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EMPLOYMENT TRIBUNALS

Claimant: Mr F Boateng

Respondent: The Security Group (National) Ltd

Heard at: East London Hearing Centre

On: 6 November 2017

Before: Employment Judge Jones (sitting alone)

Representation

Claimant: Mr J Gull (Trade Union Representative)

Respondent: Mr Adam Mitchell (HR Manager)

JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The Claimant's complaint is successful. The Respondent is to pay the Claimant unlawful deduction of wages in the sum of £142.65.
- (2) The Respondent is to pay the Claimant his holiday pay at the rate of 12 hours per day for 28 days of the Claimant's statutory holiday entitlement.

REASONS

1 The Claimant complains that the Respondent breached his contract. He complains that he is entitled to be paid holiday pay calculated at a rate of 12 hours pay per day for 28 days. His contracted hours are 48 hours worked over 4 days – i.e. 12 hours per day.

2 The Claimant transferred to the Respondent under the TUPE Regulations 2006 on 1 May 2015. Initially, during 2015 the Respondent paid the Claimant's holiday pay in accordance with his understanding of his contract. He was paid 28 days holiday at the rate of 12 hours per day.

3 The Claimant's case is that he was paid this by his original employer, Knightsbridge Guarding and that those are the terms on which he transferred to G4S who subsequently transferred him to the Respondent.

4 The Respondent defends these proceedings on the grounds that the Claimant has failed to provide conclusive proof of the contractual provisions he relies on. The Respondent has made valiant attempts to get more information from G4S but the information that has been supplied by G4S is inconclusive. The Claimant provided some payslips from G4S at today's Hearing. He has not provided payslips for a full year.

Law

5 In dealing with this case today I have considered the *Transfer of Undertakings (Protection of Employment) Regulations 2006*, Regulation 4 of which states as follows:

- “(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
- (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer –
 - (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
 - (b) N/A
- (3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.
- (4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.
- (5) Paragraph (4) does not prevent a variation of the contract of employment if –

- (a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
- (b) the terms of the contract permit the employer to make such a variation.

6 I also considered Regulation 13 of the Working Time Regulations 1998 which states that a worker is entitled to 4 weeks annual leave in each leave year. Regulation 13A states that each worker is entitled in each leave year to an additional period of leave of 1.6 weeks. This makes a total of 28 days. In 2003 when the Claimant was first employed the statutory entitlement to leave was for 4 weeks. The additional 1.6 weeks was added by Amendment Regulations in 2007.

Findings of fact

7 I find that the Claimant has been employed at this site since 2003. It is his case that he has always been paid his full holiday entitlement at the rate of 12 hours for each day. The Claimant does not have a copy of his original contract.

8 The Respondent was given some information during the TUPE transfer process from G4S. An email dated 9 April 2015 from G4S confirmed that the Claimant was employed on a 48 hour contract at a rate of pay of £7.74 and that his entitlement was for 28 days holiday. The holiday year ran from January to December.

9 G4S' own contract provides that an employee would be paid one day's pay as holiday pay based on contracted hours. That pay would not be adjusted if someone worked more hours than their contracted pay within a week. The Claimant did not officially transfer to a G4S contract but remained on the contract that he had with Knightsbridge Security Services up to his transfer over to the Respondent.

10 The Claimant was paid 12 hours pay for each day of his 28 days holiday during his first year of employment with the Respondent. In April 2016 he noticed that his holiday pay was less than expected and raised a query with them.

11 The Claimant raised a grievance on 18 August 2016. The Respondent made enquiries of G4S. Danny Scott, contracts manager of G4S responded on 25 October 2016 to confirm that the Claimant was one of 3 staff that had transferred to G4S from Knightsbridge Security Services and that he was paid 12 hours per day for "*the 4 weeks holidays*". No further details were given. Mr Scott's email was incorrect in a number of aspects – he referred to 3 staff when there were in fact 4 who had so transferred and he referred to 4 weeks holiday when in fact all employees have been entitled to 28 days leave since 2007.

12 Since receiving that email the Respondent has recalculated the amounts due to the Claimant and has paid him additional money in respect of leave. However, it is the Respondent's position that taking what Mr Scott said literally – he is only entitled to 4 weeks (20 days) at the rate of £12 per day and the rest of his statutory entitlement – the 8 days – should be paid at a different, lower rate. The Claimant was told that this

was the outcome of his grievance by letter dated 27 January from Mr Mitchell, Head of HR, who represents the company today.

