EMPLOYMENT TRIBUNALS

Claimant: Mr F Chagas

v

Respondent: The London Borough of Enfield

Heard at: Watford (By CVP) **On**: 20 and 21 October 2020

The present video hearing was directed by the tribunal in accordance with the current guidance in response to the Covid-19 pandemic.

Before: Employment Judge Bloch QC

Appearances

For the Claimant: Mr Anyiam, Counsel
For the Respondent: Ms Banton, Counsel

JUDGMENT

The complaint of unauthorised deduction from wages is not well founded and is accordingly dismissed.

REASONS

1. The claimant claims unlawful deductions from his wages pursuant to sections 23 and 27 of the Employment Rights Act

1996 ("ERA"). As clarified at the hearing on behalf of the claimant and as confirmed in the closing submissions on behalf of the claimant, the claim is made on the sole basis of an alleged breach of contract by the respondent. That breach is alleged to be in regard to a failure by the respondent to pay the claimant all his on call hours during which the claimant was available on call for the respondent between the period of his engagement by the respondent, 9 November 2017 to 3 May 2018, regardless of whether he provided his services during the on call hours.

2. At a preliminary hearing held on 18 September 2020 in which the claimant and the respondent were represented by the same counsel who appeared before me today, the issues were stated as having been discussed and agreed between the parties as follows:

   2.1 Should the claimant be paid all hours while he was asked by the respondent to be made available on call between the period 9 November 2017 to 3 May 2018, regardless of whether he worked during the on call hours?

   2.2 Is the claimant owed any unpaid hours, given the fact that the respondent asserts that the time worked during the on call period had already been taken as time off in lieu (TOIL)?

   2.3 After the 200 hours taken by the claimant as TOIL/annual leave, how many hours should be considered as TOIL for the work done while he was on call?

   2.4 The claimant claims he is owed 1675 hours. Is that correct?

Background facts

3. Between 9 November 2017 and 3 May 2018, the claimant provided his services to the respondent in the capacity of Emergency Duty Team (EDT) Manager in its Social Services Department, as an agency worker. The claimant secured that work through an agency known as Hojona Limited ("HL"). The claimant was paid through an umbrella company, known as Sprite Technical Services LLP, which is no longer trading.

4. It is common ground that the claimant was originally contracted to work full time hours of 37 hours per week from 5pm to 12 midnight, Monday to Friday as an employee of HL (which was also responsible for providing holiday or holiday pay) but to provide his services to the respondent as the end-user. His duties principally involved working from home and occasionally going to the office for meetings such as supervision and training meetings. He managed and supervised about four or five social workers all of whom worked mainly from home. These were experience social workers who operated in an autonomous manner so that the expectation of the respondent was that the supervision by the claimant would be "light touch".

5. The claimant's line manager was Ms Sarah Moran who was at the time employed by the respondent as a Head of Service for the MASH and EDT Team from August 2015 to February 2019. MASH is an acronym for Multi Agency Safeguarding Hub. Her role as Head of Service consisted of managing the Emergency Duty Team, MASH and the assessment service. Apart from the claimant she was the only person who gave evidence at the hearing before me.

6. Under the contract between the claimant and HL the claimant was to provide his services as EDT Team Manager (temporary workers) for 37 hours per week at the rate of £34 per hour with an uplift of 25% for working unsocial hours. The claimant was required to work from 5pm to midnight, Mondays to Fridays, ("Core Hours").

7. Under his agreement with the respondent which was entered in to later he was also expected to be available on call from 12am to 9am from Mondays to Fridays and 24/7 during the weekends. The claimant was always required to work at his home address, except where he attend meetings with Sarah Moran or agencies.

8. The agreement between the claimant and the respondent, although having an oral content or origin, was accepted by the parties as evidenced in full by the emails which passed between the claimant and Sarah Moran on behalf of the respondent. It was therefore common ground between the parties that my task was to construe those emails. Given that consensus, it is appropriate for me to quote at some length from the relevant emails.

9. By the claimant's email to Ms Moran dated 23 October 2017, he referred to his base rate as £35 per hour together with 25% unsociable hours at a total of £43.75 which could be rounded up to £44 per hour for easier calculation. He said that the previous model to which he had worked was that the manager would complete a standard week of 37 hours which included nights and weekends. TOIL would be calculated when these hours were surpassed with duties undertaken as required. In Brent he had taken TOIL only once every three/four months.

