Case Number: 1301724/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr E Bah	v	(1) Security Guards UK Limited (2) Midlands Payroll Options Limited (3) SGUK Limited

Heard at: Watford **On**: 12 September 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr O Matthew, Representative

For the Respondents: No appearances and not represented

JUDGMENT

(1) The claimant is entitled to the sum of £21,569.25 by way of unpaid wages (subject only to the deduction of income tax as required by the *Income Tax (Pay As You Earn) Regulations* 2003/2682 and national insurance contributions).

(2) The claimant is entitled to the sum of £1,503.36 as compensation under section 38 of the Employment Act 2002.

REASONS

Introduction; the claims which were before me

1 The claimant claims (in outline: see further below) unpaid wages and

compensation for a failure by his employer to give him a statement of his terms and conditions. The claim as originally made started to be heard by Employment Judge Lewis on 28 March 2018. He then adjourned the hearing having heard no evidence and having made no findings of fact, as he recorded in a subsequently-issued casement management discussion document in which case management orders were made. In short, the claim appeared to have been made against the wrong respondent, since the claimant's employer appeared to Employment Judge Lewis to have been what is now the third respondent, SGUK Limited. The first respondent had filed a response, but it was filed out of time and without an application for an extension of time or any reason given why it was out of time. The first respondent was therefore barred from participation in the proceedings except to the extent permitted by rule 21(3) of the Employment Tribunals Rules of Procedure 2013, namely:

> "The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

2 The first respondent did not attend the hearing of 28 March 2018. Employment Judge Lewis ordered that the claim form was served on what are now the second and third respondents. Neither of them responded to the claim (at all), and they neither appeared nor were represented at the hearing before me on 12 September 2018.

3 The ET1 claim form contained, in box 8.2, this statement of the reasons for the claim (the quotation, as with all other quotations below, is a faithful repetition of the original):

> "Since I have started working for this company from 21 August 2015 I have made several requests including my monthly payslip, pension scheme contribution and holiday pay, but it has always been push forward and backward and kept on saying that they will get back to me and never did. However, I sought for advice from my union Unite, and only received my first pay slip after 18 months being with the firm; and as for holiday pay and pension scheme nothing at all. I then came to realised also nothing has been itemised as to tax payments and deduction and judging by the amount of hours I do work and compared to the net pay amount of 715 pounds, it didn't seem to tally at all. I also rang the tax office to find out whether I have been registered with the firm and yes it was confirmed but could not indicate or verify what hours I have been working for the firm. I have emailed the company and made a written request but to no avail I have had no response from them. I have had no holiday pay and only so far received 2 payslips in almost 2 years. I met one of the managers to discuss the whole issue but all he suggested was that; I should sign on with the tax office to receive some form of benefit and then leave my ongoing situation as it is and that which I found a bit unethical and it seemed to me it is one of this company's code of

bad practice. I feel threatened to go to work even when I am not feeling well, and always threatens to deduct my money for something unreasonable. I am not enlisted in a work pension scheme with this company and as a result my pension contributions has stalled since August 2015. No itemised payslips and no holiday pay at all, even though I work a 48 hours week and in some instances up to 60 hours a week. Also I have been fully ignored since I raised a grievance from June the 1st, and in the meantime they have reduced my working hours from 4 days a week to 3 days a week on a 12 hours shift."

4 At the hearing of 28 March 2018, Employment Judge Lewis gave the claimant permission to amend the claim to include a claim of unpaid wages up to and including 24 November 2017. At the hearing before me on 12 September 2018, I gave the claimant permission to amend the claim further, to include a claim for unpaid wages from 25 November 2017 to the day before the date of the hearing before me, i.e. 11 September 2018. I state my reasons for permitting that amendment in paragraph 38 below.

5 I heard oral evidence on oath from the claimant. He had made a short witness statement, which I read. He gave me his original documents: he had not made a copy of any of them. Having (1) read the claimant's witness statement, (2) heard oral evidence from the claimant and (3) seen those original documents, I made the following findings of fact.

The facts

6 The claimant was employed by the third respondent, SGUK Limited, on 21 August 2015. He was employed by the third respondent from then onwards until the date of the hearing before me on 12 September 2018.

