EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 22 – 24 April 2024

Claimants: (1) Mr D McShaw
(2) Mr R McShaw
(3) Mr E Atwere

Respondent: Mitie Limited

Before: Employment Judge Ramsden

Representation:

Claimants In person

Respondent Mr K Webster, Counsel

RESERVED JUDGMENT

1. Each of the Claimants' Complaints of unauthorised deductions from their wages is not made out and is dismissed.
2. The Second and Third Claimants' complaints that the Respondent refused to permit them to take all of the annual leave to which they are entitled under the Working Time Regulations 1998 succeed – the Respondent refused to permit the Second and Third Claimants to exercise their rights under the Working Time Regulations 1998 to take the full amount of annual leave to which they were entitled in the holiday years 2020/2021, 2021/2022, 2022/2023 and 2023/2024.
3. The Respondent is ordered to pay to the Second Claimant compensation in the sum of **£3,796.28** on a gross basis.
4. The Respondent is ordered to pay to the Third Claimant compensation in the sum of **£3,633.08** on a gross basis.

REASONS

Background

5. The Respondent is a facilities management company. One of the services it supplies to its clients is security guarding.

6. The Claimants all work for the Respondent as part of its security team at a single specific office occupied by one of the Respondent's clients (the **Site**).

7. The Claimants remain in the Respondent's employment.

8. The Second and Third Claimants are Security Officers and the First Claimant is the Security Supervisor.

Claims and issues

9. The Claimants have brought claims against the Respondent for unauthorised deductions from their wages pursuant to section 13 of the Employment Rights Act 1996 (the **1996 Act**), and in the case of the Second and Third Claimants for compensation for failure to permit them to take all of their annual leave pursuant to the Working Time Regulations 1998 (the **WT Regulations**).

10. Specifically:

    a) The First Claimant is claiming:

        (i) Unauthorised deductions from his wages on the basis that he was contractually guaranteed work on the first weekend of every month, which the Respondent failed to honour (**Complaint 1**);

        (ii) Unauthorised deductions from his wages during the period 29 November 2019 to 24 December 2019 (he says he was underpaid during this period) (**Complaint 2**);

        (iii) Unauthorised deductions from his wages because he was removed from shifts on 4 and 5 July 2020 (**Complaint 3**); and

        (iv) Unauthorised deductions from his wages on the basis that he was contractually entitled to cover the holiday leave of the security officers at the Site (**Complaint 4**);

    b) The Second Claimant is claiming:

        (i) Unauthorised deductions from his wages on the basis that pay relating to the first hour on the first weekend of every month has been deducted from his pay from 4 April 2020 to date (**Complaint 5**);

(ii) Unauthorised deductions from his wages on the basis that he was entitled to be paid double time, and was only paid single time, for shifts on:

1. 12 April 2020;
2. 4 April 2021; and
3. 17 April 2022 (**Complaint 6**).

The Respondent informed the Tribunal, in a Preliminary Hearing on this matter in January 2024, that it accepts that the Second Claimant was due to be paid double time by way of "substitute pay" in respect of work performed on 26 December 2020, 25 December 2021 and 26 December 2021, and that payment would be made to the Second Claimant in that respect. As at the time of this hearing, those payments had not been made;

(iii) Unauthorised deductions from his wages on the basis that he was entitled to work Friday 27 March 2020 but the Respondent did not permit him to work that shift (**Complaint 7**);

(iv) Unauthorised deductions from his wages on the basis that he was removed from 4 shifts between 24 March 2020 to 30 April 2020 (**Complaint 8**);

(v) Unauthorised deductions from his wages on the basis that he was contractually entitled to cover the holiday of his fellow Security Officers but was not permitted to do so (**Complaint 9**); and

(vi) Damages in respect of the Respondent's refusal to permit him to take all of his holiday entitlement for the holiday years 2020/2021 and 2021/2022. The Second Claimant says he was entitled to 29 and 28 days' annual leave for those years respectively (**Complaint 10**); and

c) The Third Claimant is claiming:

(i) Unauthorised deductions from his wages on the basis that he was removed from a shift he was contractually entitled to work on 27 March 2020 (**Complaint 11**);

(ii) Unauthorised deductions from his wages on the basis that he was contractually entitled to cover the holiday of his fellow Security Officers but was not permitted to do so (**Complaint 12**); and

(iii) Damages in respect of the Respondent's refusal to permit him to take all of his holiday entitlement for the holiday years 2020/2021 and 2021/2022. The Third Claimant says he was entitled to 29 and 28 days' annual leave for those years respectively (**Complaint 13**).

11. All three Claimants have said that an ACAS uplift should apply in relation to the Respondent's failure to allow them to appeal the grievance outcome, and the Second Claimant has said that an ACAS uplift should also apply in relation to the Respondent's failure to comply with the VSG COT3 agreement (defined below) in respect of substitute days.

12. The issues to be determined in this hearing were set out by EJ Cawthray in Orders of 25 February 2024, and are appended to this judgment.

The facts

The agreed facts

13. The three Claimants work in the provision of security services, and have worked at the Site since August 2011 in the case of the First Claimant, October 2000 in the case of the Second Claimant, and March 2008 in the case of the Third Claimant.

14. They have a fourth colleague, Humayun Chowdhury, who is also part of the security team at the Site. Mr Chowdhury is not a claimant in these proceedings. Mr Chowdhury joined the "core team" providing security services at the Site in April 2015.

15. All three Claimants were previously employed by The Shield Guarding Co. Ltd in providing security services at the Site, and they transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) into the employment of Vision Security Group Limited (**VSG**) in 2015, when VSG took over the supply of those services at the Site.

16. The Claimants had a dispute with VSG which resulted in their filing claims with the Employment Tribunal. That dispute centred upon whether VSG honoured certain aspects of the Claimants' terms, conditions and benefits when the Claimants TUPE-transferred into its employment, namely:

    a) A monthly payment in respect of uniform cleaning;

    b) The pay arrangements if the Claimants work either a bank holiday or a substitute day; and

    c) The provision to the Third Claimant of a certificate for 15 years' long service.

    This dispute was settled on 26 July 2017 and the result recorded in a COT3 settlement agreement (the **VSG COT3**). That document, at paragraph 3, set out that:

    "*The Respondent confirms that in the event the Claimants work on a substitute day they will be paid double time for working the specific day and double pay for*

the actual bank holiday, as outlined in the Claimant's grievance outcome letters dated 11 May 2017."

The parties agreed that the reference to a "substitute day" refers to the situation where a bank holiday falls on a Saturday or Sunday and a substitute day, being the following working day, is instead used as the substitute bank holiday.

17. In April 2019 the Claimants TUPE-transferred from VSG's employment into the employment of the Respondent.

18. The Respondent employs an Operations Manager who oversees the management of security teams at various client premises in the locality. A new Operations Manager, Neil Holmes, was assigned to manage the security team at the Site from the end of 2019.

19. The Claimants say that the matters they complain about as part of this matter date from February 2020, when their relationship with Mr Holmes deteriorated.

20. The Claimants filed a grievance against Mr Holmes on 6 April 2020 which related to most of the matters that are the subject of this claim. As part of that grievance process the Claimants supplied various pieces of written evidence to the Respondent, including the VSG COT3.

21. The Claimants' grievance against Mr Holmes was rejected by the Respondent on 21 August 2020. The Claimants appealed that decision.

22. The Claimants' grievance appeal came to an end on 22 December 2020.

23. The First Claimant contacted ACAS about early conciliation, and an Early Conciliation certificate was issued in respect of the First Claimant's dispute with the Respondent, both on 12 January 2021 (so early conciliation between the First Claimant and the Respondent commenced and ended on 12 January 2021).

24. The First Claimant issued a Claim Form on 4 March 2021, which was given case number 2300887/2021 (the **Single Claim**). While that Claim Form observed that the First Claimant's claim was part of a multiple involving the Second and Third Claimants, the Claim Form did not bring a claim on behalf of those individuals.

25. Due to an initial problem with the information supplied by the Claimant the Single Claim was rejected by the Tribunal, but that problem was subsequently corrected and the Tribunal accepted the Single Claim and determined that it was to be treated as having been received on 11 April 2021.