10. By an email from Sarah Moran to the claimant dated 6 November 2017 she said that she was really glad that they had agreed a pay rate. She was in agreement to TOIL should the claimant go over the agreed 37 hours… "but as discussed it is unlikely that you will be given how the EDT operates." (This sentence is in my judgment best construed by inserting a comma after "be").

11. By email from Sarah Moran to the claimant dated 20 November 2017 she said that:

> "As the EDT Manager I would expect that in an emergency you are called by staff between midnight and 9am if there is something really urgent. I would then need to be notified in the day. The only time I would expect your staff to call you between these hours would be as a result of a serious incident (death of a service user) or that a member of staff is hurt or harmed."

12. By an email from the claimant to Sarah Moran dated 22 November (13:20) he referred to: "On call periods - or days – 00.00 to 9.00 – TOIL to be arranged."

13. By an email of 22 November 2017 (14:54) Ms Moran wrote to the claimant as follows:

> "It feels really important that we agree the issue of money and hours now as this seems to be an issue that keeps coming up…

> You are employed to work 37 hours per week which has been paid at the agreed hourly rate + 25% unsociable hours.
>
> I am expecting that you will be available for work between – 5pm – midnight each evening and on call between 12-9am and you are on call all weekend. Given what I know of Enfield EDT I am not envisaging that the seven hours per evening are going to hours where you are required to undertake work as the EDT SW's [Social Workers] are very autonomous and only call on occasions (I have been on call a lot in the last three months and there are examples of shifts where I am not called at all and am effectively on call and not working). I am therefore of the view that the work you need to undertake to manage the service will not require you to work above and beyond the agreed 36 hours.
>
> There will need to be some flexibility with us as you will occasionally need to be available in the daytime for meetings/supervision but again I would see this as being part of the 36 hour week. If we find ourselves in a situation where you are working over the 36 hours (which I cannot see happening and would need evidence of work undertaken) then I can look at agreeing some toil.
>
> Can you confirm that you are in agreement with the above so we can move forward."

14. The claimant responded by email on the same day [16:40]. Plainly (as Ms Moran said in evidence and I accept) part of that email was a quotation of something Ms Moran had said that included the following:

> "What do you mean by flexible ends? I have no expectation that you should be in during the day once things are up and running and you are not in your induction period? I would expect you to run the service and have autonomy on what you think you need to attend in the day but this post is ultimately an out of hours post and all of the out of hours need to be covered by the team. If you are taking [lots] of toil I have to cover this

> with senior managers who are already working long hours in the day".

15. By an email of 23 November 2017 (11:27:58) the claimant said:

> "Thank you Sarah for your call this morning and clearing our ways of working. I am very happy with the arrangements and want to proceed as agreed.
>
> I have instructed my agency to change the timesheets…. The on call hours will be calculated as TOIL to be taken every 2/3 month in the future."

16. I was taken to various minutes of supervision meetings in the bundle. These covered the period between 28 November 2017 until 19 March 2018. Those supervision notes were relied upon by the respondent to show (as I accept) that TOIL was granted to the claimant on two occasions namely 16 days in January 2018 and 11 days in April 2018. He used these days (as Ms Moran understood he would) to visit "home" in Portugal

17. It was clear from the evidence that no specific calculation was carried out as to the exact number of these days. Ms Moran expressed trust in the claimant. She was aware that he was working hard and when he asked for these two periods of TOIL she granted them. She assumed they represented hours worked by the claimant and did not seek to challenge that those amounts of 16 and 11 days were due in January and April of 2018 respectively. There was no suggestion in the supervision minutes of any complaints about work or any suggestion about periods of TOIL building up beyond the periods that were sought and granted on each of these two occasions.

18. That said, there were times when the claimant did express concern about the amount of time that he was having to spend on the job. So, by email of 5 December 2017 the claimant told Ms Moran that he had had one of the busiest days of his whole life. He was about to collapse and would now need to have rest periods as things were back to normal. The response which he received from Ms Moran was that he could not keep up this pace and she would be working with him "…on Pace and expectations as you have very high expectations of yourself". She then

instructed him not to log on the next day until 4.30pm and to do the bare minimum - "just be available to EDT staff".

