EMPLOYMENT TRIBUNALS

Claimant: **Mr C Silcox**

Respondent: **Kent Central Ambulance Service**

Heard at: **London South, by CVP** **On:** **19 and 20 August 2024**

Before: **Employment Judge Rice-Birchall**

Representation
Claimant: In person, accompanied by Mrs Silcox
Respondent: Mr Otchie, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.
2. The Tribunal does not have jurisdiction to hear the claim of unauthorised deductions from wages in respect of national insurance. The claim is dismissed.
3. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.
4. The complaint in respect of holiday pay is well-founded. The respondent failed to pay the claimant in accordance with the Working Time Regulations 1998 (WTR).
5. The respondent shall pay the claimant £1203.03. The claimant is responsible for paying any tax or National Insurance.
6. The respondent failed to give the claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 (ERA) in March, September and October 2022 and March 2023.

REASONS

Background

1. This was a claim brought by the claimant on 29 September 2023 in respect of work he performed for the respondent. Early conciliation took place between 29 July 2023 and 9 September 2023.

Issues

2. At the outset of the hearing, the issues were agreed as follows:

Unfair dismissal

a. Was the claimant an employee or worker?
b. If he was an employee, was the claimant dismissed?
c. If so, what was the reason or principal reason for dismissal? Was it a potentially fair reason? The claimant says it was because he sought to assert a statutory right.
d. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

Holiday Pay (Working Time Regulations 1998)

e. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The claimant calculated he was owed £1309.03 not including calculations from March, September, October 2022, and March 2023.

Unauthorised deductions

f. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted? The claimant confirmed that this claim was in relation to National Insurance contributions that he said had been erroneously deducted by the respondent but conceded that the Tribunal did not have jurisdiction to hear that claim and so it did not form part of the Tribunal's consideration of the claim.

Wrongful dismissal / Notice pay

g. Was the claimant entitled to be paid for his notice period?

Written Itemised Pay Statements

h. Did the respondent failed to give the claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in March, September, October 2022, and March 2023.

Remedy

i. How much should the claimant be awarded?

PID/whistleblowing

j. This claim was dismissed by EJ Self on 30 January 2024.

Amendment application

3. At the outset of the hearing, the Tribunal considered an amendment application made by the claimant on 24 July 2024, in which he sought to add a claim of detriment arising from a flexible working request. We spent

some time discussing the amendment required. The application was refused for reasons explained at the hearing. The claimant was reminded that he could request written reasons, reasons for the refusal having been given orally.

Evidence

4. The Tribunal had the benefit of a witness statement from the claimant and from Nosakhare Idahosa, Head of HR for the respondent. Both the claimant and Ms Idahosa gave oral evidence. There were two bundles: one prepared by the respondent and one by the claimant. The claimant's bundle contained a detailed calculation of holiday pay he said he was owed, albeit based on an estimate for the months when he had not, he said, received a pay slip.

Findings of fact relevant to the issues and on the balance of probabilities

The respondent

5. The respondent is a private ambulance service.

The claimant

6. The claimant is a full-time fire fighter. However, between February 2021 and March 2023, the claimant worked for the respondent as an ambulance care assistance when he was not working as a fire fighter.
7. An average and annual pay schedule drawn up by the respondent, showed that during 2021/2 (1 April – 31 March) the claimant worked an average of approximately 19 hours per week and during 2022/3 he worked an average of approximately 9 hours per week.
8. The claimant would share his availability for work with his manager, who would offer the claimant work to match his availability.
9. From March 2022, the respondent introduced a new app, PEARL. The respondent states that pay slips were available on it but the claimant did not know that. The claimant did use it from time to time to book shifts.
10. There was also a What'sApp group. This was not a formal platform but was a further medium which was used to alert the drivers, such as the claimant, to work which was available.
11. The claimant could turn down work offered: the respondent gave two examples (8/2/23 and 14/4/23).
12. The claimant was paid monthly in arrears around the end of the month.
13. The claimant worked his last shift on 20 March 2023.
14. A P45 was issued to the claimant on 9 May 2023.

