EMPLOYMENT TRIBUNALS

Claimant: **Dominic Pickin**

Respondent: **Total Security Services Limited**

Heard at: **London South Employment Tribunal**

On: **24th May 20222**

Before: **Employment Judge Apted**

Representation
Claimant: Litigant in person
Respondent: Mr Cater

JUDGMENT

1. The claimant's claims for unlawful deductions from wages are not well founded and are dismissed.

REASONS

Introduction:

2. The claimant was employed by the respondent on the 19th June 2010 as a Security Officer. The respondent is a privately owned security company which employs approximately 4000 licensed security officers across the United Kingdom.

3. On or about the 24th January 2021, the claimant was involved in a physical altercation with a customer outside a branch of Tesco's in Western Road, Brighton, Sussex where the claimant was working. The customer had previously been barred from the store. On the 2nd February 2021, the respondent received a request from Tesco that the claimant be "removed" from the store. On or about the 5th February 2021, the claimant was told that he had been suspended. The respondent accepts this was an error and wrote to the claimant on the 12th February 2021 confirming that he was not suspended.

4. The claimant therefore last worked for the respondent on the 1st February 2021 and has not returned to work for the respondent since then.

5. On the 16th March 2021, the claimant submitted a sick note to the respondent confirming that he was unfit for work from the 10th March 2021.

6. Early conciliation commenced on the 5th May 2021 and ACAS issued a certificate on the 16th June 2021. The claimant submitted a claim on form ET/1 to the Employment Tribunal on the 19th August 2021.

7. The respondent responded to the claim on form ET/3 and attached Particulars of Response. Both of these are undated.

8. The claim was listed for a Final Hearing on the 24th May 2022.

The Issues:

9. On form ET/1 at paragraph 8.1, the claimant ticked the box stating that he was making another type of claim which the Tribunal could deal with, namely "Illegal reduction of wages and illegal reduction of hours". At paragraph 8.2, the claimant states that all of his shifts were withdrawn without notice, that the respondent failed to communicate with him and that he had only been offered 2 shifts on the 9th and 20th March 2021. At paragraph 9.2, the claimant stated that the remedy he sought was "…such compensation as an impartial assessor deems fit and a review of the work practices of TSS which I believe are unjust and based on a misrepresentation of law."

10. In his 'Final Submission Summary of Case' dated the 9th May 2022, the claimant sets out his claims as follows:

    a. Unlawful deduction of wages between the 5th February 2021 and the 10th March 2021 on the basis that he normally worked 40 hours per week and had only been offered two shifts;

    b. Unlawful deduction of wages between the 11th March 2021 and 23rd September 2021 (when he was in receipt of Statutory Sick Pay), on the basis that the respondent was responsible for his sickness absence having increased his anxiety and stress by unfairly reducing his hours and wages;

    c. Such "compensation" as an impartial assessor "deemed fitting" for the way in which he claims to have been treated by the respondent.

11. The respondent's case is firstly, that the claimant's claim is out of time and that secondly, the claimant has not worked since the 2nd February 2021 and therefore he is not owed any wages and no wages have been deducted.

The Law:

12. Section 13 of the Employment Rights Act 1996 gives an employee or worker the right not to have unauthorised deductions from their wages. So far is relevant, section 13 reads as follows:

    "13 Right not to suffer unauthorised deductions.

    (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."

13. The meaning of wages is defined in section 27 of the Employment Rights Act 1997. So far is as relevant, section 27 reads as follows:

"27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,
(c) statutory maternity pay under Part XII of that Act,
…
(j) remuneration under a protective award under section 189 of that Act,
but excluding any payments within subsection (2).

(2)Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),
(b) any payment in respect of expenses incurred by the worker in carrying out his employment,
(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,
(d) any payment referable to the worker's redundancy, and
(e) any payment to the worker otherwise than in his capacity as a worker."

The hearing:

14. The claim was listed for a final hearing on the 24th May 2022. In preparation for the hearing, I was in possession of the following documents from the claimant"

    a. An Index;
    b. Final Submission – Summary of Claim – dated the 9th May 2022;
    c. Four zip files labelled Parts 3, 4, 5, 6, and 7 which contained numerous individual documents as set out in the Index above.

15. On behalf of the respondent, I was in possession of a respondent's bundle totalling 111 indexed and paginated pdf pages, together with an unsigned witness statement from Mr Stuart Conroy.