19. I find that acting on trust Ms Moran granted the claimant some 200 hours TOIL, represented by the two periods referred to above

20. The relationship between the claimant and the respondent came to an end following an email which the claimant sent to Bindi Nagra, Director of Adult Social Care, on 23 March 2018 complaining about certain issues regarding the service. Ms Nagra later said that she had met the claimant for a catch up. He recognised that his email to her was an emotional response, unhelpful and said he would like Ms Moran to disregard it and move forward.

21. By an email dated 3 May 2018 Ms Moran told the claimant that it was her intention to replace the claimant as the EDT Team Manager "as a result of your behaviour and conduct." That led to an email the same day from the claimant saying that Ms Moran should find her own cover for on call from that day as he could not be on duty for 24 hours, 7 days a week.

22. There followed an email from Ms Moran on the same day stating that she had ended the claimant's placement as of that day and she was not willing to have him continuing his position as EDT Team Manager. She explained to the tribunal that she could not continue the engagement of someone who was prepared to refuse to work that very day.

23. There followed claims on behalf of the claimant for a substantial amount of money representing untaken TOIL. So, by an email dated 9 May 2018 Mr John Clegg from Hojona said that there was a total of 1,675 hours owed in respect of TOIL. It is clear (and indeed that is the claimant's case today) that he was claiming to be entitled to every hour while he was on call even if he did not actually provide actual services during that time. His claim is made up of weeks of 45 hours on call during the week and 48 hours for the weekend giving a total of 93 hours. From that total was deducted the 200 hours which the claimant had been given by way of TOIL leading to the resulting total of 1,675 hours.

24. That claim was strongly rejected by the respondent. For example, on 21 May 2018 Ms Moran wrote saying that TOIL was given as follows:

> "Every 10 weeks work 2 weeks paid leave awarded in recognition of toil. This effectively works out as 1 day per week extra on recognition of extra hours worked."

25. Ms Moran explained in her evidence that this was an ex-post facto calculation of the amount of TOIL which had in fact been granted in January and April. There was no formula but she was simply working back to show how much TOIL had been sought and granted. It amounted to roughly 1 day per week extra pay in recognition for the extra hours worked. On that basis she agreed to pay a further day's wage, ie the Friday, being the next day after the claimant's last day of work.

The law

26. It is not necessary to set out in detail the provisions of s.13 and s.23 of the Employment Rights Act. Briefly, a worker has a right not to have an unauthorised deduction applied to his wages. If the claimant was (contractually in the present case) entitled to the on call payments he claims, there was an unlawful deduction of wages; if he was not so entitled, there has been no unauthorised deduction.

27. Significant, in terms of the way in which this case developed, is the question of how the tribunal should construe the agreement between the claimant and the respondent and in particular the emails which I have quoted above.

28. It is well known that there have been a spate of recent Supreme Court cases dealing with the question of the correct approach towards interpretation of contracts. It is sufficient for me to quote from Lord Hodge in Wood v Capita Insurance Services Limited [2017] 2WLR 1095 (which in my judgment encapsulates the right approach) in which he said:

> "The Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focussed solely on a parsing of the

> wording of a particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

29. While Lord Hodge was there referring to a formal contract, in my judgment the same principles apply, with necessary adjustment, to the construction of the more informal agreement evidenced by the emails in this case.

30. Given the seeming reliance at one stage by counsel for the claimant on an alleged implied term of the contract, it is important to bear in mind another Supreme Court case of Marks and Spencers Plc v B & P Paribas Security Services Trust Company (Jersey) Limited [2016] AC 742 in which the Supreme Court rejected the interpretive approach towards implied terms and insisted on the test of "necessity" for the implication of terms. That was a return to a more traditional, stricter, approach towards the implication of terms.

31. The representatives for the parties kindly provided me with written submissions and they will forgive me for not quoting at length from those, which I have read with care. In brief, the claimant's argument was that on a fair construction of the emails the claimant was entitled to be paid for every hour that he was available for work, whether or not he actually provided services during that period. Mr Anyiam also relied upon the European Court of Justice preliminary ruling in the case of Matzak v Ville de Nivelles. That was a preliminary ruling concerning the interpretation of various articles of the Working Time Directive of the European Parliament and Council. It was not exactly clear how the claimant could benefit from that decision given the acceptance by the claimant (and the respondent) that this was a case of pure contract. Mr Anyiam confirmed that the current case was not under the directive or any domestic regulation or rule flowing from the directive. He stated simply that the Matzak ruking was of general application. Doing the best I could to see how the first submission (claim based solely in contract) could benefit from the Matzak decision, it seemed to me that the claimant might be saying that there was an implied term that the approach adopted by the European Court of Justice regarding on

call working for the purposes of the directive should be implied into the contract between the claimant and the respondent.