The claimant's contract

15. The claimant's contract stated: "You are employed on a zero-hour contract and therefore are not provided with regular guaranteed hours of work but are called upon for employment when required."
16. It continued: "The Company will not incur any liability towards the zero-hour worker in the event of the Company failing to engage the zero hours worker on any assignment. The worker hereby acknowledges and accepts that any assignments are in the nature of the work, and the Company is under no obligation to provide continuing assignments. The worker hereby further

acknowledges and accepts that solely the Company shall determine his suitability for any particular assignment. The Company is not obliged to offer any assignment to the worker."

17. As regards holidays, the contract provided that the holiday year ran from April 6 to April 5 and that the claimant should agree dates of holiday at least 14 days in advance, and then, in bold: "You may not carry holiday forward from one year to the next. The Company is not allowed to make a payment in lieu of leave not taken at the end of the holiday year."
18. The contract was silent as to the amount of holiday the claimant was entitled to, but the Company Handbook stated that the claimant weas entitled to 12.07% of his basic hours worked as annual leave, plus public and bank holidays, and stated that all holidays must be taken between 1 April and 31 March. It stated that all holidays must be agreed in advance and that no holiday could be carried over.
19. As regards, other business or employment, the contract stated: "You may not do other work (even voluntary work) or engage in any other business outside your hours of work for us if in our reasonable opinion this could be prejudicial to your work for us."
20. The Company Handbook was referred to and the contract stated that breach of any policy could result in disciplinary action. The clause on disciplinary and grievance procedures stated: "A copy of the Company's disciplinary and grievance procedure is contained in the Company Handbook which forms part of the terms and conditions of this contract of employment."
21. The contract provided for statutory notice of termination of employment.

Share transfer

22. On 2 March 2022 the respondent was acquired by share purchase.

Consultation

23. As stated above the claimant worked his last shift on 20 March 2023.
24. On 1 April 2023, the respondent launched a consultation with all staff to discuss changes. As regards the claimant, the significance of the change was that the respondent no longer intended to use zero hours contracts but intended to move all staff onto either full time or part time permanent contracts. Staff who could not work full time were encouraged to request regular part time hours via a flexible working process. As a result of this process the respondent no longer has any zero hours contracts.
25. On 27 April 2023 the respondent held a 121 consultation with the claimant about proposed changes to the business. The claimant completed a flexible working application form. Through the form, the claimant effectively requested to remain on a zero-hour contract as his full-time work as a firefighter, which involved irregular shift work, prevented him from committing to regular hours with the respondent.
26. Significantly on 30 May 2023, the claimant received an email asking for availability, which was followed up by a phone call on 31 May 2023 and an email on 1 June 2023, which requested the claimant's availability for June and July to explore "aligning [the claimant] with [the respondent's] business needs". On the same date, the claimant received an email stating that no members of staff were now on zero hours contracts.
27. The claimant never did follow up on those emails to provide his availability so that that could be further discussed. The claimant's reason for not doing

so was that he wanted to ensure his holiday pay and pay slip queries and issues were resolved before embarking on a new contract, though he never communicated this in those terms to the respondent.

28. When the consultation was complete, the system was updated and so the claimant "dropped off" the PEARL app when it was reconfigured for use with permanent contract hours on 23 June 2023. The claimant could no longer access it from this point. He was removed from the WhatsApp group chats on 13 July 2023.

