



Vq

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R. Mugisha  
**Respondent:** Alliance Risk Management Solutions Ltd

**London Central by CVP remote technology**  
**Before:** Employment Judge Goodman

**On: 7 January 2021**

## Representation

**Claimant:** in person  
**Respondent:** Mr C. Berdahl, company director

## JUDGMENT

1. The respondent made unauthorised deductions from wages and is ordered to pay the claimant £ 2,331.
2. The respondent underpaid holiday pay and is ordered to pay the claimant £259.
3. The respondent is ordered to pay the claimant £2,232.68 for failing to provide written particulars of employment.

## REASONS

1. The claimant worked for the respondent as a mobile patrol and response officer. On 5 August 2019 he resigned, and on 1 November 2019 he presented a claim for unfair dismissal, unpaid wages and holiday pay. At a hearing on 5 May 2020 he withdrew the unfair dismissal claim, leaving the underpayment and holiday pay claims.

### Conduct of the Hearing

2. The start was delayed, first because the hearings clerk met difficulty, then because the claimant had trouble getting a stable connection. He joined by i-pad, then by telephone, and then with a work laptop, and could be seen and heard from time to time, but at others he could hear others, but not be heard or seen by them. He was nevertheless able to communicate by the chatline. In the end, he joined by a telephone link to CVP which was kept open throughout, and the hearing then went ahead.
3. Three witnesses for the respondent were present, and in the morning, some observer members of the public.
4. When the hearing started, I had a 650 page bundle of documents on a Google drive, three witness statements for the respondent, and nothing from the claimant but the

bare summary of claim on ET1 (the claim form), and a schedule of loss which listed the amounts claimed, but did not otherwise explain how the claims arose or what was in dispute. The case management orders made by E J Quill at the 5 May 2020 hearing had included: “exchange witness statements for every witness you wish to call (including yourself) setting out all of the evidence that you wish to give that is relevant to the issues. The statement should be signed.” This was to be done by 7 September 2020. Regrettably, the claimant did not send any witness statement then or later, despite a number of email requests from the respondent, which was ready to exchange. I asked the claimant why he had not complied with the order. He said he had “missed that bit” about having to make a statement himself, and had not replied to the respondent because “they knew” he had tried to speak to former colleagues to get statements from them, and he has been barred from their premises.

5. In the interest of justice I allowed the claimant a final opportunity to submit his evidence, and adjourned the hearing to 2 p.m. I declined to adjourn to the following day (the case having been listed for two days) as there might not then be time to complete the hearing and give judgment, and if postponed to another 2 day listing, it might not be heard until the end of 2021; it was unfair that the respondent, which had complied with orders and was ready to proceed, should have to wait another year for the trial of the dispute. In the event the claimant filed a short statement at 2.10 pm, and after some further difficulty trying to connect on his work laptop, the hearing continued by telephone. Towards the end of the afternoon I discussed how the hearing should proceed. The claimant said he was working that night - as he had the previous night - and asked for the hearing to start at 2 pm on the second day. As that would leave no time for judgment, it was agreed that we carry on, and so we did until 6.15 pm, when I reserved judgment.
6. I heard evidence from Christopher Berdahl, the respondent’s sole director, from the claimant, Rodney Mugisha, and from Ramsey Nichol, chief operations officer. There was a written statement from the payroll officer, who had to leave the hearing part way through the day, but it was not helpful on the detail of the disputes about hours and payments. Neither side was represented, or familiar with court or tribunal hearings, and the reasons for the dispute about particular heads of claim not always clear, so the hearing proceeded by taking each disputed claim, item by item, and questioning each side about what was in dispute. Both sides in their statements complain about conduct by the other, but rarely got to grips with the detail of why the claims were disputed.
7. The claimant appeared unfamiliar with the contents of the bundle, although it had been sent to him in August 2020, and said there were other documents he wished to rely on, without stating what these were or why they were not in the bundle . As a result of these difficulties in presenting the evidence in an orderly way, I have had to spend some time after the hearing with the documents to work through the facts and merits of the claims. I have done the best I can on the material. I did not have any confidence that postponement to another day would improve the presentation of material evidence.

### **The Claims and Issues**

#### **8. Unlawful Deductions from Wages**

- (1) **Meet and Greet**- there is a claim for 118 at 1 hour each. The rate is £9.25 per hour. The respondent agrees that 10 hours should be paid, and denies the other 108 hours, saying they occurred *during* the shift, and are only paid in addition to the shift payment if they occurred outside shift hours.
- (2) **Call Outs** – the claim is for 24 at 3 hours each. The respondent says this is in fact a claim for 21 (the other 3 being duplicated), and that only the 13 of these which have references for reports on the call out, are payable; of these 13 they

are only prepared to pay 2 of those (27 and 28 August 2019), because, they say, the reports on the rest were filed late.