16. I confirmed at the outset of the hearing that all parties had access to the same material, which they confirmed that they did. The respondent had sent 3 additional pages from the respondent's employee handbook to the claimant, which he had received, but which I did not. I was also unable to access the claimant's payslips as set out in part 8 of his Index (although this has not affected my decision in any way).

17. The hearing was conducted using the Cloud Video Platform (CVP). A Notice instructing all parties how to use the CVP had been sent by the Tribunal. All parties joined via CVP and it was possible to see and hear each other clearly. I was satisfied that there were no barriers to communication, that it was in the interests of justice for the hearing to be conducted in this way and that the principles of open justice were secured.

18. During the course of the hearing, I heard sworn evidence from Mr Conroy on behalf of the respondent and sworn evidence from the claimant. I made a note of their evidence in my record of proceedings. At the conclusion of the evidence, Mr Cater on behalf of the respondent, and the claimant made submissions, which I also noted in my record of proceedings. At the conclusion of the hearing, I reserved my judgment, which I now give together with my reasons.

19. In reaching my decision, I have considered all of the documentary and oral evidence in the round. I shall only refer to such pieces of evidence as are necessary to explain my decision. The fact that I do not refer to a piece of evidence, does not mean that it has not been considered.

Preliminary issue – time limits:

20. The respondent submitted that the claimant's claim had been made out of time. The respondent submitted that time began to run from the 12th February 2021 (which was the day after the respondent confirmed that the claimant had not been suspended). Conciliation commenced on the 5th May 2021 and a certificate was issued on the 16th June 2021. The respondent submitted that the time limit therefore expired on the 16th July 2021. The claimant sent an ET/1 on the 19th August 2021, which the respondent submitted was therefore 34 days late.

21. The respondent submitted that the time limit should not be extended as it was reasonably practicable for the claim to have been presented in time.

22. The claimant submitted that time should be extended because he does not have any legal knowledge. He submitted that at the time he was not sleeping and was not sufficiently "…on the ball to know what was going on…" He thought that having contacted ACAS, the respondent would contact him.

23. Under section 23(2) Employment Rights Act 1996, a claim for the unlawful deduction of wages must be presented within three months from the date of payment of the wags from which the deduction was made. Section 23(4) of the Employment Rights Act 1996 states that a tribunal may extend the time limit by such period as the tribunal considers reasonable if the tribunal is satisfied that it was not reasonably practicable for the claim to have been presented in time.

24. In my judgment, it was not reasonably practicable for the claim to have been brought in time and it was just and equitable to extend time. I bear in my that the claimant is a litigant in person without any legal knowledge. At the time of these events, there are sick notes at pages 98 – 110 of the respondent's bundle and in part 7 of the claimant's bundle, confirming that the claimant was suffering with stress, anxiety, low mood, and a surgical procedure relating to a tumour of the prostate. I therefore allowed the application to extend the time limit and allow the claim to be brought of time.

Findings of Fact:

25. The claimant was employed under a Contract of Employment by the respondent as a Security Officer, on the 19th June 2010 (respondent' bundle page 33 - 36). The second paragraph confirms that his hours of work will consist of variable shifts each week. The contract does not guarantee a number of hours in any given period. The claimant's salary was £6.60 per hour. The contract confirms that there are no contractual sickness payments in addition to statutory sick pay. In my judgment therefore, the contractual position between the claimant and respondent is that the respondent does not guarantee a minimum number of hours in any given period.

26. It is agreed between the parties that an incident took place at Tesco's, Western Road, Brighton, Sussex on or about the 24th January 2021, when the claimant was involved in an altercation with a customer who had previously been barred from the store. The accounts between the claimant and respondent about what happened, differ. In his 'Final Submission – Summary of Case' dated the 9th May 2022, the claimant states that he was acting in self-defence and in defence of an elderly customer from an "assailant" who had been barred because of his "assault, threats, aggression and theft." Mr Conroy on behalf of the respondent, viewed CCTV footage of the incident on the 2nd February 2021. He sent an email setting out what it showed (at page 45 of the respondent's bundle). This email, in summary, states that the claimant threw a man in the door and onto the floor and after that man attempted to punch the claimant, the claimant punched the male before moving off camera. He states that the police arrived on scene who are alleged to have subsequently returned and issued the claimant with a warning about future conduct.

27. I therefore find that some sort of physical altercation took place between the claimant and a man on or about the 24th January 2021. As a result of this, Tesco asked that the claimant was removed from the store, which he was. It is agreed and I find that the claimant then worked an additional number of days thereafter, up to and including the 1st February 2021. His last day of work for the respondent was therefore the 1st February 2021 and he has not worked for them since then.

