing but the claimant continued to experience difficulties taking part in the hearing. Given the technical difficulties experienced by the claimant, I was not satisfied that the claimant was able to hear what I heard. Having considered Rule 46 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, I concluded that it would not be fair and equitable for the hearing to proceed on CVP and I adjourned the hearing to be re-listed in person. The hearing today is the re-listed final hearing.

Preliminary issues

6. At the beginning of today's hearing, before I heard any evidence, I had to deal with several preliminary issues.
7. I had heard from both parties in relation to the preliminary issues at the hearing on 29 April 2002, during a period where the claimant's connection to CVP was stable. I heard further submissions from both parties on these preliminary issues at today's hearing.

Respondent's application to strike out the claimant's claim

8. The respondent had applied to strike out the claimant's claim under Rule 37. Their application was contained within their email to the Employment Tribunal on 4 October 2021.
9. Mr Burgess confirmed that the respondent did not wish to proceed with their application to strike out the claimant's claim.
10. I dismissed the respondent's application on withdrawal.

Claimant's application to amend his claim to include a complaint of constructive dismissal

11. The claimant sought leave to amend his claim to include a complaint of constructive dismissal.
12. The claimant said that he had requested that the respondent pay him a fuel subsidy and that they never came back to him and that this led to him resigning.
13. The respondent objected to the claimant's application to amend his claim to include a complaint of constructive dismissal on the grounds that the claimant had less than 2 years' service and was not entitled to pursue a claim for constructive dismissal.
14. In order to bring a complaint for constructive dismissal, which is a type of unfair dismissal claim, section 108 of the Employment Rights Act 1996 requires a claimant to have not less than two years' service to make an unfair dismissal complaint.
15. At the time of his dismissal, the claimant had been employed by the respondent for 1 year and 26 days. He did not therefore have the required two years' service to enable him to bring a claim for constructive dismissal.
16. I refused the claimant's application to amend his claim to include a complaint that he was constructively dismissed because he did not have two years' qualifying employment immediately prior to the date of his dismissal.

Claimant's application to amend his claim to include a complaint of breach of contract

17. The claimant further sought leave to amend his claim to include a complaint that the respondent had breached his contract of employment by failing to provide him with work during the period 25 April 2022 to 2 June 2022.
18. The claimant had raised this at an earlier stage in the proceedings, in an email to the Employment Tribunal on 6 September 2021 and an email to the respondent on 20 October 2021. The claimant asked me to allow his application to amend his claim and to consider that he did not have a solicitor representing him and that he was doing his own research.

19. On behalf of the respondent, Mr Burgess submitted that the claimant's application to amend his claim should be dismissed. Mr Burgess referred me to the guidance in *Selkent Bus Co Limited v Moore* [1996] ICR 836 and asked me to consider: (1) the nature of the amendment; (2) the applicability of time limits; and (3) the timing and manner of the application.
- (1) Nature of the amendment: Mr Burgess submitted that this was an entirely new cause of action being presented by the claimant and that this was a matter that the claimant was aware of at the time he presented his ET1 claim form. Mr Burgess submitted that it was open to the claimant at that time to include details of the alleged breach of contract within his ET1 claim form and that it was reasonably practicable for the claimant to have fully presented his claim in time.
- (2) Applicability of time limits: Mr Burgess submitted that the time limit for the claimant presenting his claim for breach of contract expired on 27 August 2021. Mr Burgess submitted that as the claimant's application to amend was received by the respondent's representative on 20 October 2021, this application was made 54 days out of time. Mr Burgess also submitted that whilst time limits are not the only factor, they are a factor of considerable weight, referring me to the decision in *Gillett v Bridge 86 Ltd* UAEAT/0051/17/DM.
- (3) Timing and manner of application: Mr Burgess asked me to consider that the claimant's application to amend was submitted only 2 days before the original listing date of the final hearing on 22 October 2021. Mr Burgess submitted that to allow the claimant's application to amend his claim would lead to a disproportionate delay as it would necessitate a further postponement to allow for the gathering of further evidence and obtaining of witness statements. Mr Burgess submitted that if the amendment were allowed, this would not be in the interests of justice or fair to either party.
20. I considered the ET1 claim form presented by the claimant which included a reference to a reduction in shifts to 2 days a week until 11 May 2021, the date the claimant resigned. The claimant's witness statement dated 24 September 2021 also referred to a reduction in shifts, stating at paragraph 6 that there were no shifts available to him throughout the month of May 2021 and that he only had 24 hours of shifts throughout April and May 2021.
21. I was satisfied that the claimant's application sought to add to the content of his ET1 claim form and witness statement rather than to introduce an entirely new complaint.
22. I noted that the bundle of documents before me included screenshots of shifts for the period 25 April 2021 to 22 May 2021.

