



EMPLOYMENT TRIBUNALS

Claimant: Reverend I Ibe
Respondent: Boss Security Services Limited
Heard at: Ashford, Kent **On:** 7 and 8 June 2017
Before: Employment Judge Wallis
Members: Mr M P O'Connor
Mr N Phillips

Representation

Claimant: Mr Farhat, Legal Officer
Respondent: Mr M Mukulu, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The claim for wages and holiday pay is successful;
2. The Respondent is ordered to pay the Claimant £2,583 (gross) unpaid wages and £837.22 (gross) holiday pay;
3. the claim of discrimination on the grounds of religion or belief is unsuccessful and is dismissed;
4. The costs applications from the Respondent and the Claimant were refused.

REASONS

Oral reasons were given at the end of the hearing. The parties requested written reasons.

Issues

1. At a case management discussion on 23 November 2016 the issues were agreed with the parties and are replicated below:-
 - a) The Claimant has brought claims of unlawful deduction from wages and discrimination because of religion or belief. He says that his employment is ongoing and that he was mistaken in claiming unfair dismissal.

b) The Respondent has brought a counterclaim against the Claimant but as the Claimant has not brought a claim of breach of contract the Tribunal has no jurisdiction to hear the counterclaim which is hereby dismissed.

c) The issues that will need to be decided at the final hearing are therefore as follows:

d) **Termination of employment.**

a. Has the Claimant been dismissed or is his employment ongoing?

e) **Unlawful deduction from wages.**

i How much is owed by the Respondent to the Claimant?

ii How is this calculated and over what period, having regard to whether or not the Claimant's employment has been terminated and if it has not been terminated, the Claimant's reasons for not attending work since May 2016? It is the Claimant's case that he did not return to work because the Respondent threatened to have him arrested if he did so.

f) **Direct discrimination because of religion or belief.** The Claimant identifies himself as an orthodox Christian and relies on a conversation that took place between him and Steven Morrison of the Respondent on 31 May 2016.

i Has the Claimant shown that on the balance of probabilities the conversation took place as alleged between him and Mr Morrison?

ii Did Mr Morrison tell the Claimant during the course of that conversation to tell lies about his working patterns?

iii If so, in telling the Claimant to tell such lies did Mr Morrison treat the Claimant less favourably than he would have treated others who did not share the protected characteristic of an orthodox Christian belief?

iv If so, did the Respondent treat the Claimant in that manner because of his orthodox Christian belief?

v Did Mr Morrison say anything else to the Claimant during that conversation that amounted to less favourable treatment because of his religion or belief?

vi Does the Claimant rely on an actual or a hypothetical comparator? In either case the comparator must be in the same circumstances as the Claimant save that the comparator does not share the Claimant's orthodox Christian belief.

g) **Harassment because of religion or belief.**

Did the conversation on 31 May 2016 amount to unlawful harassment of the Claimant by Mr Morrison in that it was unwanted conduct related to his religion or belief that had the purpose or effect of violating his dignity or creating an intimidating, hostile, humiliating, degrading or offensive environment for the Claimant?

h) Indirect discrimination because of religion or belief

i Did the Respondent apply to the Claimant a provision, criterion or practice ("PCP") of requiring him to work back to back shifts without being relieved by another employee? The Claimant will say that if applied, this PCP would place those sharing his Christian beliefs at a disadvantage compared to others who do not share them and the PCP did place him at such a disadvantage because it made it more difficult, if not impossible, to attend church on a Sunday.

ii If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

i) The Tribunal noted that the claim form contained a claim for holiday pay that was not referred to in the list of issues.

Documents and evidence

2. We had an agreed bundle of documents and written statements from the witnesses. One of the Claimant's witnesses Mr Otekpu did not attend the hearing. His witness statement was expressed in the same wording as the statement of the Claimant's other witness Miss Queen Sign. We read his statement without objection by the Respondent.
3. We heard evidence from the Claimant Mr Innocent Ibe and from the Respondent's director and owner Mr Stephen Morrison.
4. At the start of the hearing we heard applications with regard to the presentation of documents. Despite the case management discussion having taken place in November 2016, neither party was well-prepared. We heard arguments about the nature of the disclosure and allowed the Claimant to present further documentation to the Tribunal. This was largely correspondence between the parties which was relevant to the issues to be decided.