26. ACAS early conciliation in respect of the claim brought by all three Claimants began on 12 April 2021 and ended on 14 April 2021.

27. The First Claimant filed a Claim Form on behalf of himself and the Second and Third Claimants on 22 April 2021 (the **Multiple Claim**). The First Claimant's case as part of that multiple was given case number 2301550/2021, the Second Claimant's case as part of that multiple was given case number 2301551/2021,

and the Third Claimant's case as part of that multiple was given case number 2301552/2021.

28. Mr Holmes ceased to carry out the role of Operations Manager for the Claimants' region in June 2021. He was replaced by a subsequent Operations Manager.

29. Carol Imrie commenced her current role with the Respondent – that of Senior People Business Partner - about a year ago. As part of her role, Ms Imrie provides HR support to a number of business areas, including Security & Cleaning South.

<u>The first disputed fact: Do the unsigned contracts of employment in the hearing bundle represent the terms and conditions on which each of the Claimants are employed by the Respondent?</u>

30. The Respondent has pointed to a written (but unsigned) contract of employment in the Bundle between VSG and each of the Claimants which the Respondent says governs the terms and conditions of each of the Claimants' employment. Those documents are unsigned by each of the relevant Claimants, and state in each case that "*Your employment under these terms and conditions will commence on 19th October 2015*" (though the relevant Claimant's continuous service already accrued is recognised).

31. The particular relevance of these contracts is they contain a term which reads:

"*You should be aware that both the number of hours worked and when these hours are worked may vary as they are dictated by the shift pattern of the site upon which you are working and as stated above you may be reallocated to a different shift or site at any time.*"

32. The Claimants each gave evidence to the effect that they had never signed the contract purportedly with them. The First and Second Claimants said that the first time they saw the contracts pertaining to them was at the time of the grievance in April 2020. The Third Claimant said that he was on holiday at the time that grievance was raised, and that the first time he saw the contract pertaining to him was in connection with these proceedings.

33. The First and Second Claimants' position is consistent with an email contained in the Claimants' Supplementary Bundle from Chris Rugg, the Respondent's 'Regional Director – Mitie Security', to Lloyd Siebert, a Senior HR Administrator at the Respondent, dated 23 October 2020, where Mr Rugg wrote:

"*I wish to issue new contracts to the officers at [the Site]. They are rejecting the VSG contracts that we have on file claiming they are not accurate.*

Can you assist?"

34. The reply from Mr Siebert on 8 November 2020 included:

"*If they are VSG employees we would not have the contract unless provided as part of the ELI data.*"

35. Ms Imrie for the Respondent agreed that the Respondent did not have signed copies of those agreements, but she said that she understood those contracts to have been provided to the Respondent by VSG in connection with the Claimants' TUPE-transfer.

36. Ms Imrie's position necessarily involves assumption – she was not working for VSG at the time that these documents were apparently presented to the Claimants. As she has acknowledged, she is not in a position to assert that the Claimants were in fact provided with them by VSG, or agreed to them. Therefore the only direct evidence on the point is the Claimants' denial that they ever saw those terms in October 2015, and the corroboration from the contemporary documents that the First and Second (and possibly the Third) Claimants denied the accuracy of those agreements when they were presented with them in 2020.

37. The Claimants' evidence on this point is preferred. The Tribunal finds that the terms and conditions of their employment are not set out in the VSG documents from 19 October 2015. The Claimants' position is that the terms and conditions of their employment were never documented in a single contract. In any event, no other written contract has been presented to the Tribunal, and therefore the Claimants' terms and conditions – to the extent relevant to determine these claims - fall to be determined by assessment of the relevant evidence.

<u>The second disputed fact: Is the First Claimant the person who determines the working hours for security service provision at the Site?</u>

38. The parties agree that the First Claimant, as Security Supervisor, draws up the roster for his working hours and the working hours of the three Security Officers at the Site. Where they disagree is whether the First Claimant's roster is determinative of the hours of work of the security personnel at the Site.

39. The Claimants say that it is, the Respondent says that that roster amounted to a recommendation to the relevant Operations Manager, which was subject to the approval of the Operations Manager.

40. Ms Imrie's evidence was that, in most cases the Security Supervisor's roster – which would be based on set rotas that each member of the team works to - would be approved by the Operations Manager month-on-month, the only exceptions being when overtime is authorised, and when holiday cover or unexpected absences need to be covered. However, Ms Imrie said that the Operations Manager has a degree of discretion – provided they are confident that the relevant personnel's contractual number and pattern of working hours will be honoured – to adjust the roster, and they may do so to ensure fairness between staff, in light of their duty of care to all staff, and/or if there are health and safety

concerns. Indeed, Ms Imrie went so far as to say that part of the role of the Operations Manager is to ensure that overtime is spread evenly and not given to specific employees only. Unfortunately, there was no document in the Bundle that set that out. This is surprising given that the Operations Manager role, and indeed the Security Supervisor role, presumably has been the subject of recent job descriptions (given the size of the Respondent organisation) which could have been shown to the Tribunal, and their performance would be subject of appraisals that could demonstrate this "approval" (or, in the case of a Security Supervisor, this "initial drafting") function.

41. The First Claimant said that Ms Imrie is describing the general position, but there can be site-specific instructions, and there are for the Site. The First Claimant said that the site-specific instructions for the Site make it clear that his rosters are determinative for the Site, and he pointed the Tribunal to an email beginning on page 1149 of the Claimants' Supplementary Bundle in support of that. That email does refer to site-specific matters, such as the contact details to be used in the event of an emergency, when the fire alarm is tested, etc., but there is nothing in this email that shows an instruction from the relevant client that the working rosters of the security time at the Site are to be determined by the First Claimant (or the Security Supervisor).

42. The Tribunal is left with the oral evidence of the Claimants on the one hand against that of Ms Imrie on the other to answer this question.

43. The Tribunal prefers Ms Imrie's position on this point. It is far more plausible that a large organisation such as the Respondent would not allow the head of a site-specific four-person team to determine, with binding effect, the rosters of work for that team. That would present the risk of nepotism and bias, e.g., of that person rostering themselves for more or less work, more favourable shifts, etc., provided the team members' contracts are silent about shift patterns or the Respondent has the power to alter any contractual shift pattern. It is far more likely that the Respondent would wish to have regional oversight to check that site-generated rosters are appropriately drawn up, operating the kind of checking process Ms Imrie describes. In such a situation, consistent with Ms Imrie's evidence, it might be expected that such a check would rarely involve a deviation from the Security Supervisor's provisional roster, given such a person would be expected to carry out that function fairly, and that might well lead the Security Supervisor to believe that their roster is determinative.

44. The Tribunal finds that the Operations Manager, not the Security Supervisor, has the "final say" on the roster of work at the Site, *provided that* they respect (as Ms Imrie has said) contractual terms about the number of hours of work and working patterns, as well as leave entitlement and other matters that could impact the work roster.

The third disputed fact: Did the Respondent refuse to permit the Second Claimant's request to take some of the holiday to which he was entitled in each of the 2020/2021, 2021/2022, 2022/2023 and 2023/2024 holiday years?

45. The parties agree that the Second Claimant took 22 days' leave in 2020/2021, and 20 days' leave in 2021/2022. The Tribunal was not taken to evidence beyond those periods.

46. The Tribunal was shown:

    a) an email from Mr Holmes of 22 December 2020 where he stated that the Second Claimant was entitled to 21 days' holiday (plus, in that year, an additional bonus day); and

    b) an extract of the Workplace+ portal showing that in January/February 2021 Mr Holmes declined to approve the Second Claimant's request for annual leave on the basis that the Second Claimant had exceeded his annual entitlement of 21 days plus the extra bonus day.

47. This is clear evidence that the Second Claimant sought to take leave in the 2020/2021 holiday year that was rejected by the Respondent because the leave request would have exceeded the 22 days to which Mr Holmes believed the Second Claimant was entitled.

48. That evidence, together with the fact that the Second Claimant took less leave in 2021/2022 than he was entitled to, along with the fact that the Respondent operated a "use it or lose it" policy, supports an inference that the Second Claimant was also not permitted to take all of his annual leave in 2021/2022.

