Case No: 220548/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr CG Onyejegbu

Respondent: Interserve Security (First) Ltd

Heard at: London Central **On: 2 May 2019**

Before Judge: Employment Judge A Isaacson

Representation

Claimant: Ms L Hudson, FRU

Respondent: Mr N Bidnell – Edwards, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

The claimant's claims for an unlawful deduction from wages and holiday pay fail and are dismissed.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle of documents and heard evidence form the claimant and from Mr R Askham, an account manager at the respondent company. Both representatives gave oral submissions. Following a request from the Tribunal the respondent obtained a copy of a standard contract for employees who transferred to them from Charter Security on 31 October 2014 and evidence of an alleged Bacs payments made to the claimant for £340 in December 2017. The claimant was asked to send to the Tribunal, after the hearing, a copy of his bank statements for December 2017 and January 2018, which he did on the 3 May 2019.

Claims and issues

2. The claimant presented his claim form on the 14 June 2018. The claim form included claims for race discrimination, age discrimination, unfair dismissal and redundancy pay. These claims were withdrawn by the claimant at a case management preliminary hearing before Judge Sharma on 7 February 2019. The claimant also presented a claim for an authorised deduction from wages and a holiday pay claim which are the claims now before me.

3. J Sharma recorded in her CM Order that the claimant alleged that there had been a change in his employment status from being a permanent employee on fixed hours to becoming a temporary employee on a zero hour contract. J Sharma also recorded that Mr Smith, for the respondent, submitted that such a change in status/nature of the contract did not take place.

4. The issues for this preliminary hearing were confirmed as:

   4.1 Was the claimant paid less than his contractual hourly rate from 15 June 2016, applying section 23 (4A) Employment Rights Act 1996 ("ERA"), the date being the period of two years ending with the date of the claimant's ET1?

   4.2 What were the claimant's contractual obligations and rights in relation to his working hours?

   4.3 In relation to the claimant's claim for holiday pay I summarise the issues as: was the claimant entitled to be paid for holiday leave and if so, what amount is he owed?

Findings of fact

5. On 1 August 2000 the claimant was employed by Initial Security Limited as a security guard, posted at KPMG until 2007 when he was transferred to Pegasus Security Limited and then onto Chubb Security Personnel Limited. On 31 August 2009 the claimant was transferred to Charter Security PLC ("Charter"). The claimant was then transferred to the respondent on 31 October 2014. The name of the respondent at the time was First Security.

6. The respondent provides manned guarding services. It is common for security guards to move between contracts to service client requirements. When a site is closed, or an individual is asked to leave a site, the individual employee is placed on a redeployment list and alternative work is sourced for them. If alternative work is not sourced within two weeks, the Respondent's HR department initiates a redeployment process, alerting the employee that if he is unable to find alternative work within a specified time frame, their employment may be terminated by reason of SOSR.

7. Whilst on the redeployment list, employees are offered work according to their contractual hours in accordance with the respondent's Timegate system in order that they don't lose pay. The employee is expected to accept reasonable job roles offered. An unreasonable failure to accept a role is recorded on the respondent's system and they are not paid for that shift. The employee would only be paid for the hours they worked but the respondent would endeavour to provide the claimant with enough hours work so they didn't lose pay.

8. Holiday pay is based on the hours scheduled to be worked on the shifts that are taken as holiday and will vary from employee and depend on the shifts they have taken off. Mr Askham stated that the respondent's holiday entitlement was 28

days / 5.6 weeks. However, the Tribunal accepts the evidence of the claimant that his original terms included that his holiday entitlement increased with his years of continuous service. After 10 years he was entitled to 33 days holiday per year. This entitlement is confirmed in the claimant's latest contract dated October 2018 set out further below.

9. The Tribunal accepts the evidence of Mr Askham that employee contracts vary. Not every site works 12 hours shifts; some work 5, 8 or 9 hours shifts. The larger sites usually have 12 hours shifts. Some employees are on contracts that state minimum hours of 60 or 48 or even less per week. Within Southwark there are generally two types of contracts CS1 and CS2. CS1 are contracts which may state fixed hours or fixed terms, may state that they are subject to change based on the client's requirements and are permanent contracts. CS2 contracts tend to be for agency security guards who move from site to site.

