EMPLOYMENT TRIBUNALS

Claimant: **Mr Gitau Ngugi**

Respondent: **Servoca Events and Security Ltd**

Heard at: **East London Hearing Centre (by telephone)**

On: **Thursday 15 October 2020**

Before: **Employment Judge Housego**

Representation

Claimant: Cheng Zhang, representative
Respondent: Andrew Galvin, solicitor, Make UK

JUDGMENT

The claims for unfair dismissal and for holiday pay are dismissed.

REASONS

1. The Claimant worked for the Respondent as an events steward at football stadia on match days, from 2016. He supplied to the Respondent a witness statement in which he accepted that had an agreement with them which meant he could offer himself as available, but was not obliged to do so. The Respondent was under no obligation to offer him any work. If he made himself available and he was offered and accepted an assignment both parties were committed (and when occasionally the Respondent cancelled him he was paid).

2. Mr Ngugi was not obliged to offer himself for any particular shifts. He was not obliged to offer any minimum number of shifts. He told them when he was available and they booked him when they needed him (and not when they did not).

3. Accordingly there was no mutuality of obligation, and no contract of employment. The claim for unfair dismissal therefore has no prospect of success.

4. Mr Ngugi was plainly a limb b worker and was entitled to holiday pay. The Respondent accepts this. For 3 years Mr Ngugi accepts that received payslips

which told him that his pay included a base rate, uplifted by 12.07% in respect of holiday pay. He says that he did not sign the agreement which specified this, but that is not to the point, since he had it, and knew that was what was being done.

5. While this seems to have been imposed without any increase in the total pay (so effectively reducing the pay rate) that was imposed in 2016, and it is now far too late to say that that was an ineffective change to Mr Ngugi's terms and conditions. It is not said that the effect reduced his pay below NMW levels.

6. This meets the required tests, first[1]:

> *"3. Article 7 of Directive 93/104 does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker."*

As Mr Ngugi worked only on match days the 12.07% in respect of holiday pay (which is the correct percentage[2]) does not need to correspond with booked holiday, and meets the requirement (about agency workers but on the same point) below[3]:

> *"27. We agree with both counsel that a term-by-term approach is required by the AWR. The structure of the AWR, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (e.g. annual leave) by conferring a greater entitlement in respect of another (e.g. rest periods), drive one to that conclusion. However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave.*
>
> *28. However, the analysis in the preceding paragraph is subject to an important caveat. That is that the payment mechanism deployed must be transparent and the agency worker must be able readily to ascertain precisely what aspect of his remuneration relates to annual leave. In our*

[1] Robinson-Steele (Social policy) [2006] EUECJ C-257/04
[2] 52 weeks, less 5.6 weeks holiday = 46.4 weeks work a year. (5.6 divided by 46.4) x 100 = 12.07%
[3] Kocur v. Angard Staffing Solutions Ltd & Anor (AGENCY WORKERS) [2018] UKEAT 0181_17_2302

> *judgment, if it is clear on the facts that an agency worker receives remuneration in respect of annual leave which is at least that which employees receive, then, notwithstanding that this may be achieved by a different mechanism, the requirement under Regulation 5(1) AWR would be met."*

7. Accordingly, at the date of the ending of the relationship Mr Ngugi had been paid all his holiday pay in advance, as recorded on each payslip. The holiday pay claim therefore also has no prospect of success.

8. For these reasons both claims are dismissed. In the claim form Mr Ngugi ticked the box marked "other claims" but no other claims were made either in the ET1 or on his behalf today.

Employment Judge Housego
Date 15 October 2020