49. While the Tribunal was not taken to evidence of the annual leave the Second Claimant was permitted to take in the holiday years 2022/2023 and 2023/2024, the Respondent did not seek to argue that it had altered its position on the Second Claimant's annual leave entitlement subsequently. As the Second Claimant asserts that he was entitled to 28 days per annum throughout his employment – save for the 2020/2021 leave year when he was entitled (and the Respondent agrees) to an additional day – there is no reason to suppose that the Respondent changed it position on that in 2022/2023 or 2023/2024, not least because it would have weakened its resistance of the Claimant's arguments regarding his entitlement in 2020/2021 and 2021/2022. The Tribunal therefore concludes that the Second Claimant was also not permitted to take further leave that he sought to take above 21 days in each of the 2022/2023 and 2023/2024 leave years. This is a reasonable inference to make given the parties' positions on the earlier years' entitlement.

The fourth disputed fact: Did the Respondent refuse to permit the Third Claimant to take some of the holiday to which he was entitled in each of the 2020/2021, 2021/2022, 2022/2023 and 2023/2024 holiday years?

50. The Third Claimant's evidence was very confusing on his holiday entitlement, but it was very, very clear that he would have taken 28 days if that was permitted – he stated clearly in oral evidence: "*it is not my intention to carry even one day over the threshold*", and he talked about the fact that he travelled abroad to see his family.

51. Given the Third Claimant's holiday entitlement was and is identical to the Second Claimant's, it is reasonable to accept the Second Claimant's evidence that the Third Claimant was treated in an identical manner to him by Mr Holmes in respect of the 2020/2021 and 2021/2022 leave years. It is also reasonable to infer that the Respondent's practice would have continued in the subsequent two years – not least because if it had behaved otherwise the Claimants would have pointed that out to the Tribunal in support of their position as to their correct entitlement in the 2020/2021 and 2021/2022 disputed years.

52. This clearly supports an inference that the Third Claimant was not permitted to take more than the 26 days' holiday he in fact took in 2020/2021 (when an extra day's holiday was provided to the Claimants due to covid), and the 20 days' holiday in 2021/2022 he in fact took, and 20 days' holiday in each of 2022/2023 and 2023/2024.

The hearing

The documents for the Tribunal

53. In spite of the facts that this hearing was only listed for three days, and that EJ Cawthray spent some time at the preliminary hearing on 18 January 2024 talking to the parties about the disproportionate length of the bundle, supplementary bundle, witness statements and apparent written submissions from the Claimants in documents entitled "Argument Statements" seen by her at that time, it seems that little heed was given to her guidance, given:

    a) The core Bundle apparently agreed by the parties for this hearing is 616 pages in length;

    b) The Claimants have produced a further Claimants' Supplementary bundle running to 2,995 pages; and

    c) The witness statement bundle is 253 pages long, comprising:

        (i) Witness statements from each of the Claimants (sometimes more than one) with appendices (with the First Claimant's witness statements and appendices running to 118 pages);

(ii) An "Argument Statement" from each of the Claimants (running to 19 pages);

(iii) "Updated" witness statements from each of the Claimants (running to 62 pages); and

(iv) A witness statement from the Respondent (running to six pages).

54. Moreover, the Bundles provided do not include some core documents that the Tribunal and the parties needed to refer to, including:

a) EJ Cawthray's Orders of 25 February 2024 – which were added by the Tribunal as pages 617 to 628 of the Bundle;

b) A document sent by the Claimants to the Respondent and the Tribunal on 11 March 2024, purportedly being an application to amend their claims – added as pages 629 to 638 of the Bundle; and

c) The Respondent's reply to that document of 26 March 2024 – added as pages 639 to 640.

55. At the end of the second day of the hearing the Claimant's sought to refer to email correspondence between the Second Claimant and Jay Olaofe. The Claimants could not find that correspondence in any of the Bundles, despite their belief that they had sent that correspondence to the Respondent for inclusion in the Bundle following timely disclosure of that document to the Respondent. The Claimants were instructed to provide to the Tribunal both the email correspondence and the proof that that correspondence had been disclosed to the Respondent. On the third day of the hearing the Claimants produced the relevant email correspondence, but not the proof of disclosure. The Employment Judge refused to admit that email correspondence into evidence, on the basis that it was not in the interests to do so - witness evidence had concluded, the Claimants had no evidence that the Respondent had ever seen that document, and the Claimants had had ample opportunity to disclose it before the final day of the hearing.

Application to amend

56. EJ Cawthray's Orders noted that: "*Whilst discussing the List of Issues it also became apparent, that the Claimants were seeking to rely on alleged deductions and losses that took place after the submission of the ET1…. I explained to the parties that any allegations that relate to events after the ET1 are not contained in the claim form, and may require an application to amend or a new claim*".

57. The Claimants believed they had made such an application on 11 March 2024, but Mr Webster pointed out (and the Tribunal agreed) that in fact that document is in fact an explanation as to why the Claimants had not understood that they needed to make an application to amend in order to claim losses beyond the date of the (relevant) Claim Form, rather than an application to amend itself.

58. The Employment Judge informed the Claimants that they could make that application orally, and that to do so they would expected to specify:

    a) What amendment(s) they are looking to make;

    b) What the value of any further deductions under each of the existing heads of claim is; and

    c) The basis on which they believe they were entitled to be paid those sums by the Respondent.

    The Employment Judge told the Claimants that she would expect to hear their application after the break for reading.

59. Upon the resumption of the hearing, it became clear that the Claimants considered that they could apply to amend their claims so as to include future losses – i.e., losses post-dating the Tribunal hearing, and they did not understand that losses relating to the period 'post-claim form to the date of the hearing' were not part of their existing claim. The Employment Judge took some time to explain both that (a) the Tribunal cannot award sums for deductions from wages which have not yet occurred and may never occur, and (b) losses relating to any deductions after the date the relevant claim form was filed up to the date of this hearing are not automatically part of their claim but that an application to amend their claim to include them could be made and would then be considered by the Tribunal.

60. The Claimants were instructed to calculate the value of the amendments they were seeking to their claims overnight, but this in any event needed to be done on the second morning of the hearing.

61. Once that was done (with the Claimants insisting that they are claiming for the full value of their holiday entitlement from 2021 to date, without deduction for holiday they had taken), the Claimants confirmed the total value of their application to amend was, in their view, £42,967.16.

62. Mr Webster took instructions and then opposed the application, on the basis that the value was too great. He argued that the requested amendment exposed the Respondent to too great a financial risk, which he said meant the balance of prejudice favoured rejecting the amendment.

63. The Employment Judge allowed the amendment.

    a) It is clear that the Respondent has been aware that the Claimants were likely to make an application to amend to include losses from the date the relevant claim forms were presented (or treated as presented, in the case of the Single Claim) to the date of the hearing. The Respondent should therefore be prepared to meet the amended case (as well as the unamended one).

b) The facts and circumstances pertaining to the amendment are the same as those pertaining to the unamended case, save that the period in which the Claimants say they sustained their losses "ran on" to the date of the hearing.

c) In any event, the Claimants could simply file a third claim form in respect of that subsequent period – such a claim would be 'in time'. Similarly to the circumstances in the case of *Prakash*, it would be administratively simpler to deal with this by way of amendment rather than the Claimants issue fresh (in time) proceedings.

The balance of injustice and hardship lies firmly in allowing the amendment, and the Employment Judge ruled that the requested amendment was granted. The Complaints which relate to a series of acts which the Claimants say have continued – i.e., Complaints 1, 4, 5, 6, 9, 10, 12 and 13 – are therefore amended so that the deductions or failure to pay holiday pay with which they are concerned (as applicable) runs to the date of the hearing.

Law

Amendments

64. Rule 29 of the Employment Tribunals Rules of Procedure 2013 is a wide case management power:

"*The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order…*"

65. This Rule (along with all the others) must be interpreted and exercised in light of Rule 2 – the overriding objective to deal with cases fairly and justly.

66. The seminal cases on the question of whether an amendment should be permitted (some of which were determined under the predecessor rules to Rule 29) are *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore* [1996] IRLR 661, *Vaughan v Modality Partnership* UKEAT/0147/20/BA (V), *Abercrombie v Aga Rangemaster* [2013] EWCA Civ 1148, *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07/LA and *Ladbrokes Racing Ltd v Traynor* UKEAT/0067/06.

