EMPLOYMENT TRIBUNALS

Claimants:
(1) Ms R Abdullahi
(2) Ms A Sahal
(3) Ms Z Adow
(4) Ms S Mohammed
(5) Ms F Ali

v

Respondent:
Solo Service Group Limited

Heard at: Leicester

On: 19 & 20 April 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr L Bronze (Counsel)
For the respondent: Mr P Drakeley (Operations Director)

JUDGMENT

1. The claims brought by Ms F Ali are dismissed upon withdrawal.

2. The respondent made unlawful deductions from the remaining claimants' wages on the following occasions:-

    a. Ms R Abdullahi – from 18 December 2020 to 11 March 2022;
    b. Ms A Sahal – from 18 December 2020 to 11 March 2022;
    c. Ms Z Adow – from 18 December 2020 to 7 May 2021; and
    d. Ms S Mohammed – from 18 December 2020 to 11 March 2022.

3. **BY CONSENT**, it is ordered that the respondent shall pay the remaining claimants the following sums by way of compensation for the unlawful deductions:-

    a. Ms R Abdullahi – £1,114.68;
    b. Ms A Sahal – £2,788.36;
    c. Ms Z Adow – £275.02; and
    d. Ms S Mohammed – £1,272.17.

4. **BY CONSENT**, the respondent will pay the below claimants the following sums as a goodwill gesture, and agrees for these sums to form part of this judgment order:-

    a. Ms R Adbullahi – £76.00;
    b. Ms A Sahal – £118.75; and
    c. Ms S Mohammed – £61.75.

WRITTEN REASONS

Background

1. These reasons are produced at the request of the respondent. I gave judgment with oral reasons in favour of the four remaining claimants on the morning of the second day of the hearing, which was scheduled to last three days but ended after two. The parties were then able to agree remedy between them on the day for me to make the above order by consent.

2. It is commendable that the respondent chose to make payments to the claimants in excess of what I may have awarded by way of a goodwill gesture. Because remedy was agreed, I only give written reasons here in respect of liability.

3. The claimants were represented by Mr Lee Bronze (Counsel) and Mr Paul Drakeley (Operations Director at the respondent). I heard evidence from each of the four claimants in support of their claims. For the respondent, I heard evidence from Mr Andrew Buchanan (Operations Manager at the respondent). I also had the sight of an agreed bundle of documents which ran to 318 pages. Page references in this judgment relate to page references in that bundle of documents.

The claims

4. The claims arise from a proposed reduction to the contracted hours of the claimants, cleaners, as a response to the COVID-19 pandemic. The respondent required the claimants to suffer a temporary reduction in hours, and consequential pay, to accommodate what it says was a reduced need for cleaning staff at client sites. Following a consultation process, the changes were implemented unilaterally. The claimants claim that they did not agree to the variation and that their contracts do not allow such a variation to take place without agreement. None of the claimants were dismissed and re-engaged on new terms, and so the issues were quite narrow.

5. I heard four claims over the two days. Ms Ali's claim was withdrawn when it became apparent that she had worked enough additional overtime to have mitigated any losses suffered as a result from an unlawful deduction. Each of the claimants gave evidence through a Somali language interpreter, who also translated everything that was said during the course of the proceedings. I am very grateful for that assistance.

6. All of the claimants remain employed by the respondent save for Ms Adow, who resigned with effect from 9 April 2021.

7. The issues to be decided were as follows:-

    a. *Have the claimants proven a legal entitlement to a properly payable sum by the respondent on a particular occasion?*
    b. *Did the sums in question amount to wages for the purposes of s27 Employment Rights Act 1996?*
    c. *What are the occasions on which the sums properly payable ought to have been paid?*
    d. *What sums were paid to the claimants by the respondent on each of the occasions?*
    e. *If there has been a deduction, was it required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimants' contracts, or had the claimants previously signified in writing their agreement or consent to the making of the deduction?*
    f. *If the deduction was unauthorised, what sums should the respondent pay to the claimant?*

8. In the event, because remedy was agreed, I was only required to decide (a), (b), and (e).

The facts

9. The facts were broadly agreed. The claimants were not cross examined on what they say happened to them during the consultation, although they were asked about matters relating to remedy. The facts as I find them are as follows.

10. The claimants were employed by Servest Group before the respondent took over the contract with Leicester County Council. Their employments with Servest terminated on 31 March 2017 and they were then transferred into the employment of the respondent by way of the Transfer of Undertaking (Protection of Employment) Regulations 2006. The transfer was effective from 1 April 2017. Letters relating to the transfer were at pages 71 to 73.