10. The claimant never had a copy of a contract of employment given to him to keep although he recalls having one placed on his personnel file at the beginning of his employment in 2000. The respondent was not given any paperwork relating to the claimant following his transfer to them in 2014. The only paperwork relating to the claimant's terms and conditions prior to the transfer in the bundle is a summary sheet from Chubb security dated 31.8.09 (p38) which confirms the claimant's title and states he is full time. Under hours it states *"(Subject to change based on Client requirement)"*. On 22 April 2010 Charter confirmed in a letter that the claimant was employed on a full-time basis but does not specify the claimant's hours.

11. The sample Charter contract for the claimant's position which the respondent received at the time of the transfer in 2014 confirms in the job title that it is a full-time role but doesn't set out the hours of work. It confirms that annual leave is calculated using a maximum of a 48 hours week.

12. On the 9 June 2016 First Security confirmed that the claimant was employed on an hourly rate of £8.80 ph and his average hours were 66.8 hours per week and was a permanent employee. This is evidence of his average weekly hours at that time but does say the claimant was contracted to work these hours.

13. For legal purposes, following a car accident in 2016, First Security sent a letter/email to confirm the claimant was employed but stated in the letter that the claimant was a zero hours security officer. I accept the claimant's evidence that as soon as he saw this letter he was very upset by the suggestion that he was on a zero hours contract and he tried to see first HR and then Mr Egan, accompanied by his wife. Mr Egan told him that the zero contract was a mistake. The claimant referred to this change in his status as the preliminary hearing before J Sharma, as recorded in her Order.

14. I accept the claimant's evidence that from the start of his employment he was full time and permanent. He worked 5 days per week from 7am to 7pm, Monday to Friday, in addition to extra work he offered on site. On average he worked two Saturdays per month and averaged 66.8 hours per week, as confirmed in the letter dated 9 June 2016 from First Security. This continued until late 2016 when his posting at a nursing home in Southwark came to an end.

15. Even though there is no written contract of employment to assist me I find on balance, based on the claimant's evidence, that between 2000 and late 2016, by custom and practice over the 16 years a term was implied into his contract of employment that he was contracted to work 60 hours per week Monday to Friday. This conclusion is reached based on the fact that the claimant consistently worked those hours for 16 years without variation, despite moving to

various sites and based on Mr Askham's evidence that in the industry there are varying employee terms and conditions, but some employees do have 60 hours per week contracts.

16. However, I also conclude that it is likely that the contract would also contain a clause, similar to the clause set out in the Charter contract, that his hours of work would be subject to change, based on the client's requirements.

17. After the nursing home posting the claimant was told by his manager Mr Egan that there wasn't a permanent role for the claimant and that he and HR would tell the claimant of any work that was available. The claimant was at this stage put on the respondent's redeployment list and placed in *"the pool*" and was at risk of being dismissed for SOSR. At this time the claimant was offered a variety of shifts in different places, at different hourly rates, which he accepted due to the need to meet his financial obligations. He would frequently call his manager and ask whether they had jobs available for him.

18. In late 2016 the claimant was offered an 8 hours shift per day, 5 days a week at Southwark Council but didn't accept it as the reduced hours would mean a reduction in his income and the congestion charge and irregular shift pattern was not conducive to his management of his diabetes.

19. Until August 2017 the claimant did ad hoc work at different locations in Southwark. A schedule of the hours the claimant worked is at pages 79 to 82 of the bundle. A summary of each week's hours is set out at pages 77 to 78. It is clear that in this period between late 2016 and August 2017 the claimant worked less than 60 hours for a number of weeks; 14 out of 38 weeks. Although the claimant continued to ask Mr Egan for more full-time permanent work, as he needed to meet his financial obligations, there is no evidence that the claimant made it clear that he objected to the work being offered and the reduced hours.

20. I find that by working the reduced hours at different locations without clearly objecting to the reduced hours, the claimant was accepting a variation to his terms of employment. Alternatively, the claimant's terms were varied as provided for by the flexibility clause contained within his contract. There is a difference between making it known you need further hours of work and actually making it clear that you object to any changes to your hours and that you are only working the hours you have been given under protest to mitigate your loss. There is no clear correspondence from the claimant in this period objecting to the hours of work he was being given. His grievance, on the face of it doesn't specify an alleged entitlement to 60 hours per week and even in the claimant's own claim form he does not clearly set out that he is claiming his contractual entitlement to 60 hours per week. This only became clear later in his witness statement.

