EMPLOYMENT TRIBUNALS

Claimant: **Mr Abiodunrin Odumosu**

Respondent: **Total Security Services Limited**

Heard at: **East London Hearing Centre**

On: **27 November 2020**

Before: **Employment Judge S Knight**

Representation

Claimant: In person, unrepresented

Respondent: Patricia Hall, consultant (Peninsula Business Services)

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**

2. **The Claimant was wrongfully dismissed by the Respondent.**

3. **The Respondent did not make unauthorised deductions from the Claimant's wages.**

4. **The Respondent is ordered to pay the Claimant a total of £1,343.37 (calculated gross) for unfair dismissal.**

5. **No separate award is made for wrongful dismissal.**

6. **For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:**

   (1) **The total monetary award for unfair dismissal is £1,343.37.**

(2) The prescribed element is £0.

(3) The prescribed element relates to 10 September 2019 to 27 November 2020.

(4) The amount by which the total monetary award for unfair dismissal exceeds the prescribed element is £1,343.37.

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent, as a Retail Security Officer, posted to various premises across London, particularly supermarkets. The Respondent is the UK's largest privately owned security company, employing over 5,000 licensed security personnel. The Claimant was employed between 30 June 2017 and 10 September 2019, when he resigned.

The claims

2. The Claimant claims for:

(1) Unfair dismissal (by way of constructive dismissal);

(2) Breach of contract / wrongful dismissal; and

(3) Unauthorised deductions from wages.

3. On 12 September 2019 ACAS was notified under the early conciliation procedure. On 26 October 2019 ACAS issued the early conciliation certificate. On 5 November 2019 the ET1 was presented.

The issues

4. On 9 April 2020 at a Telephone Preliminary Hearing, Employment Judge Tobin agreed with the parties a list of issues. I discussed this with the parties at the hearing. They agreed that to this list I should add the question of whether there had been unauthorised deductions from wages. The Respondent agreed that I did not need to consider whether there had been a potentially fair reason for dismissal. The reason for this was that no potentially fair reason for dismissal was advanced by the Respondent, because the Respondent's case was put solely on the basis that the Claimant resigned and was not dismissed.

5. In light of these discussions, the issues could be briefly summarised as follows:

(1) Constructive unfair dismissal and wrongful dismissal:

(a) Was the Claimant constructively dismissed due to the Respondent fundamentally breaching the contract of employment?

(b) If so, did the Claimant affirm the contract before resigning?

(c) If not, did the Claimant resign in response to the Respondent's conduct?

(d) If so, what remedy should be awarded?

(2) Unauthorised deductions from wages:

(a) Were the deductions from wages, which it is agreed were made, authorised deductions?

(b) Were the deductions from wages, which it is agreed were made, excepted deductions?

Procedure, documents, and evidence heard

Procedure

6. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face to face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.

7. The Claimant, the Respondent's representative, and the Respondent's witness Ms Blake attended via Cloud Video Platform. The Claimant connected via a mobile phone which had poor internet signal. As a result, there were constant connection issues with the Claimant. At the outset of the hearing I canvassed with the parties what should be done about this. They wanted to go ahead with the case. Eventually, the Claimant was able to find strong enough signal in a quiet place to conduct the hearing.

8. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

9. The Respondent had provided a hearing bundle consisting of 137 pages, along with a witness statement from Ms Blake. During the hearing, the Claimant emailed the Tribunal to provide his written arguments.

Evidence

10. At the hearing I heard evidence under oath from the Claimant, and under

affirmation from Ms Blake. I took a full note of the evidence in my Record of Proceedings.

11. The Claimant had not provided a witness statement, and did not give evidence in chief. However, in the bundle there was his ET1 and a record of his grievance against the Respondent prepared by Ms Blake and another HR business partner of the Respondent's. Together, these documents set out the Claimant's, case in full. The Claimant was cross-examined, during which he maintained his account. He added as follows:

(1) Prior to 14 June 2019 the Respondent had ignored concerns the Claimant had about safety in the workplace. The Claimant did not raise a grievance at the time.

(2) On 14 June 2019 the Claimant was on the way to work but was delayed due to road works so did not go into work, instead taking the 269 bus home from Bromley to Bexleyheath. He made a call to an office of the Respondent known as "Control" when he decided to return home.

