EMPLOYMENT TRIBUNALS

Claimant: Mr R Hudson

Respondent: Samworth Farms Limited

Heard at: Midlands (East): Hybrid - Attended and CVP

On: 26 November 2021

Before: Employment Judge Broughton

Appearances:
Claimant: In Person

Respondent: Ms Younis (Litigation Consultant)

JUDGMENT

The declaration and decision of the Employment Tribunal is that:

The Respondent made an unlawful deduction from the Claimant's wages pursuant to section 13 Employment Rights Act 1996 and failed to pay the Claimant the full wages due to him in breach of the contract of employment.

The Respondent is ordered to pay the Claimant;

a) The gross sum of **£1,000** for overtime worked for the period January 2021 to April 2021; and

b) The gross sum of **£1,677** for unpaid wages for the period from 9 August 2020 to 30 April 2021.

REASONS

Background

1. The Claimant issued a claim in the Employment Tribunal on 25 July 2021 following a period of ACAS early conciliation between 16 June 2021 to 19 July 2021, to recover alleged underpayments of wages namely overtime payments.

The Evidence

2. The Claimant attended the hearing in person, he was without representation and had not prepared a witness statement. The Claimant had produced a document entitled 'diary of events' which was accepted as his evidence in chief. He was asked questions under oath by the Tribunal by way of clarification of his evidence and then cross examined by the Respondent.

3. The Respondent called one witness, director Mr Russell Price who along with the Respondent's representative, Ms Younis, attended remotely via Cloud Video Platform (CVP), consent for which had been given by the Tribunal prior to the hearing. Mr Price produced a witness statement, gave his evidence under oath and was cross examined by the Claimant.

The issues and claims

4. In an email to the Tribunal on 10 August 2021 the Claimant clarified the sums he is seeking;

   a) Unpaid overtime for the period January 2021 to April 2021; the Claimant claims that he worked over 20 hours per month of overtime calculated at £13 per hour equating to over £1000

   b) Payment for out of hours remote evening support work at £6.50 per day (regardless of time spent) worked over 300 days equating to £1950 .

5. The Claimant alleged in his dairy of events that the Respondent had breached his contract of employment.

6. At the start to of the tribunal hearing, the Claimant informed the Tribunal that he had checked his calculations and between January to April 2021, he had worked 117 hours and believes he is therefore entitled to unpaid overtime not of £1,000 but £1521. In the alternative, he had agreed to a payment of £1,000 in settlement of his claim to overtime and he claims that sum.

7. The Respondent defends the claim on the basis that the Claimant agreed to a new contract in July 2020 which meant that overtime was no longer payable and that there had never been any agreement to pay £6.50 for evening remote support work.

8. The issues were therefore;

Unauthorised deductions: section 13 Employment Rights Act 1996 (ERA)

   a. Were the wages paid to the claimant on in January 2021 to May 2021 less than the wages he should have been paid?

   b. Was any deduction required or authorised by a written term of the contract?

   c. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

   d. Did the claimant agree in writing to the deduction before it was made?

   e. How much is the claimant owed?

9. Breach of Contract : Article 7 : Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

    a. Did this claim arise or was it outstanding when the claimant's employment ended?

    b. Did the respondent do the following:

        i. Not pay the Claimant for overtime worked during January 2021 to April 2021.

        ii. Not pay the Claimant for evening support work carried out between August 2020 to May 2021?

    c. Was that a breach of contract?

    d. How much should the claimant be awarded as damages?

Findings of Fact

10. The Tribunal made its findings of fact based on a balance of probabilities. All the evidence has been considered in full however, the findings address the evidence relevant to the Tribunal's determination of the issues. References to numbers are to page numbers in the joint bundle. Emboldened words throughout the judgment are the Tribunal's own stress.

11. The Claimant it is not in dispute, commenced employment with the Respondent on 20 January 2020.

12. The Claimant was employed as an Anaerobic Digester Plant Operator reporting into the Assistant Farm Manager. He worked at a farm at Cropwell Bishop, Nottingham hereafter referred to as the Site. In essence, biodegradable waste material is broken down at the Site by anaerobic digestion, to make bio-gas.

13. The Claimant was issued with a contract of employment (Contract) when he joined the Respondent. The terms of which were set out in a letter dated 14 January 2020 (page 27- 35).

14. The Claimant's core hours it is not in dispute, were 7:30am to 4:30 pm Monday to Friday.

15. The relevant terms of that Contract were as follows;

    Clause 4 : Salary

    *4.1 Your salary is **£27,000** per year, which shall accrue from day to day and be payable monthly in arrears on the last working weekday of the month directly into your bank or building society account. Your pay is based on 40 hours' work per week for 52 weeks. **Any time worked beyond your normal daily 8 hours will be paid as overtime at the rate of £13 per hour.***

    4.2 Your salary will be reviewed annually and may be increased from time to time at the Company's discretion without affecting the other terms of your employment. There is no obligation to award an increase…

    Clause 5: Hours of Work and Rules

5.1 Your normal hours of work are between 7;30am and 4:30pm. Mondays to Fridays inclusive. There is half an hour for lunch between 12;30pm and 1:00 pm and two fifteen minute breaks at 9:00am and 3;00pm. Your normal basic hours are therefore 40.0 per week (5 x 8 hours).

5.2 Time sheets must be completed every week and given to the Assistant Farm Manager.

5.3 A five day week (Monday to Friday) will operate, but you will be required to work those hours which are necessary for the efficient running of the AD plant and farm. This will include some evening and weekend work.

Clause 13; Changes to your terms of employment

We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible, and in any event within one month of the change.

