EMPLOYMENT TRIBUNALS

Claimant: Mr N Krishnan

Respondent: Samsung Cambridge Solution Centre Ltd

Heard at: Cambridge Employment Tribunal **On:** 20 October 2022

Before: Employment Judge Dobbie (sitting without members)

Representation
Claimant: In person
Respondent: Ms C Jennings (Counsel)

JUDGMENT having been sent to the parties on 29 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent from 27 January 2020 to 30 July 2021 as a Staff Engineer DevSys (Development Systems).

2. The Respondent is part of Samsung Electronics Co. Ltd, a multinational electronics corporation which is headquartered in South Korea.

3. By a claim form presented to the tribunal on 20 September 2021, following ACAS Early Conciliation from 21 July to 1 September 2021, the Claimant brought claims for: breach of contract and unlawful deduction from wages. His claim referred to overtime and deductions made to his notice pay.

4. The Respondent defended such claims and submitted an employer's contract claim for certain loans (relocation allowances etc) it had provided to the Claimant. The deductions to the Claimant's notice pay were said to be made in accordance with such loan agreements and some further payments were still said to be due and owing from the Claimant to the Respondent under those agreements.

5. At the final hearing, the Respondent withdrew the employer's contract claims.

6. At the final hearing, I sought to clarify the basis of the Claimant's claim and he confirmed that he was not pursuing a claim about deductions made to his notice pay (for the loans) and that he was only pursuing claims for non-payment of overtime. I wanted to ensure he understood what this meant for the claim and pressed him on whether he wanted to pursue contract or wages claims for the deductions made to his notice pay. He replied *"I do not raise it as a concern, I am only claiming my overtime".* He accepted in his answers to me that he deemed himself bound to repay the sums under the loan agreement (hence, presumably, why he was not arguing that the deductions made to his notice pay in respect of them was unlawful or a breach of contract).

7. The basis of the claim for overtime was said to be for at least 500 hours worked between January 2020 and May 2021, which the Claimant says should have been compensated either with TOIL or payment at time and a half (1.5x).

8. Given the refined scope of the claims, the facts about the loan agreements are not relevant and will not be referenced.

FINDINGS OF FACT

9. The Claimant commenced employment with the Respondent on 27 January 2020. He was engaged as a Staff Engineer DevSys (Development Systems). He resigned on 5 May 2021, giving 3 months' notice as required under his contract. This was later shortened by agreement. His employment therefore terminated on 30 July 2021.

10. The Claimant's principal duties were to maintain and deploy systems and tools as required by Samsung, both in Cambridge and worldwide, to support software for Samsung's range of wireless solutions. This role involved helping to develop software and deploy tools through the entire software lifecycle including design, implementation, test, debug and support. The systems included, but were not limited to, version control systems, software build systems, release systems, issue tracking systems and database management.

11. The Claimant's terms and conditions of employment were recorded in a written contract dated 31 January 2020 and signed by the Claimant on that date, and which stated (insofar as hours and pay for overtime are concerned):

> **9 Normal Hours of Work**
>
> 9.1 The Company's normal business hours are 09.00am to 5:30pm Monday to Thursday and 09:00am to 05:00pm on Fridays, inclusive with a one-hour break for lunch each day.
>
> 9.2 Given the nature of your position, your hours may vary and you will be expected to work such reasonable additional hours as may be necessary to enable you to properly discharge your duties. Your remuneration package is calculated on the basis that you will work as necessary during as well as

> outside of normal business hours in order to properly perform your duties. Accordingly, you will not be paid for any additional hours worked outside normal business hours, however you may be entitled to time off in lieu at the discretion of your line manager. [93]

12. The Claimant's contract therefore did not expressly specify fixed working hours for him personally, but did have core business hours for the company. The Claimant says he often worked in excess of his normal hours approximately two extra hours a day. His claim is for pay for those additional hours, which he quantified as being at least 500 hours, although he had no records or evidence to demonstrate these additional hours or when they were worked.

13. The Respondent does not dispute that the Claimant worked additional hours outside of the company's core hours. However, it did not agree that the extent of the overtime claimed accurately reflected the additional hours he had worked.

14. In Mr Humphries witness statement, he stated at para 29 that:

> From the oversight of work that I had, I consider that it would be correct to say that on average he was doing several hours a week on top of *his* 37 normal business hours per week. This is normal for members of DevOps. There will have been occasions when working additional hours would have been unavoidable as the task was time critical, but this was not a daily occurrence. [emphasis added]

15. The Claimant accepted that at no time had he been promised pay or TOIL that he had not received. He stated that *"I am saying I was not given TOIL for extra hours even though I asked several times."*

16. When asked by me: *"so you asked for some form of benefit, pay or TOIL, but you were never told you could have it?* He answered: *"Correct. We used to get Amazon voucher. Whenever I asked, they either skipped off or did not answer the questions".*

17. Later in his evidence he stated *"When I asked for compensation I was told it was only an Amazon voucher then that was stopped".*

18. In his closing argument, the Claimant stated:

> …most of the time we were required to work beyond normal business hours and we had to work for longer hours often. As time went on it was a regular practice that we worked long hours every day and I raised this in a meeting with my manager but it was ignored. I raised it in a 1-2-1 meeting but they but evaded also about pay for extra hours, I got no reply… On several occasions the team raised concerns about workload and increasing workforce to tackle…. Samsung said it would not allow it so by this time I was working only 4 members who were permanent an one contractor, 5 in total. No one listened and gave more and more work with same number of team members. I lost my family life… so I decided to leave because of family issues so no option but to leave…. so I gave notice to the Respondent and told management that the extra hours need to be compensated and insisted paid before I leave or extend notice as TOIL. They said they are reasonable additional hours, normal in this business, so I raised a complaint and

grievance appeal which took a one sided position in favour of the company. they said extra hours were normal and voluntary and there was no obligation to pay."