32. The relevant (fourth) question in that decision was whether Art.2 of the Directive "must be interpreted as not meaning that stand-by time which a worker spends at home with a duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities to have other activities, must be regarded as 'working time'". That was a case involving firefighters who were required to live in a place where they could respond to calls from the employer within eight minutes.

33. The Court (Fifth Chamber) referred to cases where it had been held that the physical presence and availability of the worker at the place of work during the standby period with a view to providing his professional services must be regarded as carrying out his duties even if the activity actually performed varies according to the circumstances. The Court said that a standby system which requires the worker to be permanently accessible without being required to be present at the place of work, was a different situation. Even if he was at the disposal of his employer, since it must be possible to contact him in that situation, the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as "working time". However, the Court went on to say that the obligation in that case to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the requirement to reach his place of work within 8 minutes were such as to objectively limit the opportunities which a worker in Mr Matzak's circumstances had to devote himself to his personal and social interests. In the light of those constraints Mr Matzak's situation differed from that of a worker who during his standby duty must simply be at his employer's disposal inasmuch as it must be possible to contact him.

34. Mr Anyiam sought to align the current case with that. However (as submitted on behalf of the respondent) this was not a case where the claimant was expected to live at any particular place or placed under time constraints such as in Matzak limiting opportunities to devote himself to his his personal and social interests. There was no evidence of that. (Indeed, it was clear

that when Ms Moran on one occasion became aware of the claimant overworking she told him not to do any further work and to shut himself off from his laptop computer). Accordingly, even had this been a case under the Directive, the Matzak decision would not have helped the claimant.

35. Finally, Mr Anyiam relied upon the fact of the allowance of TOIL in January and April as indicating that there was indeed an agreement that all hours on standby would be "remunerated" by the provision of TOIL. However, such evidence is at best ambiguous as to the existence of such an agreement.

36. On behalf of the respondent, in her written submissions Ms Banton analysed the matter in terms of offer and acceptance but later (in my judgment correctly) emphasised more the question of the correct construction of the emails. In this regard, first, there was nothing expressed in those emails to indicate an agreement to pay for all hours irrespective of whether any work was done and, in particular, all hours on call. She submitted that indeed that opposite was clearly the case when the emails were reviewed. There was a clear distinction made in those emails between work actually done as compared with being available to do work (ie on call). The emails further made it absolutely clear, she submitted, that the on call hours and therefore the TOIL, was expected to be fairly small if not minimal. It is right, given that the claimant began to show himself willing to work very hard, that Ms Sarah Moran adopted what she described as a fairly generous approach towards the granting of TOIL. That in no sense constituted an acknowledgement or acceptance of an entitlement to TOIL for every hour during which the claimant was available for work. In this regard the granting of TOIL of 16 days from January 2018 and 11 days in April 2018 was consistent with the emails indicating that every few months there would be time granted in respect of TOIL. This fitted in with the claimant's need to return to his home in Portugal from time to time. There was nothing to evidence permission to "bank" vast amounts of TOIL, which was simply not referred to by the claimant when he was requesting the more limited number of days off (totalling 200 hours) as he did.

37. Finally, at the core of Ms Banton's submissions was the complete uncommerciality of the claimant's purported interpretation of the contract. It was obvious that the core duties and focus of the

claimant's employment were the 37 hours per week for which he was being remunerated at an additional sum to reflect the unsocial hours involved. To grant additionally what would have amounted to 93 hours of TOIL every week would turn the contract on its head. It would mean that every week he would for being on call be remunerated at two and a half times the amount that he received for his core number of hours.

Decision.

38. Interpreting the contract in accordance with the approach set out by the Supreme Court decisions to which I have referred above and in particular the emails which appear at pages 162, 163 and 175 to 178 of the bundle, I draw the following conclusions:

    38.1 The emails draw a clear distinction between work actually done and time during which the employee was available for work.