7 While the first respondent claimed in its response to the claim (which was filed late) that there had been a transfer of the claimant's employment to the second respondent in or about April or May 2017, and that that transfer was a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 ("TUPE"), there was no evidence before me of such a transfer. In addition, on 11 July 2017, Ms Jenny Round of "Security Guards UK" sent to the claimant an email requiring him to attend first aid training on the following day, 12 July 2017. The email contained a statement that it was sent by "SGUK LTD", giving the company registration number as 7486670. That email therefore showed that the claimant's employer in July 2017 was the third respondent, and was consistent with the proposition that there had been no transfer under TUPE of the claimant's contract of employment from the third respondent to the second respondent.

8 On 14 November 2016, the claimant wrote to the third respondent's HR department: "Could you please let me know how much holidays I have accrued and how do I go on to book it; and in the meantime could you please send me

copies of my pay slips."

9 On 11 May 2017, the claimant received his first pay slip for his work done for the respondent. It was for the month of April 2017 and stated that he had been paid £720 gross. It was headed "Security Guards Uk".

10 On 1 June 2017, the claimant emailed the third respondent in the following terms:

> "FORMAL GRIEVANCE
>
> Dear Sir or Madam
>
> I believe you will agree that I am one of your employees, and as such I am therefore raising a grievance on the following issues that I am aggrieved over:
>
> • I have not received any statutory holiday or holiday pay from you since I joined the company from september 2015, and I am owed at least a 40 days accrued holiday and payment for this holiday. I understand that I am entitled to 28 days holiday a year if I work full time, pro rata if I work part time, but certainly not none.
>
> • I have not been receiving payslips of every month from you in order to show my earnings and contribution. My understanding is it to be a legal requirement that I receive an itemised payslip to show my pay, deduction etc.
>
> • I have not been receiving any workplace pension from you and that which I should have been provided. My understanding it is the law to arrange a workplace pension for me if a company pension scheme does not exist. I appear to be in no such scheme.
> Please arrange a formal grievance hearing that I and my chosen work colleague or Trade Union Official can attend to discuss my concerns in more detail."

11 On 2 June 2017, the claimant received a statement of his pay for the month of May 2017. It was headed "Midlands Payroll Options" and was for £720 gross.

12 On 11 July 2017, Ms Round sent the claimant the email to which I refer in paragraph 7 above. The claimant was unable because of illness on 12 July 2017 to attend the first aid training to which that email related, and instead he attended the training on 17 July 2017, from 8am to 4pm.

13 In the meantime, on 16 July 2017, the claimant filed his ET1 claim form in these proceedings. It was stamped as being received on 19 July 2017 by the Birmingham Regional Office of the Employment Tribunals. On 25 July 2017 it

was sent to the first respondent, at the address of the third respondent, i.e. Pearl House 445, Dudley Road, Wolverhampton WV2 3AQ.

14 The tribunal file showed that Day A for the purposes of an extension of time by reason of ACAS conciliation (under section 207B of the ERA 1996) was 16 June 2017 and Day B was 16 July 2017.

15 On 28 July 2017, the claimant was suspended by the respondent without any reason being given to him for it. At 08:54 on that day, he emailed "control@securityguardsuk.com" in the following terms:

> "Dear Sir or Madam
>
> I would like to receive details of my written contract, as I should have received one by now after 23 months in employment with the company. What does it explain regarding suspension and pay. I urgently require this information if you have not got them available."

16 On 31 July 2017 a person called "Shane" of "Midlands Payroll Options" called the claimant's trade union representative, Mr Richard Gates. Mr Gates then (at 15:47) emailed the claimant in the following terms:

> "Hi Mr Bah,
>
> I have just spoken to a guy called Shane at Midlands Payroll Options which he informs me is the company you tuped over to in March 2017, and of whom you are now employed by.
> He informs me you have a copy of your contract which was previously with Security Guards UK, however if you do not have a copy of it, he said if you write to him requesting it, he will provide this to you, and you can get this to me ASAP.
> I also asked if they have given you any holiday since you joined them in March, bearing in mind it is now nearly August, his reply was that YOU have not requested any?
> I suggest you put your request for holiday in ASAP."

17 The claimant's response, sent at 16:51 on the same day, was in these terms:

> "Hi Richard,
> Sorry to bother you and is he saying that the company I was employed by before March 2017 was Security Guards uk and not that I am with a different company by the sounds of it? Because I am not aware of any new company taken over or a name change or them having to be declared bankrupt. I am still reporting to Security Guards uk and that's why I am baffled by his explanation."