67. What is clear from those authorities is that when answering the question of whether the discretion in Rule 29 should be exercised to permit or reject the applied for amendment, the assessment is 'what does the overriding objective require?', or to put it another way, 'in which party's favour does the balance of injustice and hardship sit?'. The burden sits with the party seeking the amendment to persuade the tribunal that the overall balance of injustice and hardship makes the amendment appropriate.

68. The factors to be taken into account in conducting this weighing exercise include, where appropriate on the facts:

    a) The nature of the amendment (e.g., is it a clerical error, or more substantive?);

    b) The extent to which the amendment likely involves substantially different areas of inquiry than the existing claims;

    c) The applicability of time limits;

    d) The timing and manner of the application for amendment;

    e) The merits of the amendment;

    f) The compensation available; and

    g) The real, practical consequences of allowing the amendment.

69. When considering the real, practical consequences of the amendment, cases such as *Vaughan* encourage tribunals to look at the practical consequences of (in the case of an amendment sought by a claimant) the respondent resisting it, e.g., additional counsel fees, witnesses having left the respondent's organisation because of time gone past, papers lost, CCTV tapes recorded over, etc. This must be considered alongside the prejudice to the claimant if the amendment is not permitted.

70. In *Prakash v Wolverhampton City Council* UKEAT/0140/06/MAA the EAT concluded that applying the *Selkent* test to those facts - where the effect of the amendment sought could alternatively be achieved by the claimant issuing fresh proceedings (a new claim would be 'in time') – "obviously" meant that the balance of injustice and hardship was in favour of the amendment. "*It would obviously make sense, in a case such as this, to allow an amendment (if considered appropriate) rather than require the Claimant to issue a second originating application.*"

Unauthorised deductions from wages

71. Section 13 of the 1996 Act provides:

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages ***properly***

payable *by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer form the worker's wages on that occasion*" (emphasis added).

72. Section 27 of the 1996 Act defines wages as "*any sums payable to the worker in connection with his employment*", and that includes, in subsection (a), "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

73. The words "*properly payable*" in section 13(3) mean there must be some legal entitlement to the sum in question (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27).

74. A claim of unauthorised deductions is not the same as a claim for breach of contract or for misrepresentation (where damages may be awarded if the claim is successful) - rather it is a statutory claim based on an entitlement to payment which has not been made (or not made in full). This will involve a factual determination of whether the claimant had a legal entitlement to the payment in question (*Steel v Haringey LBC* EAT 0394/11).

Implied terms of a contract of employment – custom and practice

75. When constructing or construing a contract of employment, terms may be implied into that contract in a number of ways. The relevant question is not 'what was it reasonable for the parties to have agreed?', but 'what did the parties in fact agree?'. This is to be determined by evidence as to the agreement they reached (for example, correspondence between them agreeing about a given point that was not mentioned in the written agreement in error), or what it may be reasonable to infer that they agreed.

76. A tribunal will not lightly find that custom and practice implies a term into an employment contract – the term asserted must be:

    a) reasonable (meaning 'fair') (*Devonald v Rosser & Sons* [1906] 2 KB 728);

    b) notorious (meaning 'well known') (*Ropner & Co v Stoate Hosegood & Co* (1905) 92 LT 328); and

    c) certain (meaning 'precise') (*Devonald*).

77. These principles have been elucidated further in subsequent case law, but the essential question remains whether the averred custom and practice is reasonable, notorious and certain. The Court of Appeal in *Park Cakes Ltd v Shumba* [2013] IRLR 800, considering whether repeated payment of enhanced redundancy terms over a period of time had solidified into a contractual entitlement, referred to the following considerations:

a) The number of occasions on which, and the period of time in which, the benefits in question have been paid;

b) Whether the benefits are always the same;

c) The extent to which the enhanced benefits are publicised generally;

d) How the terms are described;

e) What is said in the express contract; and

f) Equivocalness. Because the burden of establishing that a practice has become contractual sits on the party claiming that it has, that party will not succeed if the practice is equally explicable on the basis that it was an exercise of discretion rather than a legal obligation.

Entitlement to annual leave

78. Regulation 13 of the WT Regulations provides that:

"*… a worker is entitled to four weeks' annual leave in each leave year.*"

79. Regulation 13A supplements that as follows:

"*Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).*

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

…

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due."

80. Regulation 30(3) of the WT Regulations provides that where a complaint under Regulation 13 or 13A is well-founded the Tribunal *shall* make a declaration to that effect, and *may* make an award of compensation to be paid by the employer to the worker.

81. Regulation 30(4) sets out that:

"*The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to-*

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of."

Time limits – unauthorised deductions from wages under section 13 of the 1996 Act

82. Section 23 of the 1996 Act governs the bringing of complaints under section 13 for unauthorised deductions from wages, and that section stipulates:

"*(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....

(3) Where a complaint is brought under this section in respect of-

(a) a series of deductions or payments…

the reference in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

83. As subsection (2) clearly shows, time limits are not a mere formality – the tribunal does not have jurisdiction to hear a complaint unless the condition(s) in either subsection (2)(a) or (4) is (are) satisfied.

84. As noted in subsection (3A), section 207B of the 1996 Act extends the limitation period for bringing an unauthorised deduction from wages claim subject to certain conditions so as to facilitate conciliation between the parties before institution of proceedings.

85. Where the three month time limit (as extended by early conciliation if appropriate) has expired, in order for the Tribunal to hear the complaint it must be satisfied **both** that:

(i) it was not reasonably practicable for the Claimant to bring their claim within the time limit; and

(ii) it was presented within such further period as the tribunal considers reasonable.

86. The starting assumption is that, in passing the 1996 Act and WT Regulations in the terms it did, Parliament has set an expectation that the primary time limit is the period within which, in the ordinary course of events, it *is* reasonably practicable for would-be litigants to meet. There is also a strong public interest in claims being brought promptly.

87. The burden of proof is on the claimant to show the reason or reasons which rendered it not reasonably practicable to meet the limitation period (*Porter v Bandridge Ltd [1978] IRLR 271*).

88. There has been considerable case law on whether waiting for the completion of an internal appeal procedure against the employer's decision to dismiss renders it "not reasonably practicable" to bring a claim before that process is complete. The theme of those cases is that waiting to exhaust the employer's internal appeal process on its own is not enough (*Palmer and anor v Southend-on-Sea Borough Council* [1984] ICR 372) – something more will be needed. In the case of *John Lewis Partnership v Charman* EAT 0079/11, the EAT found that 'something more' to be the claimant's youth and inexperience, his dependence on his parents' advice and his ignorance of his legal rights. In light of those particular circumstances the EAT concluded it was not reasonably practicable for the claimant to present his claim in the primary time limit period.

89. Where the claimant is ignorant as to his rights, the Court of Appeal decision in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, as considered in *Porter*, indicates that the tribunal is to ask whether the claimant's ignorance was reasonable in the circumstances – whether the claimant ought to have known of their rights.

Time limits – claims for compensation related to entitlement to annual leave under the WT Regulations

90. Regulation 30 of the WT Regulations provides that:

"(2) Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented-

(a) before the end of the period of three months… beginning with the date on which it is alleged … the payment should have been made, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three… months".

91. Regulation 30B adjusts this time limit to facilitate ACAS early conciliation, in the same way as applies to unauthorised deduction from wages complaints.

92. While section 23 of the 1996 Act (pertaining to unauthorised deductions) acknowledges that a claim may relate to a "series" of deductions, and provides for the time limits within which claims must be brought to be calculated by reference to the last deduction in the series (section 23(3)), the equivalent provision for time to run from the last in a series of refusals to allow a worker to take annual leave does not appear in the WT Regulations. Consequently, where an employer refuses to allow a worker to take their Regulation 13 or 13A annual leave, a claim must be presented within the time limit for each refusal. However, the ECJ in *King v Sash Window Workshop Ltd* (C-214/16) EU:C:2017:914 and the Court of Appeal in *Smith v Pimlico Plumbers Ltd* [2022] IRLR 347 confirmed that where an employer has not permitted the worker to take (or deterred them from taking) annual leave to which they are entitled, the untaken leave rolls over into the next holiday year.