Holiday pay/pay slips

29. The claimant did not take holiday though he made several requests for clarity as regards his annual leave entitlement/pay, as further discussed below.
30. Notwithstanding the clause in his contract that specifically states that there would be no payment in lieu of holiday outstanding at the end of a holiday year, the claimant was paid in lieu of holiday on three occasions: £180 in both January and February 2022 and £526 in July 2023.
31. The claimant says he did not receive pay slips for March 2022, September 2022, October 2022 and March 2023 and July 2023 when he was paid in lieu of accrued holiday and was therefore unable to do a precise calculation of holiday pay but calculated that he was entitled to £1203.03 based on an average pay for the months in respect of which there was no payslip. His calculations were based on 12.07% of his hours worked. His calculations excluded the amounts that he was paid in lieu of holiday accrued but untaken. The calculations were further complicated by the fact that there were different rates of pay depending on the time of day worked.
32. The claimant first raised issues with his holiday pay in January 2022 when he emailed the respondent to request an update on his annual leave calculation and how much he was due to be paid. He received no response but did receive two payments of £180 in January and February 2022, though no explanation of the calculation was given.
33. A further email was sent in May 2022, when he emailed someone called Lottie to request an update on how much annual leave he had accrued and again no response was received.
34. An email dated 2 September 2022 informed the respondent that the claimant had not been paid for August and did not have a pay slip. He chased his August pay on 5 and 6 September as he had received no response and still had not been paid.
35. On 7 and 8 September 2022 the claimant had a text exchange and was informed he would have to wait until 16 September to be paid. He still had no pay slip.
36. The claimant was paid on 8 September 2022.
37. On 14 September 2022 the claimant chased his missing pay slip with no response.
38. On 5 June 2023 the claimant made an enquiry as regards holiday pay. Although the claimant did not say so, he wanted to get the holiday pay issues he had sorted out before he logged any further shifts on Pearl. He followed up on this request on 8, 10, 13 and 22 June 2023. He was also chasing his pay slip for March 2023.
39. On 22 June 2023, the claimant informed the respondent that he would escalate the situation to ACAS for early conciliation, but there was still no response. He was now requesting pay slips for September and October 2022 and March 2023.

40. He was logged out of the Pearl app on 23 June 2023. The Pearl app had the pay slips on it.
41. A further complaint re holiday pay/pay slips was logged on 30 June and the claimant finally received a response on 11 July 2023 as regards the payslips but the documents were password protected with no password provided until 14 July 2023.
42. The claimant received a further payment in lieu of holiday (£526.53) on 13 July 2023. There was no pay slip or correspondence from the respondent. The claimant was only informed that that payment was holiday pay when the respondent replied to his Tribunal claim.

Law

Employment status

43. A contract of employment (or a contract of service as it used to be called) is described in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2QB 497, 515C: "A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be. . ."
44. As Stephenson LJ put it in ***Nethermere (St Neots) Ltd v Gardiner [***1984] ICR 612, 623***,*** "There must . . . be an irreducible minimum of obligation on each side to create a contract of service. "
45. Mutuality of obligation is the obligation on an employer to provide work (and pay a wage or salary) and the obligation on an individual to accept and perform that work. The significance of mutuality of obligation is that it determines whether there is a contract in existence at all.
46. Mutuality of obligation does not require work to be offered where there is no work available.
47. Where an individual is subject to a large degree of control as to how the work is done, an absence of mutuality of obligation will nonetheless act as a bar to employee status.
48. This mutual "minimum of obligation" (also referred to as mutuality of obligation) was further explained by the EAT in ***Cotswolds Developments Construction Ltd v Williams*** *UKEAT/0457/05*, as follows: ":... it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. ... It is plain, therefore, that the existence and exercise of a right to refuse work ... [is] not critical, providing that there was at least an obligation to do some. ... Although Kerr LJ dissented in the result [in Nethermere (St Neots)], he too expressed the "inescapable requirement" as being that the purported employees "… must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer."

49. If there is no obligation on the employer to provide any work (or pay) and none on the putative employee to accept any work provided, then the relationship is too casual to constitute a contract of employment as the mutuality of obligations test will not be satisfied.
50. In each case the question the court has to answer is: what contractual terms did the parties actually agree?"
51. In ***Autoclenz Ltd v Belcher*** (SC(E)) [2011] ICR it states: "Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.
52. For a contract of employment, there must be an obligation to provide or pay for work on the one hand, and an obligation to perform that work on the other.