19. From the above, it is plain that the Claimant did work in excess of 37 hours a week. It is also clear that at no time was he told or promised additional pay or TOIL for any such hours, even when he requested it or raised it as a query.

20. On 5 May 2021, the Claimant had an informal discussion with Lucy Bedford stating his intention to resign and on 6 May 2021, he set out his intention to resign in writing. It was after this that he raised a grievance seeking pay for additional hours worked, which was ultimately refused. The parties agreed to shorten the Claimant's notice period, such that his employment terminated on 30 July 2021.

RELEVANT LAW

21. Section 13 Employment Rights Act 1996 ("ERA") states:

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

22. In New Century Cleaning Co Limited v Church [2000] IRLR 27, the Court of Appeal held that, for wages to be "properly payable", the worker must have a legal, but not necessarily contractual, entitlement to them. The legal basis of the entitlement could arise from contract, statute or some other source. In the present case, the Claimant relies on the express terms of his contract as the legal basis for entitlement.

23. The Court of Appeal confirmed in Agarwal v Cardiff University and others [2018] EWCA Civ 2084 that employment tribunals have jurisdiction to determine the terms of the contract when considering a claim for unlawful deductions.

24. In Delaney v Staples (t/a De Montfort Recruitment) [1991] ICR 331, the Court of Appeal held that tribunals could, indeed should, determine the terms of the contract when ascertaining what was properly payable.

25. In Vision Events (UK) Ltd v Paterson UKEAT/0015/13, the EAT held that a tribunal had erred when it implied a term that an employee was entitled to be paid for accrued hours worked under a flexi-hours scheme on termination of employment. In the majority's view, it was not necessary for business efficacy to imply such a term and it was not a term which both parties would have agreed to. Therefore, the employee's claim that there had been an unlawful deduction from wages failed.

APPLICATION OF LAW TO FACTS

26. The Claimant's case was advanced on the basis that the express terms of his contract entitled him to additional pay for overtime. He stated in his witness statement:

> In the Employment Contract that was signed at the start of employment states that the Claimant role in the Organization would need to work extra hours as when needed and these reasonable extra hours will be compensated.

27. He confirmed in his evidence that he was referring to the clause extracted above (clause 9 of his contract).

28. The Claimant stated that rate of time and a half for overtime is something he was told at the CAB as a general statement about what some employers pay in respect of overtime. He did not advance any evidence that the Respondent had ever done so.

29. The question for the tribunal on both the s.13 ERA claim and the contract claim then is whether payments for overtime are "properly payable" in that there was a contractual right to be paid overtime, and indeed whether the Claimant's contract envisaged "core hours" and "overtime".

30. In this case, the Claimant does not rely on any promises made after his written contract was agreed upon, he simply refers to the fact that clause 9.2 states that he might be entitled to compensatory TOIL at the discretion of the manager [93]. Hence the case turns on contractual interpretation of the written documents, not on consideration of any implied terms or variation of contract based on subsequent promises. Indeed, as stated above, the Claimant accepted he had never been made any promises of extra pay and had in fact been ignored or refused when he raised this.

31. Turning to the contractual documents, they are clearly binding and valid, given that the Claimant accepts he was given them, read them and signed them at the outset of his employment. As extracted above, the relevant clause states:

> …your hours may vary and you will be expected to work such reasonable additional hours as may be necessary to enable you to properly discharge your duties. Your remuneration package is calculated on the basis that you will work as necessary during as well as outside of normal business hours in order to properly perform your duties. Accordingly, you will not be paid for any additional hours worked outside normal business hours, however you may be entitled to time off in lieu at the discretion of your line manager. [emphasis added]

32. It is very clear from this binding express term that in no circumstances would any additional pay be due, and that even TOIL was at the discretion of the manager, i.e. it would have to be agreed / approved by the manager.

33. Further, whilst it would appear that the Claimant did have core hours (as stated by the Claimant and as indicated by para 29 of Mr Humphries' statement extracted above) there was no concept of overtime as such. Rather, the contract envisaged core hours and expressly stated that additional hours will need to be worked as necessary. The contract expressly stated that the remuneration rate already took into account the fact that there would need to be such additional hours, as part of the contract.

34. In his submissions, the Claimant also maintained that because he had been compensated for overtime when working in prior tech workplaces he expected the same here. He did not expressly state that he was arguing that there was an implied term (i.e. custom and practice in the industry) to be paid. However I did consider whether such an argument would have had any merit. I considered that contract clearly anticipates working outside normal office hours and states there is no extra pay for it. Therefore it could not even be argued that a requirement to pay for overtime should be implied to give business efficacy to the contract or by way of industry practice, similar to Vision Events (UK) Ltd v Paterson UKEAT/0015/13.

35. For these reasons, the sums which the Claimant claims were not ones that were "properly payable" within the meaning of s.13 ERA, or one which were due to him under his written contract or any implied contractual term. There was no alternative basis advanced for the payments being due to him. Therefore, in light of the foregoing, the claims fail.

Employment Judge Dobbie

Date 20 January 2023

REASONS SENT TO THE PARTIES ON

30 January 2023

L TAYLOR-HIBBERD

FOR THE TRIBUNAL OFFICE