EMPLOYMENT TRIBUNALS

Claimant: **Mr D Wraga**

Respondent: **Tesco Stores Limited**

Heard at: London South **On: 21 June 2022**

Before: EJ England

Representation
Claimant: Miss S Sullivan, Solicitor
Respondent: Miss Kaye, Counsel

RESERVED JUDGMENT

1. The claim for automatic unfair dismissal does not succeed and is dismissed.

2. The claim relating to holiday pay does not succeed and is dismissed.

3. The claim for an unlawful deduction of wages (sick pay) does not succeed and is dismissed.

REASONS

Introduction

1. By an ET1 filed on 11 May 2021, Mr Wraga filed his claim, ticking the boxes for unfair dismissal and pay claims relating to notice, holiday and arrears of pay. His ET1 went on to explain those claims, although without significant detail. He clarified that the case for unfair dismissal was brought under section 104 of the employment rights act 1996.

2. The Respondent defended all of the claims and made no admissions whether there had been any assertion of a statutory right.

3. By the time of the trial the claims remained unclear. There had regrettably been no active case management and only a set of standard orders sent out by letter dated 30 November 2021, which included the standard directions for schedule of loss, exchange of documents and witness statements.

4. A schedule of loss had been filed [147] but this also did not assist much in providing clarity. It contained no claim for notice pay and set out the basis for the unfair dismissal claim in broad terms. For the pay claims it simply said “the Claimant is owed sick pay in the amount of £652 net” and then for holiday pay “the Claimant had 10 days annual leave outstanding in the amount of £692 net”. The Claimant had also filed a witness statement by the time of trial and this also in my view did little to provide clarity as to the basis of the claims. For example sick pay was dealt with in very broad terms at paragraph 4 and it was unclear which communications were relied upon for the allegation relating to an assertion that a statutory right had been infringed. I do not criticise the Claimant for this lack of clarity but it is necessary to explain the background to the claims.

5. Therefore at the start of the hearing in front of me I sought to clarify the issues and claims with the parties. In respect of holiday pay, Miss Sullivan explained that the Claimant’s claim was based on him having worked five days a week even though his contract provided for less days and it was said that his entitlement to holiday leave should be based therefore on five days a week. Applying that principle, less the leave he took, was said to provide for the 10 days of the holiday pay claim. The Claimant relied on this claim as an unlawful deduction of wages claim and/or a breach of contract.

6. The sick pay claim was explained as an unlawful deduction of wages claim and it was agreed that the Claimant was off sick from 2 February 2021 until 16 February 2021. Although the Grounds of Resistance referred to different dates at paragraph 6 this was explained to be an error. The claim was that he should have been paid sick pay in respect of the 5 days per week in which he did not work for each week of sick leave rather than two days. The Respondent clarified that although there was reference to an overpayment in the Grounds of Resistance this was not relied upon to offset or justify any underpayment of wages if there was one.

7. The claim of automatic unfair dismissal was clarified as relying on s.104(1)(b) ERA 1996 and there was an allegation of an infringement of a relevant statutory right relying on s.104(4)(a) in respect of wages generally referring to his sick pay and holiday pay and (d) in respect of holiday pay and the working time regulations.

8. The allegations of an infringement were said to have occurred on four occasions. Firstly, 23 March 2021 in a discussion with HR, secondly by contacting ACAS on 24 March 2021, thirdly on 12 April 2021 in a conversation with Mr. Stuart Smith and finally on 27 April 2021 in a conversation again with Mr. Smith.

9. The Respondent provided an opening note for the purposes of trial and this eventually made its way through the tribunal system and came to me during lunchtime. In any event Miss Kaye explained that the Respondent conceded that on 12 April 2021 the Claimant had alleged an infringement of a relevant statutory right in respect of an underpayment for working a shift on the 22 February 2021 [122], although this did not relate to sick pay or holiday pay. By the time of closing submissions no further formal admissions were made but Miss Kaye sensibly recognised that the contact with ACAS was more likely than not an allegation that a relevant statutory right had been infringed.