Holiday pay

53. On 1 January 2024, regulation 13 of the Working Time Regulations 1998 were amended to introduce a statutory right for the worker to carry over holiday where, in any leave year, the employer fails to:
    - recognise a worker's right to annual leave or paid annual leave;
    - give the worker a reasonable opportunity to take leave or encourage them to do so; or
    - inform the worker that leave not taken by the end of the leave year will be lost.
54. In such cases the worker has the right to carry over any untaken leave or leave which has been taken but was unpaid. The right to take the carried-over leave will last until the end of the first full leave year in which there is no such failure by the employer.
55. This amendment was intended to codify the effect of ECJ cases on carry-over, particularly the cases on the principle that workers must have an effective opportunity to take their holiday under the Directive.

Pay slips

56. Under section 8(1) ERA both employees and workers have the right to be given a written, itemised pay statement by their employer. This must be provided at or before the time when any payment of wages or salary is made.
57. In ***Anakaa v Firstsource Solutions Ltd*** *[2014] NICA 57*, the Court of Appeal in Northern Ireland considered the similarly worded Northern Irish legislation (article 40 of the Employment Rights (NI) Order 1996 (*SI 1996/1919*)) and whether the employer had complied with its obligation to give a written, itemised pay statement where employees were only given online accessible pay slips. The court was persuaded that in the modern context, the obligation was satisfied where words are reproduced in a visible form on a computer screen. It added the caveat however, that if the

employer becomes aware that an employee is having difficulty accessing the information in this way, it would need to find an alternative method of providing the information. This decision is not binding, but may be persuasive, in the English tribunals and courts.

58. An employee or a worker may make a reference to an employment tribunal where their employer does not give them a statement at all or gives them a statement which does not comply with the requirements of section 8 in some way (*section 11(1), ERA 1996*).
59. If the tribunal finds that an employee or a worker has not received a pay statement or standing statement of fixed deductions, it must make a declaration to that effect (*section 12(3)*).
60. If a tribunal finds that any unrecorded deductions have been made during the 13 weeks immediately before the employee's application to the tribunal for a reference, it may order the employer to pay compensation of up to the aggregate amount of those unrecorded deductions during the 13-week period (*section 12(4), ERA 1996*). Although there may be a punitive element to an order under section 12(4), where an employer's non-compliance is purely a technical breach and there has been no real loss suffered, an employment tribunal may make no award or only a token award.
61. The distinction between an award for failure to provide an itemised pay statement and an award under the unlawful deductions regime is that an award for the latter under section 24 of ERA 1996 is in respect of an unauthorised deduction, whereas an award for the former under section 12(4) is for an unnotified deduction. Therefore, a deduction could be authorised, but still subject to a financial award if it has not been notified in an itemised pay slip (for example, a failure to show a deduction for PAYE and NICs). Where a deduction is both unauthorised and unnotified, the aggregate of the awards paid under the two sets of provisions must not exceed the amount of the deduction (*section 26, ERA 1996*).

Conclusions

Employment status

62. The claimant was not an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996. The claimant was at all times a worker as defined by section 230(3) (a) of the Employment Rights Act 1996.

63. The claimant's written contract made it clear that the respondent was under no obligation to provide continuing assignments and that the respondent was not obliged to offer any assignment to the claimant: "The Company will not incur any liability towards the zero-hour worker in the event of the Company failing to engage the zero hours worker on any assignment. The worker hereby acknowledges and accepts that any assignments are in the nature of the work, and the Company is under no obligation to provide continuing assignments. The worker hereby further acknowledges and accepts that solely the Company shall determine his suitability for any particular assignment. The Company is not obliged to offer any assignment to the worker."

64. Accordingly, the respondent did not have to provide a minimum amount of work, or any work at all, to the claimant. Likewise, there was no obligation

on the claimant to carry out shifts for the respondent if he did not want to (even when he had provided his availability).

65. The zero hours contract entered into by the claimant was casual in nature and did not give rise to mutuality of obligation between the parties. There is no reason to suspect that the agreement was sham as regards the employment relationship and as regards the mutuality of obligation between the parties.

66. As stated in ***Autoclenz*** (above), "Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties."

67. From the evidence the written terms do accurately reflect the true agreement of the parties: the respondent was under no obligation to provide work; the claimant was under no obligation to offer work. When he did offer work, the claimant was not obliged to accept it, as he occasionally did not.