21. In August 2017 Mr Askham required a security officer to cover a site at ENO Bayliss ("ENO") in West Hampstead. He contacted Mr Egan who confirmed the claimant was available and they both thought it was a suitable role for him. I accept Mr Askham's evidence that he was under the impression that at this time the claimant was under the misunderstanding that he was employed by Southwark council as all his placements had been within Southwark throughout the 17 years period.

22. The claimant asked for details to be provided to him and Mr Egan confirmed in an email on 2 August 2017 that the hours were 55 Monday to Friday at an hourly rate of £8.75. The claimant asked for clarification about the pay rate and Mr Askham confirmed that he would pay the claimant £9.75 per hour while he was covering the site as he was desperate to fill the site. The respondent would bear

the loss of the £1 per hour. Mr Askham understood that he had only agreed to this increase in the hourly rate while the claimant tried covering at the site but if he took the permanent role then he would be accepting an hourly rate of £8.75 per hour. This is not clearly set out in the email exchange on page 48, dated 22 August 2018, although it refers to a permanent position. It is understandable that the claimant was under the impression, following this email, that he would be paid £9.75 if he took the permanent role.

23. Mr Egan then asked Mr Askham to confirm that the claimant would keep his continuous service record and terms and conditions, other than site, and hours of work would remain the same. Mr Askham replied, "*Yes of course*" and then confirmed that the claimant was not leaving the company, that he still worked for Interserve and not Southwark. The claimant does not specifically ask the respondent to confirm he would retain 60 hours per week and Mr Askham did clearly set out in his earlier email that the role at ENO was for 55 hours per week.

24. On 23 August 2017 the claimant started working at ENO. In September 2017, when he looked at his payslip he realised he had been paid at the hourly rate of £8.75 and not the agreed £9.75. He telephoned his supervisor who told him to put a pay query to Mr Egan which he did in September 2017 and heard nothing. In October the same thing happened and he raised a query again and heard nothing.

25. On 25 October 2017 Mr Askham emailed the claimant to ask if he was interested in covering the ENO position permanently which would be at the hourly rate of £8.75. If not, he would return to the pool where there was plenty of work available at his hourly rate. The claimant replied expressing his surprise as he thought he had been moved to ENO on a permanent basis with the agreed hourly rate of £9.75 and referred to Mr Askham's confirmation that all issues relating to his contract of employment and years of continuity would remain the same. This demonstrates that at this time the claimant believed his move to ENO had been on a permanent basis at an agreed hourly rate of £9.75.

26. Since there is nothing in the paperwork that states the claimant would be offered more than 55 hours work per week at ENO, I find that by accepting the role at ENO on what he believed was a permanent basis, the claimant was accepting a further variation to his terms and conditions to work 55 hours per week.

27. Mr Askham responded by saying that he thought that his previous email was clear and that ENO could become the claimant's permanent site but at the rate paid to other officers on site at £8.75 per hour (p49-51)

28. In November 2017 the claimant informed Mr Askham that he would not continue to work at the reduced rate at ENO and contacted his union regarding being unhappy about being moved around since mid-2016 without a permanent role. On 6 November 2016 he put in a formal grievance (P53-54).

29. On the same day he spoke to Mr Askham about leaving the role at ENO, Mr Askham informed him that someone at ENO had complained about a telephone altercation, which the claimant alleges he was unaware of. The respondent started a disciplinary investigation into the alleged altercation.

30. The claimant's written grievance did not include a reference to his hours of work nor specify that he was entitled to 60 hours work per week. However, it is accepted by Mr Askham that part of the claimant's grievance was that a letter had been sent suggesting he was on a zero hours contract. The matters raised in the grievance included a failure to pay a taxi fare, the £1 per hour difference at ENO, statutory sick pay, incorrect contractual hours, failure to provide permanent

work, agency work being offered permanent roles, removal from the site and a request for redundancy pay in the alternative to a permanent role.

31. There are no minutes of the grievance meeting and there is a dispute as to what was said at the grievance meeting. The Timegate system had recorded the claimant as being on zero hours. Mr Askham's evidence was that the claimant argued he was on a 48 hours per week contract prior to the transfer and asked the system to be changed to reflect this. This wasn't a problem for Mr Askham as the claimant had always worked in excess of 48 hours per week with the respondent.