13 It is here that I turn to the pay information and payslips that the Claimant has brought with him to Tribunal today. He has not provided a full year's set of payslips. However, he has given the Tribunal and the Respondent – pay information for October 2009, November 2009, March 2010, June 2010, July 2010, September 2010, May 2011, August 2011, November 2011, December 2011, January 2012, February 2012, April 2012, October 2012, March 2013, April 2013, June 2013, September 2013, January 2014, February 2014, March 2014, April 2014, May 2014, June 2014, July 2014, February 2015, March 2015, April 2015. They therefore cover every month of the year. These documents were provided by G4S while the Claimant was employed. They are titled "*Work analysis*" and set out each shift worked for the particular month, the hours worked and the pay earned for each shift. On each entry for annual leave the Claimant has been paid for 12 hours. There are no adjustments in December or January as you would expect to see if for example, he is paid 20 days at one rate and the remaining 8 days at another rate. The payslips provided cover all months of the year – even though not of the same year – and there are no adjustments shown. At every entry for annual leave he is paid for 12 hours. Attached to each of these was the corresponding payslip that gave details of gross pay and taxable pay to date, pay for holidays and National Insurance payments. These corresponded with the Work analysis documents.

14 I also considered the TUPE information provided by G4S which does not set out any formula for computing the Claimant's holiday pay. It simply confirms that he is entitled to be paid for 28 days based on a 48 hour contract. The Claimant's contractual hours have always been to work 48 hours which he worked as 12 hours per shift over 4 days.

15 The Respondent's further efforts to get more information from the transferee were met with a rebuff as G4S considered that it has complied with its statutory duty under TUPE. G4S was asked to confirm whether Mr Scott's reference to "the 4 weeks" being paid at a particular rate meant that there is a different calculation for the remaining 8 days of the Claimant's statutory leave entitlement. It refused to clarify or to answer that question. G4S also failed to clarify what Mr Scott meant when he referred to 'the 4 weeks'.

16 I have considered the evidence carefully. The burden is on the Claimant to prove that there has been a breach of the terms of his contract by the Respondent failing to pay him in accordance with the contract he had when he transferred from Knightsbridge to G4S and from them to the Respondent. In my judgment, on balance, he has proved that it is highly likely that he was paid his whole annual leave entitlement of 28 days - at the rate of 12 hour per day. The only matter that could potentially contradict that is Mr Scott's email which refers to "the 4 weeks holidays". If he meant by that that the Claimant was paid 20 days at one rate and 8 days at another rate, there is no evidence in the payslips and pay advice before the Tribunal spanning 7 years, of any instance where the Claimant was paid less than 12 hours pay for every day on which he took annual leave. It is possible that Mr Scott was thinking back to a time when annual leave was only 4 weeks and in his email he is therefore referring to

all of the Claimant's leave entitlement. That is supported by the pay advice and payslips.

Judgment

17 In my judgment, Mr Scott's email was inaccurate in the ways referred to above. He referred to 3 people being transferred and the fact is that 4 were transferred. He referred to "the 4 weeks holidays" as though this were a standard holiday entitlement. He did not refer to 4 weeks out of the leave entitlement. In my judgment the email cannot be relied on to contradict the payslip evidence.

18 It is this Tribunal's judgment that it was a term of the Claimant's contract with Knightsbridge Service Services that his annual leave would be paid at the rate of 12 hours for each day of his leave, for the whole 28 days of his leave. There was no variation of his contract at G4S. He was paid his annual leave at this rate while at G4S.

19 It was not the Respondent's case that it had to change or alter the Claimant's contract for any economical, technical or organisational reason. No such reason has been relied on or referred to in the Hearing.

20 It is my judgment that the Claimant is entitled to be paid his statutory annual leave entitlement of 28 days at the rate of 12 hours per day in accordance with the term set out in his contract with Knightsbridge Services Ltd which has been subject to TUPE transfers to G4S and then to the Respondent. The Respondent is to pay him the arrears that he has claimed and to reinstate this term of his contract. The Claimant's complaint is successful.

21 The Respondent is to pay the Claimant the sum of £142.65 as his remedy.

22 The Respondent is also to pay the Claimant's holiday pay at the rate of 12 hours pay for every day of his 28 day holiday entitlement for every year that he is employed.

Employment Judge Jones

20 November 2017