Findings of fact

5. The Claimant was employed by the Respondent as a security guard at various sites from 24 March 2016. In April we found from the time sheets that most of his shifts were worked at night at a number of care homes with whom the Respondent had a contract. We found that on 29 April 2016 he was allocated to a construction site in Erith and there is a dispute at the Tribunal hearing as to whether he worked for four 24 hour shifts at that site. It was the Claimant's case that he worked from 4pm on 29 April until 7am on 1 May 2016. We noted the time sheet at Page G9 of the bundle that the Claimant listed there that he worked at Erith on 1 May and 2 May but we found that there was not sufficient evidence to support all of those hours and some of the calculations did not appear to us to be quite correct. For example the Claimant says in his witness statement that he worked for 108 hours over that period but if we look at the hours in G5 and G9 they amount to 99 hours, and we also know from the claim form and the Claimant's witness statement that he says that he came off that site on 1 May. Having considered all of that evidence we were satisfied that he did not work at the Erith site on 2 May as set out in the time sheet at G9.
6. Despite all of that we noted that the Respondent paid the Claimant for the hours that he had worked in April 2016 and that included a 24 hour shift recorded on the

time sheet at Page G6. The Respondent has brought no evidence to contradict the Claimant's evidence about that work and we considered that the Respondent should have been able to produce some evidence to show us the shifts that they contend the Claimant had worked in order to support their version of events.

7. In coming to that view we noted that the Respondent had had notice of the claim in respect of those dates both in the claim form and later in the witness statement of the Claimant. On balance, although there is not a great deal of evidence, we accepted that the Claimant was on site for those hours.
8. We went on to accept the Claimant's evidence that he raised with the Respondent that he had worked all of those hours and clearly that was a difficult thing to have to do and we accepted his evidence that the Respondent had reassured him that it would not happen again. We found that the Claimant raised with Mr Morrison of the Respondent company around about the end of April that he did not wish to be paid in cash which is what had happened on the previous occasion and he said he wanted to be able to pay his taxes and so on properly because he was an ordained gospel minister. Accordingly, we found that the Respondent paid the Claimant by cheque on 1 May 2016 for the hours worked in April and we noted a copy of that cheque at Page G16. We found from that conversation that the Respondent and in particular Mr Morrison was aware from around the end of April that the Claimant was a minister of religion.
9. The Claimant continued working at the care home throughout May 2016 as shown by his time sheet at Page G9. On 27 May 2016 he was once again sent to the Erith site. The Claimant says that he worked there from 3.45pm on that day. The Respondent says 7pm. We found it was more likely that the Claimant was correct about that and that he started work at 3.45pm; we noted in particular that it was the Friday of the bank holiday weekend. The main dispute was whether he worked four nights only and was relieved at 7am each day (Respondent's case) or whether he worked for four days and nights continuously as he set out in his time sheet. Again we noted that the Respondent had brought no evidence, certainly no documentary evidence to show that a second guard had relieved the Claimant each morning. At the Tribunal hearing we were given the name of the guard Mr Spencer when Mr Morrison gave evidence but we noted that that name had not been mentioned previously. Again we could see that the Respondent had had notice in the claim form that this was an allegation that the Claimant was putting forward but despite that they attended the Tribunal without the evidence to show that the Claimant had in fact been relieved each morning and certainly we consider that such evidence would have been in the possession of the Respondent.
10. Turning then to the events of 31 May 2016 we noted firstly the evidence of Miss Sign the Claimant's witness; we found that she was a credible witness and that her evidence clearly supported the Claimant because she had overheard some of the conversation which took place on the telephone and which the Claimant had put on to loud speaker. We found that at the end of his shift in the morning of 31 May the Claimant made his way to Miss Sign's house because there was a pre-arranged meeting to be held there. We were satisfied that he spoke to Mr Morrison on the telephone. This was the conversation that Miss Sign overheard and we found that Mr Morrison told the Claimant that there had been some damage reported at the Erith site and that the Claimant should tell the client that there had been two guards assigned to that site. We found that the Claimant told Mr Morrison that he would not lie because he was a minister and we were satisfied that Mr Morrison's response was to say that he would not pay the Claimant's

wages if he did not support Mr Morrison and the Respondent company. We accepted the Claimant's evidence that because of his concern about the allegation he returned to the Erith site and he spoke to the client's project manager. We understand that later on the Respondent in fact lost that contract. What happened after that was that the Respondent wrote to the Claimant. We have seen a letter dated 28 May 2016 which the Respondent said was the wrong date and we accept that that is the wrong date of that letter. It should be dated 31 May and we found that because there is also an email from the Respondent in the bundle at F14 on 31 May saying that the client had complained that morning, in other words on 31 May, about the damage at the site. We can also see at the foot of F14 that there appears to be an email from the client which refers to a request that they be given a report from the guard. We notice that it is in singular in respect of the alleged damage. The Claimant accepted in his witness statement that he had received that letter from the Respondent and for some reason, we do not know why, he did not respond to it. We noted that the Respondent wrote again on 2 June 2016 and that is the letter that the Claimant says he did not receive.