23. I concluded that I would be able to hear evidence from the claimant and the respondent's witness in relation to the shifts available to the claimant during the period 25 April 2021 to 22 May 2021 and that a further adjournment would be unnecessary and disproportionate.
24. I applied the principles in *Selkent* in deciding whether to allow the amendment. I also considered the guidance in the decision of the Court of Appeal in *Abercrombie v Aga Rangemaster Limited* [2013] EWCA Civ 1148, [2014] ICR 209. I took into account all of the circumstances and balanced the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I concluded that I had the evidence available to be able to consider the complaint that the respondent had breached the contract of employment and there was no prejudice to the respondent in allowing the application.
25. I allowed the claimant's application to amend to the extent that it related to the period from 25 April 2021 to 22 May 2021, the date on which the claimant's employment terminated. I did not allow the amendment in relation to the period from 23 May 2021 to 2 June 2021 as the claimant was no longer employed by the respondent during this period.

Issues for the Tribunal to decide

26. Having dealt with the preliminary issues, the issues for me to decide were as follows:

Wrongful dismissal / Notice pay

- (1) What was the claimant's notice period?
- (2) Was the claimant paid for that notice period?
- (3) If not, was the claimant guilty of gross misconduct / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Other Breaches of Contract

- (1) Did this claim arise or was it outstanding when the claimant's employment ended?
- (2) Did the respondent not pay the claimant fuel allowance?
- (3) Was that a breach of contract?
- (4) If so, how much should the claimant be awarded as damages?
- (5) Did the respondent not provide the claimant with shifts during the period 25 April 2022 to 22 May 2022?
- (6) Was that a breach of contract?
- (7) If so, how much should the claimant be awarded as damages?

Procedure, documents and evidence heard

27. The claimant was a litigant in person.
28. There was a paginated file of documents before me running to 55 pages. References to page numbers throughout this judgment refer to the paginated file of documents. Further documents produced in advance of the hearing and during the hearing were as follows:
 - a. A breakdown of the claimant's earnings for the 12 week period between 16 January 2021 and 11 April 2021;
 - b. Confirmation of payment of the sum of £212.77 to the claimant by the respondent;
 - c. A letter from the claimant dated 7 October 2021;
 - d. A screenshot of a WhatsApp message exchange between the claimant and Mr Faran following the claimant's resignation.
29. There were written witness statements from Mr Aro and Mr Faran, Area Manager for the respondent. Mr Faran gave evidence for the respondent. The claimant was the only witness for himself.
30. I considered all the written and oral evidence notwithstanding whether it is addressed specifically in this decision.

Findings of Fact

31. The respondent is a business providing uniformed security personnel and security services at various clients' sites nationally.
32. The claimant was employed by the respondent as a Security / COVID officer between 27 April 2020 and 22 May 2021, a period of 1 year and 26 days.
33. No concerns were raised by the respondent with the claimant regarding his performance or conduct during the course of his employment.
34. On 13 June 2020, the claimant signed a written statement of terms and conditions of employment [pages 24-32]. The relevant clauses are as follows:

"HOURS OF WORK

Your normal hours of work are variable and are those required to carry out your duties to the satisfaction of the Company and as necessitated by the needs of the business. Your hours of work consist of variable shifts each week between Monday – Sunday. TSS is a 24 hours business, therefore your shifts can start at any time within this duration, however appropriate daily and weekly rest periods will be provided as per the current legislation. Breaks are unpaid and in line with the Working Time Regulations and you will

be paid for the actual hours of work undertaken. You will not be expected to work more than 48 hours per week unless you have chosen to work in excess of this by opting out of the Working Time Regulations.