10. The papers provided for trial comprised a bundle of 222 pages. This was well put together with bookmarks, a hyperlinked index and even page numbers that matched between the electronic and printed versions. References within this judgment in square brackets are to pages of that bundle. I received and a witness statement from the Claimant and a witness statement from a Mr Varadha of the Respondent, who was a grocery team manager and Claimant's line manager.

11. After finishing evidence and submissions at 4.45pm there was insufficient time to deliver my judgment and it therefore had to be reserved.

Findings of Fact

12. The parties gave evidence about a number of matters and I will not make findings on all points. Although I have considered all of the evidence I focus my findings on those matters relevant to the issues in question.

13. The Respondent is the well known and very large supermarket chain and the Claimant was employed as a customer assistant in the Welling store from 19 November 2020 until the effective date of termination on 15 May 2021.

The Claimant's Contract:

14. The terms of the Claimant's contract emerged in the course of the trial as a very important issue despite not being identified as such at the outset. The importance centred around a question of what were the terms relating to the days on which the Claimant was contracted to work; principally was it 2 days or 5.

15. A letter of 23 November 2020 [108] offered the Claimant:

    "…the temporary position of Customer Assistant - Replenishment working flexible hours at WELLING store for a period of 14 weeks.

    Working flexible hours means you will be expected to work your core contracted hours of 14.00 each week and any flexible additional hours when required with a minimum of 24 hours notice. The times and days that you are available to work the flexible additional hours under normal circumstances were discussed and agreed at your interview. Your core hours and flexible additional hours added together will be a maximum of 36.5 hours per week. Details of your hours are attached to this letter and form part of your Terms and Conditions of Employment."

16. Further details were explained in the letter [110] as:

    "The Company needs you to maintain the flexibility you have specified. If you are consistently unable to work your flexible additional hours when you have been asked to, this may be considered a breach of your Contract of Employment and could result in disciplinary action up to and including dismissal. If you experience ongoing difficulty in working your flexible hours, please speak to your Line Manager and they will try to support you in changing these where possible."

17. A document headed terms and conditions of employment [111] replicated the description of core and flexible hours. Under a heading "changes to your terms and conditions of employment" it was said "any changes to the details provided in this document will be communicated to you in writing within one month after the change if the company needs to change your contract of employment we will always consult with you for a minimum of four weeks and give you notice of the change is taking place".

18. Although the Claimant's employment was originally intended to end on 13 March 2021 this was extended to 11 May 2021 [112].

19. In cross examination (just before morning break) the Claimant stated that he did not think the contract stating two days of core hours was correct because he had made a verbal contract with his employer for five days. He accepted that this was not part of his pleaded case nor did it appear in his witness statement. Later in his evidence he said that he recalled making the contract for five days because he was worried about paying his rent and needed the increased hours, further that he did not raise a problem because he didn't want to be a problematic worker, although accepting that he did later raise issues about his holiday pay and sick pay.

20. I do not accept that there was a verbal contract made for five days work. Although recognising that the Claimant was a litigant in person when he filed his ET1 and he did not put anyone's details under the representative category, his witness statement at paragraph 6 explained that he had taken advice from the CAB and spoken to the employment advisor Miss Sullivan back in March 2022. Even accepting that a litigant in person may well not set out the full factual or legal basis for a claim in their ET1, it remained surprising that such a fundamental point regarding a verbal contract that provided over double the amount of contracted days than his written contract was not mentioned in his witness statement, even if prepared without any legal assistance. More pertinent though was that there were no contemporaneous documents to support the idea of an oral contract. There was nothing from the employer and there was no reference made by the Claimant before his oral evidence in trial.

21. The Claimant rightly pointed out that the shifts he in fact did complete [123 to 125] for the majority of his employment were 5 days of work, particularly for the period up until around March 2021. In my judgement that is not enough to evidence an oral contract and moreover is consistent with the terms of the written contract that there would be two days core hours and additional hours worked beyond those when available. In addition, the Claimant was vague in his evidence as to how this oral contract was formed and I also note the terms and conditions relating to changes to terms which provided for changes to be in writing, which had not occurred. In my judgment the most likely explanation is that assurances were given to the Claimant that it was likely he would be provided with more than two days of work, as the contract envisaged, but this did not form a separate or varied contractual term beyond what is set out in his written documents.