18 On 10 August 2017, Mr Gates wrote to "control@securityguardsuk.com":

"Hi
I am trying to contact someone who can advise me of my Unite member Mr Bah current employment situation?
My name is Richard Gates Regional Officer for Unite the union based at our Luton district office.
I understand from Mr Bah he is currently suspended for work, but that appears to be all he does know!
I have a number of questions relating to this suspension, which I would appreciate some answer to:

1. Why is he currently suspended from work?
2. Why has he not been sent a letter stating the grounds of this suspension and the conditions of suspension as stated in the ACAS code of practice?
3. Is he currently suspended on full pay as stated should be the case in the ACAS code of practice, as this suspension should not be a punitive measure.
4. Can you confirm he is suspended due to an allegation? If so when will the investigation in to this allegation be completed?

I am not sure if you will respond to this email, however I have copied my Unite member Mr Bah in to this email so he can print this out and use this as evidence of his unions attempt to get answers to these questions from his employer."

19 There was no response to that email.

20 In a letter from Her Majesty's Revenue & Customs ("HMRC") dated 18 August 2017 to the claimant, it was recorded that HMRC had been told by the third respondent that the claimant had been paid £8,294.00 for the tax year ended 5 April 2017, and that he had paid no income tax during that year.

21 The claimant's records showed that he had in fact been paid £16,400 before deductions for that year, and that the third respondent had deducted a total of £2,050 in that year. For the months of April 2017 to June 2017, the claimant received respectively the sums of £1360, £1440, and £1440, from which were deducted the following sums respectively: £170, £180 and £180. I accepted the claimant's evidence that he had not been paid for the training day that he had attended on 17 July 2017.

22 The claimant had sought but not been able to find alternative employment since July 2017.

23 On 15 August 2018, Mr Kelvin Josef of Obaseki Solicitors, wrote to the tribunal in the following terms:

> "We apply for permission to amend the claim in case number: 1301724/2017 to include unfair dismissal. The Claimant was suspended by the Respondent on the 28th July 2017 without pay. Whilst Claimant continue to be on suspension without pay, the Claimant have't received any further correspondence or communication from the Respondent in respect of his suspension.
>
> Claimant has made several attempts by way of email and letter to contact the Respondent in order to ascertain whether he has been dismissed from his employment or remains on suspension. The Respondent has refused and ignored all reasonable attempt by the Claimant to make contact.
>
> It is a common ground and trite, that any period of suspension must be reasonable, we therefore consider that the unreasonable period in which the Claimant has been on suspension without pay amount to a dismissal.
>
> We respectively submit that the Claimant continued suspension without pay is grossly unreasonable and is tantamount to dismissal pursuant to all known law and conventions, we therefore respectfully request the Tribunal to allow an amendment to include unfair dismissal."

24 Employment Judge Lewis's decision to refuse that request to amend was notified to Mr Josef on 1 September 2018.

The applicable law

The law of unfair constructive dismissal

25 The word "dismissed" in the law of unfair dismissal is defined by section 95 of the Employment Rights Act 1996 ("ERA 1996"). If there is no express dismissal within the meaning of section 95(1)(a) of that Act, then, in a situation such as that in issue here (where there was a contract which was not a limited-term contract), there can be a dismissal only if the conditions in section 95(1)(c) of that Act are satisfied. In that regard, the position is as stated by Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 761, at 769A-C:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he

> continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

26 It was said by Asquith LJ in *Pickford v Howard Tool Co* [1951] 1 KB 417 that an unaccepted repudiation "is a thing writ in water and of no value to anybody".

27 The Court of Appeal held in *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668 that an acceptance of a repudiation must be clear and unequivocal.