(3) He received calls from Control as he returned home on 14 June 2019 and he informed Control that it was inconvenient to talk, because he was on a crowded bus, unable to sit, and was sweating and uncomfortable.

(4) After this, the Claimant's work "vanished".

(5) When the Claimant would attempt to call the Respondent, the Respondent would not pick up.

(6) The Claimant had been told by Control that his Area Manager was a person called Ade. When he contacted Ade about his continuing employment by the Respondent, Ade said he was not the Area Manager.

(7) The Claimant would be in physical danger if he attended the Respondent's head office. The Respondent treated him like a trouble-maker.

(8) He attended an induction for a new job on 10 September 2019, the same date that he sent his resignation letter to the Respondent, and also the same date that the Respondent wrote an email to the Claimant asking whether the Claimant had resigned. The letter was sent in the morning, before the email was received.

(9) The Claimant had not been informed of the reasons for the deductions in respect of student loans, or deductions to pay the DWP or London Borough of Lambeth. However, deductions totalling £220 for his SIA licence had been consented to by him, and been returned to him, and he was not claiming for deductions to repay an advance of wages.

12. Ms Blake is a HR business partner employed by the Respondent. She provided evidence from the Respondent's records of the Claimant's employment history with the Respondent. She also provided evidence of a grievance that the Claimant raised after he resigned, her colleague's handling of it, and her handling of the Claimant's appeal. She explained that £220 in deductions made from the

Claimant's wages to pay for an SIA licence was returned to the Claimant at the conclusion of the appeal. She provided clear contemporaneous written documentation which explained how the grievance and appeal were handled.

13. After the conclusion of all other evidence Ms Blake provided figures for the Claimant's income. Over his last 12 paycheques his wages averaged £1,507.10 gross per month (£1,190.78 net per month). The parties agreed that this works out as £347.79 gross per week (£274.80 net per week).

14. The Claimant in contrast provided a figure of £2,226.58 gross per month (£513.83 gross per week). He calculated this based on his highest monthly hours in any month (in April 2018), multiplied by his highest hourly rate in any month (in May 2018).

Closing submissions

15. Ms Hall for the Respondent made closing submissions. She set out how each of the deductions from pay was authorised or excepted. She accepted that there was no evidence of any attempt being made by the Respondent to contact the Claimant after 18 June 2019, until 10 September 2019, when it asked if he had resigned or was going to return to work. She accepted that the Respondent was required to provide to the Claimant a minimum of 5 hours of work per week, or 20 hours per 4-week period, as provided in the Claimant's Statement of Main Terms of Employment. She submitted that by not disputing the Respondent's failure to offer him work between June and September, the Claimant accepted any alleged breach of contract by the Respondent. She submitted that the evidence pointed to the Claimant resigning because he started a new job. I checked again with Ms Hall whether the Respondent advanced a potentially fair reason for dismissal; she confirmed that they did not.

16. The Claimant did not make closing submissions, but referred the Tribunal to a document which set out his case.

Law

Unfair dismissal, wrongful dismissal, and constructive dismissal

17. Section 94 of the Employment Right Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

18. Section 95(1) ERA 1996 provides that an employee is dismissed if they terminate the employment contract (with or without notice) in circumstances in which they are entitled to terminate the contract without notice by reason of the employer's conduct. This is called a "**constructive dismissal**".

19. In order to show that there was a constructive dismissal, the employee must show that there has been a "**repudiatory breach**" of contract by the employer. A repudiatory breach of contract is a breach so serious that the employee is entitled to regard themselves as discharged from their obligations under the contract. An example of such a repudiatory breach is a breach of a fundamental term of the

contract, such as the mutual term of trust and confidence, but this is not the only type of repudiatory breach.

20. If there is a constructive dismissal, section 98(1) ERA 1996 provides that it is for the employer to show that the dismissal was for one of the potentially fair reasons in section 98(2) ERA 1996, or for some other substantial reason. If it was for a potentially fair reason, then section 98(4) ERA 1996 requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating the reason as a *sufficient* reason for dismissing the employee.