32. The claimant denied saying he was on a 48 hours per week contract at the grievance meeting but wasn't clear what exactly he had said in the meeting. It is possible for two people to leave a meeting genuinely recalling something different from the same meeting. I accept Mr Askham's evidence that he believed the claimant had asked him to change the system to recall a 48 hours week. Certainly the claimant was keen to ensure he was not recorded as having a zero hours contract and had worked various hours since late 2016. None of this is recorded in the outcome letter.

33. The claimant hasn't shown any evidence to the Tribunal that after this decision the claimant objected to being on a 48 hours contract. I find that at this point the claimant's terms were varied again so that the claimant was on a 48 hours contract. It was understood by all parties that the claimant wanted to work more hours to cover his outgoings, but he wasn't guaranteed more than 48 hours per week.

34. Mr Askham also agreed, as part of his outcome to the claimant's grievance, to pay the claimant for the taxi and the £1 per hour for the hours worked at ENO and that a sick note had not been uploaded on the system.

35. The claimant did receive a payment in December 2017 for £340 which was an advance towards the £550 payment owed to him for the £1 per hour worked at ENO. The claimant was not aware of this advance payment partly due to him not expecting to receive it, and possibly due to the fact that his bank account was temporarily closed at this time due to a fraud. When he received his monthly payslip he was disappointed to see the £550 shown as a payment owing but then £340 being deducted immediately. The claimant now accepts that he did receive the £340 and now understands that the reason for the deduction shown on his payslip but I can understand why the claimant was confused until this was clarified to him at the Tribunal hearing and following looking at his bank statements. The claimant also confirmed that he had received his taxi fare for £60 in the same way.

36. The claimant was put back in the redeployment pool and on two weeks' notice of SOSR. The claimant felt he wasn't offered all the roles that were available whereas the respondent said the claimant rejected some roles offered to him at this time.

37. In February the claimant was asked to apply for a role at TFL. He was rejected from that role due to his diabetes but later in March was accepted by TFL to do cover work.

38. In June 2018 he started relief cover of 48 hours per week at TFL and in October 2018 signed a new permanent contract (p138) where his normal hours are specified as 48 hours per week.

39. The claimant's schedule of hours worked between August 2017 and 14 June

2018 show that the claimant worked less than 60 hours in 17 out of the 45 weeks worked.

40. Under holidays his contract confirms his entitlement to 33 days paid holiday leave, which reflects the claimant's own recall of his accrued holiday entitlement in his original contract of employment. Although Mr Askham suggest this is a mistake, I find this is supporting evidence that the claimant was entitled to 33 days holiday after 10 years of service.

41. There is a dispute between the parties about the number of holiday days taken by the claimant in 2016. The claimant says 28 and the respondent says 29. In 2017 the claimant says he took 28 days and the respondent says 25 but could carry over the remaining days leave. In 2018 the claimant says 27 days and the respondent says 29. Although there is a dispute about the number of days taken it is clear that the respondent has agreed on occasion to allow the claimant to carry over some holiday days and that his entitlement has been more than 28 days.

Submissions

42. The claimant's representative argued that the claimant's position had been consistent and credible; that he was on a permanent full-time contract for 60 hours per week and that he had never agreed to a variation to the contract. When he was placed in a pool it was on a temporary basis and didn't constitute a variation or waiver. The claimant would not have agreed to any variation as he couldn't afford to. When he accepted the ENO placement it was on the basis that he retained his terms and conditions. The claimant's representative referred to the claimant's witness statement for his submission for his holiday pay claim.

43. The respondent's counsel argued that the claimant was never guaranteed 60 hours per week. His hours fluctuated and in the industry the hours varied from contracts and sites. Since there is no written contract the Tribunal is required to imply terms. Needing to be flexible about the place of work goes hand in hand with flexible hours. If the claimant had the right to 60 hours work that right had not been maintained as his actual working hours had significantly deviated from a 60 hours week. For a significant period, the claimant did not object and did not refuse work offered.

44. In Jones v Associated Tunnelling Company (1981) IRLR 477 the court confirmed it was an established principle that if new terms of employment are performed without protest it can be inferred that the employee has agreed to the new terms. The claimant had over the years performed varying hours of work and therefore had accepted a variation to his terms and conditions without protest.