- (3) **SACO tasks** – the claim is for 139 tasks at 1 hour each. The respondent says these payments were made as an incentive, and depended on paperwork being filed promptly. The respondent argues the claimant filed paperwork for these late or not at all.
- (4) **Unpaid Shifts** – there is a claim for shifts worked on 2 and 3 September, 2 shifts at 12 hours each. The respondent accepts 2 shifts but one is on a different date- 12 hours on 14 July and 10 hours on 3 September.
- (5) **Additional Hours** A further 45 hours is claimed for unpaid hours between 18 June and 23 August 2019. This is denied.

### **Holiday Pay**

9. The claim is for:

- (1) 8 days accrued and unpaid at the time of termination of employment on 7 September 2019
- (2) Underpayment, in that on the claimant's case he was entitled to 12 hours pay per day, but on the respondent's case, only 10 hours per day.

### **Particulars of Employment Terms**

10. There is claim of failure to provide written particulars of employment terms. The respondent's evidence was silent on this. On direct questioning, the respondent admitted no written document was supplied.
11. **ACAS Code** -there is a claim to uplift any award for failure by the respondent to answer the claimant's grievance about pay.

### **Factual Summary**

12. The respondent carries on business providing security services for property owners, in particular, services for owners of short-let accommodation, where they will "meet and greet" an incoming tenant, supply and collect bedlinen and towels, fix minor defects, and on occasion patrol the vicinity where a booking is suspected of being made for a party (where that is forbidden), and if necessary evict unbooked guests. The respondent covered a large geographical area, not limited to London.
13. From the documents, there appear to be half a dozen or so security officers employed, and others who work as contractors. Ramsay Nicol supervised day to day operations and when staff were short, worked shifts himself. He authorised timesheets and additional payments. Ms Suntry Numsarapadnuk collated the timesheets and liaised with a payroll accountant, who then produced payslips and made weekly payments to employees.
14. The claimant worked for the respondent on a self employed basis for some months in 2018. After a break of 2 months, caused by expiry of his SIA licence, he was taken on as an employee on PAYE (meaning tax and national insurance was deducted from his pay before paid to him) from 8 December 2018.
15. It was agreed he was to be paid at £9.25 per hour.

16. I was provided with a generic contract of employment, but it was not a document provided to the claimant during employment, and I treat it as evidence of what the agreed terms *might* have been. The job title in the contract was security officer. The number of hours to be worked was not stated. There was a clause opting out from the limit on working hours in the Working Time Regulations, though I add that as a matter of law, an opt out is ineffective without the claimant's prior agreement in writing. Bank holidays were paid at time and a half. There was to be "an hourly site bonus as appropriate". Holidays in the first year of employment could be taken as they accrued, and could not be carried over from year to year.
17. There was also a 51 page handbook, with many detailed policies.
18. These documents give some guidance to what the agreed terms of employment might be, but no more than that, because it is clear they were not provided to the claimant; the emails show more than once that he was asking the employer what the procedure was for claiming holiday.
19. Neither the generic contract nor the handbook explains what had to be done to earn bonus, or be paid for a SACO task, or whether meet and greets were included in the shift pay, all of which are the subject of dispute in this claim. Neither side explained what discussion on these issues took place. There may have been none. In practice any discussions took place by text or email, due to employees working on different client sites, or on mobile patrol by car.
20. There were some procedural changes from time to time made by email - for example, that additional payments would be made fortnightly because of delays authorizing them.
21. The basic shift was initially 10 hours, but in an email of 6 January 2019 Mr Nicol informed employees this was now to be 12 hours because of additional work coming in. Callouts not in the shift hours would be paid extra. In a further email on 19 June he said callouts would be paid at 6 hours, and that a timely incident report would lead to "swift payment".
22. The rota sheets were annotated to show hours worked, and some extras, for example where a shift was to be paid at a premium rate, or a bonus for an eviction, or sick leave.
23. There are also timesheets completed by employees and sent to Ms Numsarapadnuk, who then told the payroll accountant who was to be paid what hours for the week, and the accountant then prepared the weekly payslips.
24. There were many queries about pay made by the claimant and by others. Errors were sometimes made by the payroll accountant, or there was delay authorising extra shifts; confusion sometimes arose because the claimant would include a statement of accrued underpayments on each timesheet (so it might not be clear what was a new claim and what was a statement of an outstanding claim), and so on. Generally errors were acknowledged and put right later. The tone of the correspondence on this is generally cordial.
25. The claimant worked very long hours, often 60-80 hours per week. There are some examples of disputes when he asked to take time off as annual leave and was refused because there was insufficient cover from others for the work required on those dates.
26. The witness statements of Mr Berdahl and Mr Nichol make allegations about the conduct of the claimant and his colleagues, but these did not assist the tribunal in deciding whether he was entitled to payment on the disputed claims. The allegations range from adding VAT to his first contractor's invoice when he was not registered

