EMPLOYMENT TRIBUNALS

Claimant: Mr Giles Duncan

Respondent: AAR International

Heard at: Lincoln **On:** 4 June 2018

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: did not attend & was not represented
Respondent: Mr Barron (solicitor)

JUDGMENT

1. The Claimant's claim that the Respondent breached his contract of employment by failing to give him the notice to which he was entitled fails and is dismissed.

2. The Claimant's claim that the Respondent made unlawful deductions from his wages by failing to pay him overtime fails and is dismissed.

REASONS

Preamble & the Hearing

1. The Claimant was employed by the Respondent from 2 May 2017 to 30 November 2017. The Respondent dismissed the Claimant by giving him one week's notice on 23 November 2017.

2. The Claimant presented a Claim Form on 23 February 2018 and the Respondent then presented a Response. There was a Closed Preliminary Hearing by telephone before Employment Judge Hutchinson on 22 May 2018 ("the Preliminary Hearing") and the claim came before me in Lincoln on 4 June 2018.

3. The Respondent was represented by Mr Barron, a solicitor. Nicola Owen, a Senior HR Manager of the Respondent, attended and gave evidence on behalf of the Respondent. She provided a witness statement running to 40 paragraphs. She was asked some supplementary questions by Mr Barron and I also asked her some questions.

4. The Respondent provided a bundle running to 216 pages. All page references are to the Respondent's bundle unless otherwise stated.

5. The Claimant did not attend the Hearing and was not represented at it either. However he had written to the Tribunal before the Hearing to request that it go ahead in his absence (he had recently obtained work abroad). He did not apply for an adjournment. He emailed a variety of documents to the Tribunal and the Respondent the day before the Hearing. He did not provide a paginated bundle. I created a small bundle running to 36 pages of the documents he had emailed. Most but not all of the

documents in this bundle were also contained in the Respondent's bundle. A copy of this bundle is on the Tribunal's file. The Claimant also provided a witness statement running to 8 pages.

Issues and discussion at the beginning of the Hearing

6. In the Claim Form the Claimant had described his complaints as being for (1) notice pay; (2) arrears of pay; and (3) "dismissed due to illness and breach of contract due to false recruitment". There had been a discussion of the claims at the Preliminary Hearing before Employment Judge Hutchinson.

7. The result of that discussion was that the Claimant clarified that his claims were for:

   7.1. Notice pay: the Claimant explained that he believed that he was due three months' notice because this was the period specified in his contract of employment. I accept Mr Barron's explanation (not least because this is consistent with the record of the Preliminary Hearing and the Claimant's witness statement) that the Claimant explained that his case was simply that he was entitled to the three months' notice referred to in his contract of employment. He did not argument in the alternative that he was entitled to "reasonable notice" which was longer than the statutory notice to which he was entitled.

   7.2. **Wages:** the Claimant explained that he had worked continuously for the first three months and that he was entitled to 48 days' overtime. The Respondent had made unlawful deductions from his wages by not paying him this overtime.

8. As such the Claimant accepted at the Preliminary Hearing that he did not (for example) pursue a claim of disability discrimination in relation to his dismissal. Further, he did not pursue any claim on the basis of "false recruitment" (and of course in any event the Employment Tribunal would have had no jurisdiction to consider a claim for misrepresentation).

9. Mr Barron explained that the Respondent's position in relation to these two claims was as follows:

   9.1. **Notice pay:** there was no "valid contract" and so the Claimant was only entitled to statutory notice of one week which he had been paid. Alternatively, if there were a "valid contract", the Claimant's probationary period had been validly extended with the result that as of 23 November 2017 he had only been entitled to the one week's notice which he had been given.

   9.2. **Overtime pay:** there was no "valid contract" and so there was no contractual term entitling the Claimant to overtime. Alternatively, if there were a "valid contract", the Claimant was not entitled to overtime as claimed under its terms.

10. Consequently, the issues for me to determine were: (1) on what terms the Claimant was employed; (2) whether the Claimant had received the notice of termination to which he was entitled under those terms; and (3) whether the Respondent had made unlawful deductions from the Claimant's wages by failing to pay him overtime due under those terms.