Tribunal stress

Overtime

16. The Respondent produced Timesheets and it was put to the Claimant in cross examination that the Timesheets included break times (1 hour in total). The evidence of the Claimant is that the system was a 'mess', to start with the Office Manager was supposed to deduct the 1 hour from the time recorded however employees complained that they were not getting 1 hour but the time was still being deducted. The system than changed so that employees had to amend their own time recording using an application on their mobile telephones called Time Doctor . The Claimant was not sure but believed the system changed in or around January 2021. That would seem consistent with the Timesheets which record consistently a 30 minute deduction for a lunch break until 13 January 2021 when the times recorded varied (page 47).

17. Mr Price did not address in his evidence any issue with the reliability of the Timesheets and nor did he address the Claimant's evidence on this point in re-examination. The Tribunal on a balance of probabilities, accept the Claimant's account that the Timesheets did not accurately record the actual break times taken prior to January 2021. The Claimant however did not produce an alternative breakdown of the hours worked prior to January 2021.

14 July 2020

18. The Claimant complains that Mr Price introduced changes to his Contract without his agreement in July 2020.

19. It is not in dispute that his salary was increased in July 2020 from £27,000 to £30,000. The additional £3,000 the Claimant understood was to compensate him for any overtime worked. It is not in dispute that £3,000 is equivalent to 230 hours of overtime annually (£13 per hour multiplied by 230 equating to £2,990).

20. It is not in dispute that a discussion took place between the Claimant and Mr Price on the 14 July 2020. It was not minuted and no one else was present.

21. The Claimant complains that he wanted to remain on the original Contract terms, he was concerned that if he worked more than 230 hours per year, he would receive less remuneration and preferred to remain on a lower salary and be paid for the actual overtime hours he worked.

22. Mr Price gave evidence under cross examination that he changed the Contract terms, to simplify the Respondent's systems and because the Claimant's "*overtime seemed random and out of control"* and by putting him on a salary and not paying overtime, the Respondent did not have to control the hours the Claimant worked however his evidence is that the Respondent " *didn't want to put people out of pocket, wanted to pay people fairly" an*d his evidence is that when they had the meeting, the Claimant agreed to the changes.

23. In his evidence in chief Mr Price states (paragraph 4) that;

"*On 15th July 2020, there was a meeting between the Claimant and me at which Mr Hudson agreed to a change in his contract terms to compound the regular time and overtime into an increase salary of £30,000 p.a* ***to include 230 hours overtime*** *to take effect from the beginning of July".*

24. The Tribunal find therefore on the evidence of both the Claimant and Mr Price that the increase in salary of £3,000 was introduced on the basis that this covered 230 hours of overtime.

25. Mr Price gave evidence that overtime hours changed throughout the year, in Winter the Claimant would be expected to work less overtime and therefore he felt that the overtime would "*equalise over 12 months*" and that it was hoped the Claimant's attitude would *"improve*" with the new package.

26. A new full time employee started at the Site on 10 August 2020 and the Tribunal accept the evidence of Mr Price that it was hoped that the Respondent would be able to have a one in three weekends rota for staff, on his arrival. It was put to the Claimant in cross examination that he only worked 1 in 3 weekends after this employee joined, however the Claimant's evidence is that he continued to work more weekends than this because it was the Harvest period. The Timesheets produced by the Respondent indicate that the Claimant worked more than one in 3 weekends during at least September and October 2020 following the arrival of the full time employee in August 2020. How many hours the Claimant worked during this period was not addressed in the evidence of Mr Price. The Tribunal find that although it may have been the intention to reduce overtime with the arrival of another employee, that the Claimant continued at least for a period of time to work more than one in three weekends.

27. Mr Price also asserted n his evidence in chief that (paragraph 5);

"*He was given the opportunity to earn additional discretionary bonuses based on performance of the plant. It was agreed that to ensure the new salary was fair that it would be reviewed after three months".*

28. Mr Price does not assert in his evidence in chief that the payment of £3,000 was intended to compensate the Claimant for all overtime worked and that the bonus was also intended to provide additional compensation for overtime in excess of 230 hours. He does not in his evidence in chief link bonus to overtime; it was a performance based bonus.

29. The Tribunal accept the Claimant's evidence that he initially objected to the change to his terms but that Mr Price informed him that everyone else was being put on the new contract terms and that he would not be allowed to work until he agreed.

30. The Claimant's evidence is that Mr Price informed him that the contract terms would be reviewed in 3 months to make sure that the Claimant was " *not out of pocket"* which is consistent with Mr Price's evidence that he would review the new salary in 3 months to make sure it was fair.

31. Under cross examination, while the Claimant continued to maintain that he did not accept the changes and felt he had no 'control', he accepted that he did not raise a formal grievance but asserts that he made it clear that he was not happy but that as Mr Price accepted it equated to 230 hours and agreed to a 3 month review; *" I thought we will see how it goes.."*

32. On the basis of that assurance of a 3 month review, the Tribunal find that the Claimant ultimately at the meeting, agreed to continue working for 3 months on the new terms.

Email 15 July 2020

33. The Claimant was not provided with an amended document recording the new terms however, Mr Price sent the Claimant an email on 15 July 2020 (page 36) confirming what had been *agreed;*

*" **We spoke yesterday** about what you should expect from the business in terms of your job and I thought that you would be interested to read the current business overview…*

To confirm our discussion yesterday;

1. *Your salary will be increased from £27,000 to £30,000 pa from this month in order* ***to compound the occasional overtime that you need to work into your regular salary.***
2. *You will also be included within the* heat bonus, with OTE of a further £2,000 pa
3. *I have put a reminder* ***to review progress after three months***

Our new starter arrives on 10th August, so we should be able to go back to a one in three weekend rotation more quickly than we had thought"

Tribunal Stress

34. The Claimant then worked under the new terms and does not alleged that he raised any further protest during the three month period. He accepted the payment of the new salary and continued to work overtime.