for VAT, to damaging his patrol vehicle “with malicious intent”, from saying he and his colleagues switched off their vehicle trackers, and a general suspicion that workers were starting late and finishing early. Mr Nichol was from time to time exasperated by late filing of reports by staff.

27. None of these accusations were taken up with the claimant at the time, and the claimant was very often called on for extra work, even to extent of being paid triple time to do so, so he must have been a useful worker. His conduct as a security officer was never faulted, and the one complaint attached to him was regarded by the respondent as based on a misapprehension by the resident who had objected to him.
28. The employment ended when the claimant resigned because he was exasperated by what he saw as failure by the respondent to engage with his claims of underpayment. There is a dispute about the termination date. On ET1 the claimant says it was 5 August 2019. On ET three respondent says it is 7 September 2019, the date given on the P 45 they prepared.
29. The claimant refers in his claim form to having lodged a grievance before starting this claim on 10 November 2019. Regrettably neither side has provided the tribunal with a copy. It must be assumed it was about pay, but there was no more detail. As a result it is not known when it was filed, what it was about, or what happened to it.
30. Although there is agreement on the hourly rate, the parties not agreed the amount of weeks pay. I have extracted the following table from the payslips included in the hearing bundle:

<b>Date</b>	<b>hours</b>	<b>gross amount</b>	
10/5/19	76	£703	another seven hours “ad hoc” £129.50
17/5/19	84	£777	another five hours “ad hoc” £92.50
24/5/19	74	£684.50	
31/5/19	12	£101	
7/6/19	82	£758.50	
14/6/19	75	£698.75	
21/6/19	100	£925	
28/6/19	90	£832.50	
5/7/19	72	£666.	
12/7/19	60	£555	
19/7/19	72	£666	
26/7/19	36	£333	
2/8/19	60	£555	
9/8/19	12	£111	per C claimant employment terminated 5/8/19
16/8/19	-	-	
23/8/19	-	-	
30/8/19	12	£111	
6/9/19	60	£555	per R the claimant resigned 6/9/19.

31. On this evidence, the claimant is likely to have ceased work on 5 August 2019, and the payments after that date show retrospective payments based on recalculation on the timesheets. I could find no written resignation email in the bundle. There is a claim for an *unpaid* 24 shift worked on 2-3 September, hard to fit into this picture.
32. Calculating the week’s pay, on the basis of the 13 weeks worked before 5 August 2019, including the “ad hoc” hours, the total is £ 7,256.25, and the average week’s pay is £ 558.17.

**Relevant law – Unauthorised deductions from wages**

33. Sections 13 to 23 of the Employment Rights Act 1996 provide that for any pay period the tribunal must establish what was “properly payable” to the worker, and award the difference as an unauthorised deduction if payment for that period was less. Deductions from wages are only authorised if the worker agreed to the deduction in writing, and authorisation cannot be made after the event.

#### **Meet and Greets**

34. There is no clarity on whether the respondent is right that they are only paid when occurring outside the regular shift (in which case he is owed for 10 of them) or the claimant to the effect that they were to be paid in addition to regular shift pay whenever occurring. The only reference in the documents was to drivers not getting the payment during a shift. In the absence of evidence to the contrary I accept the respondent’s case that the one hour payment for a meet and greet was an incentive payment when it occurred out of hours (and presumably the driver then got the hourly rate in any event) the claimant is entitled to 10 meet and greet payments, so there is a deduction award of £92.50.