The Law

11. In order for a contract to exist several conditions must be satisfied. There must be an agreement comprising an offer made by one party and accepted by the other. That agreement must be made with the intention of creating legal relations and it must be supported by consideration.

12. As will become clear below, much depends on this case on what terms were offered and accepted. An offer must be made with the intention of the party making it being legally bound as soon as it is accepted. It must therefore be sufficiently clear and unequivocal for the party to whom it is made to accept it without further negotiation.

13. Acceptance of an offer may be express (whether in writing or oral) or by conduct unless the offer specifically requires acceptance to be communicated in a particular way. The case of Collymore v Capita Business Services Ltd UKEAT/162/98 is authority for the proposition that, if an employee begins their employment after receiving a letter setting out the terms on which employment is offered, the employee will be "taken to enter their employment on those terms" even if they have not expressly accepted the offer.

Findings of Fact

14. I am bound to be selective in my references to the evidence when setting out my findings of fact. However, I wish to emphasise that I considered all the evidence in the round when making these findings.

15. The Claimant applied for a job with the Respondent working as a co-pilot on a contract that the Respondent held with the Ministry of Defence to provide search and rescue operations in the Falkland Islands. The service provided under the contract was referred to as "FISAR" (Falkland Islands Search and Rescue).

16. The Claimant was interviewed by the Respondent on 5 April 2017 after a previous telephone interviews with Ms Owen. At those two interviews there was some discussion of the benefits which were provided to employees. No offer of employment was made at either interview: a decision to offer employment was only made after the second interview. An offer was, however, subsequently made on 19 April 2017 by letter (page 40) ("the Offer Letter"). The Offer Letter requested that the Claimant "Please sign a copy of this letter to indicate your acceptance of the offer by Monday 24 April 2017".

17. In her written statement (paragraph 5) Ms Owen did not suggest that the Offer Letter had enclosures. However, when I asked her about this in her oral evidence, she suggested that the contract of employment at page 39SS of the bundle ("the First Contract") was enclosed electronically with the Offer Letter and that the staff handbook (extracts of which were at pages 33 to 38A) ("the Staff Handbook") had been sent by post at the same time.

18. I find that in fact no further contractual documentation was enclosed with the Offer Letter. I so find for the following reasons:

    18.1. The terms of the Offer Letter itself suggest this. On the second page (page 41) it states:

    > *The full terms and conditions of your employment will be set out in your contract of employment and Staff Handbook which shall be issued to you on acceptance of this offer.*

    It would have been inconsistent with this wording for the First Contract or the Staff Handbook to have been enclosed with the Offer Letter. Further, there was nothing in the Offer Letter which suggested that documents were enclosed with it (e.g. the word "enc" at the end of a list of enclosures).

    18.2. The emails between pages 51 and 58 suggest that the First Contract and Staff Handbook were sent with an induction pack sent after the Offer Letter;

    18.3. The Claimant objected to the terms of the First Contract on 23 May 2017 (page 55) raising various specific terms in relation to it. Given that he had clearly previously emailed Stefan Pearce accepting the terms of the Offer Letter on or before 20 April 2017, the most likely sequence of events is that he received the First Contract after and not at the same time as he received the Offer Letter. (The email communicating acceptance was not included in the bundle but the terms of the email at page 55 make clear that such an email was sent and that was also what the Claimant suggested in his written statement.)

19. In making this finding I have discounted the evidence of Ms Owen in relation to this point as recorded at paragraph 17 above. I have done this for two reasons. First, she made no mention of documents having been enclosed with the Offer Letter in her written statement. Secondly, although I find that Ms Owen was doing her best to recall things accurately, her evidence in relation to this issue was confused. I find that she did not have a clear recollection of what was or was not included with the Offer Letter.

20. As I have found above, the Claimant accepted the offer contained in the Offer Letter by an email on or before 20 April 2017 and Mr Pearce indicated that the email would be taken as the Claimant's "acceptance until you are in a position to sign the letter". In fact the Claimant never did sign the Offer Letter because of the dispute that then arose about the terms on which he was to be employed after he had received the First Contract and the Staff Handbook.