93. The "*not reasonably practicable*" test set out above is to be given the same meaning in this context as in the unauthorised deduction from wages context, and indeed every context (such as unfair dismissal) in which that text appears in comparable legislation (*GMB v Hamm* EAT 0246/00).

Adjustment to awards of compensation for unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures

94. Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) applies to (among other things) awards in respect of complaints of refusal to permit a worker to take annual leave provided for by the WT Regulations. The combined effect of section 207A and Schedule A2 is that such awards may be increased or decreased by an amount which the tribunal considers "*just and equitable in all the circumstances*", up to a maximum uplift or reduction of 25% if the tribunal considers that there has been an unreasonable failure on the part of the employer (prompting an increase) or employee (prompting a decrease) to comply with the ACAS Code of Practice on disciplinary and grievance procedures (the **ACAS Code**).

Application to the claims here

Time limits

95. Complaints 1, 4, 5, 6, 9 and 12 relate to a series of acts (deductions) from the Claimants' wages which the Claimants aver continued up until the date the Claim Forms were presented and after, with the latest in each of those series being sufficiently proximate to when the First Claimant filed the Single Claim on 4 March 2021 and the Multiple Claim on 22 April 2021 that time limits are not an issue for those Complaints.

96. Complaints 10 and 13 relate to an alleged refusal on the part of the Respondent to permit the Second and Third Claimants to take the annual leave to which they are entitled. The Second and Third Claimants aver that the Respondent did not permit them to take their annual leave in 2020/2021 and thereafter. If these complaints are made out on the facts, they will not be out-of-time because of the effect of the decisions in *King* and *Pimlico Plumbers* that the accrued but not-permitted-to-be-taken annual leave rolls over into the next year.

97. By contrast, the other Complaints concern, relative to the date the relevant claim form was presented, do engage the question of whether the Tribunal has jurisdiction to hear those complaints. The Employment Judge asked the parties to address her on the issue of time limits on the first day of the hearing.

98. Complaints 2 and 3 were brought by the First Claimant in the Single Claim filed on 4 March 2021, which the Tribunal instructed was to be treated as having been received on 11 April 2021. Complaint 2, relating to unauthorised deductions in the period 29 November 2019 to 24 December 2019 should have been filed by no later than 23 March 2020. Complaint 3, relating to the alleged removal of the First Claimant from shifts on 4 and 5 July 2020, should have been filed by no later than 6 October 2020.

99. Complaints 7, 8 and 11 were brought by the Multiple Claim, which was presented on 22 April 2021. Complaint 7, relating to the Second Claimant's assertion that he was removed from shift on 27 March 2020, should have been presented on or before 26 June 2020. Complaint 8, concerning the removal of the Second Respondent from four shifts between 24 March 2020 and 30 April 2020, should have been presented on or before 29 July 2020. Complaint 11, concerning the removal of the Third Claimant from his shift on 27 March 2020, should have been presented on or before 26 June 2020.

100. The Employment Judge explained the applicable test – that the Claimants would need to demonstrate, in relation to each complaint that is apparently out-of-time, both that it was not reasonably practicable to bring that complaint in the relevant time limit, and that the complaint was brought within a reasonable time thereafter.

101. The Second Claimant made representations on behalf of all three Claimants, and the others agreed with the representations he made. He said:

a) The Claimants were pursuing an internal grievance procedure with the Respondent that was not concluded until 22 December 2020;

b) The Claimants contacted ACAS after that, and ACAS issued an Early Conciliation certificate in respect of the First Claimant and Mitie on 12 January 2021, and the Single Claim was filed on 4 March 2021, though it was, as described above, treated as having been received by the Tribunal on 11 April 2021;

c) Following that, there was some confusion about the correct name for the Respondent. When that confusion was resolved, the Multiple Claim in respect of all three Claimants' claims was presented on 22 April 2021; and

d) The Tribunal should take account of the fact that the period of time in question involved the covid-19 pandemic, and the Respondent took some time to progress and complete the grievance process, and to clarify the employing entity's name. The Claimants felt they had to be understanding of the Respondent's position at that time, and they were not going to open up a case while there was still an ongoing grievance.

102. The Claimants considered it had not been reasonably practicable to bring these Complaints within the primary time limit, and that they had been brought within a further time that was reasonable in those circumstances.

103. Mr Webster for the Respondent replied that he did not think the Claimants had provided any good reason why the Tribunal should exercise the discretion afforded it by the legislation.

104. The Tribunal agreed with the Respondent:

a) The Claimants' waiting for the conclusion of the internal grievance procedure was not sufficient, without more, to make it not reasonably practicable to bring the complaints in time (*Palmer*);

b) While the Claimants' reliance on their ignorance of their rights or the Covid-19 pandemic were put forward by the Claimants as the 'something more':

(i) that ignorance was not reasonable in circumstances of prolonged delay (where there is more opportunity to make enquiries about time limits), and in the modern era where nearly everyone has access to the internet on smartphones and can use internet search engines to make enquiries about time limits;

(ii) their particular ignorance is less reasonable than for inexperienced claimants, as these Claimants have been in involved in prior litigation, which would have involved presenting their claims on time; and

(iii) while the Covid-19 pandemic may well have made things more difficult for the Respondent, the Claimants could still have filed their claims and then withdrawn them if the internal appeal had been successful. Covid-19 was a nationally difficult time that lasted for more than a year. There has been no reason cited to me specific to this case that explains why the Respondent or Claimants' situation was any different to other parties involved in employment disputes and Employment Tribunal litigation during this period.

105. The Tribunal therefore has no basis on which to conclude that it was not reasonably practicable to present a claim for Complaints 2, 3, 7, 8 and 11 within the primary time limit. The question of whether they were presented in such further period as was reasonable does not therefore arise. The Tribunal does not have jurisdiction to consider them.

<u>The relevant contractual terms between the Respondent and each of the Claimants</u>

(a) <u>Was the First Claimant contractually-guaranteed work on the first weekend of every month?</u>

106. The First Claimant asserts that he was contractually-guaranteed work on the two weekend days of the first weekend of every month. In the absence of a written contract or any written document supporting this the First Claimant has pointed to custom and practice as establishing that as a contractual term. He says that he undertook weekend work for the Respondent and its predecessors over many years. He pointed the Tribunal to pages in the Claimants' Supplementary Bundle in support of this - 613, 662, 663, 762 and 347.

a) The document at page 347 of the Claimants' Supplementary Bundle shows the rostered hours for April 2017. That indicates that the First

Claimant worked the first Saturday and Sunday of that month (1st and 2nd of April), along with the next Saturday (8th), and the following Saturday and Sunday (15th and 16th).

b) The document at page 662 of the Claimants' Supplementary Bundle shows the rostered hours for the month of February 2019, and indicates that the First Claimant did not work any of the weekends in that month.

c) The document at page 613 of the Claimants' Supplementary Bundle shows the rostered hours for May 2019. That indicates that the First Claimant worked one weekend day in May 2019, being the first Saturday (4th). The Sunday of that weekend was not worked nor booked off as annual leave.

d) The document at page 663 of the Claimants' Supplementary Bundle is the roster for August 2019. This indicates the First Claimant worked the first Saturday in August 2019, and did not book the Sunday off as annual leave, and that he worked Saturday 31 August 2019.

e) The index to the Claimants' Supplementary Bundle indicates that the document at page 762 of that Bundle is the January 2019 Workplace+ record for the First Claimant (but the fact that it is a record of the hours he worked is not identified on the face of the document). That indicates that the First Claimant worked the first Saturday and Sunday of that month.

107. The First Claimant has also cited an email from Marc Greene of The Shield Group dated 13 February 2014, where Mr Greene has emailed the First Claimant saying:

"*Dion*

You're not Monday to Friday as you work weekends".