11. Upon commencement of employment with the respondent, the claimants signed new terms and conditions of employment. All of these are in the same form and signed contracts for each claimants were contained in the bundle, bearing the title *"Terms of Employment TUPE"*. The only relevant clause for this dispute is clause 2, which reads (my underline for emphasis):

> *"Hours: Hours of work are subject to variation by <u>mutual agreement</u> between yourself and your manager/supervisor"*.

12. The claimants say that they worked fixed hours each week. This is supported by the exercise of the respondent, which felt that there was a need to reduce contracted hours though consultation. There was some confusion between the parties about the number of hours generally worked. The claimants calculated their hours on a weekly basis, whereas it appears that the respondent calculated hours on a four weekly pattern. It is clear that the hours that the claimants worked did

vary from time to time. Their contracts did not contain a set number of hours per week in them, although a very basic review of their pay slips indicate that their claims as to hours are broadly correct if you account for holidays, bank holidays and sickness.

13. The respondent had attempted to tabulate the hours worked by the claimants in an effort to show that there was no set hours and could be no expectation about what hours were to be worked. However, there were errors in the documents, and different versions of the documents in different copies of the bundle setting out which claimant worked what hours, and what they were paid. The information I had was different to the information Mr Drakeley had, and this was different to the documents within the witness bundle. I indicated that the exercise would need to be done again in the event the parties could not agree the hours between them. I am grateful to the parties that they were able to come to such an agreement.

14. On 27 October 2020, Mr Buchanan made an announcement to staff based at Leicester County Hall to the effect that there would be a consultation on a proposed change to contracted hours. This was followed up by a letter dated 2 November 2020, which set out that the proposal was to reduce hours by 3 hours and 22 minutes per week. The claimants were invited to a consultation meeting to discuss the changes. The proposed changes were said to come into effect on 30 November 2020. A copy of the letter is at page 74.

15. The claimants say they received a copy of the letter but that it was in English and not translated. On 27 November 2020, Mr Buchanan met with the claimants with an interpreter. He reiterated the need for the change to hours and said that it would go ahead, with each of them affected as outlined in their letters. It is apparent that the respondent did not initially allow the claimants to be accompanied to their consultation meetings unless it was by a union member, which is why the meetings were not arranged until the closing date of the consultation. I understand that GMB union did intervene on behalf of the claimants.

16. Also on 27 November 2020, Mr Buchanan wrote to the claimants, in Somali, to advise that the consultation had closed and the proposed changes would be put in place. I am not clear on when the letters were written but, given the need for their interpretation, I consider it likely that nothing the claimants could have said in their consultation meeting would have changed the outcome. This deprived the claimants of the ability to engage properly with the consultation process. This is unfortunate but does not, in my view, affect the outcome of this case.

17. The 27 November 2020 letters from the respondent to the claimants asked the claimants to returned a signed copy to confirm their agreement to the proposed changes. None of the claimants returned those copies, and none of the claimants have agreed to the changes which were imposed. The changes were imposed from 30 November 2020. Each of the claimants confirmed that they were ready and willing to do the work according to their original contract. Some were able to mitigate some losses through taking overtime.

18. Written representations were made during November 2020 to try to resolve the situation. The GMB representative suggested redundancy as an alternative approach. The respondent considered that it had conducted a lawful variation of

contract following a consultation exercise. On 30 November 2020, without reference to any contractual terms allowing the proposition, the respondent's Ms Horner (HR Manager) wrote (page 91):

> *"Solo, as the employer, is able to vary terms and conditions of employment, through consultation. A meaningful and reasonable time bound consultation has taken place and the process concluded".*

19. On 2 December 2020, the claimants raised a grievance which was heard on 16 December 2020. The grievance was not upheld. The respondent denied that the variation to the claimants' contracts was ineffective and considered that the hours had been reduced. It was denied that the hours reduction constituted a breach of contract. On 22 December 2020, GMB appealed the grievance outcome, saying that there had been no meaningful consultation and that redundancy should have been offered instead.

20. That appeal was heard by Mr Drakeley on 3 February 2021. The appeal was unsuccessful. The minutes of the meeting (pages 138 to 143) show that the respondent was told by two different unions that what it had done was in breach of contract, that the consultation process had not been properly conducted, and that the respondent was forcing the claimants (and others) to work less hours than those to which they were contractually entitled.

