NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Re: *Bobby Lewis Acres, et al. v. Serco Inc.*
Case No.: CL-2018-7300

Dear Counsel:

This matter came before the Court for trial without a jury on April 30, 2019. The Plaintiffs are 21 individuals who were formerly employed by the Defendant, Serco Inc. ("Serco"). The Plaintiffs claim that Serco did not pay the full amount owed to them, in breach of the terms of the Parties' employment agreements. Specifically, the Plaintiffs claim that they were paid a hardship uplift of 15% rather than 35% for their work in

OPINION LETTER

Afghanistan, and that they were not paid any uplifts for work in excess of 40 hours in a week. Serco denies any breach of the employment agreements. At the conclusion of the trial, the Court took the matter under advisement. Since that time, the Court has had the opportunity to consider the evidence and arguments of counsel. For the reasons that follow, the Court finds in favor of Serco.

I. Background

Serco is a government contractor that held the Base Closure Assistance Team contract ("BCAT") with the United States Department of Defense to provide advisory assistance in the drawdown and closure of military bases in Afghanistan. In order to meet its obligations under the contract, Serco hired the 21 individual plaintiffs, all of whom were required to relocate to Afghanistan. The terms of employment were stated in the Parties' employment agreements, each of which consisted of an initial Offer Letter and a subsequent Letter of Assignment. The terms of these documents are identical for each employee, except for the position title and the rate of pay. The Parties stipulate that the Offer Letter and Letter of Assignment collectively constitute the entire employment agreement between each employee and Serco. The Parties further stipulate that the Offer Letter and the Letter of Assignment should be read together as if one document, although they were issued and accepted at different times.

A. Offer Letter

Each of the Plaintiffs received and accepted an offer of employment from Serco, the terms of which were stated in the Offer Letter. Each Offer Letter, in relevant part, read as follows:

> It is with pleasure that we offer you the contingent full time, exempt [*Position Title*] position with Serco Inc. at our Afghanistan BCAT office as a [*Position Title*] reporting on or about *[Date*]. Your weekly pay rate will be $[*amount*] [*sic*] while deployed you will be paid a straight hourly rate of $[*hourly rate*[1]] for hours worked above 40 each week, along with the uplifts for Danger and Hardship on your base pay as designated by the Department of State.

B. Letter of Assignment

Each of the Plaintiffs also received a letter of assignment before leaving the United States for Afghanistan. Each Letter of Assignment, in relevant part, read as follows:

[1] The hourly rate for each employee was equal to the amount of the weekly pay rate divided by 40.

This Letter of Assignment is to confirm our mutual understanding of the terms and conditions applying to your forthcoming international assignment with Serco Inc. ("the Company") to our BCAT contract in Afghanistan.

1. Employment Terms

You will be on assignment in Afghanistan. The detailed provisions of your base compensation and employment terms are governed by the terms and conditions of your offer of employment and your "at will" employment relationship with the Company.

2. Hazardous or Dangerous Work Location

As described in your offer of employment, your work location in Afghanistan will be outside the Continental United States in U.S. Government designated "imminent danger zone" and "hostile fire zone." There will be possible exposure to risk of injury or death as a result of political unrest, insurrection, war and similar conditions. By accepting this assignment you are acknowledging such risks and agree to undertake and assume the risk of injury or death in exchange for the compensation provided in this letter and the previously provided benefits summary.

7. Relocation and Assignment Allowances

The Company (or in some cases the customer) will provide a variety of assignment allowances for the duration of your assignment to Afghanistan. The allowances detailed below are applied to your assignment tour in Afghanistan only and may be recalculated or discontinued should the terms of your assignment and/or location change. All benefits are subject to each general policy's limitations and subject to general disclaimers.

d) Premium Allowances
You are eligible for the following compensatory uplifts for Danger and Hardship on your base pay as designated by the Department of State.

Hardship Allowance
You will receive a hardship allowance provided as a 15% differential, paid via Serco payroll. The hardship differential is designed to provide additional compensation for service at places

in foreign areas where conditions of environment differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive. The Hardship differential is specifically for this assignment tour in Afghanistan and may be recalculated or discontinued should the terms of your assignment or location change.