21. There may be multiple reasons why an employee resigned. The Court of Appeal gave guidance on how to deal with such situations in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978; [2018] 4 All E.R. 238 1 May 2018 at ¶ 55:

> "(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

22. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause (*Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859; [2004] 4 All E.R. 97; 8 July 2004 at ¶¶ 29-30).

23. In order to sue for the breach of contract, the employee must not delay their resignation too long, or do anything else which indicates "**affirmation**" of the contract (*W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823; 31 July 1981).

24. An employer faced with a repudiatory breach of contract by an employee can choose to waive that breach and affirm the contract. This does not necessarily require any positive action on the employer's part, as it may be taken to have acquiesced in the breach, and affirmed the contract, if it fails to respond to the breach. See *Bartholomew v LK Group Ltd*, unreported, QBD; 26 February 2003 and *Cook v MSHK Ltd* [2009] EWCA Civ 624; [2009] IRLR 838; 9 July 2009.

Unauthorised deductions

25. Sections 13 to 27B ERA 1996 sets out the statutory basis for a claim of unauthorised deduction from wages. Section 13 ERA 1996 provides in particular as follows:

> “(1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) 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
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section *“relevant provision”* , in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
>
> (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting

"wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

26. Section 14 ERA 1996 provides that some deductions are excepted from the protection given by section 13. Insofar as is relevant it states as follows:

"14.— Excepted deductions.

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person."

27. "Wages" is widely defined. According to section 27(1) ERA 1996 it includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

Findings of fact

28. The Claimant's evidence was at times difficult to understand. The Claimant is able to speak and understand English well, but his choice of words is odd. He uses complicated words where simple ones would be good enough. The complicated words he uses are often the wrong ones. Any conversation with him, even about simple matters, quickly led to him misunderstanding something, or saying something that did not seem to make sense. At times this got in the way of understanding what he meant. In assessing his evidence, I have made allowance for this.

Unfair dismissal, wrongful dismissal, and constructive dismissal

29. Having reviewed the Statement of Main Terms of Employment, I find that it was a term of the Claimant's contract that the Respondent was required to offer him 4 hours of work per week, or 20 hours of work per 4-week period.

30. I find that the process for the Claimant starting a shift was that he would arrive at his work site and call an office of the Respondent known as “Control”. He was required to do this from the office phone at the work site, not from his mobile phone.

31. I find that on 14 June 2019 the Claimant was delayed on his way to his work site due to road works. Before he reached his work site, the Claimant decided not to attend work because of the delay. I find that the Claimant considered it no longer worthwhile attending his work site that day. I find that he made this decision at a bus stop in Bromley, before deciding to take the 269 bus back to Bexleyheath.

32. I accept the evidence of the Claimant that he did make a call to Control on 14 June 2019 when he decided to return home. I also accept the agreed position of the parties that the Claimant received calls from Control as he returned home on 14 June 2019. I find that the Claimant accepted a call and informed Control that it was inconvenient to talk, because he was on a crowded bus, unable to sit, and was sweating and uncomfortable. I find that he did not receive further calls from Control on that day (indeed, the Respondent does not allege there was any further such call). I accept the Claimant’s evidence that when he would attempt to call the Respondent, they did not pick up.

33. I find that after 14 June 2019, when the Claimant informed Control that it was inconvenient to talk, the only attempts to contact the Claimant were made with calls at between 12:00 and 13:00 on 18 June 2019. Those calls to the Claimant were unanswered. There is no evidence of a message having been left, and I find that no message was left. There is no evidence of any further attempts having been made to contact the Claimant before 10 September 2019, and the Respondent does not allege that any further attempts were made. I find that no such further attempt was made.

34. The Claimant alleged in his grievance, and repeated in his evidence to the Tribunal, that he had been told that his Area Manager was a person called Ade. This has been his clear and consistent account since before this case was brought. This issue was part of his grievance against the Respondent. A letter responding to the Claimant’s grievance was written by an HR business partner of the Respondent’s. The HR business partner assumed that the provision of Ade’s contact details by Control, rather than the correct details of the Area Manager, must have arisen from a mistake, and that it was not malicious. The HR business partner explained the mistake as arising from the fact that Ade was the Area Manager up until approximately April 2019, when he was replaced. In light of the evidence of the Claimant and the outcome of the grievance, I find that Control did incorrectly inform the Claimant that Ade was his Area Manager, whereas Ade had been moved to a different position. I accept that this was an honest mistake on the part of Control: the mistake was not malicious.