Subject to the following provisions, the Company guarantees a minimum number of five hours per week or twenty hours per four weekly period. For the avoidance of doubt all hours made available to you by the Company shall count towards the discharge of the minimum hours, whether or not those hours are worked by you and providing that you are ready, willing and able to work. There is no obligation on the Company to make available all or part of the minimum hours in any particular week or to spread them evenly over the month.”

“REMUNERATION

Your wage is currently £8.75 per hour payable monthly by credit transfer as detailed on your pay statement. All authorised additional hours worked, will be paid at your basic hourly rate. Hours worked on Bank Holidays are paid at double time. A site-specific enhancement may be available, details of which will be given separately.”

“NOTICE OF TERMINATION TO BE GIVEN BY EMPLOYER AND EMPLOYEE

Notice to be given by both parties is set out as follows: Under two years’ service – one week’s notice. Thereafter each side will give an additional week’s notice for each additional, full years’ service, to a maximum of 12 weeks.”

35. The claimant was employed by the respondent on a variable hours contract.
36. The respondent guaranteed a minimum of five hours per week or twenty hours per four week period.
37. The claimant was paid £8.75 per hour.
38. The claimant worked at several sites in the period from 30 April 2020 and 23 May 2020. This is recorded in the payslips issued for April 2020 and May 2020 [pages 44 and 45].
39. From 27 May 2020 onwards, the claimant worked at Bolton Dawes Morrisons, as recorded in the payslips issued for May 2020 through to March 2021 [pages 45 – 55].
40. The parties agreed that the claimant worked at the Bolton site as a permanent site until a date on or around 25 April 2021.
41. Shifts are allocated by way of a portal to which employees, the respondent and the control room have access. Where an employee is assigned to a permanent site, their shifts are automatically loaded on the portal.

42. Employees also have the facility to search for available shifts and indicate their availability to work via a “Work Search” facility. Employees have the option to accept or decline shifts that are listed in the “Work Search” results. Employees also have the option to call the control room to provide availability for shifts.
43. The claimant’s and respondent’s evidence as to indicating availability via the portal differed. The claimant gave evidence that he was not required to provide availability but simply accepted or declined shifts that appeared in the portal. Mr Faran’s evidence, on behalf of the respondent, was that if an employee was working in a permanent store they would get a full rota on the portal but if not assigned to a permanent store, employees would make themselves available via the portal or by contacting the control room. I accepted the respondent’s evidence that where not assigned to a permanent store, employees would use the “Work Search” facility to select shifts and provide availability. I find that the claimant’s explanation, on the balance of probabilities, relates to those employees who are assigned to a permanent store. My reason for this is that the claimant had worked at the same site as a permanent store for almost 12 months.
44. The parties agreed that the claimant worked at the Bolton site as a permanent site until a date on or around 25 April 2021. However, at this point, the claimant’s and respondent’s evidence differs. Mr Faran, on behalf of the respondent, stated that the claimant had refused to work at Bolton as a permanent site on or around 25 April 2021. The claimant’s evidence was that he advised Mr Faran that he did not wish to travel to Bolton unless he would be paid a fuel subsidy for travel to and from the store. I find that on the balance of probabilities, on or around 25 April 2021, the respondent took the claimant’s comments to mean that the claimant did not wish to work at the Bolton site and amended the portal to reflect that this was no longer a permanent site for the claimant.
45. There were no shifts on the portal for the weeks commencing 25 April 2021, 2 May 2021 and 9 May 2021. I have been taken to the diary screenshots included in the file of documents [pages 41 – 43]. I find that on the balance of probabilities, this was due to the respondent having amended the portal to reflect that the Bolton site was no longer a permanent site for the claimant.
46. Although the claimant says that he was only allocated 24 hours of shifts in April 2021 (paragraph 4 of his witness statement), I find that he worked a minimum of 32.25 hours in April 2021. The breakdown of hours worked by the claimant provided to me during the hearing records that the claimant was paid for the following shifts between 1 April 2021 and 11 April 2021:
- 1 April 2021 – 8.5 hours
 - 3 April 2021 – 8.0 hours
 - 9 April 2021 – 7.75 hours
 - 10 April 2021 – 8.0 hours
47. Although the claimant says there were no shifts available to him from 25 April 2021 to 3 June 2021 (paragraph 4 of his witness statement) I find that there were shifts available to him during that period. There were two

