In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 246

BETWEEN:-

DAVID DUMONT

Plaintiff

-and-

BERMUDA COLLEGE

Defendant

JUDGMENT

(In Court)

Contract of employment – construction of Collective Agreement – whether Plaintiff entitled to on-call payments

Date of hearing: 8th January 2018
Date of judgment: 17th January 2018

Mr Peter Sanderson, Benedek Lewin Limited, for the Plaintiff
Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

Introduction

1. The Plaintiff was employed by the Defendant as a Facilities and Security Supervisor from 13th February 2012 until 23rd May 2017. By a Specially Endorsed Writ of Summons dated 27th June 2017 he claims damages for breach of contract. The breach alleged is the Defendant's refusal to pay him for being "on-call" outside normal working hours. The amount claimed in the Writ is $62,749.28 plus interest. The Defendant says that he is not entitled to any on-call pay because he was never on-call within the meaning of his contract of employment and was not contractually required to be so.

Contract of employment

2. The Defendant issued the Plaintiff with an offer letter dated 27th January 2012, which stated that the offer letter, together with the current Collective Agreement and the Bermuda College Personnel Policies, constituted his statement of employment with the Defendant.

3. A statement of employment was a document which the Defendant, as the Plaintiff's employer, was required to issue to him by section 6(1) of the Employment Act 2000. It had to be signed and dated by both employer and employee, and to contain certain particulars of the contract of employment. As stated by Elias J (as he then was) stated in Mr J Parker v Northumbrian Water Ltd 2008 WL 2148153 EAT at para 25:

   "*The fact that the employer asserts that a statement of terms properly reflects the contractual terms is not conclusive of the terms of the contract; the employee may disagree. However, where the employee in terms states that they do reflect the terms ... it is plainly open to a tribunal to say that he means what he says.*"

4. Gascol Conversions Ltd v Mercer [1974] ICR 420 EWCA was a case where there was an acknowledgment by the parties that the statement was itself a contract and that the terms were correct; System Floors Ltd v Daniel [1982] ICR 54 EAT was a case where there was not.

5. The Plaintiff accepts that the statement of employment was a contract of employment. He signed it on 2nd February 2012 acknowledging that he agreed to all the terms and conditions of service contained in the statement, and that he had discussed the terms of his contract with his immediate supervisor, Oliver Pitcher ("Mr Pitcher"), who was Director of the Facilities Management Department. The parties agree as to the terms of the contract: where they disagree is as to what those terms mean.

6. The job summary in the statement of employment summarises the Defendant's responsibilities as including performing security and safety services to protect the physical property and technical assets of the Defendant and to provide for the safety and security of students, staff and faculty of the Defendant and of members of the public who enter the campus to conduct legitimate business. It states that specific daily operational responsibilities are listed in the job description attached.

7. Para 3.0 of the job description attached is headed "*Supervision of the Provision of Security Services*". The duties which it sets out include:

> "*3.3 In conjunction with the Director of Facilities and Security and the Department of Human Resources and Development, establish policies and procedures for the guidance of the staff under supervision. The policies and procedures cover details of the areas to be patrolled, what is to be done, monitoring of the electronic system, response to the burglar and fire alarms, etc.*
>
> *3.4 Prepares work schedules and assigns staff, as necessary, to ensure appropriate cover of the campus and that the facility is kept under surveillance at all times to detect and respond to incidents or accidents;*".

8. Para 4.0 of the job description is headed "*Security Services*". The duties which it sets out include:

> "*4.2 Provides security and safety services, as rostered, to monitor and provide a security presence to prevent incidents and to check on the fire extinguishers and alarms;*".

9. The Collective Agreement mentioned in the statement of employment was the Bermuda College Faculty and Support Staff Agreement, which the Defendant negotiated with the Bermuda Public Service Union ("BPSU"). When the Plaintiff was first employed, the Collective Agreement in force ran from 1st August 2011 to 31st July 2014. A subsequent version of the Collective Agreement ran from 1st August 2014 to 31st July 2017.

10. The relevant provision of the Collective Agreement is Article 64, which is set out below. The Article was the same in both versions of the Collective Agreement, save for Article 64.3, which was worded slightly differently in each version. The different wordings are shown in square brackets.

"***ON-CALL AND CALL-OUT***

Employees who are required as a condition of their employment to be 'on-call' may be required to remain 'on-call' at their home or such other place of their choice notified in advance by the head of their department or they may be recalled by telephone for a period of time in addition to their prescribed hours of duty, provided that:

1. Such periods of 'on-call' shall, whenever possible, be scheduled in the duty schedule and notified to the employee concerned.

2. Such periods of 'on-call' shall apply normally during those hours during which it is reasonable to expect staff to be at home and shall not apply so as to unduly restrict their leisure activities.