45. Mr Askham's evidence was compelling and consistent. He said the claimant was on a zero hours contract but asked to be put on a 48 hours minimum contract. He got what he asked for. There is an absence of an objection regarding his hours in his various emails and grievance.

46. In relation to holiday pay the claimant is still employed and therefore not entitled to any pay in lieu of holiday not taken. Some holiday entitled was carried over but if the claimant then didn't take the holiday it was lost: "take it or lose it".

The law

47. If there is no written contract of employment terms may be implied in to employment contracts if they are regularly adopted in a particular trade or industry if the custom is reasonable, notorious and certain. A Tribunal can also

imply a term into an employment contract by looking at how the parties have operated the contract in practice, including all the surrounding facts and circumstances. What is relevant is the intentions of the parties when the contract was first made, and the parties conduct. This is looked at objectively and reasonably. The law will imply whatever reasonable terms the parties themselves would probably have agreed if they had directed their minds to the question.

48. An existing contract can only be varied by agreement by both parties. A contract may contain an express term which allows an employer to make changes to terms and conditions of employment.

49. If an employee's terms are varied and the employee starts to work under the new terms and conditions without clearly objecting, then this could be perceived as having accepted the changes.

50. The Working Time Regulations 1998 (WTR) provide for a minimum entitlement to annual leave and additional annual leave. The WTR provide for compensation to be paid in relation to entitlement to leave but only when a worker's contract has been terminated. One of the main purposes of the regulations is to ensure workers get at least 28 days holiday per year for their health and safety. Holiday should be taken and not carried over although some holiday entitlement can be carried over by agreement. Unless agreed otherwise, holiday not taken is lost.

Applying the law to the facts

51. I find on balance that between 2000 and late 2016 by custom and practice a term was implied in to the claimant's contract that his hours of work were 60 hours per week Monday to Friday but that his hours may be varied depending on the needs of the client.

52. When his site closed, and he was placed in the redeployment pool and was at risk of SOSR dismissal the claimant accepted a variation to his terms and conditions by working at various sites on reduced hours to earn as much as was possible in that period. The claimant did not specifically object to his reduced hours. By working the reduced hours over a period of many weeks it can be inferred he accepted a variation to his contractual hours. Alternatively, his contract contained a flexible clause which allowed his employer to vary his hours of work according to the needs of the client.

53. When he accepted the ENO contract on the basis he thought it was a permanent position the claimant agreed to vary his hours of work to 55 hours per week.

54. His hours were further varied when the claimant was placed in the redeployment pool again. The claimant did not make it clear to the respondent that he was not accepting the hours offered and was working the hours under protest. There is a difference between making it known you need further hours of work and actually making it clear that you object to any changes to your hours and that you are only working the hours under protest to mitigate your loss. Even in the claimant's own claim form he does not clearly set out that he is claiming his contractual entitlement to 60 hours per week. This only became clear in his witness statement.

55. In relation to holiday pay I agree with the respondent's counsel's submissions that under the WTR the right to be paid for annual leave only crystallises when an employee is dismissed. The claimant has not been dismissed and therefore cannot succeed in his claim for holiday pay.

56. The claimant is entitled to 33 days holiday leave after 10 years of service. The

WTR do not entitle an employee to carry over their leave entitlement. An employer may agree to carry over leave days but if they aren't taken, they will be lost. The claimant should have taken his full annual entitlement or reached an agreement to carry over any remaining days leave to the next year. He should have then used that entitlement in that following year. By not taking those extra days in the following year he lost that entitlement.

57. The claimant now accepts that he was paid an extra £1 for each hour worked at ENO and was paid for the taxi fare he incurred.

58. In summary, I find the claimant agreed to vary his contractual hours when he no longer worked 12 hour shifts at a site in Southwark Monday to Friday. By working varying hours without clearly protesting he was agreeing to vary his contractual hours. Alternatively, his contract contained a variation clause. Accordingly, he is not owed any money from the respondent for the weeks in which he worked less than 60 hours.

59. The claimant is not entitled to be paid for holiday entitlement not taken while he remains employed. The claimant is entitled to 33 days leave entitlement per year as he has accrued this entitlement by being continuously employed for more then 10 years.

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Employment Judge Isaacson

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Date 9 May 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 May 2019

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FOR THE TRIBUNAL OFFICE