August 2020

35. It is not in dispute that the Site is owned by an external investment company who contract with Resolve Biogas Limited (Resolve) to manage the Site and Resolve contracts with the Respondent to operate it The Respondent according to the undisputed evidence of Mr Price, contracts direct with the investment company and Resolve separately.

36. The Claimant asserts that in or about the first week of August 2020, Mr Price asked him to check the Site every day from August 2020 for which he agreed to pay him £6.50 as a fixed rate for each evening.

37. The Claimant's evidence is that the Site as with other aerobic digester plants, need remotely operating and managing out of hours, which is done with an auto dialler electronic system, whereby if there is a fault someone can be contacted and the fault addressed. However, the Respondent knew the auto dialler was not working and an upgrade would cost between £30,000 to £40,000 and so asked the Claimant instead to work around this by logging in every evening to monitor the site and that this was discussed in front of Mr Michael Barker, a director of Resolve. The Claimant's evidence is that this was possibly during the first week in August.

38. The Claimant's evidence is that there is an application on the mobile phones which allowed the Claimant to monitor the site. If he was off site he could log on and monitor the Site and run it remotely. The Claimant checked the application on his phone three times every evening , it would take him about 5 to 10 minutes each time to check if everything was running as it should. The Claimant gave evidence that the Site kept failing i.e. not producing gas as it should and some evenings, he would have to spend an hour or two making adjustments remotely. The Claimant's evidence is that it was agreed he would be paid £6.50 for every evening he checked the application but he complains that he never received a penny of this payment.

39. Mr Price asserted under cross examination that there was no benefit to the Respondent in the Claimant checking/monitoring the site remotely in the evenings because the Respondent does not own the plant and the payments they receive are not performance dependant.

40. The Tribunal was not presented with the documents setting out the contractual relationship between the Respondent, Resolve and the investment company however, the Claimant did not challenge Mr Price's evidence that this was not an obligation set out in the contractual agreement and the Tribunal therefore accept that it was not..

41. Mr Price denies that he reached this agreement with the Claimant and refers to the absence of any document recording it as compared with his email of the 15 July 2020 where he took the step of recording what had been agreed on that occasion.

42. When Mr Price was asked by the Tribunal whether his evidence was that the Claimant had at any point used the mobile telephone application to monitor the site remotely, his evidence was that he did not know because it was not recorded on Time Doctor and when asked whether the Claimant had an application on his phone to monitor the site his evidence was;

" possible he had an app on his phone, I don't know"

43. Later when given an opportunity to clarify his position by the Tribunal, Mr Price stated that he was not disputing that the Claimant had the application on his phone and *w*hen asked by the Tribunal whether Mr Price accepted that there were occasions when the Claimant logged on in the evening to sort problems out with the Site, his evidence was again vague;

" *I couldn't tell you …there may have been but he didn't record it on Time Doctor …"*

44. The Claimant under cross examination accepted that he did not log the times he monitored the site in the evenings, he gave evidence that it often only took 5 or 10

minutes and he did not see the point in taking the time to log on to the Time Doctor application because it was agreed he would receive a fixed rate of pay, payment was not dependant on time spent and further he was never told he needed to do that. The Tribunal find his explanation credible.

45. Mr Price's alleged lack of knowledge about whether the Claimant had an application to monitor the Site let alone whether he used it to address faults remotely, appears to this Tribunal, surprising given his role in managing the Site. He only took a step back when Mr Matts joined in April 2021 .

46. Mr Price denied in cross examination that he had ever agreed to this payment and maintained that for someone to operate the plant in that way could be potentially dangerous;

" I did not offer this, I disagree it was part of your package, I would not expect to pay it, this time was never recorded, in addition to which, it could be potentially dangerous .."

47. Mr Price gave evidence that he would not expect people to work over their holidays.

48. In response to question from the Tribunal about why, if no such payment was agreed Mr Matts had referred to it in the email to the Claimant of the 7 May 2021 (page 41 – see below) and offered an increased salary to cover, in part, the remote evening support, the response from Mr Price was not the Tribunal find credible;

"I think at that point Rob had raised it as an issue, he wanted paying for it…it was out of the blue, Ian [Matts] was trying to stabilise the work force, it was easier if Rob stayed , Ian was trying to accommodate his requirements."

49. When asked to clarify why in those circumstances Mr Matts mentioned the evening remote work if this was not work the Claimant should have been doing, Mr Price asserted that Mr Matts was trying to " *pacify*" the Claimant.

50. If however, as Mr Price alleged in cross examination to check the site remotely was not only something the Respondent did not have to do (and in certain circumstances could be dangerous), it is not credible the Tribunal find that to 'pacify' the Claimant, the Respondent would agree to remunerate him going forward to carry out this monitoring, the Respondent could have simply offered the same increase in salary without linking it to work he was not required to perform.

51. The Claimant asserts that on a date he cannot recall, he was taking a weeks holiday and sent an email (not produced to this Tribunal) to the Office Manager and suggested another colleague checks the site while the Claimant was on leave but that Mr Price sent him an email stating it was for him to decide who he pays and who he does not pay and insisted that only the Claimant check the site. When asked about this by the Tribunal, Mr Price stated at first that he "*could not recall it*" but then stated that he did not believe the discussion took place. The Tribunal did not consider his answer to be as equivocal as it would expect, if this was an arrangement he would so adamant was not in place and would be unnecessary. Further in his evidence in chief he alleges that to monitor the site remotely may be dangerous (paragraph 21(;

"*Employees would not be asked to work whilst on holiday, and there would be operational and health and safety issues if one employee was remotely operating the plant whilst niether was managing it on site."*

3 month review

52. The Claimant complains that he made several requests in November and December 2020 for a review meeting to the foreman and a verbal request to the Account Manager after the 3 month period had lapsed but that those requests " *fell on deaf ears*". The Tribunal find that in the circumstances, the failure to hold a review meeting was a breach of the express terms which had been agreed and potentially a breach of the implied term of trust and confidence. However, the Claimant continued to work..