108. As described above, in order for the First Claimant to succeed in his argument that he was, by dint of custom and practice, contractually-guaranteed to work the first weekend of every month he would need to show that term to be reasonable, notorious and certain (*Devonald*, *Ropner*). By analogy with the *Shumba* case, a repeated practice of the First Claimant working the first weekend of every month could be part of the evidence he relies upon to support his position that the parties had in fact agreed that he was to work the first weekend of every month, but that is not the only consideration. *Shumba* indicates that (in the absence of also being able to consider the terms of a written employment) the Tribunal should consider:

a) The number of occasions on which, and the period of time in which, the First Claimant worked those shifts and was paid for them;

b) Whether the Claimant's working pattern as regards weekend shifts was always the same;

c) The extent to which the practice was known by the Respondent and the First Claimant's team; and

d) Whether the practice is equally explicable on another basis, for example, that each time the First Claimant worked on the first weekend of every month it was by specific and individual agreement.

109. It is clear from the above description of the evidence relied on the First Claimant that he undertook weekend work – however there is very far from adequate evidence to support his assertion that there was a consistent practice of his working the first weekend of every month. Indeed, it is only the evidence pertaining to the month of April 2017 and that of January 2019 that indicates that the First Claimant *did* work both days of the first weekend of the month. The other months do not show the First Claimant working the first weekend of the month, or, in the Tribunal's view significantly, that either or both of the first weekend days not worked was booked off as annual leave (which would indicate an obligation to work).

110. The First Claimant has not shown, on the balance of probabilities, that he was contractually-entitled to work the first weekend of the month.

(b) <u>If so, was he entitled to be paid for that if he was ready and willing to work but the Respondent instructed him not to work?</u>

111. This question does not arise, given that the First Claimant has not shown a contractual entitlement to work the first weekend of every month, but it would be extremely difficult for an hourly-paid claimant with no written contract of employment to establish an implied term of their contract of employment that entitles them to be paid for work they have not in fact carried out.

(c) <u>Were all three Claimants contractually-entitled to cover each other's holiday, and the holiday of the third Security Officer, Mr Chowdhury, at the Site?</u>

112. The Claimants have said that the position taken by the Respondent, that the leave of the "core site" Security Officers may be designated by the Operations Manager to (non-site-based) Support Officers, is not supported by any evidence whatsoever. However, as it is the Claimants who are asserting that they have a contractual entitlement to cover each other's holiday *it is for them to prove their position* on the balance of probabilities.

113. To do so they have pointed to pages 485 to 487, 491, 493 and 494 of the Bundle.

a) Page 485 shows the First Claimant seeking cover for a shift "*since Maureen is on leave*", and that email is addressed to "_DL_UK_VSG Controllers", "VSG – Control – Control Shift Manager", "_DL_UK_VSG Control Shift Manager", "South Ops Team" and David James Platts. The

Claimants have not said who Maureen is, or how her absence relates to whether the Claimants were entitled to cover each other's, and Mr Chowdhury's, shifts;

b) Pages 486 and 487 are email footers – there is no substantive content on either of them;

c) Page 491 is a payslip. It does not have any items which relate, on-their-face, to holiday cover; and

d) Pages 493 and 494 refer to cover for reception being required. The email also states that the Third and Second Claimants had swapped shifts, but it is not clear if that is in order to provide holiday cover or for a different reason.

114. The oral evidence of the Claimants is far from sufficient to establish – when the Respondent disputes that evidence - a contractual term by custom and practice of the Claimants and Mr Chowdhury having a contractual right to cover each other's holiday. No documentary evidence of a repeated practice has been shown to the Tribunal of them doing so (when that should be perfectly possible to do given Workplace+ records absences and worked shifts).

115. Accordingly the Tribunal finds that the Claimants are not contractually-entitled to cover each other's holiday or the holiday of Mr Chowdhury.

(d) <u>If so, were they entitled to be paid for that if, in each case, the relevant Claimant was ready and willing to work but the Respondent instructed him not to work?</u>

116. This question does not fall to be answered, as because the Claimants have failed to establish that they were contractually entitled to cover each other's holiday, so the question of whether wages were "*properly payable*" to them even if they did not in fact cover that holiday leave does not arise.

(e) <u>Was the Second Claimant contractually-entitled to an hour's work every month when the First Claimant worked his weekend shift due to the later start time of the First Claimant's weekend shift?</u>

117. The Second Claimant said that, when the Respondent stopped the First Claimant from working his one-weekend a month (Saturday and Sunday), the Second Claimant lost out on one-hour's work for one of those weekend days. The Second Claimant explained that the First Claimant, as the Security Supervisor, began his weekend shifts at 8am rather than the standard day-shift start time for Security Officers of 7am. This meant that the night-shift Security Officer who had covered the preceding night would need to stay on one extra hour on the Saturday and

Sunday morning that the First Claimant worked in order for 24/7 security cover to be maintained at the Site. This, the Second Claimant says, was him one day a month.

118. Moreover, the Second Claimant says that he was contractually-entitled to this one-hour shift once a month, i.e., that custom and practice had rendered this a term of his contract of employment.

119. The Tribunal was shown evidence of the Second Claimant working a shift of a one-hour duration on:

a) Saturday 7th and Sunday 8th October 2017;

b) Saturday 4th May 2019 and Sunday 5th May 2019; and

c) Saturday 7th and Sunday 8th March 2020,

but no such one-hour shifts were worked by him in June 2019, or the second half of May 2019.

120. The Tribunal was not taken to other documentary evidence of the Second Claimant working this shift. This is surprising when his continuous employment began in October 2000 and the First Claimant's in August 2011. The Second Claimant's witness statement simply refers to "*all evidence attached in list of evidence shows I no longer earn those extra hours*", but the Tribunal has not been pointed to sufficient evidence to support the Second Claimant's contention that he ***consistently*** worked an extra one-hour shift on the first weekend of the month prior to the time when the First Claimant stopped doing weekend shifts. There should be around 100 examples of this (one for every month since the First Claimant's continuous employment began until March or April 2020) for the Second Claimant to point to. Three examples are not sufficient evidence to reasonably establish a consistent practice, or that it was notorious (well known), or that it was certain (precise) (*Devonald*, *Ropner*).

121. Moreover, the Second Claimant asserted that he lost this one-hour shift because the First Claimant was prevented from working his one-weekend a month by the Respondent – but the First Claimant did not work Sunday 5th May 2019, and the Second Claimant did work an hour's shift then. This suggests that the Second Claimant's one-hour shifts were not dependent on the First Claimant working the day shift.

122. The Tribunal finds that the Second Claimant has not shown, on the balance of probabilities, that he was contractually-entitled to an hour's work every month.

(e) If so, was the Second Claimant entitled to be paid for that hour if he was ready and willing to work it but the Respondent instructed him not to work?

123. This question does not fall to be answered, because the Second Claimant has failed to establish that he was contractually entitled to one hour's additional work or pay per month.

(f) Should the hours the Second Claimant worked on 12 April 2020, 4 April 2021 and 17 April 2022 have been paid at double time pursuant to the VSG COT3?

124. As noted above, the VSG COT3 provides (in paragraph 3) that:

"*The Respondent confirms that in the event the Claimants work on a substitute day they will be paid double time for working the specific day and double pay for the actual bank holiday, as outlined in the Claimant's grievance outcome letters dated 11 May 2017.*"

125. UK bank holidays, including bank holidays in previous years, are listed on the following government website: UK bank holidays - GOV.UK (www.gov.uk). That website shows that none of:

a) 12 April 2020;

b) 4 April 2021; or

c) 17 April 2022,

was not a bank holiday. Nor were any of those days substitute days, as each of those dates was a Sunday (Easter Sunday in each case).

126. Consequently, none of the shifts worked by the Second Claimant on 12 April 2020, 4 April 2021 nor 17 April 2022 is covered by paragraph 3 of the VSG COT3, and therefore there were no further sums payable than the single time the Respondent has paid the Second Claimant for those hours.

(g) How many days' annual leave were the Second and Third Claimants entitled to per leave year?

127. The Respondent's position on this point was not clear. Ms Imrie seemed to say, on the one hand, that all of these Claimants (given the shift-based nature of their work) are entitled to 28 days' annual leave with the value of each day's leave depending on the employee's normal weekly working hours divided by five. On the other, she said that she could understand the position outlined in an email from Mr Holmes of 22 December 2020, that a person's holiday entitlement would be based on their average weekly hours over the preceding 52-week period as a

portion of 28 days for a full-time equivalent employee, which in the case of the Second Claimant equated to 21 days.