21. On 2 May 2017 the Claimant's employment with the Respondent began and he travelled to Italy to begin a period of training on the helicopters operated for FISAR.

22. On 23 May 2017 after receiving the induction pack which I find included the First Contract and the Staff Handbook the Claimant emailed Mr Pearce raising objections to the terms of the First Contract. His objections, in essence, were that: (1) certain of the benefits he had understood he would receive were either not mentioned at all in the First Contract or were mentioned as being provided on a discretionary basis only; and (2) the amount of the training costs which he would have to repay if he terminated his employment with the Respondent was not mentioned. In light of these matters he declined to sign the First Contract. It is clear that in his email he is referring to the First Contract and not the Offer Letter.

23. The Respondent was keen to retain the services of the Claimant and on 19 June 2017 it sent him a revised version of the First Contract which specified the amount of the training costs which he would have to repay if he terminated his employment with the Respondent ("the Second Contract", at page 66). It was sent under cover of the email of 19 June 2017 at page 60.

24. The Claimant remained unsatisfied with the contractual terms which he considered were being offered to him and on 24 July 2017 wrote to Mr Pearce to record his "formal disagreement with the [Second Contract]" (page 72). He reiterated his objection to its terms on 14 August 2017 (page 80) and again on 9 September 2017 (page 137) and 3 October 2017 (page 136). The position remained unresolved as of 23 November 2017 when the Respondent gave the Claimant notice of the termination of his employment (page 165). Prior to terminating his employment, however, the Respondent wrote to the Claimant on 13 November 2017 extending his probationary period until 2 December 2017 (page 163).

25. The whereabouts of the Claimant throughout his brief period of employment are relevant to his claim and I make the following findings in relation to these. In light of the evidence given by Ms Owen and the various rosters in the bundle, I find that the Claimant was training in Italy for most of May and June, was in the Falkland Islands from 8 July to 2 August 2017 (26 days) and then again from 19 September to 4 October 2017 (16 days).

26. It is relevant to record certain terms from the Offer Letter, the First and Second Contracts and the Staff Handbook.

27. The Offer Letter provided, where relevant, as follows:

> ***Notice:*** *After successful completion of the Probationary Period the notice required by either party to terminate your employment is 3 months except in cases of gross misconduct where you may be dismissed summarily…*
>
> ***Probation:*** *Your contract with AAR International is subject to a probationary*

period of 6 months; at any time during which either you or the company can terminated your employment on one weeks [sic] notice.

28. The First and Second Contracts provided, where relevant, as follows:

> ***EMPLOYEE HANDBOOK***
>
> *You will be given an Employee Handbook containing the Company's policies and procedures relevant to your employment. Any changes will be notified to you from time to time. You should read the Handbook carefully; it gives you rights as well as imposing obligations on you….*
>
> ***PROBATIONARY PERIOD***
>
> *The first six months of your employment will be a probationary period during which the Company has the right to terminate your employment with one week's notice should you not meet the performance standards agreed with you or if you do not comply with the terms and conditions of your employment.*
>
> ***NOTICE OF TERMINATION TO BE GIVEN BY EMPLOYER***
>
> *During your probationary period: 1 week*
> *After probationary period complete: 3 months*

29. The Staff Handbook provided, where relevant, as follows:

> ***DEFINITIONS***
> ***…***
>
> ***Off Day –*** *any day not on duty as the contract operations site – Mount Pleasant Complex (MPC), Falkland Islands…*
>
> ***Duty Day*** *- any full day when the employee is physically located at the contract operations site…*
>
> ***Training Day –*** *any day that involves training at a company provided facility and is required for currency or additional qualifications.*
>
> ***Daily Rate –*** *estimated compensation for each Duty Day based on the following:*
>
> *Annual Salary/191 = Daily Rate*
>
> ***Overtime Daily Rate –*** *compensation for each Overtime Duty Day based on the following:*
>
> *Daily Rate x 1.33 = Overtime Daily Rate*
>
> ***Overtime Duty Day –*** *any full day that qualifies as additional work and compensated as overtime.*
> *…*
> ***Overtime Duty Period –*** *any period of time inclusive of more than 42 Consecutive Duty Days.*
>
> ***Off Duty Period –*** *period of time inclusive of all consecutive Off Days.*
> *…*
>
> ***Overtime Compensation***
>
> *The Program Manager may at his discretion, schedule employees for an Overtime Duty Cycle. The employee will receive Off Days plus Travel Days at a ratio of 1:1 to Duty Days or the Overtime Daily Rate will be paid for each*

consecutive Duty Day over 42 days.