December 2020

53. The Claimant gave evidence that he had a discussion with Mr Price in his office in December 2020, it was not minuted and he could not recall the exact date. The Claimant complains that they agreed that the Claimant had worked 230 hours of overtime up to that point and that the £3,000 payment had therefore been *"used up*" and that any overtime therefore, he worked from 1 January 2021 he would not be remunerated for.

54. The Claimant's evidence is that he also raised with Mr Price during this meeting that the evening support payments had not been paid. The Claimant's evidence is that Mr Price asked him to 'park' all the issues including the evening support payments, for now i.e. not pursue it at that stage, because there is an annual salary review in April 2021 and Mr Price informed him that; " *we will sort it out then".*

55. Mr Price in his evidence in chief (paragraph 7) accepts that in December 2020 the Claimant advised that he thought he would go over the allowed overtime amount. Mr Price does not assert that this was not correct or that he had disputed that the £3,000 was linked to 230 hours overtime or that he had told the Claimant the bonus payments were also intended to be taken into account; he states; *"He agreed with me to review the amount of time at the annual salary review (April 2021)."* Mr Price denies any mention of the weekend monitoring work during this discussion.

56. The Claimant does not contend that he continued to work under protest or that he raised a formal grievance. The Claimant's evidence is that he felt assured that the issues would be resolved to his satisfaction in April 2021, at the next salary review.

57. The Claimant gave evidence in answer to a question from the Tribunal, that his expectation was that the Respondent would agree to pay him £13 per hour for the further overtime he worked from January 2021.

Emails 19 April 2021

58. Mr Ian Matts was according to the undisputed evidence of Mr Price, recruited from April 2021 to manage the Site and deal with the staff . Mr Price confirmed in response to a question from the Tribunal, that Mr Matts had the authority to deal with the Claimant and reach agreement with him over the terms of his employment, including having the authority to increase the Claimant's salary

59. The Claimant sent an email on 19 April 2021 to Mr Matts and Mr Price (page 38) complaining that;

"We agreed that I had worked up my extra hours payment at the end of last year. Since my extra hours have left me short of approximately £250 for each of the last 3 months and it grates.

…

Unfortunately I feel you are forcing my hand and I will not be doing anymore extra hours or weekends until we have meeting to try to resolve this…"

60. By April 2021, the Claimant had worked from July 2020 to April 2021 (according to the Respondent's schedule at page 51) 286.50 hours of overtime which equates at £13 per hour to **£3724.50.** Not taking into account the bonus payments he received, during that same period of July 2020 to April 2021, he had received in salary an additional **£2,500** more than he would have received pursuant to the original Contract, thus by April 2021 he had received less salary and overtime than he would have received under the Contract.

26 April 2021 : pay review meeting

61. The Claimant had a pay review meeting with Mr Matts. The Claimant could not recall the date of it but accepted that Mr Price's evidence that it was the 26 April 2021 "*sounded about right*". The Tribunal therefore find on balance of probabilities, that the meeting took place on 26 April 2021.

62. Mr Price was not present at this meeting. Mr Matts did not attend to give evidence and no statement or record of the meeting prepared by Mr Matts was presented by the Respondent to the Tribunal.

63. The Claimant's evidence is that Mr Matts was 'blunt' and told him that there would be no pay increase, he would not be paid extra for the overtime he had worked from January to April 2021 because he was paid enough.

64. The Claimant gave evidence that he had calculated at that time, that during January 2021 through to April 2021 he estimated that he had worked a minimum of 20 hours overtime per month and thus he calculated he was being paid about £150 less per month and asked for £1,000 to cover the shortfall but Mr Matts refused.

Meeting in or around on 6 May 2021

65. The Claimant's undisputed evidence is that following this meeting, he stopped working overtime and stopped monitoring the site at night. He did this for about a week and got a ' quick response'. Mr Matts had a further meeting with him.

66. The Claimant's evidence is that Mr Matts agreed to pay him £1,000 to settle his complaint about overtime worked in January, February, March and April 2021 and that the Claimant had informed him; *yes o*k" i.e. he was prepared to accept the £1,000 in settlement of overtime worked from January to April 2021 albeit under cross examination he stated that this was an estimate and " *looking at it now, the overtime was far beyond but I agreed to accept £1,000 to cover it."* The Claimant had estimated the overtime mid-April and believes now that in agreeing to £1,000 he had; "*cut myself short" ie* he had underestimated the overtime hours he had worked.

67. The respondents schedule from January 2021 to May 2021; shows that the payments for those 5 months were;

Jan – May 2021 salary received under new contract terms : **£12,500** (not taking into account bonus)

Jan - May 2021 what claimant would have received under original contract terms

(i) salary : £11,250

(ii) overtime : 71.66 hours x £13= £931.58

£12,181.58

68. The Claimant did not necessarily accept the figures in the schedule or timesheets as being accurate but had not himself produced any alternative figures or breakdown of the overtime hours he had worked during that period.

69. The figures provided do show that over the period January 2021 to May 2021, the Claimant was financially better off under the new contract terms. However, he had estimated as at the April meeting, when he had entered into the discussion with Mr Matts. By May 2021 there was a Signiant drop off in overtime worked from 17.46 worked in April to 1.26 hours in May 2021 (the Claimant was absent on sick leave for some of May 2021).