22. In closing submissions the notion of an original oral contract was not pursued. Instead it was said that the contract was varied by conduct and practice and in reality had been varied to five days a week. No particular legal authority was relied upon. This very fundamental issue concerning the Claimant's terms and whether there had been a contractual variation was not raised in the ET1, nor identified in the initial discussion of legal issues. Nevertheless I have considered the matter and have considered in particular the cases of *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB) (whether the Claimant's continued discharge of his contractual obligations is "only referable" to an acceptance of a purported variation) and *Solectron Scotland Ltd v Ms G N Roper & Others* [2004] I.R.L.R. 4 ("only referable" and the extent to which custom and practice is capable of varying contractual terms).

23. I do not consider that there had been a contractual variation. I accept that for the majority of the Claimant's working time he was working more than the two days that his contract specified as core hours but that increase is consistent with the terms of his contract that it would comprise core hours and what was described as flexible additional hours. It is not only referable

to a variation. I note that the Claimant was employed over a relatively short period of time and therefore looking at custom and practise for a variation does not provide a particularly long or convincing review period.

24. There was no contemporaneous documentation to suggest a variation, other than the shift patterns, or documentation to suggest that the Claimant felt there was a variation, or was aggrieved that he did not have the variation confirmed despite pursuing complaints about other aspects such as his pay. I accept that the Claimant is unlikely to have set out a case about varying his contract with the nuances of legal principles and also that when presented with five days work he would have no motive necessarily to complain that he had not been given a contract to reflect those five days work. However, when one looks at what happened when less than five days work was provided it does not appear from either party that there had been a contractual variation. There is a series of WhatsApp messages towards the end of the bundle and the final page [222] is an undated exchange between the Claimant and his line manager. Although undated this appears in the bundle as if the exchange was after 27 May based on [221]. That chronology cannot be correct because page 222 reads very clearly as if the Claimant was still employed whereas he was not after 27 May 2021. The date of the exchange is not key but what is insightful is the Claimant's message at point 3 where he writes "I've been given three shifts a week in the next weeks would it be possible to get four?". Nothing in his question nor the reply from his line manager suggests a variation of contract but rather a position consistent with the express written contractual terms. In addition, within the other messages that precede that page, starting from 25 April 2021, there is in my view nothing to suggest a variation of contract had occurred there either.

25. Miss Sullivan expressed surprise at the terms of the written contract and argued that they needed to be rectified, hence it was evident that they did not accurately represent the terms. I can understand from an employee's point of view that the contractual terms maybe seen as unfavourable. Although expressed as "flexible additional hours" the offer letter nevertheless states that the employee will be expected to work them and the terms that follow state that if the employer is consistently unable to work the flexible additional hours then that may be a disciplinary matter and could result in dismissal. Notification of the requirement to work the 'flexible' hours was a minimum of only 24 hours notice.

26. However, this organisation of hours can be classified as 'non guaranteed overtime', a category of overtime recognised in various cases (see for example *Tarmac Roadstone Holdings Ltd v Peacock and ors* [1973] ICR 273; *Bamsey and ors v Albon Engineering and Manufacturing plc* [2004] ICR 1083). The merits and a critique of this arrangement was not the subject of the trial before me. An employer that uses such a policy would likely explain that it reflects the business need of responding to variations in custom, particularly in the retail sector and at Christmas time, that it enables

staff to be employed in the first place and I note that Tesco at least state in their letter of employment that if there is ongoing difficulty in working the additional hours that staff should speak to their line manager who will try to support them in changing the hours if possible. I do not consider that there was a variation of terms and conclude that the increased hours the Claimant worked reflect his written contract for two days of core hours plus additional non guaranteed overtime.

The facts continued:

27. The Claimant was off sick from 2 February 2021 until 16 February 2021 with COVID symptoms. He was paid sick pay on the basis of his two days of core hours. Around 23 March 2021 the Claimant became aware that his holiday entitlement was based on working two days a week whereas he felt that it should have had more based on five days a week. He contacted HR at the Respondent to discuss this issue.