shifts on the portal available to the claimant on 21 May 2021 and 22 May 2021 [page 40]. The first shift was for 8 hours at the Bolton Dawes Morrison site. The second shift was also at the Bolton Dawes Morrison site although the duration of the shift has been cropped out of the image.

48. The claimant's statement of terms and conditions of employment does not include any provision for a fuel subsidy.
49. The claimant and respondent gave conflicting evidence about whether the respondent agreed to pay the claimant a fuel subsidy.
50. The claimant's evidence is that he spoke with his manager, Mr Faran, on several occasions in May and June 2020 about a fuel subsidy. Mr Faran accepts that an exchange of messages took place with the claimant but disputes that a fuel subsidy was agreed.
51. I was directed to a screenshot of a WhatsApp message exchange between the claimant and Mr Faran [page 35]. Mr Faran advised the claimant that *"there is no fuel subsidy on your travel to Morrison Dawes"*. The claimant responded: *"Actually you told me that your manager can approve it, that you are going to talk to him regarding this issue."* Mr Faran responded: *"I didn't say about fuel subsidy I told you I will speak with my manager if we can look into to arrange pay rise."* Mr Faran sent a further message: *"I have now asked to look into this"*. I find that there was no agreement by the respondent to pay the claimant a fuel subsidy.
52. The claimant wrote to the respondent's HR department on 12 January 2021 [pages 33 and 34] requesting a change of shift pattern from afternoon to morning, due to not having a car. This letter did not make any reference to a fuel subsidy. I find that the claimant did not escalate the issue of a fuel subsidy with the HR department or raise a grievance.
53. The claimant resigned on 11 May 2021, giving 11 days' notice.
54. Mr Faran contacted the claimant via WhatsApp message following receipt of the claimant's resignation. A screenshot of this exchange of messages was provided to me at the hearing today. Mr Faran enquired as to whether the claimant would be available for shifts up to the 22 May 2021, the last date of the claimant's employment. The claimant stated that he had already made arrangements for that period. I find that the claimant did not make himself available to work any shifts for the period from 11 May 2021.
55. The claimant's last day of employment with the respondent was 22 May 2021.
56. The claimant was aged 52 at the time his employment terminated.
57. On termination of his employment, the claimant did not receive any notice pay.

The Law

58. Section 86 of the Employment Rights Act 1996 provides:

“(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week’s notice if his period of continuous employment is less than two years,

(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.”

59. Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (1994 Order) allows employees to bring a claim for damages for breach of a contract of employment, which arises or is outstanding at the termination of the employment, in the employment tribunal.

Conclusions

Notice pay

60. The claimant’s terms and conditions of employment set out the terms of the notice period. I have also considered the provisions of section 86 of the Employment Rights Act 1996 and the statutory minimum notice period required for an employee with less than two years’ service. I conclude that the claimant was entitled to a notice period of one week.

61. Prior to the hearing, the respondent had made a payment of £212.77 to the claimant in respect of notice pay due. Mr Burgess, on behalf of the respondent, conceded that the respondent was liable to pay the claimant notice pay. The claimant had returned that payment to the respondent as he was unclear as to the basis on which the sum of £212.77 had been calculated.