70. The Claimant, based on the Respondent's schedule, worked over January to March 2021 an average of 17.64 hours overtime. Had the Claimant worked 17.64 hours overtime in May 2021, he would have earned £229.32 under the original Contract, that would equate to during January to May 2021, to a payment under the old Contract of £11,250 plus overtime payments of £1,077.32, a total figure of **£12,327.32** for January to May 2021, which would be less than the new salary payments for those months i.e. 5 x £2,500 = **£12,500**

71. However, the agreement to pay an additional £1,000 was based on an estimate and there is no assertion by the Respondent that the Claimant had falsified his time sheets or misrepresented the overtime he had worked. The Respondent therefore had access to the relevant information when making its decision on how to resolve this dispute with the Claimant over the overtime he had worked from January to April 2021.

72. At this meeting in May, the Claimant's evidence is that Mr Matts offered him an increase in his salary to £32,000, the £2,000 the Claimant understood was to cover the next 6 months of overtime (on the basis that the overtime he had worked in the first 6 months had been equivalent to the £3,000 payment). He evidence is that he understood the pay increase was to include additional 'normal' overtime and remote evening support work (i.e. he would not receive the £6.50 half hour pay).

73. The Claimant's evidence is that he said ; *"£32,000 is acceptable, and £1,000 for backpay , I am happy about that ".*

74. The Claimant also alleges that at this meeting he mentioned that he had not been paid for the evening support work he had carried out since August 2020 but that Mr Matts was not aware of it and he informed him that he would speak to Mr Price about it. The evening monitoring work from August 2020, was not according to the Claimant's evidence therefore part of the discussion around the settlement figure of £1,000 which only related to 'normal' overtime worked from January 2021 i.e. *from the start of the year .*

Email 6 May 2021.

75. Mr Matts then sent an email to the Claimant on 6 May 2021 (page 41) following their meeting which stated;

" To confirm ***<u>what we have just agreed:</u>***

*-You **will** be paid £1,000 to cover the cost of overtime hours already worked **from the start of the year.***

*-You will be placed on a salary of £32,000 from may onwards to account for the overtime hours that will be accrued as part of the role of AD operator. This includes support for Ashley outside of the AD plant, your required weekend cover **and the remote evening support.***

As also discussed, I would like you

- *To focus on the efficiency of your work, to minimise the need for overtime on the plant*
- *help support Mike wherever possible to improve his understanding of the role and*
- *focus on improving the condition of the AD Site, as there have been far too many comments regarding its current state*

*Clearly, the details **we have agreed**, and confirmed here, along with the details of your contract are to be kept confidential and are not to be discussed with any other employee.*

*If you have any concerns with the points raised above , then please let me know. **I will assume a non-response is acceptance".***

76. The Claimant could not recall the date of the meeting in May 2021 but given his evidence that he had a response after a week of not working and the reference in the 6 May 2021 email ia to " what we have just agreed", the Tribunal find that the meeting was on or about the 6 May 2021.

77. The Claimant responded on 7 May 2021 by email to Mr Matts, copying in Mr Price asking Mr Matt to; *.. "please clarify can I expect this increase included in May's salary?"*

78. Mr Matts replied on 9 May 2021 confirming; " *Yes, that is the case"*

79. Despite that email exchange, Mr Price gave evidence that Mr Matts informed him after the Claimant's employment had ended, that the Claimant had not accepted the terms. No evidence was produced by Mr Matts and Mr Price did not explain why in the face of the content of the email of the 6 and 7 May 2021, no acceptance was communicated. Although the Claimant considers that he should be paid £13 for the overtime he worked since January 2021, his evidence is that he informed Mr Matts he would accept £1,000 in settlement of the overtime worked from January 2021 and that he would accept the pay increase to £32,000 to cover the items set out in the email of 6 May 2021.

80. The Tribunal find on the balance of probabilities that an agreement was made verbally at the meeting on 6 May 2021. It was confirmed in the 6 May 2021 email and the Claimant did not dispute what had been agreed, he however continued to complain about the evening support work he had carried out since August 2020 to May 2021.

81. The following day on 10 May 2021 the Claimant wrote to Mr Matts and again copied in Mr Price ;

" *Once again you failed to address the issues we discussed at your random meeting.*

I explained to you that last year Mick Barker, Russell and myself were discussing the problem of the AD site auto dialler not working and no one was receiving site alarms. Russell then stepped in and said that he would pay me half an hour pay every day to check the site out of hours. This now being over 10 months and I have never received a penny having done as requested and kept the site running. I will explain this again for you as you seem to be ignoring the problem. £6.50 x ***300 days****=* ***£1950.***

There is no mention of this overdue payment in your email and this does not reflect fairly in your proposed assumed future increase acceptance.

There is also the 25% RHI bonus that was verbally promised to which had never been paid at this 25% rate if any at all…

I feel the only way forward is for you to pay the monies owed and from 1st May to respect my Contract of Employment which states 40 hours per week …"

82. The Claimant under cross examination confirmed that the figure of 300 days (page 40) was calculated to the end of May 2021 but was prepared to accept under cross examination that the correct number of days was 288 to the end of May 2021 which equated to a figure of £1872.20. The Claimant refuted that the figure should be 283 days taking into account holidays as his evidence is that he continued to log in and check the site while on annual leave to keep the site functioning.

83. No email was sent from Mr Matts or Mr Price denying the accuracy of what the Claimant had set out in the email.

84. Mr Matts was not present to give evidence to explain the failure to respond, Mr Price gave evidence that he did not respond although he had received the email, because he considered it was Mr Matts remit to do so as the Claimant's Line Manager.