Danger Pay Allowance
You will receive a danger pay allowance provided as a 35% differential, paid via Serco payroll. The danger pay allowance is designed to provide additional compensation for service at places in foreign areas where there exist conditions of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well-being of an employee. These conditions do not include acts characterized chiefly as economic crime. The danger pay differential is specifically for this assignment tour in Afghanistan and may be recalculated or discontinued should the terms of your assignment or location change.

C. Conduct of the Parties

Throughout their deployment to Afghanistan, the Plaintiffs received a 15% hardship uplift and a 35% danger uplift on their pay for the first 40 hours of work performed in a given week. The Plaintiffs did not receive hardship or danger uplifts for hours worked in excess of 40 in a given week. The Plaintiffs, as required, completed daily timesheets to record their hours worked. Plaintiffs were required to assign the appropriate code to each time entry, according to the definitions of the codes provided to the Plaintiffs, which included codes for the uplifts. The Plaintiffs did not complain about the amount of pay until after their service in Afghanistan ended.

Each Offer Letter stated a weekly pay rate and an hourly rate for work beyond 40 hours in a week. The weekly pay rate was equal to the hourly pay rate multiplied by 40. Thus, excluding the uplifts, each of the Plaintiffs were paid at the same hourly rate regardless of the number of hours worked in a given week. In accordance with the BCAT contract, the Plaintiffs were paid only for the hours actually worked. Employees routinely worked more than 40 hours each week.

D. The dispute between the Parties

The Plaintiffs make two related claims. First, they claim that they should have received a hardship uplift of 35%, not 15%. This claim is based on the language in the Offer Letter that the employee will receive the stated rate of pay "along with the uplifts for Danger and Hardship on your base pay as designated by the Department of State[,]" and the Assignment Letter stating "You are eligible for the following compensatory uplifts for Danger and Hardship on your base pay as designated by the Department of State." At all relevant times, the Department of State regulations set the maximum hardship uplift for Afghanistan at 35%. Plaintiffs acknowledge that the Letter of Assignment also states that the employee "will receive a hardship allowance provided as a 15% differential, paid via Serco payroll." Plaintiffs argue that the discrepancy in the hardship uplift rate between the Department of State regulations and that stated in the Letter of Assignment constitutes a patent ambiguity, which must be resolved against Serco as the party that drafted the documents, and without consideration of extrinsic or parol evidence. The Plaintiffs' second claim is that they were entitled to the hardship and danger uplifts on all hours worked, not just the first 40 hours in a given week. This claim is based on the language in the Offer Letter that states that the employee compensation would include "uplifts for Danger and Hardship on your base pay as designated by the Department of State." Plaintiffs claim that because they were paid based upon the number of hours actually worked, rather than by the week without regard to the number of hours actually worked, all of their hourly earnings were part of their "base pay." Therefore, according to the Plaintiffs, uplifts were owed on all hours worked, not just the first 40 hours in a given week.

Serco denies both claims by the Plaintiffs. First, Serco denies any ambiguity in the terms of the Offer Letter and Letter of Assignment. Second, Serco denies that the Offer Letter obligated it to pay the maximum 35% hardship uplift allowable under Department of State regulations. Rather, Serco argues that it never agreed to pay the Plaintiffs anything more than a 15% hardship uplift as expressly stated in the Letter of Assignment. Lastly, Serco claims that the "weekly pay rate" stated in the offer letter constitutes the employees' "base pay," and, therefore, the Plaintiffs are not entitled to any uplift on hours worked in excess of 40 in a week.

E. Procedural history

Prior to trial, the Parties each made a motion for summary judgment. The Court denied those motions for the reasons explained in the letter opinion Judge Mann issued on April 11, 2019. The Plaintiffs made the same arguments to Judge Mann as were later made at trial. In denying all motions for summary judgment, Judge Mann held that the

Offer Letter and the Letter of Assignment were ambiguous because each Party had a reasonable, but differing, interpretation of the employment agreement. Judge Mann deferred resolution of the ambiguity until after trial on the merits.

This Court, which now considers the case for decision after a full trial on the merits, concurs with and will not disturb Judge Mann's ruling that the terms of the Offer Letter and the Letter of Assignment are ambiguous. That ambiguity must now be resolved.