11. We accepted the Claimant's evidence that he telephoned the Respondent on 6 and 7 June 2016 asking for his wages and asking for work. We found that there was no evidence that the Claimant requested any work after that point in the history of the matter and that was in contravention of the rules which were issued to him by the Respondent when he began working for the Respondent and which he had signed which we see at page F13. It provides that he should phone in every week to ask for work, and that was when his rota would have been given to him. By this time, and we do not know how he heard about it, the Claimant had heard that an allegation had been made against him by one of the care home managers and he obtained what purports to be an email from that manager to say that no such complaint had been made. There was a dispute about the veracity of that document but as this is not a specific issue that we have to decide we merely noted that it is in the bundle. The Respondent says that as a result of that allegation they suspended the Claimant from those sites. It remained unclear to us whether or not the Claimant was aware that he had been suspended from those sites.
12. On 15 June 2016 the Claimant sent an email to the Respondent asking for his wages and suggesting that he might bring a claim at the Employment Tribunal if he did not hear from them. The Respondent then wrote to the Claimant on 20 June enclosing a list of damages which they say was supplied by their client and asking him to contact them. The Claimant said that he received that letter but he did not contact them at that stage, and there was a further letter from the Respondent chasing a response from the Claimant on 6 July 2016. The Claimant finally replied to the Respondent by letter of 11 July 2016 and he set out in some detail in that letter the history of the matter. There was no specific response from the Respondent but the Claimant received his P45 dated 29 July 2016; it refers to the Claimant leaving the employment of the Respondent on 1 July 2016.

Submissions

13. We heard submissions from the parties' representatives.

The Law

14. Section 13 of the Equality Act 2010 deals with direct discrimination and provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

15. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.
16. Section 19 makes provisions in respect of indirect discrimination. It provides that A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
17. The PCP is discriminatory if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim.
18. Section 26 of the Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating etc environment for B
19. The burden of proof in respect of these provisions is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the Claimant to prove facts from which the Tribunal could, apart from the relevant section, conclude in the absence of an adequate explanation that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act.
20. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.
21. The Working Time Regulations 1998 provide that a worker is entitled to be paid for any holiday accrued at the time their employment terminates, in respect of the holiday year in which employment terminates.
22. The claim in respect of unlawful deductions from wages comes to the Tribunal under section 13 of the Employment Rights Act 1996. An employer shall not make a deduction from wages unless 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 the worker has previously signified in writing his agreement to that deduction. Where the total amount of wages is paid on any occasion is less than the total amount properly payable, then the amount of the deficiency is treated as a deduction from the worker's wages.
23. Rule 76(1) of the 2013 Rules provides that a Tribunal shall consider making a costs order against a paying party where, in the opinion of the Tribunal, the paying party has in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success.

Conclusions

24. Having made the findings of fact we returned to the agreed issues in order to draw these conclusions, having regard to the relevant law.
25. The first question was whether the Claimant had been dismissed or whether his employment was ongoing. We concluded that he had been dismissed by the Respondent and that that decision had been conveyed to him by sending the P45. We entirely accepted that in some cases the sending of a P45 does not equate to a dismissal, but looking at the circumstances of this case, which we understand is what we are obliged to do, we considered that this amounted to a dismissal. We understood the Respondent's case which is that the Claimant had resigned by not making himself available for work but there is no resignation letter from the Claimant and certainly no evidence that he had resigned at any point. We accepted the Respondent's point that the Claimant did not make himself available for work and we had to decide from what point that will have a bearing on the wages claim. But in terms of the question as to whether he was dismissed or whether his employment was ongoing we have concluded that the effective date of termination was when the Claimant received the P45 which we put on or about 1 August 2016. It was dated 29 July which was a Friday and so we anticipate he would have received that around the following Monday.
26. The next issue is the claim for wages. How much is owed by the Respondent to the Claimant, how is this calculated and over what period having regard to whether or not his employment has been terminated. We have concluded that the Claimant is entitled to be paid for May 2016 and we have made some calculations in respect of that. We have looked at G9 which was the time sheet for May and we have accepted as I have explained that he worked on 1 May 2016 because that was the end of the weekend which he worked at the Erith site at the end of April, and he worked for 7 hours on 2 May until he was relieved in the morning of Tuesday 2 May. Therefore he worked for 31 hours on 1 and 2 May 2016. He then worked for 17 x 12 hour shifts at the care homes according to the addresses on the time sheets, and then we come to the second stint at the Erith site.
27. Based on the evidence of the Claimant and the complete lack of evidence from the Respondent and having regard to the findings that we have made we calculated that he worked three 24 hour shifts and then finally a 15 hour 15 minute shift which was the period of time he spent at the Erith site before he was taken to the station as he said by a representative of the client company. Then he worked at the Pembury Road home for 12 hours as shown at the foot of G9. Adding those together we come to 334 hours 45 minutes. We then had to consider whether the Claimant was entitled to be paid for any days after that date until the effective date of termination. We know that the Claimant did not do any work for those days. What we have found is that he made himself available for work on 6 and 7 June 2016 when he telephoned the Respondent's office; based on that we consider that he was available for two 12 hour shifts. We know of course from his contract of employment that he was contracted to work 12 hour shifts and doing the best that we can on the evidence we have we consider that that amounts to his loss of wages. We have added together the hours that we have calculated that he worked in May together with the two 12 hour shifts. All of that was to be paid at the rate of £7.20 an hour which the parties agreed, and that resulted in a total of £2,583 which is the gross figure before any deductions.