35. I accept the Claimant’s account of having contacted Ade regarding his continuing employment. I accept that Ade informed the Claimant he was no longer his Area Manager. I accept that after this contact took place, no further information was provided to the Claimant by the Respondent, and no further attempt was made to contact the Claimant, until the email of 10 September 2019.

36. I infer from Ms Blake's evidence that the Claimant was not rostered to work on a date after 14 June 2019. This is consistent with the Claimant's account. I have heard no evidence of the Claimant being rostered to work on a date after 14 June 2019. Indeed, Ms Blake's account appears to be that the Claimant's rota was given to a replacement. This is supported by the copies of the rota in the bundle. I find that he was not rostered to work on any later date.

37. I reject any suggestion that the Claimant would have objectively been in danger by attending the Respondent's head office or contacting Control. On 11 October 2019 the Claimant attended the head office to go to a grievance meeting. On 11 November 2019 the Claimant attended the head office to go to a grievance appeal meeting. No harm came to him on either occasion. This was because there was no objectively well-founded risk of harm.

38. However, I find that the Claimant does have a subjective fear of contact with the Respondent's senior staff. The reason that he has this fear stems from him believing that the Respondent's senior staff in the head office and Control were treating him badly, in particular by ignoring his safety and security concerns. This fear may have reached the point of paranoia. However, to the Claimant, the fear he feels is no less real, just because it is not objectively well-founded.

39. The Claimant's evidence as to when he began a new job was confused. In his submissions contained within the bundle the Claimant said that he started his new job on 23 September 2019. However, in his oral evidence he said that he had an induction on 10 September 2019. The Respondent submits that this means that the Claimant must have been employed in his new job on 10 September 2019. I accept the Respondent's argument. I find that the Claimant's new job started on 10 September 2019.

40. The Respondent argues that the Claimant resigned because he had a new job. The Claimant argues that he resigned because the Respondent had fundamentally breached the contract of employment by not offering him work. I find that the Claimant resigned because the Respondent did not offer the Claimant work after 14 June 2019 and removed him from the work rota. The fact that the Claimant had found a new job provided an opportunity for him to resign safe in the knowledge that he would still have employment. However, I find that this only affected the timing of the resignation, not the reason for it.

Unauthorised deductions from wages

41. Ms Blake's evidence was not challenged by the Claimant. Her account is supported by carefully produced and clear contemporary documentation. She was a credible witness. I have no hesitation in accepting her evidence in its entirety where it relates to matters within her own knowledge. In particular, I accept the following.

(1) The Respondent was required by HMRC to make deductions from the Claimant's wages for his student loan;

(2) The Respondent was required by Direct Earnings Attachment Orders to make deductions from the Claimant's wages for debts the Claimant owed to the DWP and the London Borough of Lewisham;

(3) The Respondent made an advance of wages to the Claimant which it recouped from the Claimant by making deductions from his wages;

(4) On 29 June 2017 the Claimant gave the Respondent in writing permission to deduct £20 per month from his wages to pay for his SIA licence, and this was eventually returned to him.

Conclusions

Unfair dismissal, wrongful dismissal, and constructive dismissal

42. I conclude that the term of the contract requiring the Respondent to provide to the Claimant 5 hours of work per week, or 20 hours of work per 4-week period, was a fundamental term of the contract.

43. After 14 June 2019 the Respondent did not roster the Claimant from work. The Claimant attempted to contact Control, who did not respond to him. The Claimant contacted a member of the Respondent's management staff, Ade, who appears to have made no effort to rectify matters. I have accepted that the Claimant did not then take further steps to contact the Respondent. However, it was the Respondent who decided not to roster the Claimant for any further work, and to transfer his shifts to another employee. This was in breach of the fundamental term of the contract to offer 5 hours of work per week, or 20 hours of work per 4-week period.

44. The Respondent has not sought to argue that the Claimant was first in repudiatory breach of contract, and therefore to argue that it was entitled to also be in repudiatory breach of contract. In any event, even if the Claimant's actions in not attending work on 14 June 2019 had constituted a fundamental and repudiatory breach of contract, I would have found that the Respondent affirmed the contract by continuing to treat the Claimant as employed by it, even as it offered him no work. This is shown by the email of 10 September 2019, in which the Respondent asks whether the Claimant has resigned, rather than treating him as having resigned, or breached the contract of employment and been summarily dismissed in response, and states that if he has not resigned he should contact the Respondent to facilitate his return to work.