II. Analysis

A. The hardship uplift

Virginia law makes a distinction between contracts in which an ambiguity is patent and one in which the ambiguity is latent. *See Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 502, 464 S.E.2d 349, 354 (1995). A patent ambiguity is one that is apparent on the face of the contract.[2] *Id.* "[W]here the ambiguity is not self-evident from the writing," the ambiguity is latent. *Id.* As Judge Posner eloquently stated, an ambiguity is latent, when "although the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder what it meant with reference to the particular question that has arisen." *Fed. Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614, 620 (7th Cir. 1989).[3] The distinction between patent and latent ambiguities is crucial, because "parol evidence cannot be considered to explain a patent ambiguity[.] ... [W]here there is a 'latent ambiguity,' [ ] the use of parol and other extrinsic evidence [is] permissible to aid the trier of fact in determining the intention of the parties." *Galloway*, 250 Va. at 502, 464 S.E.2d at 354–55.

The Court finds that the ambiguity regarding the amount of the hardship uplift is a latent ambiguity, because it is not readily apparent from the face of the Offer Letter and Letter of Assignment. The ambiguity does not become apparent until consideration of additional information not included in either letter – specifically, the hardship uplift percentage for Afghanistan designated by Department of State regulations. The Plaintiffs conceded in their Memorandum in Support of their Motion for Partial Summary Judgment[4] that "the offer letter did not expressly state the Hardship uplift to be paid by SERCO would

[2] For example, a contract that stated that the purchaser will buy and the seller will sell an item "for $100.00 (One Thousand Dollars)" would present a patent ambiguity.

[3] "For example, if a contract called for goods to be delivered to 'the green house on Pecan Street,' and there were in fact two green houses on the street, it would be latently ambiguous." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 n.8 (Tex. 1995).

[4] During argument at the conclusion of the trial on the merits, Counsel for the Plaintiffs expressly incorporated the written arguments submitted in support of their Motion for Partial Summary Judgment.

be 35%, [but instead] referenced a specific controlling source – the DSSR[5] – from which the precise Hardship uplift to be paid could be easily ascertained." Plaintiffs' Memorandum In Support of MPSJ at 11. The Plaintiffs provide no authority for their argument that reference to "a specific ascertainable standard by which to establish the applicable rate of payment of the Hardship uplift" – which differed from other contract language regarding the payment rate of the hardship uplift – rendered the ambiguity patent rather than latent. To the contrary, because the ambiguity is not self-evident from the writing, it is not a patent ambiguity. *See Galloway*, 250 Va. at 502, 464 S.E.2d at 354

Plaintiffs argue in the Memorandum in Support of MPSJ that the ambiguity here is not a latent ambiguity. Plaintiffs argue that a latent ambiguity must arise from "subsequent extrinsic circumstances, the occurrence of which neither party anticipated." Memorandum at 11. This argument is predicated on a misunderstanding of *Galloway*. In *Galloway*, the Supreme Court noted that the contract terms at issue in that case were ambiguous because "while appearing perfectly clear at the time the contracts were formed, *because of subsequently discovered or developed facts*, may reasonably be interpreted in either of two ways." *Galloway*, 250 Va. at 503, 464 S.E.2d at 355 (*emphasis added*). The Supreme Court did not state that a latent ambiguity could exist only if caused by subsequent events, and this Court declines such a restrictive reading of *Galloway*. The circumstances presented in this case fall neatly within the Virginia Supreme Court's and Judge Posner's definition of a latent ambiguity: The ambiguity is not self-evident from the writing and the agreement itself is a perfectly lucid and apparently complete specimen of English prose. However, anyone familiar with the real-world context of the agreement would wonder what it meant.

Having determined that the ambiguity is latent, the Court turns to well-settled principles of law to resolve that ambiguity. In so doing, the Court's goal remains to give effect to the intention of the Parties. The Court may consider parol and other extrinsic evidence to determine that intention. *Galloway,* 250 Va. at 502, 464 S.E.2d at 354–55. "If the parties both manifested the same intent with respect to the ambiguity, that intent will be enforced. If, on the other hand, the parties do not manifest the same intent regarding the ambiguity, there has been no meeting of the minds on that term of the contract, and the intent of one party will not control." *Id.* at 503–04, 464 S.E.2d at 355.

