



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr B Sekele**

**v**

**Boss Security Services Limited**

**Heard at:** Watford

**On:** 14 September 2017

**Before:** Employment Judge P Daniels

## **Appearances**

**For the Claimant:** Mr A Booth-King (Friend)

**For the Respondent:** Did not appear

## **JUDGMENT**

1. The claim for unlawful deductions from wages in respect of the claimant's complete pay for September 2016; October 2016 and the pay during the period 1-7 November 2016 is well founded. No payment had been received from the respondent in respect of those periods.
2. The claimant's claim for holiday pay in relation to the Working Time Regulations 1998 is well founded in relation to 2.33 days holiday pay.
3. The claimant was unfairly dismissed by the respondent for the reason or principle reason that the claimant alleged that the employer had infringed the rights of his which is a relevant statutory right (that right being the rights conferred by the Working Time Regulations 1998 including the rights to daily rest under regulation 10 and rest breaks under regulation 12).

## REASONS

### Findings of fact

1. I heard evidence from the claimant on his own behalf. I also considered the documents that the claimant submitted to the employment tribunal. The respondent did not appear and no evidence was considered from the respondent save for the contents of the response.
2. The claimant commenced employment as a security officer on 19 September 2015. He was paid at a rate of £7.20 per hour at the material time and that time worked a normal working week of four twelve hour shifts. His average monthly pay gross at the date of termination of employment was £1555.20 per calendar month.
3. In around Easter 2016 the claimant verbally complained against the way in which his shifts were being set by Mr Morrison the manager of the respondent. The claimant was put in duties covering shortages of staff and was asked to perform a 24 hour shift without a break. The claimant complained verbally about this after Easter 2016. The claimant also raised concerns about working conditions, rest breaks, lack of security on site and other matters. Nothing was done to address the claimant's concerns and so the claimant then made a written complaint asking Mr Stephen Morrison to

review the practices. Nothing was changed by the respondent following the verbal and written complaints made.

4. At around that time the claimant was asked by Mr Stephen Morrison to insert incorrect names on timesheets for the benefit of the business. Mr Sekele was asked to sign the name of a different person to his own name for a shift that he had covered in order to not disclose the fact that the claimant was being asked to perform double shifts without rest breaks and in breach of his daily working time requirements. This happened on two or three occasions at around that time. On each occasion the claimant refused to do so. The attitude of Mr Morrison to the claimant deteriorated and he more frequently shouted at the claimant and was disrespectful to him in phone calls and in person.
5. The claimant worked his normal week working pattern for September 2016. However, when he went to cash his cheque received on the 5 October 2016 it bounced. He was informed of the cheque bouncing by letter on 10 October 2016. The claimant contacted Mr Morrison to ask for an explanation and he said that he did not care about this and did not state that he was going to address the issue. Nevertheless, the claimant continued working assuming that the matter would be put right.
6. At the end of October 2016 the claimant was asked to perform a triple shift without any break. The claimant would normally start his night shift at 7pm in the evening and finish at 7am the following morning. However the

claimant was asked by Mr Morrison to continue working at the end of that shift for a further day shift and then to continue working yet further, for a further night shift at the end of the day shift. This meant that he was effectively working without rest breaks for 36 hours non stop at the site. The site the claimant was working at, at the time was the security site where he was asked to perform security at a Tesco site which involved, amongst other things, keeping watch on a valuable digger which was on site. The claimant reluctantly agreed to perform the triple shift.

7. Following the triple shift the claimant which he finished at 7am in the morning a day and half after he started the first shift the claimant was next rostered for 7pm the following day. The claimant was then asked by Mr Morrison to do Mr Morrison another favour and agree to perform a yet further double shift in order to cover for someone else. In other words, instead of finishing at 7am the following morning he would do another day shift immediately after the night shift without any rest break.
8. The claimant refused to do so. Mr Morrison was upset and angered by this and did not appreciate the claimant's refusal. The claimant finished his shift in the normal way and then went home. The normal practice of the employer was for the office to inform staff of the shift rostered in the following week. However, the claimant did not receive email setting out any rostered shifts for the following week. The claimant telephoned the office and was informed that no shifts had been rostered for him. He then went into the office to ask for the position and was told that there were no shifts

being offered to him. The claimant took this issue up with Mr Morrison who told him that he did not care and shouted at him. The claimant then handed in his resignation by way of a letter which stated that he was resigning because of the unacceptable way in which he was being treated which was happening too often, and also made reference to rest breaks and related issues.