62. In addition, and for completeness, I conclude that there was no basis for the respondent dismissing the claimant without notice. As set out in the facts above, the respondent had not raised any concerns with the claimant regarding his performance or conduct and there were no grounds for a finding of gross misconduct or dismissal without notice.

63. Accordingly, I conclude that the respondent has failed to pay the claimant for the period of notice required under the terms and conditions of employment, that being one week. The claimant is entitled to damages for the breach of contract. The intention of damages is to put the claimant in the position he would have been had the contract been performed correctly, that is, he had been paid one week’s notice.

64. The claimant is entitled to one week's notice. Although damages are calculated on a net basis, since the claimant will be liable for tax on the notice pay, I use the gross figure in the calculation.
65. The calculation of the claimant's notice pay is based on an average of the 12 week period in which the claimant most recently undertook any work for the respondent, that is, the period from 16 January 2021 to 11 April 2021. I have used the breakdown of hours worked that was provided by the respondent in my calculations.
66. During this period, the claimant was paid for a total of 282.75 hours. Dividing this by 12 gives a weekly average of 23.6 hours.
67. The claimant was paid £8.75 per hour. The claimant was aged 52 at the time his employment terminated. The National Minimum Wage from April 2021, for those over 23, was £8.91 and I therefore conclude that sum due to the claimant in respect of notice pay is £210.28, this being £8.91 x 23.6 hours.

Fuel subsidy

68. The claimant's terms and conditions do not make any provision for payment of a fuel subsidy. The claimant agrees that the terms and conditions he signed do not provide for payment of a fuel subsidy.
69. The claimant had raised the issue of payment of a fuel subsidy with his manager, Mr Faran. However, Mr Faran was clear in his evidence both written and oral, that he had made clear to the claimant that no fuel subsidy would be paid.
70. The claimant relies on UK law for payment of a subsidy but was not able to direct me to any specific provision.
71. I conclude that there is no contractual entitlement to a fuel subsidy. I further conclude that the respondent did not agree to pay the claimant a fuel subsidy. The claimant's claim is not well founded and is dismissed.

Shifts during the period 25 April 2021 to 22 May 2021

72. The respondent guaranteed a minimum of 5 hours per week or 20 hours per four weekly period providing that the claimant was ready, willing and able to work.
73. There is no contractual provision that the respondent would make available all or part of the minimum hours in any particular week or to spread them evenly over the month.
74. In the period 1 April 2021 to 11 April 2021, the claimant worked 32.25 hours. 23.75 hours were worked between 3 April 2021 and 10 April 2021. I conclude that the respondent had satisfied its contractual guarantee of 20 hours for the four-week period up from 3 April 2021 to 1 May 2021.
75. I conclude that the next four-week period to consider runs from 2 May

2021 to 30 May 2021. The claimant resigned on 11 May 2021 and his last day of employment was 22 May 2021. I have found that the respondent had made shifts available to the claimant during that period. Whilst the shifts available on 21 May 2021 and 22 May 2021 do not necessarily amount to 20 hours in total, as the nature of the claimant's contract of employment means that the respondent did not have to provide all or part of the minimum hours in any particular week or to spread them evenly over the month, and at the time of the last day of the claimant's employment, there was a further 7 days left within the four-week period to run, the respondent was not in breach of the terms and conditions of employment as it was possible for the balancing hours to have been allocated within the period that post-dated the claimant's last day of employment.

76. In any event, I have concluded that the claimant did not make himself available for work during that period as when asked by Mr Faran, on behalf of the respondent, whether he was available for shifts, the claimant advised that he had made other arrangements. As the claimant had advised the respondent that he was not available for work during his notice period, there was no contractual obligation on the respondent to provide shifts during this period.
77. I conclude that there is no breach of contract. The claimant's claim is not well founded and is dismissed.

Employment Judge Poynton
Date: 8 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
10 June 2022

FOR EMPLOYMENT TRIBUNALS



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2408881/2021**

Name of case: **Mr BO Aro** v **Total Security Service Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 10 June 2022

"the calculation day" is: 11 June 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.