28 In *Hogg v Dover College* [1990] ICR 39, at pages 42E-43A, the Employment Appeal Tribunal said this:

> 'Up to 31 July, Mr Hogg, well and sympathetically treated by the respondents, was Head of History; he was employed to teach full-time at a full salary, plus such allowances to which he was entitled. On 31 July, he was told that he was no longer Head of History; that he would not be employed full-time and he would come down to 8 periods a week plus General studies and Religious Education; that the salary he would receive would be exactly half the new scale which superceded [sic] the Burnham scale.
>
> It seems to us, both as a matter of law and common sense, that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the respondents, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a contract, but you simply cannot hold a pistol to somebody's head and say henceforth "you are to be employed on wholly different terms which are in fact less than 50% of your previous contract". We, unhesitatingly, come to the conclusion that there was a dismissal on 31 July; the appellant's previous contract having been wholly withdrawn from him. Even if we were wrong about that, we would take the view that there was a constructive dismissal under sub-section 3 because the Tribunal found, and this is also a matter of law, that there were fundamental changes in the terms offered to the appellant - I will not repeat how fundamental they were. The question then arises whether he accepted the respondents' conduct as a repudiation of their obligations to him or whether it has to be said that by his conduct there was, in the event, no acceptance or indeed, an affirmation. Of course, one asks: affirmation of what? It could only be of a totally different contract. This is not the affirmation of the continuance of the contract where one term has been broken; this is a situation where somebody is either agreeing to be employed on totally new terms or not at all. I have already drawn attention to what happened - his Solicitors wrote on 4th September alleging that he had been dismissed; on the 7 they wrote again, in the terms which I have already read out, saying that he would accept the new terms without prejudice to his claims and on

19 October he issued his IT1. When he dealt with the matter, in evidence, he said:

> "I do not think I could have worked full-time when I came back after illness. I worked 11 periods at first and then after January 1986, went up to 16 periods. When I received the letter of 31 July, there had been no previous discussions on those points. I took the view that I had been sacked from Dover College and offered a part-time job. The offer made to me was marginally better than receiving Social Security benefits; by taking the part-time employment, that did not alter my view that I had been dismissed".

We wholly concur with that summary of the situation. It seems to us to represent the legal reality of what in fact happened.'

29 That approach was approved by the Court of Appeal in *Jones v Governing Body of Burdett Coutts School* [1999] ICR 38, at page 42, by Robert Walker LJ, with whom Morritt and Stuart-Smith LJJ agreed.

A discussion about the case law concerning constructive dismissal

30 I doubt that it is ever right to say that an employer has unilaterally, by imposing new terms on an employee, expressly dismissed the employee. In my view, it is right to say instead only that the employer has repudiated the terms of the contract, and that the employee might accept that repudiation and then work on under the new terms, but that in that case there has been a constructive dismissal, i.e. a dismissal within the meaning of section 95(1)(c) of the ERA 1996, and not an express dismissal within the meaning of section 95(1)(a) of that Act.

31 In any event, the imposition of new terms is different from a simple continuing suspension of an employee without pay. In the latter situation, in my judgment, there is a continuing fundamental breach of the contract of employment. It might be said that it is a repudiation of the contract also. But in any event, it is only if that conduct of the employer is used by the employee as the justification for ending the contract of employment, by the employee resigning in response to it, or otherwise doing something which shows that the employee is ending the contract because of that conduct, that the contract ends. It is often said that it is a repudiatory breach of contract which justifies the employee resigning and claiming constructive dismissal, but that is probably because the language of acceptance of a repudiation is the most convenient way to describe what happens when the employee resigns.

32 In any event, the employee's acceptance of the employer's conduct as justifying the termination of the contract must (see *Norwest Holst v Harrison*) be clear and unequivocal.

The calculation of wages

33 The calculation of an employee's pay for the purposes of the ERA 1996 is dealt with in sections 220-224 of that Act. Section 222 provides:

> "(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.
>
> (2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration."

34 The "calculation date" is defined for the purposes of various provisions of the ERA 1996 by section 225 of that Act, but there is nothing in that section which applies to a claim of unpaid wages under section 23 of the ERA 1996.

Holiday pay and entitlements

35 The right to paid holidays arises under the Working Time Regulations 1998, SI 1998/1833. There is a right to accrued holiday pay only if the employment ends (see regulation 14). Otherwise, there is a right to compensation only if the employee makes a claim for such in respect of a refusal to allow the employee to take holiday and does so within 3 months of the refusal to permit the employee to take the requested holiday, unless it was not reasonably practicable to make the claim in that regard, in which case the claim must have been made within a reasonable period of time after the expiry of the 3 month period.