In this case, the Court finds that at the time the contract was formed – that is when the Letter of Assignment was issued – the Plaintiffs and Serco had a shared understanding that the hardship uplift would be paid at a rate of 15%. The Court received no evidence to suggest that before commencing work for Serco, any Plaintiff knew the percentage rate of the hardship uplift for Afghanistan as designated by the Department

[5] This is the Department of State Standardized Regulations.

of State. The Parties stipulated that "[t]hroughout their respective deployments, Plaintiffs received a 15% hardship uplift and a 35% danger uplift for their first 40 (40) hours of work performed in a given week." The Parties further stipulated that until submitting the contractually obligated written request to engage in non-binding mediation, "Plaintiffs never complained to Serco about the amount of the Hardship and Danger uplifts ...." There is no evidence that any Plaintiff believed at the time of contracting that the hardship uplift would be paid at a rate greater than 15%. Serco unquestionably intended to pay a 15% hardship uplift, as was expressly stated in the Letter of Assignment. The Court finds that at the time of contracting, the Parties had a shared intent that the hardship uplift would be paid a rate of 15%. That shared intent of the Parties controls.

B. Base rate of pay

The Court turns next to the issue of whether the term "base rate of pay" to which the hardship and danger uplifts are to be applied refers to the weekly pay rate (and thus is limited to the first 40 hours of work per week) as Serco claims, or the hourly pay rate (thus applying the uplifts to all pay for all hours worked) as the Plaintiffs claim. The term "base rate of pay" is not defined in the Offer Letter or Letter of Assignment.

When considering disputed contractual language, the Court must consider the document as a whole, and the parties' intention "should be ascertained, whenever possible, from the language the parties employed in their agreement." *Pocahontas Min. Liab. Co. v. CNX Gas Co., LLC*, 276 Va. 346, 352-53, 666 S.E.2d 527, 531 (2008). Those words are considered "in accordance with their usual, ordinary, and popular meaning. No word or phrase employed in a contract will be treated as meaningless if a reasonable meaning can be assigned to it, and there is a presumption that the contracting parties have not used words needlessly." *Id.* (citations omitted).

Applying these principles, the Court finds that the phrase "base rate of pay" is synonymous with the term "weekly pay rate" used in the Offer Letter. The disputed provision reads as follows:

> Your weekly pay rate will be $[*amount*] [*sic*]while deployed you will be paid a straight hourly rate of $[*hourly rate*] for hours worked above 40 each week, along with the uplifts for Danger and Hardship on your base pay as designated by the Department of State.

This language expressly makes a distinction between the first 40 hours worked in a week and hours worked in excess of 40 in a week. The fact that the rate of pay remains the same for all hours worked does not erase this distinction. The Offer Letter then establishes that the danger and hardship uplifts will not be paid on all hours worked, but only on the portion that is the "base pay." Had the intention been to pay the uplifts on all

earnings, the Offer Letter could have said so quite clearly by omitting the phrase "on your base pay." In order to adopt the Plaintiffs' interpretation of the Offer Letter to require payment of uplifts on all earnings, the Court would have to treat as meaningless the language creating a distinction based on the number of hours worked and the words "on your base pay." This is something that the Court cannot and will not do. Rather, the most reasonable reading of the Offer Letter, which gives meaning to all of its words, is that the "base pay" on which the uplifts will be paid is the weekly rate, which is distinct from and excludes the uplifts for hours worked in excess of 40 in any given week. The Court finds, therefore, that pursuant to the Offer Letter, the danger and hardship uplifts were owed only on the Plaintiffs' pay for the first 40 hours worked in any given week.

III. Conclusion

For the foregoing reasons, the Court finds in favor of the Defendants. A draft order to this effect is enclosed. Counsel is directed to endorse the order with any objections they care to state and return it to the Court within seven days.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

BOBBY LEWIS ACRES,	)	
	)	
Plaintiff,	)	
v.	)	CL- 2018-7300
	)	
SERCO INC.,	)	
	)	
Defendant.	)	

ORDER

THESE CONSOLIDATED CASES came before the Court for trial without a jury. For the reasons stated in the letter opinion issued this day, which is hereby incorporated by reference, on the Plaintiffs' claims of breach of contract, the Court finds in favor of the DEFENDANT, SERCO INC. Therefore, it is

ORDERED that judgment is hereby entered in favor of the DEFENDANT, SERCO, INC. in all of these consolidated cases.

June 11, 2019

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Michael F. Devine
Circuit Court Judge