128. For their part, the Claimants noted that:

a) There is a single piece of evidence in the Bundle – an email from the First Claimant to others - which shows that in the 2017/2018 holiday year the Third Claimant took 28 days' annual leave; and

b) The information provided to the Respondent in anticipation of the Claimants' TUPE-transfer from VSG to the Respondent informed the Respondent that the Second Claimant was entitled to 28 days' annual leave (and the arrangement would be identical for the Third Claimant, given they worked the same hours). The Claimants say that the position was also true of the First Claimant.

129. Ms Imrie stated that the Respondent would honour the entitlement of the Claimants with VSG when they TUPE-transferred.

130. The Tribunal also notes that the Respondent confirmed that the annual leave entitlement of all three of the Claimants is 28 days per annum in its grievance outcome letter of 3 September 2020.

131. If the Respondent is now saying that the Second and Third Claimants are entitled to less than 28 days' annual leave, that is plainly contradicted by the evidence. The Second and Third Claimants are entitled to 28 days' annual leave.

Conclusions

Complaint 1: Unauthorised deductions from the First Claimant's wages on the basis that he was contractually guaranteed work on the first weekend of every month

132. The First Claimant has not established that he had a contractual entitlement to work the first weekend of every month, so this complaint fails.

Complaint 2: Unauthorised deductions from the First Claimant's wages during the period 29 November 2019 to 24 December 2019

133. The Tribunal did not have jurisdiction to hear this complaint as it was brought out of time.

Complaint 3: Unauthorised deductions from the First Claimant's wages because he was removed from shifts on 4 and 5 July 2020

134. The Tribunal did not have jurisdiction to hear this complaint as it was brought out of time.

Complaint 4: Unauthorised deductions from the First Claimant's wages on the basis that he was contractually entitled to cover the holiday leave of the security officers at the Site

135. The First Claimant has not established that he had a contractual entitlement to cover the holiday leave of the Security Officers at the Site, so this complaint fails.

Complaint 5: Unauthorised deductions from the Second Claimant's wages on the basis that pay relating to the first hour on the first weekend of every month has been deducted from his pay from 4 April 2020 to date

136. The Second Claimant has not established that he had a contractual entitlement to work an extra hour on the first weekend of every month, so this complaint fails.

Complaint 6: Unauthorised deductions from the Second Claimant's wages on the basis that he should have been paid double time, and was only paid single time, for shifts on 12 April 2020, 4 April 2021 and 17 April 2022

137. As set out above, none of these shifts attracted double time pursuant to paragraph 3 of the VSG COT3, so this complaint fails.

138. The Tribunal notes, though, that the Respondent has acknowledged that it owes the Second Claimant for its acknowledged failure to pay him double time in respect of the hours he worked on 26 December 2020, 25 December 2021 and 26 December 2021. The Respondent informed the Tribunal that a corrective payment in respect of those sums is to be made to the Second Claimant on 26 April 2024.

Complaint 7: Unauthorised deductions from the Second Claimant's wages on the basis that he was entitled to work Friday 27 March 2020 but the Respondent did not permit him to work that shift

139. The Tribunal did not have jurisdiction to hear this complaint as it was brought out of time.

Complaint 8: Unauthorised deductions from the Second Claimant's wages on the basis that he was removed from 4 shifts between 24 March 2020 to 30 April 2020

140. The Tribunal did not have jurisdiction to hear this complaint as it was brought out of time.

Complaint 9: Unauthorised deductions from the Second Claimant's wages on the basis that he was not paid for holiday cover that he was entitled to

141. The Second Claimant has not established that he had a contractual entitlement to cover the holiday leave of the Security Officers at the Site, so this complaint fails.

Complaint 10: Failure to allow the Second Claimant to take his full holiday entitlement in respect of each of the holiday years beginning with 2020/2021 to date

142. This complaint succeeds. The Second Claimant was entitled to 29 days' holiday in the 2020/2021 holiday year, and 28 days' holiday in each of the 2021/2022, 2022/2023 and 2023/2024 holiday years.

143. It is clear that the Second Claimant was not permitted to take all of that holiday in the 2020/2021 and 2021/2022 holiday years, and the Tribunal considers it reasonable to infer that the Respondent's practice of only permitting him to take 21 days' annual leave (that was applied to him in the 2020/2021 holiday year – although there was an extra one day's bonus holiday in that year – and 2021/2022) continued in the 2022/2023 and 2023/2024 holiday years.

144. A declaration to that effect is set out in paragraph 2 above.

145. Regulation 30(3) of the WT Regulations provides that the Tribunal may make an award of compensation to be paid by the employer to the worker, and if it does so, it shall be an amount which the Tribunal considers "*just and equitable*" in all the circumstances, having regard to the employer's default in refusing to permit the worker to exercise his right and any loss sustained by the worker.

146. The Second Claimant, as an employee whose monthly earnings vary with the hours he works (or the annual leave he takes), has incurred losses in respect of the holiday he was not permitted to take. The Second Claimant has valued those losses in his Schedule of Loss as:

    a) £9.15 x 12 hours in respect of each of the 7 days he was not permitted to take in 2020/2021, i.e., £768.60;

    b) £9.33 x 12 hours in respect of each of the 8 days he was not permitted to take in 2021/2022, i.e., £895.68;

c) £11.05 x 12 hours in respect of each of the 7 days he was not permitted to take in 2022/2023, i.e., £928.20; and

d) £11.95 x 12 hours in respect of each of the 7 days he was not permitted to take in 2023/2024, i.e., £1,1003.80,

amounting to £3,596.28.

147. The question then arises as to the appropriate daily value to ascribe to a day's holiday for the Second Claimant. The employee liability information shared with the Respondent by VSG simply says that the Second Claimant was entitled to 28 days' annual leave – there is no further information as to how to calculate the value of those days. In the absence of evidence to the contrary, what the Second Claimant actually earned per day is the appropriate value, i.e., the value of 12 hours' work in the relevant year. The Tribunal considers it just and equitable to award that compensation be paid to the Second Claimant in respect of those losses on that basis.

148. The Second Claimant also incurred a loss of earnings for attendance at the Employment Tribunal to pursue rectification of his rights to annual leave. The Second Claimant's Schedule of Loss details the losses he has incurred for attendance at Preliminary Hearings and this hearing, totaling £566.40. Some of the time in those hearings would have been concerned with clarifying and hearing evidence about the 11 other complaints that were not successful before this Tribunal, and so the Tribunal considers it just and equitable to award the Second Claimant £200 by way of losses sustained in pursuing Complaint 10.

149. The Respondent is therefore Ordered to pay the Second Claimant **£3,796.28** in aggregate on a gross basis.

Complaint 11: Unauthorised deductions from the Third Claimant's wages on the basis that he was removed from a shift he was contractually entitled to work on 27 March 2020

150. The Tribunal did not have jurisdiction to hear this complaint as it was brought out of time.

Complaint 12: Unauthorised deductions from the Third Claimant's wages on the basis that he was not paid for holiday cover that he was entitled to

151. The Third Claimant has not established that he had a contractual entitlement to cover the holiday leave of the security officers at the Site, so this complaint fails.

Complaint 13: Failure to allow the Third Claimant to take his full holiday entitlement in respect of each of the holiday years beginning with 2020/2021 to date

152. This complaint succeeds. As for the Second Claimant, the Third Claimant was entitled to 29 days' holiday in the 2020/2021 holiday year, and 28 days' holiday in each of the 2021/2022, 2022/2023 and 2023/2024 holiday years.

153. It is sufficiently clear that the Third Claimant was not permitted to take all of that holiday in the 2020/2021 and 2021/2022 holiday years, and the Tribunal considers it reasonable to infer that this continued in the 2022/2023 and 2023/2024 holiday years.

154. A declaration to that effect is set out in paragraph 2 above.

155. The Tribunal considers it just and equitable to award that compensation be paid to the Third Claimant in respect of this failure, for the same reasons as set out above for the Second Claimant.