Failure to give an employee a statement of terms and conditions

36 Section 38 of the Employment Act 2002 provides:

> "(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.
> (2) If in the case of proceedings to which this section applies—
> (a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change),
> the tribunal must, subject to subsection (5), make an award of the minimum

amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—
(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,
the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—
(a) references to the minimum amount are to an amount equal to two weeks' pay, and
(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

37 Schedule 5 to the Employment Act 2002 includes a reference to section 23 of the ERA 1996.

The amendment of the claim

38 At the hearing of 12 September 2018, Mr Matthew pressed the application to amend the claim to claim unfair dismissal. I refused that application because in my view, the proposed new claim had (for the reasons stated in paragraph 39 below) no chance of success. I did, however, after discussion with Mr Matthew, permit the claimant to amend his claim to include a claim for unpaid wages from 25 November 2017 to 11 September, i.e. up to and including the day before the date of the hearing before me. That was after I had discussed with Mr Matthew the effect of the case law to which I refer in paragraphs 25-29 above. In allowing the application to amend to make a claim for unpaid wages from 25 November 2017 to 11 September 2018, I applied the reasoning of the Employment Appeal Tribunal in *Prakash v Wolverhampton City Council* UKEAT/0140/06.

My conclusions

39 In my judgment, the claimant's employment continues. While the respondent is in fundamental breach and in repudiation of the claimant's contract of employment, so that the claimant could now resign and make a claim of constructive dismissal which in my view would be bound to succeed, the

claimant has not accepted that fundamental breach or repudiation and resigned in response to it. There has not been (including in the words set out in paragraph 23 above) a clear and unequivocal acceptance of the (to use the common shorthand) repudiatory breach by the respondent which continues.

40 The claimant has been ready and willing to work for the respondent. He has in fact sought other work, but he has been unable to find it.

41 The claimant is accordingly entitled to unpaid wages. In the circumstances, he is entitled to pay calculated by reference to the final three months during which he received full pay, namely the months of April, May and June of 2017. Thus, he is entitled to pay at the weekly rate of £(1360 + 1440 + 1440)/13 = £326.15 for a 48-hour week. That is £6.79 per hour. That is below the national minimum wage, which was until 31 March 2018 £7.50 per hour and has since then been £7.83 per hour. All of my calculations below are therefore based on the national minimum wage.

42 The claimant was also underpaid in July 2017 because he was not paid for 8 hours of training provided to him on 17 July 2017.

43 The claimant is therefore entitled to gross pay (i.e. before the deduction of income tax and national insurance contributions) for the period from 28 July 2017 to 11 September 2018 inclusive plus 8 hours at the rate of £7.50 per hour for 17 July 2017. Thus the claimant is entitled to

43.1 247/7 x 48 x £7.50 for the period from 28 July 2017 to 31 March 2018 inclusive, i.e. £12,702.86; plus

43.2 164/365 (there being 164 days from 1 April to 11 September inclusive) x 48 x £7.83 x 365/7 (£19,597.37) which is £8,805.39; plus

43.3 8 x £7.50, which is £60.

44 Thus, the claimant is entitled to pay in total of £21,569.25. That should be paid direct to the claimant, subject to the deduction of income tax as required by the *Income Tax (Pay As You Earn) Regulations* 2003/2682, and subject to the deduction of national insurance contributions. The income tax and national insurance contributions should of course be paid to HMRC.

45 In addition, there was a flagrant disregard by the third respondent of the obligation to give the claimant a statement of his pay and conditions pursuant to section 1(1) of the ERA 1996, and it was not remedied despite the claimant asking for it to be so. In my judgment the sum of 4 weeks' pay is the right amount to award under section 38 of the Employment Act 2002. That, calculated by reference to the national minimum wage of £7.83 and a 48-hour week, is £1,503.36.

46 The claimant's claim for holiday pay could not succeed. The claimant claimed accrued holiday pay. If he had taken holiday and not been paid for it then he would have been entitled to make a claim for that non-payment. However, he had simply not taken any holiday before his suspension. He could not claim accrued holiday pay because his employment was continuing.

47 I could not see any basis on which I could give a remedy for the failure by the third respondent to pay what are commonly called "stakeholder" pensions. It appeared to me that that was not within my jurisdiction.

48 Nevertheless, the claim otherwise succeeds.

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Employment Judge Hyams

Date_____13 September 2018_____

JUDGMENT SENT TO THE PARTIES ON

.....24 September 2018.....

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FOR THE TRIBUNAL OFFICE