#### **Call Outs**

35. The claim is for 21 (excluding duplicates) and the respondent accepts only 13 of these in fact occurred, as there is no call out report for the other 8. In any case they do not propose to pay for 11 of the ones they accept occurred, as the report was, they say, late.
36. On whether there were 21 callouts, the claimant had entered these in timesheets. It is clear from a sequence of emails from Mr Nichol to the staff from May 2019 into August that he was becoming increasingly frustrated by the need to make reports to clients to be able to charge them callout payment under contract. On 6 May 2019 he told the staff that if there was no report there will be ‘no bonus’, and if the report was late, there will be a delay in paying. It is clear that the claimant was not the only offender, and Mr Nichol changed the reporting system in July, asking drivers to print off their task sheets and then highlight in yellow the ones they had done. I could not find *any* callout reports in the bundle.
37. The first issue is whether the claimant did 21 callouts, or only 13. In the absence of any readable reports (there are some but so tiny that when enlarged they are too blurred to discern even a date) in the hearing bundle, and in the light of the confusion and frustration shown in the emails from Mr Nichol at the time, and the lack of evidence in the respondent’s statements - although they contain evidence about other matters not in dispute, it seems likely to me that the claimant did do 21 callouts as he said, rather than just the 13 for which there the respondent says there is a report.
38. In any case, If I am wrong about that, and there were only 13 callouts, he is entitled to be paid for them. The respondent was unilaterally imposing a condition after the event that drivers would not be paid, even if they had done a callout, if there was no report on it. This does not appear to be a restatement of an existing term of payment. It is over the following weeks that the claimant’s frustration at late and erratic (it is clear from the emails that the respondent accepted at the time that there were many delays and errors) payment for his hours built up. If this was a variation in contract, there is no sign that he accepted it by continuing to work. Rather, he left the job out of frustration at confusing and late payment for his work..
39. The award for these claimed deductions is  $21 \times 3 \times £9.25 = £582.75$ .

#### **SACO payments**

40. As with many of the contract terms relied on by the respondent, they are difficult to determine because of lack of evidence of what the payment terms were. On 24 July 2019 an email to all says: “all SACO tasks except flexistocks will be paid a bonus”. This suggests that if they were carried out, they were to be paid. As with callouts, there are exhortations to drivers during July about bringing their paperwork up-to-

date, whether by keeping it in a folder, or highlighting task sheets. It appears the respondent's case is not that the claimant did not do these tasks, but that he did not keep his paperwork up to date. As with meet and greet, there is no sign that a valid change was made to the contract terms requiring timely paperwork before they were payable. Therefore the 139 hours is payable, which at £9.25 an hour is £1,285.75.

### **Unpaid Shifts**

41. The parties agree two shifts were unpaid, though not which two, and it is puzzling that the claimant is said to have worked in early September when on the claim form he states the contract had ended by then. It is improbable that the claimant can have worked a 24 shift on 2-3 September as he states. Doing the best I can, the claimant is awarded 22 hours at £9.25 per hour, £203.50.

### **Miscellaneous Unpaid Hours**

42. According to the claimant, he is owed 2 hours pay for 18 June 2019, 1 hour on 20 June, 3 hours on 25 June, 2 hours on 5 July, 12 hours on 14 July, 13 hours on 23 August and 12 hours on 23 August. The last two must be duplicates. 14 July is already admitted by the respondent in the claim for unpaid shifts. That leaves 18 hours. In the light of the many errors in payment, the inclusion of irrelevant material by the respondent witnesses distracting from the real issue, and the lack of explanation by the respondent by reference to documents why they are right and he is wrong, I accept that on a balance of probability the claimant is owed another 18 hours at £9.25, or £166.50.
43. The total of these heads of unlawful deductions is £2,331.

### **Holiday Pay – Relevant Law, Discussion and Conclusion**

44. The Working Time Regulations 1996 provide that an employee is entitled to 5.6 weeks holiday in a 12 month year. In the absence of agreement, the holiday year runs from the anniversary of employment commencing, but in most workplaces there is a prescribed holiday year, usually from first of January to 31 December, but sometimes starting with the tax year in April.
45. Holiday cannot be carried over from one year to the next, and cannot be paid in lieu except on termination of employment as its purpose is to ensure that workers take adequate rest. On termination, a calculation is made pro rata of the number of days outstanding in a part year.
46. Holiday pay must reflect actual earnings, and not be limited to basic pay, otherwise workers may feel they cannot afford to take holiday.
47. In this case there is no information suggesting an agreed holiday year, so the start of the employment is the start of the holiday year. That is 35 weeks from start to end, so the proportion of holiday to which he was entitled is  $35/52 \times 5.6 = 3.77$  weeks. I assume in the absence of evidence that there were five days in the normal working week. That means that on termination he was entitled to 19 days.
48. How many days did the claimant take holiday, and for which of them was he paid. The evidence is wholly unclear. Working from Mr Nicol's statement on holiday taken, matched with the texts from the claimant requesting holiday, he had asked for 5 days in January 2019, 3 days at the beginning of April, and 6 days for July, a total of 14 days in 2019. It was not clear whether Mr Nicol's statement was intended as a record of holiday taken or as a complaint that the claimant did not always give much notice of wanting holiday, nor does it show whether the requests were granted. Of other records, the respondent's timesheets do not show any particular days as holiday. On the claimant's timesheets, I can find no time sheets for December. There are claims for 6 days' holiday pay in January 2019, and 4 days in April (making 10 days

claimed), and that he was sick for a total of seven days in May and June. The July days are not on the sheets. The pay slips do not say what is holiday. Mr Berdahl complained that sometimes he asked for holiday pay for a day off.