68. Even though the respondent did refer to the claimant as an employee and the contract was in many respects more akin to an employment contract, that presence of the clause set out above was sufficient to preclude an employment relationship. What the parties might have thought at the time about the status of the relationship is not relevant. Status is a purely contractual question for the Tribunal to decide based on the evidence before it.

Unfair dismissal

69. As the claimant was not an employee, he cannot bring a claim of unfair dismissal, and the Tribunal has no jurisdiction to hear this claim. In any event, the Tribunal is satisfied that the reason for the termination of the claimant's engagement was the move away from zero hours contracts for operational reasons and has nothing to do with the claimant or his ability to perform his role. The claimant was clearly a respected and valued member of the respondent's team, but the respondent needed organisational change to ensure cover.

Notice pay

70. According to his contract, the claimant was entitled to statutory notice of termination of employment (or engagement).

71. The Tribunal is satisfied that no notice of termination is due in the unique circumstances of this case.

72. The respondent did not terminate the claimant's employment. Rather, the claimant declined to respond to the respondent's request to provide his availability because he wanted to get his pay issues resolved, though he never informed the respondent of that decision.

73. Significantly on 30 May 2023, the claimant received an email asking for availability, which was followed up by a phone call on 31 May 2023 and an email on 1 June 2023, which requested the claimant's availability for June and July to explore "aligning [the claimant] with [the respondent's] business needs". The claimant never responded.

74. As a result of the claimant never responding, and in the unique circumstances of the respondent's decision to move away from zero hours contracts, the claimant's engagement ended. The respondent assumed that the claimant had, effectively and by his lack of response, decided not to pursue a contract with it. The claimant did not provide any further availability, and the respondent moved to a new system, which resulted in the claimant no longer being included in it. Effectively, the claimant had brought his contract to an end by failing to engage with the respondent at any time after 30 May 2023 until he "fell off" the apps on 13 July 2023.

Holiday pay

75. The respondent did fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended.

76. The calculation is complicated by the fact that the claimant's employment covered three leave years (April to March): 2020/1 (February and March only); 2021/2; and 2022/3.

77. However, the Tribunal finds that the claimant has a statutory right to carry over holiday as, in all leave years, the employer failed to give the claimant a reasonable opportunity to take leave or encourage them to do so; or inform him that leave not taken by the end of the leave year will be lost.

78. Not only were there no communications whatsoever from the respondent to explain that the claimant should take his holiday or to explain what calculations were in place when holiday pay was paid in lieu, but the respondent failed to respond to any of the claimant's attempts to clarify the position as regards holiday pay, nor did it provide any calculations for the payments in lieu of holidays accrued but untaken. It is therefore not possible to see how those have been calculated. Further, the respondent was able to make payments in lieu of untaken holiday, contrary to the position as set out in the claimant's contract of employment.

79. The Tribunal accepts the claimant's calculations as regards payment due for holiday accrued but unpaid on the termination of his employment and concludes that the respondent owes the claimant £1203.03.

Written Itemised Pay Statements

80. The respondent failed to give the claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in March 2022, September and October 2022, and March 2023. There was also no pay slip provided in July 2023 when the respondent paid the claimant in lieu of untaken holiday.

81. Despite several requests these were not provided to the claimant. The requests were sent to both control and payroll teams, but no reply was forthcoming.

82. Simply making statements available online (for example, through Pearl) satisfies the apparent obligation on the employer to ensure that the worker receives their pay statement provided the employee knows where to find

them and can log on at the appropriate date to view them. There is no evidence that this was the case for the claimant. Clearly the legislation envisaged printed copies being physically given to employees as it pre-dates the technical ability to provide information online. The cautious employer would therefore be advised to email employees each month confirming payment and either attaching their pay slip as an electronic document or informing them that their pay slip is ready to view via a portal, with the link to it.

83. The respondent did not make any unnotified deductions from the pay of the claimant in the 13 weeks prior to presentation of the claim form.
84. Further, the Tribunal is unable to award loss flowing from the failure to provide the pay slips, as requested by the claimant in respect of higher mortgage payments.

Employment Judge Rice-Birchall
Date 19 September 2024

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