28. After taking advice from Miss Sullivan at the CAB he commenced the ACAS early conciliation process. He contacted ACAS on 24 March 2021 and was issued with his early conciliation certificate on 27 April 2021.

29. On 12 of April 2021 and after discussion with his line manager, the Claimant had raised a query on an official document named “wage queries form” about not being paid for a full nine hour shift on 22 February 2021. That was swiftly rectified and by the next day he had been paid for the remaining time.

30. The Claimant’s witness statement at paragraph 12 refers to a discussion on 27 of April 2021 and says that he was told on that day “the issue” (which I read as relating to his query on holiday entitlement) was closed. He does not say that he raised a complaint that his statutory rights had been infringed.

31. The witness statement of Mr Varadha outlines that part of his role was a continuing review of staff numbers against business need. He explains that some staff on temporary contracts were let go at Christmas due to a reduced need, some staff such as the Claimant were kept on and their contracts extended as a result of other staff who were isolating or absent due to COVID-19. He further explains that over a period of weeks before the end of the Claimant’s employment that he alongside the store manager Mr. Smith had looked at how many hours of staff time were needed against the business requirements and the conclusion was that the store was over contracted, i.e. had allocated an excess amount, of approximately 400 hours [135].

32. A scoring process was undertaken and out of three categories the Claimant received the maximum favourable points for two categories but the minimum for one (absences).

33. After the scoring process Mr Varadha informed the Claimant on 29 April 2021 that his temporary contract would not be renewed. Although a final date of 11 May had been stated, when his contract was extended his notice requirements meant that he would be employed until 15 May 2021.

34. By a letter of 29 April 2021 sent by Mr. Smith, the dismissal of the Claimant was confirmed and it was stated "we have reviewed our current trade and absence projections as a result of the COVID-19 pandemic and due to this outcome we have taken the difficult decision to end your temporary contract" [132].

35. Mr Varadha further explains that all of the relevant temporary workers went through the same process at the time and that others also had their contracts ended either at that time or at a very similar time. There is a series of letters with names redacted that show other staff contracts ending in line with Mr Varadha's evidence [173-178].

Conclusions on the issues

36. I incorporate the legal principles into my consideration of the issues where relevant.

Sick pay

37. It was agreed that the Claimant had been paid the correct amount of sick pay in respect of the core hours that he had missed due to sickness absence. The claim was based on an assertion that his sick pay should have covered 5 days per week because that reflected his accurate contractual position.

38. In light of my finding above that the Claimant's contractual guaranteed hours were the two days of core hours, there has not been an unlawful deduction of wages in respect of the Claimant's sick pay and the claim is dismissed. There was no obligation to pay sick pay for further time.

39. I note the terms of the Tesco policy which at page 63 states "sickness entitlement is based on your core hours only". Mr Varadha also explained that the triggers for sickness absence were based on core hours, not the additional hours, and I also note therefore that a requirement for the employer to pay sickness pay in respect of those additional hours would be inconsistent.

Holiday pay

40. As with the claim relating to sick pay this claim stood or fell depending on what were the terms of the Claimant's contract. There was no dispute about the amount of or rate of holiday pay relating to overtime or otherwise, for example involving regulation 16 of the Working Time Regulations 1998. The basis for the Claimant's entitlement to and payment in respect of his core hours was explained by a table in Mr Varadha's witness statement, which I accept as correct in respect of those core hours.

41. No principle of law or authority was cited to me on the basis that overtime increases a worker's entitlement to an amount of holiday leave, rather than an amount of pay, nor have I been able to identify any.

42. In light of my finding above about the Claimant's contractual terms I conclude that there has been no failure to pay the Claimant the correct holiday pay and the claim is dismissed.

Automatic unfair dismissal

Did the Claimant allege that his employer had infringed a relevant statutory right?

43. I accept the Claimant's evidence that on 23 March 2021 he did make such an allegation in his discussions with HR. I further accept that his contact to ACAS on 24 March would also have involved a relevant assertion. It is accepted by the Respondent that the conversation with Mr. Smith on the 12th of April 2021 involved such an assertion.