156. The Tribunal considers it appropriate to value the Third Claimant's losses from this breach using the information in his Schedule of Loss, being:

    a) £9.15 x 12 hours in respect of each of the three days he was not permitted to take in 2020/2021, i.e., £329.40;

    b) £9.33 x 12 hours in respect of each of the eight days he was not permitted to take in 2021/2022, i.e., £895.68;

    c) £11.05 x 12 in respect of each of the eight days he was not permitted to take in 2022/2023, i.e., £1,060.80; and

    d) £11.95 x 12 hours in respect of each of the eight days he was not permitted to take in 2023/2024, i.e., £1,147.20,

    amounting to £3,433.08 in aggregate on a gross basis.

157. Like the Second Claimant, the Third Claimant incurred a loss of earnings for attendance at the Employment Tribunal to pursue rectification of his rights to annual leave, and he (like the Second Claimant) calculated that loss by reference to the time he has taken off work to attend the Preliminary Hearings and this hearing, totaling £566.40. As some of the time in those hearings would have been concerned with clarifying and hearing evidence about the 11 other complaints that were not successful before this Tribunal, the Tribunal considers it just and equitable to award the Third Claimant £200 by way of losses sustained in pursuing Complaint 13.

158. The Respondent is therefore Ordered to pay the Third Claimant **£3,633.08** in aggregate on a gross basis.

Should any of the awards to the Claimants be the subject of an adjustment for unreasonable failure to comply with the ACAS Code?

159. The awards to the Second and Third Claimants are capable of being adjusted upwards by up to 25% pursuant to section 207A of TULRCA if the Tribunal considers there has been an unreasonable failure to follow the ACAS Code, and it is just and equitable in the circumstances to make the adjustment.

160. The Second and Third Claimants aver that it is appropriate for the Tribunal to make the full 25% adjustment because there was a failure on the part of the Respondent to allow them to appeal the grievance outcome. However, no evidence has been presented to the Tribunal that there was a refusal on the part of the Respondent to permit the Claimants to appeal the grievance outcome. In fact:

    a) the grievance outcome letter in the Claimants' Supplementary Bundle (at page 884) refers to the Claimants being able to appeal that decision;

    b) the Claimants did appeal that decision on 4 September 2020 (page 911 of the Claimants' Supplementary Bundle);

    c) a grievance appeal meeting was held on 26 October 2020 (as referred to on page 936 of the Claimants' Supplementary Bundle); and

    d) in oral evidence (in relation to the question of whether some of the Complaints were out of time) the Second Claimant said that the final correspondence on the grievance at stage 2 was 22 December 2020.

161. There is therefore no basis for the Tribunal to conclude that there has been an unreasonable failure to comply with the ACAS Code, or that it would be just and equitable to adjust the award to the Second and Third Claimants in respect of annual leave they were not permitted to take. No adjustment is made to those awards.

Summary

162. For all of the above reasons:

    a) Complaints 1 to 9 (inclusive), 11 and 12 are not made out and are dismissed; and

    b) Complaints 10 and 13 succeed, and:

        (i) The Respondent is ordered to pay to the Second Claimant compensation in the sum of **£3,796.28** on a gross basis in respect of Complaint 10; and

(ii) The Respondent is ordered to pay to the Third Claimant compensation in the sum of **£3,633.08** on a gross basis in respect of Complaint 13.

Employment Judge Ramsden

Date 25 April 2024

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix: List of issues from 25 February 2024 Case Management Orders

1. Time limits

1. Have the Claimant's claims for unlawful deductions and holiday pay been brought within the relevant time period of three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
2. If not, do the alleged deductions which the Claimant refers to in their claim form constitute a series of deductions, the end of which fell within the time limit?
3. If not, was it reasonably practicable for the Claimant to issue their claim within the time limit?
4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unauthorised deductions

Dion McShaw

3. Was the Claimant Mr Dion McShaw contractually guaranteed work on the first weekend of every month?

   3.1 If yes, was Mr Dion McShaw denied this work? The First Claimant says he was denied working the first weekend of every month from February 2020 until present.

   3.2 If yes, what loss did Mr Dion McShaw suffer? [C1 is to confirm the exact dates on which he says he was denied work on the first weekend of every month and the precise amount of money he says he is owed in relation to the work denied, for example. 1 March 2020 – 8 hours x £10 = £80.]

4. Was Mr Dion McShaw under paid during the period 29 November 2019 – 24 December 2019?

   4.1 If yes, what loss did Mr Dion McShaw suffer? [C1 –confirm if he is continuing with or withdrawing this allegation. If continuing, he must set out the exact sums he alleges he is owed.]

5. Was Mr Dion McShaw contractually entitled to 'weekend cover guard during weekend leave days'?

   5.1 If yes, was Mr Dion McShaw denied this cover?

   5.2 If yes, what loss did Mr Dion McShaw suffer? [C1 is to confirm the exact dates on which he says he was denied weekend cover guard work and the precise amount of money he says he is owed in relation to the work denied, for example. 1 March 2020 –8 hours x £10 = £80.]

6. Was Mr Dion McShaw removed from 2 working shifts? The First Claimant says he was removed from shifts on 4 and 5 July 2020.

    6.1 If yes, was Mr Dion McShaw entitled to be paid for this?

    6.2 If yes, what loss did Mr Dion McShaw suffer? [C1 is to confirm the precise amount of money he says he is owed in relation to the two working shifts he says he was removed from.]

7. Was Mr Dion McShaw not paid for holiday cover that he was entitled to? [C1is to confirm the precise amount of money he says he is owed and in relation to which shifts.]

Ernest Atwere

8. Was Mr Ernest Atwere removed from his shift on 27 March 2020?

    8.1 If yes, was Mr Ernest Atwere entitled to be paid for this?

    8.2 If yes, what loss did Mr Ernest Atwere suffer? [C3 is to confirm the precise amount of money he says he is owed in relation to the two working shifts he says he was removed from.]

9. Was Mr Ernest Atwere not paid for holiday cover that he was entitled to? [C3 is to confirm the precise amount of money he says he is owed and in relation to which shifts.]

Ryan McShaw

10. Did Mr Ryan McShaw have pay relating to the first hour on the first weekend of every month deducted from his pay from 4 April 2020 to date?

    10.1 If yes, was Mr Ryan McShaw entitled to be paid for this?

    10.2 If yes, what loss did Mr Ryan McShaw suffer? [C2 is to confirm the exact dates on which he says he had first hour of pay deducted work and the precise amount of money he says he is owed in relation to the work denied, for example. 1 March 2020 – 1 hours x £10 = £10.]

11. Was Mr Ryan McShaw contractually entitled to double time on a 'substitute day'?

    11.1 If yes was he underpaid in relation to his shifts on:

        11.1.1 12 April 2020 see note – how much

        11.1.2 24 April 2021 and

        11.1.3 17 April 2022?

During the course of the hearing Mr. Webster stated that the Respondent had made further enquires and accepts the claimant was due to be paid substitute

pay on 26 December 2020, 25 December 2021 and 26 December 2021 and that a payment will be made to the claimant in this respect.

12. Was Mr Ryan McShaw contractually entitled shift on Friday 27 March 2020?

    12.1 If yes, was Mr Ryan McShaw entitled to be paid for this shift?

    12.2 If yes, what loss did Mr Ryan McShaw suffer? C2 says he was owed for £12 hours at £9.15 per hour = £109.80.

13. Was Mr Was Mr Ryan McShaw removed from 4 shifts between 24 March 2020 – 30 April 2020?

14.

    14.1 If yes, was Mr Ryan McShaw entitled to be paid for this?

    14.2 If yes, what loss did Mr Ryan McShaw suffer? [C2 is to confirm the exact dates on which he says he had first hour of pay deducted work and the precise amount of money he says he is owed in relation to the work denied, for example. 1 March 2020 – 1 hours x £10 = £10]

15 Was Mr Ryan McShaw not paid for holiday cover that he was entitled to? [C2 is to confirm the precise amount of money he says he is owed and in relation to which shifts.]

Holiday Pay - Ernest Atwere & Ryan McShaw

15. Were the Second Claimant and the Third Claimant denied their full annual leave entitlement in the years 2021 and 2022? The Claimants say they are entitled to 28 days annual leave and that for the leave year ending on March 2021, and for each leave year since, the Respondent has only allowed them to take 20 days leave per year.