49. In the absence of any direct information of when the claimant took holiday, and more importantly, when the respondent says they paid him for any holiday, I turn to the claimant's schedule of loss, which is to the effect that he was in fact paid for 20 days at 10 hours per shift (his claim is to be paid at 12 hours per shift). If that is right, then there were *no* unpaid holiday days outstanding on termination. Doing the best I can, it seems likely he had 6 days (20 -14 days) holiday in 2018, and took the 14 days claimed for in 2019.
50. On the schedule of loss he does seek another eight days unpaid holiday. He has not however made the pro-rata adjustment where the year is less than 12 months.
51. With regard to the claim of underpayment for the 20 days holiday, it is clear from the documents that at least from January 2019 the working day was 12 hours. The respondent does not dispute that he was paid 10 hours for each holiday day. It appears that the 14 days taken in 2019 were paid for at 10 hours, not 12, so he is owed 2 x 14 hours, at £9.25 per hour, making £259 in total underpayment.

### **Written Particulars of Employment**

52. Section 38 of the Employment Act 2002 provides that if in the case of proceedings to which this section applies the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996, it must make an award to the worker of 2 weeks pay, and if just and equitable, may make an award of four weeks pay.
53. The duty in sections 1 and 4 of the 1996 Act is to give the worker written particulars of certain terms in his contract, and to update the particulars when there are changes to any terms.
54. The claimant was never given written particulars of contract terms. Asked why not, Mr Berdahl said some of his workers had no passports or no fixed domicile, and later, that there was no letter of engagement because "it's like a zero hours, might work no days or 6 days- we never written it down", "every employee is different", but his colleague Ramsey had sent the claimant a text on 4 December. This text is in bundle, and shows him asking the claimant for his driver's licence, passport, proof of address, right to work document, SIA license number, UTR number (for HMRC) and bank details, but nothing about the terms of employment. Meanwhile, the claimant asked for holiday pay price and procedure, but had no answer, and on 12 February 2019 had asked Mr Berdahl whether it was a zero hours contract, and had no reply.
55. In these circumstances it just and equitable to order the respondent to pay four weeks pay as the award for failing to provide statutory particulars. It is clear there was uncertainty about the terms, that the claimant asked for information, which might have prompted the respondent to see that there was an omission if the respondent had overlooked providing particulars, and providing written statement of payment arrangements would have saved much trouble in this claim. Further, it is clear from Mr Berdahl's answer that failing to send particulars of employment was not a matter of accidental omission. It was overall practice because, it seems, some of his workers had regular immigration status or could not show they have the right to work in the UK. That is, of itself, obviously a bad reason, it is conscious flouting of the law, but it is certainly no excuse in the claimant's case, where he did have the right to work.
56. The award is 4 weeks at £ 558.17, making £2,232.68.



**Breach of ACAS Code on Discipline and Grievance**

57. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 permits the tribunal to order an increase in any award of up to 25% if it appears there has been a breach of the ACAS Code on discipline and grievance, which provides that grievances must be investigated and the employee get a reply to his grievance. The claimant's queries about his pay can be regarded as grievances. In general, as noted, they were dealt with. The claimant does not point to any particular grievance going unanswered, and so I decline to make an increase in the award, because it would not be just to do so where it is not clear what in particular the respondent should have done.

**Delay Delivering Judgment**

58. I can only regret that the parties have had to wait five and a half months to learn outcome of this case. Much of the initial fact finding was written the day following the evidence being heard. It was then out aside part -written for a succession of multi-day hearings and administrative tasks which have made it very difficult to set aside the time required to study the documents and make a proper comparison with the witness evidence in order to make findings about what was in dispute.

**Tax**

59. As earned income, the amounts payable to the claimant are liable to income tax in the current year. I have not ordered net payments because no information is available on his earnings, either in tax year ending 5 April 2020 (when it is known he was out of work for several months following termination) , or the next year, nor is it velar the respondent is able to make statutory deductions after termination. It is for the claimant to declare this as earnings and pay the tax.

Employment Judge - Goodman

Date: 24<sup>th</sup> May 2021

JUDGMENT SENT TO THE PARTIES ON

25/05/2021..

FOR THE TRIBUNAL OFFICE