21. On 1 April 2021, the claimants were offered their hours back, firstly with a partial restoration and then with a full restoration from 14 April 2021. The claimants were asked to sign a letter indicating agreement to the new contractual change. On 15 April 2021, GMB emailed Mr Buchanan to note that the letter implies that the claimants had agreed to the reduction, which they had not. Consequently, the claimants did not sign this letter either and each says in their witness statements that they have not had those hours restored.

The law

Interpretation of contractual terms

22. In *Arnold v Britton [2015] UKSC 36*, Lord Neuberger outlined how a court or tribunal should approach disputes about the meaning of contractual terms. The correct way to do so is to interpret the intention of the parties as to the meaning of the terms by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"* (per Lord Hoffmann in *Charterbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*).

23. To assist with this exercise, Lord Neuberger reviewed existing authorities and distilled them into six relevant factors to be considered in order to determine how a contract has been constructed and how it should be interpreted. Those factors are [para 15]:

    a. the natural and ordinary meaning of the clause;
    b. any other relevant provision of the contract (Lord Neuberger was considering a lease in *Arnold* but the same principles apply);

c. the overall purpose of the clause and the contract;
d. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
e. commercial common sense; but
f. disregarding subjective evidence of any party's intentions.

24. Consequently, the interpretation is an objective exercise by design. Lord Neuberger emphasises the importance of the ordinary language of the provision being considered, which should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

Variation of employment contract

25. Variation to contractual terms may become effective by agreement. Such an agreement may be oral and the variation never committed to writing. The question is whether the tribunal is satisfied on the evidence available that an oral agreement served to vary the contract of employment (*Simmonds v Dowty Deals Ltd [1978] IRLR 211)*. Naturally, the best form of evidence of a variation by agreement is through writing. Where terms are said to have been imposed, working under protest will not be taken to mean that there is agreement by conduct (*Hepworth Heating Ltd v Akers and ors [2003] UKEAT)*.

26. Any variation of contract requires the exchange of consideration to be valid. Courts and tribunals have been able to find consideration for variations quite quickly, whether that is in relation to the settling of a pay claim where a pay rise is awarded (*Lee and ors v GC Plessey Telecommunications [1993] IRLR 383)*, or where the employer enjoys greater staff retention where guaranteed bonuses are promised (*Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394)*.

27. Each contract variation should be considered as a standalone event, and a unilateral reduction to working hours requires a contractual variation if the employer is not already permitted to act in this way. In *International Packaging Corporation (UK) Ltd v Balfour [2003] IRLR 11*, Lord Johnstone said (para 10):

> *"The fact that in the past there may have been agreements to vary the contract does not in itself create a power to enable the employer to do that unilaterally. Reduction in working hours is plainly a variation of a contract of employment and, unless expressly catered for within that contract, or allowed by implication again within the terms of the contract, any actual deduction of wages, even if related to the hours worked, is not authorised by the statute and can only be achieved by agreement."*

Unlawful deduction from wages

28. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the

circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

29. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium.

30. In the alternative, where a shift alteration is unlawful (such as through a breach of contract), then an employee who offers services in line with their contract but is not allowed to work and is not paid will suffer an unlawful deduction from wages (*Beveridge v KLM UK Ltd [2000] IRLR 765)*. Tribunals are able to consider that a breach of contract claim which results in reduced pay can be treated as if a claim for unlawful deduction from wages (*Capek v Lincolnshire County Council [2000] IRLR 590*).

Discussion and conclusions

31. In my view, considering the claimants' contracts and the authorities, the outcome of the case is startlingly clear. The clause in the claimants' contracts about hours is short and plain. On its ordinary meaning, the claimants' hours were only to be varied by agreement between each of the claimants and the respondent. There is no provision in the contract allowing the respondent to impose unilateral changes. There is no reference to any other policies and procedures. The respondent produced no other documents and ran no other arguments to the effect that the employment contracts contained any additional terms.

32. The respondent appeared fixed on the notion that the claimants' hours varied from month to month, and that there was no fixed minimum hours to be provided in the employment contract. This argument overlooks the plain term about mutual agreement. If hours did alter previously, presumably the claimants agreed to that and worked without protest such that there was no unliteral imposition. The respondent required the claimants' agreement to unilaterally reduce their hours. None of the claimants agreed to the change implemented, and the ensuing enforced changes amounted to a breach of contract on the part of the respondent. There was no lawful variation to the claimants' contracts.

33. Following the authorities outlined above, the claimants remain entitled to get paid for their contracted hours where they are prepared to work and wish to do so. The respondent did not pay them for those hours it says it lawfully removed. It follows that the claimants have suffered an unlawful deduction from wages and should be compensated accordingly.

Employment Judge Fredericks

20 June 2022