85. Mr Price did not allege in his witness evidence that he instructed Mr Matts to respond or that he otherwise communicated with Mr Matts regarding his account of the arrangement over evening remote support, until asked about directly this by the Tribunal. Mr Price only then alleged that he had had a discussion with Mr Matts. However, the Tribunal find it surprising that if what the Claimant was saying was not true and no such arrangement had ever been agreed, that Mr Price had not mentioned such a discussion with Mr Matts in his statement of evidence where he had told Mr Matts that his account of an arrangement was false. When asked why he had not mentioned this meeting in his statement, Mr Price then stated that; " *We didn't have a specific meeting about the email – we met regularly to discuss matters*." That however still does not address his failure to mention any alleged discussion about the email in his witness statement. Further, it is even more surprising that Mr Matts did not respond if the Claimant was making what he knew after allegedly speaking with Mr Price, were wholly false allegations about an agreement reached with Mr Price.

86. Mr Price's account of what was discussed with Mr Matts following the Claimant's email of the 10 May 2021, lacks credibility

87. Further, It is not alleged by the Respondent that Mr Matts no longer works for the Respondent and no explanation was put forward for not calling him to give direct evidence about what had been discussed with the Claimant. Mr Matts is a key witness regarding those discussions and the Tribunal consider it reasonable in the circumstances to draw an inference adverse to the Respondent, regarding what was discussed with Mr Matts by the Claimant at the meeting on the 6 May 2021 and what

had been discussed between Mr Matts and Mr Price following the email of the 10 May 2021.

88. The Tribunal conclude on the evidence and on a balance of probabilities, that there was an agreement between Mr Price and the Claimant in August 2020 to carry out monitoring of the site and that he would be paid £6.50 for every evening that he did so and he was not required to record his time on Time Doctor because the rate agreed was a fixed fee, not dependant on time spent. The Tribunal find on balance that the Claimant raised this in his discussions with Mr Price in December 2020, which was the next time they sat and discussed his remuneration package and that he understood that this would be addressed in April 2021 along with his concerns over 'normal' overtime pay. The Tribunal find that this issue was raised again hence the express reference in the email of the 6 May 2021 to evening support work and the exasperation expressed by the Claimant in his email of the 10 May 2021 that the issue of outstanding payments for this work had been overlooked.

89. There is no document evidencing the agreement about overnight working and the Tribunal accept that Mr Price had set out in writing the changes to the Claimant's contract in July 2020 however, the Tribunal prefer the evidence of the Claimant that there was such an agreement in August 2020 to pay him £6.50 per day to monitor the site.

90. The Tribunal did not find persuasive the evidence of Mr Price, that he was unaware of whether there was monitoring of the Site by the Claimant, that he was unaware of whether the Clamant had an application on his mobile phone to allow the Claimant to monitor the Site remotely, only then to concede that he was not disputing the Claimant had such an application . Further, the evidence of Mr Price that there was no requirement for evening monitoring of the Site was not credible in light of the fact that the increase in salary from May 2021 was expressly to include payment for this work. The argument Mr Price presented that evening monitoring work was mentioned to 'pacify' the Claimant , was not persuasive, the Respondent could have simply explained that this monitoring work was not required going forward and still offered the same salary increase. Mr Price did not assert in his evidence before this Tribunal ,that there was to be no actual requirement going forward from May 2021 for the Claimant to carry out this work.

91. Further, the explanation from Mr Price he did not respond to the Claimant's long email of the 10 May 2021 which alleged that such an agreement had been made, was not credible. If such an allegation was made, the fact that Mr Price left it to Mr Matts to deal with, that may be reasonable, however Mr Matts did not respond either and Mr Price did not give evidence that he understood he would be responding or that he had asked him to make sure that he did so.

92. The evidence of Mr Price that there was no agreement to pay £1,000 for overtime worked from January 2021 was also not supported by any evidence from Mr Matts and it lacked credibility given what was set out clearly in the emails exchanged between the Claimant and Mr Matts, including the email of the 6 May 2021 where Mr Matts, expressly referred to what had been "*agreed"* between them. That Mr Price was prepared to assert that there was no agreement according to Mr Matts, gives further cause for concern regarding the reliability (in terms of) credibility more generally of Mr Price as a witness of fact.

93. The Tribunal therefore find that an agreement was reached between the Claimant and Mr Matts regarding a sum to settle his dispute over overtime worked from January 2021 to May 2021 and that the Claimant had also agreed to the increase in

salary which would cover any further overtime and the work monitoring the site in the evenings going forwards

94. What had not been settled was the dispute over the evening monitoring work the Claimant had carried out from August 2020.

95. The Tribunal find that the pay for the evening work from May 2021 was to be included in May 2021's salary. The Claimant's salary is as per clause 4.1 of the Contract (it is not alleged that the date when salary was payable was changed) was payable monthly in arrears on the last working weekday of the month, therefore the salary to be paid at the end of May 2021 was for the month of May 2021. Any claim for unpaid evening work therefore must relate to the period from the end of the first week of August 2020 (when the Claimant alleges the agreement was reached) to the end of April 2021.

96. The Claimant and Mr Price had reached an agreement that the Claimant would monitor the Site every evening for which he would be paid a fixed overtime fee of £6.50. Given the wording of clause 4.1 of the Contract (the Respondent does not assert some other payment date was agreed), the payments were payable monthly in arrears on the last working weekday of the month.

97. Following a meeting on 1 June 2021, the Claimant's employment was terminated on notice. He makes no claim in relation to notice pay.