28. Four days later, on about the 5th February 2021, the claimant discovered that he had not been allocated any shifts. When he telephoned his area manager, he was told that he had been suspended without pay pending an investigation (see respondent's bundle page 48). It is accepted by the respondent that that was wrong and the claimant was not suspended (see Mr Conroy's statement, paragraph 13). On the 12th February 2021, Lawrence Brown on behalf of the respondent wrote to the claimant about his "suspension" (see page 67 of the respondent's bundle). In that email Mr Brown refers to a conversation that took place the day before, namely the 11th February 2021. Mr Brown confirmed that the claimant was not suspended and that he was eligible to work at other sites. I therefore find, that from the 11th February 2021, the claimant knew that he was not "suspended" and that he could have continued to work.

29. The claimant was subsequently declared unfit to work by his General Practitioner from the 10th March 2021 (see sicknote 1 ending 10 04 21 in part 7 of the claimant's bundles) as a result of stress, anxiety, and low mood. Between the 2nd February 2021 and the 10th March 2021, there is a dispute between the parties about how they communicated with each other regarding the claimant's availability for work. The claimant stated that he attempted to communicate by using the respondent's HR portal and by email. The respondent states that the claimant's contract of employment (which includes the employee handbook) required him to communicate through their HR portal. However, there is evidence within the respondent' bundle at pages 40 – 44 that the respondent also telephoned the claimant without success.

30. In my judgment, I do not need to resolve the correct method of communication between the parties between these dates. The real issue is whether the claimant was available for work and whether in fact he did work or not. In my judgment, the claimant was available for work. He was available for work from the 2nd February 2021. The respondent accepts that it had erroneously informed the claimant that he was "suspended" when he was not. That error was corrected on the 11th February 2021, when it is accepted that the claimant could have continued to work at other locations. As a result of the breakdown in communication, the claimant has not worked since the 2nd February 2021. I therefore find that the claimant was available to work since the 2nd February 2021, but I find (and it is agreed) that he has not done so.

31. The claimant further claims that he should be paid his full salary between the 11th March 2021 and 23rd September 2021 (when he was in receipt of Statutory Sick Pay), on the basis that the respondent was responsible for his sickness absence having increased his anxiety and stress by unfairly reducing his hours and wages.

32. I find that the contractual position between the parties was as follows:

    a. the claimant would be paid for the shifts worked.

    b. The respondent did not guarantee a minimum number of hours.

    c. In the event of sickness absence, the claimant was only entitled to statutory sick pay.

33. The claimant submits that he worked approximately 40 hours per week for about 10 years. He therefore had an expectation, he said, that he would continue to receive that minimum number of shifts. In support of that submission, the claimant states that he was an employee of the respondent and that the respondent regulated his annual leave. In my judgment, there is no doubt that the claimant is an employee. As an employee (working 5 days per week), he is entitled to a minimum amount of 5.6 weeks annual leave per year under the Working Time Regulations 1998.

34. In my judgment, the issues in this case are resolved by looking at what the contractual position was between the parties. I have set these out at paragraph 31 above. Additionally, when the claimant signed his contract of employment, he also signed to accept that the employee handbook formed part of his contract of employment. A part of that handbook is at page 111 of the respondent's bundle. This reads as follows:

    "If there is a temporary shortage of work for any reason, we may try to maintain your continuity of employment even if this necessitates placing you on short 'me working, or alternatively lay off. If you are placed on short time working, your pay will be reduced according to time actually worked. If you are placed on lay off, you will receive no pay other than statutory guarantee pay."

35. It is therefore clear in my judgment, that the claimant cannot have expected to have worked a minimum number of hours/shifts every week. In my judgment, if I accept that the claimant did have such an expectation, I would have to disregard what the express contractual position was.

36. The claimant has not worked for the respondent since the 2nd February 2021. I find that the respondent was not required under the terms of the contract to provide a minimum of shifts. As the claimant has not worked for the respondent he has not been paid. I therefore find that as the claimant has not worked, there has not been any deduction from his salary, whether lawful or not. It follows, that I find that there has not been any deductions from wages, the claimant not having performed any work in connection with his employment.

37. The claimant's claims for unlawful deductions from wages are therefore not well founded and are dismissed.

38. The claimant's final claim is for such compensation as an impartial assessor deems fit for the way in which he has been treated by the respondent. The Tribunal has no power to award compensation for injuries to feelings within the context of a claim for the unlawful deduction of wages.

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Employment Judge Apted
Date: 27 May 2022

Sent to the parties on
Date: 8 June 2022