    38.2 The main purpose of the contract was for the claimant o work his core hours of 37 hours per week. Those hours were from 5pm until midnight and he was paid an unsociable element of 25 per cent on top of the usual going rate. The emails made it abundantly clear that the on call hours (midnight to 9am - 45 hours per week) and weekends (48 hours per week), totalling 93 hours were subsidiary to the core hours.

    38.3 Ms Moran made it plain in the emails that she expected little if any TOIL to be built up and any such TOIL would be taken at three monthly intervals (approximately).

    38.4 In response to a question which I put to Mr Anyiam he made it plain that the agreement contended for by the claimant was not the result of any amendment which occurred during the course of the employment (for example, when it became clear that the claimant was working perhaps longer hours than expected). He made it clear that at inception of the contract the claimant was entitled to be paid an additional 93 hours per week. This in my judgment is a wholly uncommercial reading of the contract:

(a) It turns the contract on its head making the on call aspect of the contract the principal part of the contract in terms of value to the claimant (in money terms or in time off) and is at odds with what was being communicated by Ms Moran to the claimant at the time;

(b) In that respect, it contradicts entirely the acceptance by the claimant (referred to above) that there would be little TOIL under the contract;

(c) Even more difficult is the contention that any TOIL not actually taken is converted into a very sizeable sum of money, as matters turned out. The claim is for £65,000 and that is after the 200 hours TOIL taken has been deducted. It is difficult to imagine how the respondent would have been prepared to enter in to such a contract and indeed, Ms Moran gave evidence that it would never have been authorised, being way beyond her budget;

(d) While I look primarily at the wording of the emails to divine objectively what the parties intended, in this case the course of dealings does shed some light on what the parties intended and in particular the relatively small amounts of TOIL taken in January and April (small relative to the 93 hours per week which the claimant claims to have been entitled to). This is in my judgment consistent more with respondent's case than that of the claimant. I accepted Ms Moran's evidence that she took the request for TOIL made by the claimant on trust and that the amount of time claimed for TOIL seemed broadly reasonable to her at the time, so she granted those requests.

(e) Finally, as regards the reliance on the Matzak case, in my judgment that case is not relevant to the dispute before the tribunal today.

38.5 As to the question of an implied term, both parties were agreed that this was not a case brought by virtue of the Working Time Regulations or any other statutory provisions. There was in my judgment no necessity for

implying any such term such as contended for by the claimant. Indeed, the contrary is true. Any such term would if viewed against the background of the emails which I have construed have been wholly unreasonable and indeed contrary to the express terms of the contract. In any event, as pointed out by Ms Banton, the Matzak case relied upon by the claimant was more supportive of the respondent's position than that of the claimant, given that there was no evidence in this case of any compulsion regarding where the claimant was to spend his on call hours. He was not required to be at the employer's place of work nor was he obliged to be within a particular physical distance from that place of work. He was much more in the position of someone who was able to manage his time with few constraints and pursue his own interests. Given the absence of an obligation to be physically present at a place determined by the employer and the absence of geographical and temporal constraints, resulting from a requirement to reach his place of work within a certain number of minutes, there was no particular limitation on the opportunities which a worker in the claimant's circumstances had to devote himself to personal and social interests. Indeed, such evidence as there was indicated Ms Moran remonstrating with the claimant and asking him not to overwork and to give attention to his personal interest.

Conclusion

39. In my judgment therefore, the first question posed for decision by me is to be answered in the negative. The claimant was not entitled to be paid all the hours he was asked by the respondent to make himself available on call during the period of 9 November 2017 to 3 May 2018, regardless of whether he worked during the on call hours. That finding provides the answers to the remaining three questions but for the sake of good order, in my judgment the claimant is not owed any unpaid hours (given

that the unpaid hours are all claimed for on the basis of the proposition in question number 1, which I have rejected) and the third question is answered by my acceptance of the evidence of Ms Moran that the hours were considered by her as payment for the work done while he was on call. As to question number 4, the claimant, in my judgment, was not owed pay for 1675 hours or any number of hours beyond that for which he has already been remunerated.

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Employment Judge Bloch QC

Date: 2 December 2020

Sent to the parties on: .

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For the Tribunal Office