Submissions

98. The parties made oral submissions.

Respondent's Submissions

99. The Respondent submits that it is clear that from July 2020 to December 2020 , the Claimant had been overpaid by £226.10 and overpaid from January to April 2021 and thus it is submitted there are no monies owed for this period.

100. It is submitted that there was no agreement to pay the Claimant for overnight remote working, and that as Mr Price stated, the email from Mr Matts where this is mentioned (page 41) was to '*pacify the Claimant and have a stable workforce.'* Further, it is submitted the Claimant diligently recorded his other overtime hours and that he never mentioned the failure to pay this until 21 May 2021, although he alleges he had been doing to work since August 2020.

101. It is submitted that the offer made by Mr Matts in May 2021 as set out in the email at page 41, was not accepted, it was an offer, but not accepted. The Claimant did not return to work after 19 May 2021. However, it is submitted that even if it was agreed, he was paid this amount if the Tribunal take into account the payments he received as set out in the Respondent's schedule (page 51). No further submissions were made. No reference was made to any statutory provisions or case authorities.

Claimant's submissions

102. The Claimant submits that with respect to remote evening work, there was no requirement to record his time because it was a fixed payment and he did the work and resolved the issues on the Site.

103. In terms of what he was paid from July 2020 to December 2020, he submits that he worked 230 hours and the Respondent has attempted to complicate it by 'stretching it out' i.e. looking at his overtime over a longer period.

The Law

Unlawful deductions

Deduction from wages – section 13 Employment Rights Act 1996

104. The relevant statutory provisions are as follows;

13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages ***properly payable*** *by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

23 Complaints to employment tribunals.

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section ***unless it is presented before the end of the period of three months beginning with—***

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment ***are to the last deduction or payment in the series or to the last of the payments so received.***

3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the

date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B)Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

(5)No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).

Properly Payable

105. The Respondent does not assert that the payments claimed do not fall within the definition of wages nor that they do not form a series of alleged deductions giving rise to any issues of jurisdiction.

106. There is a dispute however, in this case over whether the wages i.e. overtime and evening support work, were *properly payable*

Breach of Contract

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 (**Order**)

Article 4 Extension of Jurisdiction

Proceedings may be brought before an employment tribunal] in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies;

(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and

(d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

Article 7 Time within which proceedings may be brought

7. *An industrial tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*

(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Contractual Construction

107. The starting point in construing a contract is that words are to be given their ordinary and natural meaning. The interpretative exercise involve the court in identifying what the parties meant: "*Through the eyes of a reasonable reader, and, save perhaps in a very neutral case, that meaning is most obviously to be gleaned from the language of the provision*". ***Arnold v Britton 2015 UKSC 36 [2015] AC1619*** at [17].

108. Another principle of construction is that the contract shall be construed more strongly against the granter or maker. This is only to be applied to remove and not create a doubt or ambiguity : ***Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd [2018] EWHC 558 (TCC)***; the contra proferentem rule.

Affirming the contract.

Imposing change

109. If an employer imposes a unilateral change in contractual terms, this will be a breach of contract. This breach may or may not be so serious as to amount to a fundamental breach of contract.

110. An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. The tribunal must consider the evidence to determine whether the employee's continued performance was indeed under protest: ***Novakovic v Tesco Stores Ltd EAT 0315/15*.**

111. House of Lords in ***Rigby v Ferodo Ltd 1988 ICR 29, HL***. The House of Lords held that the employees, in working *on under protest,* had not accepted the employer's purported change in the terms and conditions and were entitled to sue for the difference between the amount of wages they should have received. The House of Lords stressed that as long as there is a continuing contract, not terminated by either side, the employer will remain liable for any shortfall in contractual wages. If the employer wants to limit liability, it must bring the contract to an end, although in doing so it will run the risk of unfair dismissal claims being brought.

112. **MacRuary v Washington Irvine Ltd EAT 857/93:** The employee's claim for unpaid wages was upheld by the EAT because he *had expressly refused to accept the pay cut and had stated that he was working on under protest.* The employer had made unauthorised deductions from his wages.

113. ***WE Cox Toner (International) Ltd v Crook 1981 ICR 823, EAT***, The EAT held that the tribunal had misdirected itself. Mere delay by itself did not constitute an affirmation of the contract but if the delay went on for too long it could be very persuasive evidence of an affirmation;

"On balance we think that the industrial tribunal misdirected itself by concentrating on the delay as being the <u>only</u> evidence of affirmation of the contract by Mr. Crook,

whereas the most cogent evidence of such affirmation was his continued performance of the contract which they did not advert to"

114. Where an employee is not in possession of the full facts and still trying to resolve the situation may be evidence against a finding of affirmation **Post Office v Roberts 1980 IRLR 347, EAT.**

Inferences – standard of proof

115. In ***Manzi -v- King's College Hospital NHS Foundation Trust*** **[2016] EWHC 1101** (QB) the claimant invited the court to draw an adverse inference against the defendant because it did not call evidence from a witness. As the defendant argued in *Manzi,* a party is entitled to take a proportionate approach, particularly in a relatively low value claim. However, this must not be at the expense of calling a witness whose role was central to the issues in dispute, otherwise that party will run the risk of the court drawing an adverse inference.