3. An employee who is required to remain 'on-call' shall be paid an allowance of $38.83 per shift during the period of [August 1, 2011 to July 31, 2012] [August 1, 2012 to July 31, 2013].

4. An employee who is called out after normal working hours shall receive a minimum of three (3) hours pay if eligible for overtime payments, at the appropriate rate. Other staff will receive a minimum of three (3) hours' time in lieu at the appropriate rate."

11. I read Article 64.3 to mean that an employee who is required to remain on-call shall be paid an allowance. The allowance was set at $38.83 for the period 1st August 2011 to 31st July 2012. As it was not subsequently raised, it remained at $38.83 throughout the life of both versions of the Collective

Agreement. The reference in the second version of the Collective Agreement to the period 1st August 2012 to 31st July 2013 was most likely a clerical error for 1st August 2014 to 31st July 2015. I do not believe that this construction of the Collective Agreement is contentious. It was not suggested to me that an on-call allowance was only payable during the periods (i) 1st August 2011 to 31st July 2012 and (ii) 1st August 2012 to 31st July 2013, or alternatively 1st August 2014 to 31st July 2015, but not during the rest of the period covered by the Collective Agreement, and I am satisfied that any such suggestion would have been wrong.

The evidence

12. The Plaintiff led a team of four full time security staff, which later went down to three, and some occasional staff. His contractual duties included ensuring that at all times outside of normal working hours either he or one or more of his staff was available to be called out to the campus to deal with any alarms that went off there. There were 16 alarms. His predecessor, one Mr Richardson, drew up a rota for the security staff, so that everyone had the possibility of being called out. But the Plaintiff, when appointed, reserved all the call-outs to himself. He said that they were his responsibility because he was the supervisor.

13. He was given a cell phone by the Defendant on which he could be contacted after hours. He said he took this as an implied instruction to answer all the calls to the cell phone himself and not delegate the responsibility to another member of his team. However he accepted that he was never told expressly that the phone was personal to him rather than a team phone. When cross-examined, the Plaintiff was confronted with evidence that in July and August 2015 two other members of his team had been contacted directly by Bermuda Security Group ("BSG") when alarms went off. BSG was the security company to which the alarms were linked. The Plaintiff clarified his evidence to explain that there were three contacts for every alarm: one primary and two secondary. He was the primary contact.

14. There were two sources of call-outs. First, members of the general public. The Defendant put the cell phone number in the telephone directory as the Defendant's emergency number for members of the public to call. Second, BSG. Initially, the alarms were linked to BSG's Bermuda office. They would assess whether it was a false alarm. If, in their assessment, it was not, they would call the Plaintiff and discuss with him whether further action was needed. He would typically get one to two calls from them per week. BSG would also call the police, and the Plaintiff would attend the campus as the keyholder to meet the police.

15. From mid-July 2015 to the end of that month, there was a sharp increase in alarms going off out of hours. Afterwards, alarms went off out of hours less often, but more often than they had done before mid-July 2015. At the end of July, the role previously played by BSG was outsourced to its monitoring centre overseas. The monitoring centre notified the Plaintiff every time an alarm went off without first assessing whether the alarm was a false one. The notifications were made by email. The Plaintiff had an alert on his cell phone, so that every time an email alert came through the cell phone rang. He would review the email to assess whether the alarm was false, and, if he assessed the alert to be genuine, go onto the campus to investigate.

16. The Plaintiff stated that he was woken up by the alarm a few times every night. In fact, over the 22 month period 29th July 2015 to 27th May 2017, the monitoring centre sent the Plaintiff 55,132 emails – an average of 83 a day. The Plaintiff said that this was evidence that the alarm system was working properly: the Defendant said, and I agree, that this was more likely evidence of its malfunction. The number of email notifications received by the Plaintiff's successor was far fewer.

17. The Plaintiff was paid overtime or time off in lieu when he was called out, but he was never paid an allowance for being on-call. Mr Pitcher gave evidence that when discussing the terms of the Plaintiff's contract with him before the Plaintiff signed the statement of employment:

"*I did not refer to the [Collective Agreement] in my discussions with [the plaintiff]. The call out pay or time in lieu is a normal practice and has always been the method of remuneration for the on call security staff when called out. Therefore I simply relayed the standard policy to Mr Dumont. He had no issue with this and thereafter followed the policy.*"

18. From time to time the Defendant prepared and distributed internal lists of "*On Call Personnel*" consisting of 11 or 12 emergency contacts with the email address and telephone number for the office, home and cell phone of each of them. The Plaintiff appeared on several such lists, but neither he nor anyone else on the lists was paid on-call allowance.

19. In April 2016 the Plaintiff was reading the Collective Agreement when assisting another staff member with an employment issue. For the first time he noticed Article 64.3. He filed a grievance sheet in April 2016 claiming an on-call allowance for the period 13th February 2012 to 18th April 2016. This was on the basis that he had been on-call every day during that period, apart from the three weeks 1st to 21st February 2016, when he handed over his cell phone to a colleague, who covered for him.