For Duty Period extensions that are published after the employee begins a Rotation Cycle, the employee will be compensation for each Duty Day not within the previously published Duty Period. Compensation will be the employee Daily Rate up to 42 Duty Days and the Overtime Daily Rate for any day in excess of 42 Duty Days. In all cases, the employee may receive additional Off Days or Overtime pay but not both.

For roster changes that are published less than 30 days prior to the start of a Rotation Cycle, the employee will be compensated for any additional (incremental) travel expenses that are incurred due to the changed in schedule.

During any contract year (1 April to 31 March), the employee will be compensated for any Duty Day in excess of 195 total Duty Days for the year. Each employee will receive an end of year reconciliation of Duty Days worked. Any Duty Day in excess of 195 days and not previously compensated by the policies above, will be compensated with the Overtime Daily Rate.

Training

…

This per diem will be paid for currency training and travel to the Simulator. Pilots are required to work up to 6 days per year in the Simulator, excluding travel days. For purposes of this policy, pilot Training Days are incorporated into the Off Duty Period and are considered Off Days within the Rotation Cycle. Any pilot Training Day in excess of 6 days per year will be compensated at the employee daily rate.

Submissions

30. The Claimant did not attend the hearing and so made no oral submissions. His case was as set out in his witness statement and a document headed "My Summary for the Tribunal". This document focuses primarily on the underlying reason for the Claimant not signing either the First or the Second Contract: he did not believe that either reflected the benefits which he believed had been discussed with him at interview. It does not, understandably given that the Claimant is representing himself, set out any real legal analysis of what has occurred. The witness statement is a little clearer. At page 6 the Claimant argues he is entitled to benefit of a three month notice period because "I had agreed to and worked to the contract in all ways but was only unable to sign it as the terms and conditions greatly differed from those agreed at employment commencement." He did not agree that the Respondent was entitled to extend his probationary period. The overtime claim is explained in both the Summary document and witness statement by reference to the number of days the Claimant had worked and by reference to various discussions the Claimant had had with different employees of the Respondent.

31. The Respondent provided a document headed "Legal Submissions on behalf of the Respondent". Its position was that (1) the Claimant had not accepted the terms offered so there was no express acceptance of those terms; (2) acceptance could not be implied on the basis set out in Collymore v Capita Business Services Ltd because the First and Second Contracts contained post termination provisions (relating to the payment of training costs) and "express approval" of these was required by the Claimant; and (3) consequently the Claimant was employed on "implied contractual terms such as the right to be paid his salary, and statutory terms which would have affected his employment".

Conclusions

32. I conclude that the terms on which the Respondent offered to employ the Claimant were those set out in the Offer Letter and, by incorporation, the First Contract and the Staff Handbook. "By incorporation" because the Offer Letter expressly refers to the full terms and conditions of employment being as set out in the First Contract and

the Staff Handbook. I reject the contention of the Claimant that an offer on different terms was made at an earlier stage. There was doubtless discussion about terms and conditions at the interviews, but no offer capable of acceptance was made at either interview. The only offer made was the written offer contained in the Offer Letter.

33. I conclude, however, that the Claimant was not employed under the terms set out in the Offer Letter, the First (or Second) Contract and the Staff Handbook because he never accepted those terms.

34. So far as express acceptance of the terms is concerned, the Offer Letter required that the terms set out in the Offer Letter and the First or Second Contract be accepted by the Claimant signing a copy of the Offer Letter. The Claimant did not do this. He accepted the offer of employment by an email (the terms of which are unknown because it was not included in the bundle). The Respondent did not then waive the requirement that the offer be accepted by the Claimant signing a copy of the Offer Letter but rather indicated that "I can take your email as acceptance until you are in a position to sign the letter" (page 44). In fact the Claimant never did sign the letter. Consequently he never expressly accepted employment on the terms set out in the Offer Letter.