9. Mr Morrison refused to accept the letter of resignation being handed to him and brushed this off. The claimant therefore handed this letter of resignation to the office and left the premises. The claimant considered his employment at an end as a result of his treatment by the employer. The claimant considered that he had been constructively dismissed.
10. By an ET1 dated 20 April 2017 the claimant claimed unfair dismissal, breach of s.13 of the Employment Rights Act 1996 by reference to unlawful deductions from wages and unpaid annual leave under the Working Time Regulations 1998.
11. The employment tribunal wrote to the parties on 13 June 2017. The employment tribunal accepted the claim. The respondent was invited to submit a response to the claim on the prescribed form. The hearing date was listed in that letter for Thursday 14 September 2017. The tribunal went on to give directions as to exchange of documents by the 25 July 2017, written statements in advance of the hearing to be exchanged by 22 August 2017 and the statement of issues to be prepared if possible by

7 September 2017. In response to the letter dated 13 June 2017 a lady named Kim on behalf of the respondent filed a response. The response claimed that the claimant had resigned and put the claimant to strict proof of his allegation. The response stated that the respondent had never at any time victimised, bullied or blackmailed the claimant.

12. The company employs approximately 50 employees.
  
13. The claimant filed a written grievance complaining about his treatment dated [DATE]. The respondent did not reply to the grievance. The claimant also telephoned the respondent on a number of occasions asking him to deal with the matters, but the respondent did not do so. The respondent did not appear at the employment tribunal hearing. No explanation was provided. On telephoning the respondent a representative of the respondent stated that Mr Morrison was away.
  
14. Under s.13 of the Employment Rights Act 1996 it quotes 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 workers contract; or
  - (b) The worker has previously signified in writing his agreement or consent to the making of the deduction ...

15. Under regulation 12 of the Working Time Regulations 1998 (rest breaks):-

- (1) Where a workers daily working time is more than 6 hours, he entitled to a rest break.
- (2) The details of the rest break to which a worker is entitled under paragraph (1) including its duration and the terms on which it is granted shall be in accordance with any provisions for the purposes of this regulation which are contained in the collective agreement or a workforce agreement.
- (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for under paragraph 1 is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spent it away from his workstation if he has one.

16. Under regulation 10 of the Working Time Regulations 1998 (daily rest):-

- (1) A worker is entitled to a rest period of not less than eleven consecutive hours in each twenty four hour period during which he works for employer.

17. Under s.104(1) of the Employment Rights Act 1996 an employee who is dismissed shall be regarded for the purpose of this part as unfairly

dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that the employer - ... he alleged that the employer had infringed a right of his which is a relevant statutory right (with the rights conferred by the Working Time Regulations 1998 being defined as a relevant statutory right at s.104(4)(d)).

## **Conclusions**

### Working Time

18. Under s.13(a) of the Working Time Regulations 1998 “the additional period of leave to which is 20 days”.
19. In this case, the claimant confirmed that the holiday year was a calendar year at this employer. The claimant gave evidence that he had received 15 days holiday pay in the year. The claimant was entitled as at termination date of 7 November 2016 to eleven twelfths of his annual pay entitlement which amounted to 17.33 days. The claimant having taken only fifteen days had a shortfall of 2.33 days. He was therefore entitled to a claim for 2.33 days pay. A days pay for these purposes is calculated at the sum of £[BLANK].

### Unlawful deductions from wages



20. In relation to the claimant's claim for unlawful deductions from wages the claimant gave clear and consistent evidence that he had not received any payment for the whole of September 2016 and that the £1,555.20 (subject to deductions) was payable to him for that period. He gave evidence and documents to show that the cash in payment of that sum had been delivered to a bank but had bounced. In relation for October 2016 the claimant gave evidence that the whole of this month had been unpaid, again in the sum of £1,555.20. No payment was received for October 2016. The claimant also gave evidence that he had worked three shifts of 12 hours in the period between 1 November 2016 and 7 November 2016. Accordingly he claims 36 hours pay (for that period at the rate of £7.20 per hour).
21. The claimant has shown with cogent and clear evidence that these sums remain outstanding. There is no evidence before the employment tribunal from the respondent whether in the response or otherwise setting out any basis upon which the contention that these sums are unpaid is incorrect. The response does not make any reference to the payment dates of these sums. This claim is well founded.

Unfair dismissal by reason of asserting a statutory right

22. The claimant asserted the statutory right under the Working Time Regulations 1998 in relation to rest breaks under regulation 12 and daily working time under regulation 10. S.104(2) of the Employment Rights Act 1996 states:-

“It is immaterial for the purposes of subsection (1)

- a) whether or not the employee has the right to; or
- b) whether the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

Subsection 3 states:-

It is sufficient for subsection 1 to apply that the employee without specifying the right made it reasonably clear to the employer what the right claimed to be infringed was.”