20. The Defendant did not provide the Plaintiff with a formal response. But in "*around June 2016*" he was told by his BPSU representative that his claim had been disallowed. He continued to work as he had done previously, and takes the position that he has no claim for on-call payments for the period after he was informed that the Defendant would not pay them. At trial, his counsel expressly confirmed that this remained his client's position. There is no evidence as to when in June this information was communicated to the Plaintiff, but, as the Writ claims for on-call payments until July 2016, I shall take his claim as running to 30th June 2016.

21. The Plaintiff submits that he was on-call even when he was away from work because he was sick, or on vacation, or on manoeuvres with the Royal Bermuda Regiment. Although he was not available to be called out during that time, he continued to field calls from BSG on his mobile.

22. The Defendant submits that the Plaintiff was never on-call as the Defendant never required him as a condition of his employment to remain on-call at his home, or at a place notified in advance by the head of his department, or to be recalled to work out of hours by telephone by the Defendant. The Defendant submits it is significant that Article 64.3 has never been implemented in the way that the Plaintiff suggests, and that neither any other member of the security staff or the BPSU has ever contended that it should be.

Contractual interpretation

23. The principles governing the interpretation of contracts have been considered by the UK Supreme Court in a number of recent cases and require little elaboration here. As stated by Lord Neuberger JSC in Arnold v Britton [2015] AC 1619 at para 15:

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context.*"

24. However he warned at para 20:

> "*... while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.*"

Discussion

25. The case turns on the correct interpretation of Article 64.3. In my judgment this is quite straightforward. An employee is on-call at any time outside of normal working hours when, pursuant to his contract of employment, he is both required to ensure that he is available to be called out and is in fact available. The Plaintiff satisfied this test. Under his contract of employment, he was required to arrange for one or more persons to be on call at all times to attend the campus if an alarm went off. The contract gave him a discretion as to who was required to be on call. He decided that it should be him. He was therefore entitled to on-call payments under Article 64.3.

26. There is nothing in the language of Article 64.3 to suggest that an on-call payment was not payable on nights when an employee who was on-call was called out, and for which he was therefore entitled to a call-out payment. I am therefore satisfied that the Plaintiff was entitled to an on-call payment for every night on which he was on-call, irrespective of whether he also received a call-out payment for that night.

27. Notwithstanding the Defendant's submissions to the contrary, it is immaterial that the Plaintiff could have arranged matters so that others were on call instead; or that the telephone calls which he was liable to, and from time to time did, receive were made not by the Defendant directly but by a security company engaged by the Defendant. It is also immaterial that latterly the notifications of an alarm going off were sent to the Plaintiff not by phone but by email, although his cell phone rang whenever an email arrived. What mattered was that the Plaintiff, as permitted by his contract of employment, had arranged matters so that he was both required to ensure that he was available to be called out and was in fact available.

28. The Defendant objects that this construction of Article 64.3 is unduly favourable to the Plaintiff. But it is not the Court's task to relieve the Defendant of an improvident bargain. Indeed any other construction would

enable the Defendant to organise its affairs so as to avoid on-call payments for employees who are liable to be called out altogether.

29. The Defendant submits that the parties to the Collective Agreement never understood Article 64.3 to operate in this way. But when construing a contract the Court looks not to the parties' actual, subjective intentions, but to the intentions implied objectively by the language of the contract considered in its relevant context. The construction of Article 64.3 relied upon by the Plaintiff satisfies this test.

30. Sensibly, the Defendant did not pursue an argument that the discussion between the Plaintiff and Mr Pitcher before the Plaintiff signed the statement of employment – a discussion in which the Collective Agreement was not even mentioned – somehow varied the contract of employment to exclude or vary Article 64.3. It did not.

31. There may be an issue as to whether Article 64.3 entitles the secondary contacts on an on-call list to an on-call payment, or only the primary contact. But that is not an issue which I need resolve as it does not arise on the Plaintiff's claim and was not argued before me.

Summary

32. The Plaintiff is contractually entitled to an on-call allowance over the period 13th February 2012 to 30th June 2016 inclusive for the days when he was available to be called out. He is not entitled to an on-call allowance for the days when he was unavailable to be called out because he was off work, even though he was fielding cell phone calls from BSG on those days. At the invitation of the parties, I will leave it to them to agree the days for which, in light of this judgment, an on-call allowance is payable.

33. I provisionally order that costs should follow the event, to be taxed on a standard basis. Ie that the Defendant should pay the Plaintiff's costs. If either party wishes to persuade me otherwise they have liberty to apply for

that purpose provided that they do so within seven days of the date of this judgment.

DATED this 17th day of January, 2018

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Hellman J