35. So far as implied acceptance of the terms is concerned, such acceptance to be implied from the Claimant beginning his employment with the Respondent, I conclude that this did not take place because:

    35.1. There were continued negotiations throughout most of the Claimant's brief employment about the terms on which he was to be employed. Both parties conducted themselves on the basis that terms had not been agreed. The Respondent amended the terms of its offer by issuing the Second Contract and repeatedly insisted that it was necessary for the Claimant to sign the Offer Letter. The Claimant for his part repeatedly rejected the terms set out in the First and Second Contracts, as I have set out in my findings of fact above;

    35.2. The facts here are different to those in Collymore because in that case there was no suggestion that there was any requirement for the offer of employment to be accepted in a particular way.

36. The question therefore arises of on what terms the Claimant was employed as to notice and overtime if he was not employed in those respects under the terms set out in the Offer Letter, the First (or Second) Contract and the Staff Handbook.

37. So far as notice period is concerned, I conclude that the Claimant was entitled to statutory notice of one week as provided for by section 86 of the Employment Rights Act 1996. The Claimant received this notice and so his claim for breach of contract fails and is dismissed.

38. So far as the claim for unpaid overtime is concerned, I conclude that no term was agreed in relation to overtime. I accept that the Claimant may have had discussions about how he might be compensated if he worked beyond his normal scheduled hours or outside his normal scheduled rota, but I conclude that such discussions were too vague to amount to an agreement in relation to how overtime would be remunerated. I conclude that there is no basis on which a term relating to overtime can be implied into the contract of employment of the Claimant. Consequently the Claimant's claim for unlawful deductions from wages fails and is dismissed.

39. I have also considered the position if (contrary to my conclusions above) the Claimant was in fact employed on the terms set out in the Offer Letter, the First (or Second) Contract and the Staff Handbook (together "the Terms of Employment").

40. I conclude that under the Terms of Employment the Claimant was entitled to just one week's notice. I so conclude because the Respondent had a right to lengthen the Claimant's probationary period as set out in the First (and Second) Contract and I

conclude that the Respondent exercised that right in accordance with the Terms of Employment. Consequently, at the date on which the Claimant was given notice, he was still only entitled under the Terms of Employment to one week's notice, which is what he received.

41. I also conclude that under the Terms of Employment the Claimant was not entitled to any overtime payments. This is for the following reasons:

    41.1. I have found above that the Claimant only spent a total of 26 days in the Falkland Islands from 8 July to 2 August 2017 and then 16 days from 19 September to 4 October 2017 when he left the Falkland Islands for the last time;

    41.2. The provisions relating to overtime payments make plain that overtime is only *potentially* payable (alternatively an "Off Day" may be provided): (1) when an employee performs an Overtime Duty Cycle which is a cycle comprising more than 42 "Duty Days"; or (2) when a Duty Period is extended. In each case overtime is potentially payable in respect of the "Duty Days" worked beyond the first 42. Further overtime will be paid (if not previously compensated) when a reconciliation is carried out at the end of the year running from 1 April to 31 March in respect of "Any Duty Day in excess of 195 days";

    41.3. As such overtime is only potentially payable when more than a certain number of "Duty Days" are worked in a particular period. The definition of a "Duty Day" is "any full day when the employee is physically located at the contract operations site". The "contract operations site" is defined as "Mount Pleasant Complex (MPC), Falkland Islands";

    41.4. The Claimant did not at any point spend more than 42 consecutive days in the Falkland Islands at the Mount Pleasant Complex. Nor did he spend more than 195 days in the Falkland Islands in any relevant 12 month period. Consequently he was not entitled to receive any overtime payments.

42. The Claimant's claims would therefore have also failed if I had concluded that he was employed under the Terms of Employment.

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Employment Judge Evans

Date: 13 June 2018

JUDGMENT SENT TO THE PARTIES ON

25 June 2018

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FOR THE TRIBUNAL OFFICE