44. The 27 April 2021 is harder to assess because the Claimant's own evidence at paragraph 12 merely says that he was told the issue was closed. I considered whether it was likely in such a discussion that he nevertheless would have made a relevant assertion and on balance acccept that he would have done because that was the context of the conversation. In addition I note that paragraph 52 of Mr Varadha's witness statement says "he raised a query on the 27 April 2021" suggesting that an assertion about an underpayment was made.

Was any such assertion the reason or principal reason for dismissal?

45. The starting point is as ever the words of the legislation and I note that the test requires me to identify the principal reason.

46. Miss Kaye referred me to *Maund v Penwith District Council* 1984 ICR 143 for the principle that the initial burden was on the Claimant. I considered that case as well as the later discussion in *Kuzel v Roche Products Ltd* [2008] ICR 799 and accept in this case there is an initial burden on the Claimant.

47. I consider that this initial burden is met because there is an issue of causation that warrants investigation. There is a correlation in time between the Claimant making the relevant assertions, a reduction in overtime offered and then his dismissal.

48. However, a correlation in time is far from sufficient evidence for me to conclude that the principal reason was as alleged by the Claimant. Fundamentally, I accept the explanation given by Mr Varadha that there was an ongoing process of reviewing the contracts of temporary workers against business need, business need at the time fluctuated during Christmas, fluctuated again due to COVID and that the reduction in overtime then non-renewal of the Claimant's contract reflected an oversubscription of staff hours when compared to the business need. It was put to the Claimant in cross examination that the process of reviewing whether there was a need for his contractual hours would have taken place over a number of weeks and he accepted that was certainly possible and said that he had no real knowledge either way about the time.

49. There is evidence as cited above that it was not just the Claimant who was let go at the time and there is no suggestion that other stuff let go had also raised similar queries about their statutory rights.

50. Miss Sullivan understandably placed emphasis on a change Mr Varadha made to his witness statement. At paragraph 38 he unambiguously explains that he recalls the Claimant saying he contacted ACAS and this did not impact their working relationship. When taken to this in cross examination Mr Varadha immediately said that that hadn't happened and that he did not know of the contact with ACAS until after the Claimant had left, further that he thought he gained that knowledge because one of his managers had told him. I gave this serious consideration as to whether and to what extent this demonstrated unreliability or worse on Mr Varadha's part. Although troubling, I do not conclude that this change meant Mr Varadha's evidence was as a whole unreliable or that he had been deceptive as was asserted on behalf of the Claimant. I consider that it was a mistake in his witness statement that he had not picked up on in the context as he explained that English was not his first language. If an attempt to deceive was made, it seemed odd to me that Mr Varadha would say in his witness statement that he did know of the ACAS contact given this weakened his defence (although noting the change then made in live evidence). I also have to consider his evidence in the round and how he came across, which to me did not seem unreliable or deceptive.

51. It was said by the Claimant that Mr Varadha had been aggressive to the Claimant on the phone and in text messages once the Claimant had complained about his pay. This again did not appear in his ET1 or witness statement, it was denied by Mr Varadha and there was no

contemporaneous documentation to support this assertion. The WhatsApp messages available did not demonstrate hostility from Mr Varadha regarding the Claimant's pay queries. Although questions were asked by Miss Sullivan about why the messages were limited in time, there was no outstanding application for disclosure of which I was informed.

52. In addition the Claimant agreed in cross examination that when he had raised other pay queries Mr Varadha had been helpful and had ensured they were resolved. Page 122 was an example.

53. Finally on the point of motivation I note that Mr Varadha presented the decision to not extend the Claimant's contract as a joint one, for example at paragraph 29 of his witness statement referring to the joint review of hours against business need conducted by himself and Mr. Smith. There was no credible case asserted by the Claimant against Mr. Smith other than the fact he knew of the assertions regarding statutory rights.

54. I therefore find that the principal reason for dismissal was not the assertion of a statutory right and this claim is dismissed.

Conclusion

55. I have not found in favour of the Claimant for any of the claims and they are therefore dismissed. I appreciate this is not the outcome the Claimant wanted but note to his credit he secured further employment relatively quickly and I wish him well in that continued employment, as well as to Mr Varadha.

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Employment Judge England
Date 27 June 2022