28. Turning to the holiday pay claim, this is not in the list of issues set out in the case management order but the relevant box is marked on the claim form. The Claimant worked for a period of 18 weeks for the Respondent, by which we mean that he was employed for that period of time and so we calculated, using the Working Time Regulations calculation, the number of days holiday he was entitled over the course of the year. We had to pro rata that over 18 weeks and that gave us to just over 10 days, 10.38 days accrued in that period of time. We have multiplied by the pay that he would have received on each of those days for a 12 hour shift and that gives us a figure of £837.22.
29. Turning to the claim of discrimination on the grounds of religion and belief, looking at the questions that have been posed in the case management order, the first question relates to the direct discrimination claim and is whether the Claimant has shown on the balance of probabilities that the conversation took place as alleged between him and Mr Morrison on 31 May 2016. As we have set out in our findings we concluded that there was that conversation and it took place in the way that the Claimant described.
30. The next question is whether Mr Morrison told the Claimant during that conversation to tell lies about his working pattern. We were satisfied that during the conversation Mr Morrison did ask the Claimant to lie, in other words to tell the client that there had been two guards assigned to that site.
31. The next question is, if so, in telling the Claimant to do that did Mr Morrison treat him less favourably than he would have treated others who did not share the protected characteristic of an orthodox Christian belief and we have decided that the answer to that must be no. We have concluded that the Respondent would have acted in the same way with any other guard and that he did so in order to protect his contract with the client. The Claimant's belief did not enter into the consideration of that request or instruction from the Respondent.
32. The next question is whether, if so, did the Respondent treat him in that manner because of his belief. As set out above, we concluded that the Respondent did not treat him in that way because of his religion or belief. He treated him in that way because he wanted to protect the contract. He wanted the Claimant to tell the client that the Claimant had not been on site for four days and nights on his own.
33. We are then asked to look at whether Mr Morrison said anything else to the Claimant during that conversation that amounted to less favourable treatment because of religion or belief. Again we have found nothing else that Mr Morrison said during that conversation that could be described as less favourable treatment because of that protected characteristic and indeed nothing was alleged by the Claimant.
34. Turning then to the claim of harassment we concluded that the conversation did not amount to unwanted conduct which related to religion. It may well have been unwanted in the sense that the Claimant did not want to be told to misrepresent the truth to the client, but it was not related to his religion or belief. There was of course Mr Morrison's suggestion that the Claimant's wages would be withheld if the Claimant did not tell the client what Mr Morrison wanted him to tell the client but we were satisfied that that was because there was a dispute about the wages and because there was the potential of losing that contract if the client could not be satisfied about what had gone on at the site that weekend.

35. Turning to the claim under section 19, indirect discrimination, the first question in such a claim is whether an employer has applied a provision criterion or practice. In this case that is said to be requiring the Claimant to work back to back shifts without being relieved by another employee. We concluded that there was no evidence of any provision, criterion or practice here. Certainly we could see no evidence that the Respondent required all guards to work 24 hour shifts. There was simply no evidence to suggest that, and it was vehemently denied by Mr Morrison. The evidence is that the Claimant himself worked those shifts and we have accepted that. We have concluded that he did so because he was a conscientious worker. He had not been relieved by the relief guard and he decided that it was appropriate for him to remain on site until somebody came to take his place and we have concluded that is quite different from this being a requirement or in other words a provision, criterion or practice. The discrimination claims are unsuccessful for all of those reasons.

Costs applications

36. Both parties made costs applications at the end of the hearing. The Respondent submitted that the discrimination claim was 'misconceived'. They thought that the wages claim could have been heard in one day. They had not prepared a schedule of costs.

37. The Claimant submitted that that the same facts would need to be heard in both claims and that the Claimant's evidence had been accepted by the Tribunal. The Respondent had refuted the claims but did not provide evidence to support its bald assertions.

38. Having adjourned to consider the applications, the Tribunal decided that there were no grounds for making any order; it could not be said that the discrimination claim had no reasonable prospect of success; there was no dispute that the Respondent was aware that the Claimant was a minister of religion. The evidence about the events had to be heard.

39. The Claimant's application for costs in the wages claim was not persuasive. Costs are still rare in the Tribunal. The Respondent was entitled to have the evidence about the unpaid wages heard and evaluated, and most of the questioning related to the wages claim.

40. Both applications were refused.

Employment Judge Wallis

Date 4 July 2017