116. In ***Keefe -v- The Isle of Man Steam Packet Company Limited*** **[2010],** the court stated: '*In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. If a defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that defendant runs the risk of relevant adverse findings.'*

117. If a key witness cannot be located or is otherwise unable to give evidence, the court will need to be provided with 'proper reasons and credible explanations' as to why that witness cannot be called : ***Welds -v- Yorkshire Ambulance Service NHS Trust & Sheffield Teaching Hospitals NHS Foundation Trust*** **[2016]**. In those circumstances, the court is unlikely to draw an adverse inference.
Conclusion

Conclusion and Analysis

'Normal' Overtime

118. The Claimant complains that in July 2020, the Respondent imposed a change in his contractual terms by increasing his salary and removing the overtime payments. The Tribunal accept that such a change was imposed however, the Claimant chose not to treat it as a fundamental breach of contact and resign, he did not refuse to work under the new terms, he did not stay and work under the new terms 'under protest' (albeit the Tribunal accept he protested initially at the meeting about the changes). He had those options but he did not employ them.

119. While he expressed that he was not happy with the new terms, his evidence is that ultimately he agreed to a 3 month review; *" I thought we will see how it goes.."* The Claimant was persuaded to work under the new terms and he did so. He did so on the understanding, that the position would be reviewed in 3 months. That review was part of the agreement and confirmed in the email of the 15 July 2020. The understanding between the parties was that the increase in salary would be a fair reflection of the overtime the Claimant would work for next 12 months, Mr Price anticipating that with the arrival of a new full time employee, the Claimant would work less overtime.

120. The Tribunal find that the Claimant had by his conduct in remaining in the Respondent's employment and not continuing to protest during July through to

November 2020, and receiving the benefit of his increased salary, not only impliedly agreed by his conduct to the variation in the contract of employment, the Tribunal find that he expressly agreement.

121. The Claimant was in a 'take it or leave it' situation however although he had stated he was not happy, he was prepared to trust the Respondent to make good any shortfall in the April salary review.

122. The Claimant was sent an email in July 2020 setting out the new terms and he did not write back rejecting acceptance of those.

123. The change in remuneration had an immediate effect because the Claimant worked overtime in July, August and September 2020 for which he was not paid any sum in addition to his salary payments. Although there was no review after 3 months which was in breach of the agreement, the Claimant chose to remain in the Respondent's employment and continue to work overtime for which he received no additional remuneration until December 2020.

124. The Claimant then met with Mr Price in December 2020. The Claimant raised that he considered that he the overtime he had worked for the past 6 months was in excess of the equivalent rise in salary and he raised the evening support work. He was assured that the matter would be addressed in the April 2021 salary review. No express agreement was reached about what the salary review would be but Mr price's own evidence was that he did not intend for the Claimant to lose out financially.

125. At the April 2021 pay review, the Respondent refused to pay the Claimant for what he alleged was overtime in excess of a value of £3,000 however, there then followed a meeting on 6 May 2021 and regardless of what overtime had been worked and whether this exceeded the increase of £3,000, the parties entered into negotiations to settle the dispute. The Claimant agreed to a further increase in salary and a sum of £1,000 for overtime worked from January 2021 to May 2021. The Claimant believes on reflection his estimate undervalued the overtime he did, the Respondent believes that he had not worked in excess of the equivalent payment of £3,000. The Respondent's evidence is however, that it was keen to stabilise the workforce and retain the Claimant. It was in the Respondent's interests, regardless of what overtime had actually been worked, to settle the dispute.

126. The Claimant was entitled to a payment of £1,000 and failure to pay this sum, which was properly payable and a contractual entitlement, was not paid. The Respondent does not allege that Mr Matts did not have the authority to negotiate on its behalf.

127. The Tribunal conclude that on a natural reading of the email of the 6 May 2021, interpreted through the eyes of a reasonable reader and applying the contra proferentem rule, the payment was payable along with the increase in salary, in the May 2021 salary payment. That payment is properly payable and not paying it in the May 2021 salary, was an unlawful deduction under section 13 ERA. The claim was issued within the time prescribed by section 23 ERA i.e. within 3 months from the date of payment of the wages. It also amounted to a sum outstanding on the termination of the employment of the Claimant and the claim was issued within the time limit prescribed by Article 7 of the Order namely within the period of three months beginning with the effective date of termination of the contract giving rise to the claim.

Evening Monitoring Work

128. The Claimant and Mr Price had reached an agreement that the Claimant would monitor the Site every evening for which he would be paid a fixed overtime fee of £6.50 to be paid along with his 'normal' salary.

129. The payments were not made. The Claimant had agreed to an increase in salary to cover these payments, from May 2021. The payments he had not been were from August 2020 to April 2021. The Claimant had raised the failure to pay these payments in December 2020 and again in April and May 2021 and had reasonably understood from the assurance of Mr Price in December 2020 that the matter would be resolved. There was no waiver by the Claimant of his entitlement. The Respondent's defence of the claim is simply that no such agreement existed.

130. The payments are properly payable and form a series of similar deductions under section 23 (3) (a) ERA and were unlawful deductions under section 13 ERA. The claim was issued within the time prescribed by section 23 ERA i.e. within 3 months from the date of payment of the wages. If the last payment of salary to include the deductions was 30 April 2021, the claim was issued within the requisite time limit of 3 months from the date of the last deduction. The sum was also outstanding on the termination of the employment and the claim was issued within the time limit prescribed by Article 7 of the Order, namely within the period of three months beginning with the effective date of termination of the contract giving rise to the claim.

Remedy

131. The Respondent is ordered to pay the Claimant by way of compensation for breach of contract and/or unlawful deduction of wages the following sums;

    c) The gross sum of **£1,000** for overtime worked from January 2021 to April 2021; and

    d) The gross sum of calculated at £6.50 per day, not taking into account holiday but calculated from the 9 August 2020 to 30 April 2021 less 1 week during which the Claimant refused to carry out any overtime: £6.50 x 258 days = **£1,677**.

132. The Claimant will have to account to HMRC for any deductions for tax and national insurance.

Employment Judge Broughton

Date: 17 January 2022

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