23. In the course of Easter 2016, the claimant made it reasonably clear to the employer that he believed that his rights in relation to rest breaks and working hours ...[end of tape 1]..... the claimant asserted his statutory rights in clear terms when he made it reasonably clear to the respondent firstly verbally after Easter 2016 the he was concerned that the employer was not complying with his rights in relation to rest breaks and working hours. Thereafter, he filed a written grievance complaining again about the breach of his rights which I find made reference to rest breaks and also his daily working hours. Furthermore, the claimant complained about being given double shifts shortly before the termination of his employment by reason of

constructive dismissal. Mr Morrison indicated that he did not appreciate the claimant raising these concerns and that he should do it as he was told.

24. Following the claimant raising yet again his concerns about the breach of his statutory rights the claimant and refusing to work a yet further double shift in early November 2016 the claimant found out that he was no longer being rostered to perform any shifts at the employer. The normal email which was sent to staff was not sent to him. He contacted the office and he was told that no shifts had been allocated to him. At this stage the claimant had still not been paid in relation to his September pay which post dated his complaints about rest breaks and working hours and had still not been paid in relation to any of his October 2016 pay either. The claimant had also been treated rudely and aggressively by Mr Morrison on the telephone who had shouted at him and shown disrespect for him and his position.
  
25. The first question was whether the claimant had been dismissed by the employer. In order to prove constructive dismissal, the claimant needed to show that he had resigned in response to a fundamental breach of the express and/or implied terms of his contract of employment. Further, that he resigned partly in response to such breach and that he did so without delay. Further, the claimant would need to show that the nature of the breach was such as to go to the root of the contract and entitle the claimant to treat his self as dismissed by the employer.

26. The claimant considered that there had been a number of breaches of his contract of employment. These breaches included the failure to pay him wages for September 2016 and October 2016. The claimant has established that he had not been paid these wages as at the date of his dismissal and that this was in clear breach of the express terms of his employment.
  
27. The claimant also relied upon a breach of the implied term of trust and confidence in that the employer had changed his roster pattern after he refused to perform yet another double shift without a rest break and in breach of his daily working hours provision under regulation 10. The claimant also relied upon the fact that he had not been given his rights under the Working Time Regulations 1998 to rest breaks and daily working hours was a breach of the implied term of mutual trust and confidence. In response to the above breaches the claimant tendered his resignation with immediate effect on 7 November 2016. Mr Morrison initially refused to accept that resignation so the claimant left a letter in the office of the employer so this letter was accepted by the office and there was never any indication that it was repudiated.
  
28. In order to show that the claimant resigned in response to any fundamental breach of his contract the claimant needs to show that part of the reasons for his resignation was any such breach. See Nottinghamshire County Council v Meikle.

29. The claimant has shown strong reasons why his resignation was in response to him asserting his statutory rights.
  
30. First, his dismissal on 7 November 2016 immediately post dates his refusal to work a further double shift in breach of his working time regulations rights. Further, the refusal to work a further double shift and his ensuing resignation followed immediately after the claimant learning that he was still due unpaid pay for the whole of September 2016 and October 2016. In addition, the claimant has satisfied me that the reason for him not receiving such pay was partly because of his complaints about breach of his rights and asserting those rights. Mr Morrison's behaviour in response and his shouting at the claimant and refusing to accept his responsibility to comply with those rights is evidence that Mr Morrison did not appreciate the claimant raising these rights. Mr Morrison also by stating "I don't care about these, do what you like" indicated that he had no intention of complying with these statutory rights. This is consistent with the idea that he would dismiss whether actually or constructively someone who sought to observe those rights.
  
31. In addition, Mr Morrison's request for the claimant to put someone else's name as working on a roster for the purposes of a claim/client? in order to hide the fact that he had worked a double shift in breach of his obligations to the claimant under the Working Time Regulations 1998 was a clear breach in itself of the implied term of mutual trust and confidence.

32. I consider that the claimant also resigned partly in response to the yet further request for the claimant to falsify a time record by putting someone else's name on a timesheet for a period of time that he worked in order to hide the fact that he was doing a double shift in breach of his rest and other rights and potentially in circumstances where he would not be providing as vigilant a service for the end user. In particular, the end user would be likely to be concerned about someone working in security in circumstances where they had no rest breaks and were not able to be as vigilant and observant as potentially someone who had had breaks would be.
33. The response did not in any way address the suggestion that the respondent had observed rest breaks in relation to the Working Time Regulations 1998 in any way and there was no evidence before me with the respondent not having appeared to suggest that dismissal was not related to these matters. In all the circumstances, the claimant gave cogent and consistent evidence of the link between the two matters. In all the circumstances I was fairly satisfied that the principle reason for dismissal (constructive dismissal in this case) was by reason of the claimant asserting his statutory rights under the Working Time Regulations 1998.
34. In order to properly establish the losses arising to the claimant the matter was adjourned in order for a remedy hearing.
35. The remedy hearing is listed for one day for Thursday 11 January 2018.

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Employment Judge P Daniels

Date: 11 January 2018.....

Sent to the parties on: .....

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For the Tribunal Office