45. As the Respondent was in repudiatory breach, the Claimant was entitled to resign in response to the repudiatory breach. I have concluded that he did resign in response to the repudiatory breach. I have considered whether the Claimant deferred resigning and therefore accepted the breach and affirmed the contract. I have concluded that he did not. This is because the breach in failing to offer the Claimant work was a continuing breach, perpetuated each week (or 4-week period) that the Claimant was not given work. The last such occasion would have been shortly before the Claimant's resignation. There was no undue delay leading to affirmation of the contract.

46. The Respondent has not put forward a potentially fair reason for dismissal. I therefore conclude that the Respondent has not proved on the balance of probabilities that the Claimant was dismissed for a potentially fair reason.

47. I therefore conclude that the Claimant was constructively unfairly dismissed. He was also wrongfully dismissed.

48. I have considered the remedy available to the Claimant.

49. The Claimant had 2 years qualifying service at the date of his resignation, 10 September 2019. I conclude that this was the Effective Date of Termination.

50. At the Effective Date of Termination the Claimant was 55 years old.

51. The Claimant is entitled to a Basic Award for unfair dismissal of 1.5 times his gross weekly wage for each year of service for the Respondent that he has provided over the age of 41. As such, The Claimant is entitled to a Basic Award for unfair dismissal of 3 times his gross weekly wage.

52. I conclude that the correct way to calculate the Claimant's weekly wage is by averaging his last 12 paycheques (as the Respondent suggests). The Claimant's approach of taking his highest number of hours in a month, and highest rate of pay, is not correct.

53. I therefore conclude that the Claimant's gross weekly wage was £347.79. The Claimant's gross weekly wage multiplied by 3 is £1,043.37. As such, the Claimant will be awarded a **Basic Award of £1,043.37**.

54. The Claimant is entitled to a Compensatory Award for unfair dismissal for any losses he has suffered.

55. I found that the Claimant began his new employment on the same date as he resigned. He has not put forward a case that his wages in his new job are less than those in his old job. As such, I conclude he is not entitled to compensation for loss of earnings.

56. Given the Claimant's relatively brief employment by the Respondent, and the speed with which he found a new job, I award a global sum of £300 for loss of statutory protection and right to long notice.

57. No other sum falls to be awarded by way of compensation for unfair dismissal.

58. As such, the Claimant will be awarded a **Compensatory Award of £300**.

59. The Respondent has not suggested that it would have dismissed the Claimant if he had not resigned. Indeed, their letter of 10 September 2019 shows that they intended that if he had not resigned he would be assisted back to work with them. As such, no *Polkey* reduction will apply.

60. I have considered whether the awards should be reduced or increased for failure to follow an ACAS Code, or reduced due to the Claimant's conduct or contributory fault. The Respondent has not suggested that any reduction should be made. I conclude it would not be just and equitable to reduce or increase his awards on such a basis.

Unauthorised deductions from wages

61. In respect of each of the deductions from wages, the Respondent has provided a clear explanation for why they were made, which I have accepted. The Claimant may not have been aware of the reasons for all of them, but this does not impact on their lawfulness.

62. The student loan repayments were excepted deductions under section 14(3) ERA 1996. The Respondent was entitled (and required) to make the deductions.

63. The deductions in respect of Direct Earnings Attachment Orders from the DWP and from the London Borough of Lewisham were also excepted deductions under section 14(3) ERA 1996. The Respondent was entitled (and required) to make the deductions.

64. The Claimant clarified that he is not claiming for the deductions made to repay the advance of his wages.

65. The deductions in respect of the SIA Licence was an authorised deduction under section 13(1)(b) ERA 1996, because the Claimant had given a written agreement for the deductions before they were made. The Respondent was entitled to make the deductions. In any event, they have been refunded.

66. No other unauthorised deductions from wages are claimed.

67. Therefore, there were no unauthorised deductions from wages.

Employment Judge Stephen Knight
Date: 7 December 2020