



EMPLOYMENT TRIBUNALS

Claimant
Mr M Lachut

Respondent
John Simpson Civils Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS

ON 28th April 2017

EMPLOYMENT JUDGE GARNON (sitting alone)

For Claimant No attendance
For Respondent John Simpson Director

JUDGMENT

The Judgment of the Tribunal is the claims of unlawful deduction of wages, for compensation for untaken annual leave and breach of contract are dismissed

REASONS (bold print being mine for emphasis)

1 Preliminary Matters and the Law

1.1 By a claim form presented on 3rd December 2016 the claimant brought claims of unpaid wages pursuant to Part II of the Employment Rights Act 1996 (“the Act”) compensation for untaken annual leave, best pursued under the Working Time Regulations 1998 (“the WTR”) and a breach of contract claim for expenses in respect of protective equipment and notice pay pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the 1994 Order”)

1.2. The respondent filed a response on 28th December 2016 and denied all liability to the claimant. The respondent also indicated an intention to counterclaim against the claimant pursuant to the provisions of the 1994 Order. The respondent was asked to particularise that claim but failed to do so.

1.3. On 28th February 2017 Employment Judge Buchanan conducted a private preliminary hearing at which the claimant attended, as did Mr Simpson for the respondent who confirmed no counterclaim was pursued. A Judgment dismissing the counterclaim on withdrawal by the respondent was issued.

1.4. Employment Judge Buchanan then defined the issues in paragraph 3 of his case management summary thus:

General Issues

3.1 *When did the claimant work for/with the respondent? The claimant says he began work on 25 April 2016 whereas the respondent says the working relationship began on 10 June 2016. It is common ground that the relationship ended on 4 October 2016.*

3.2 *In what capacity did the claimant work for/with the respondent? Was the claimant an employee of the respondent or if not, was the claimant a worker for the respondent? I **note and record** that the respondent will say that the claimant was self-employed at all times.*

3.3 *Was the contract subsisting between the parties tainted with illegality? If so, what effect (if any) does that have on the claimant's right to recover relying on that contract?*

3.4 *How much was paid by the respondent to the claimant throughout the period of the working relationship and in particular during the 12 week period in which work was carried out prior to the date on which the relationship ended on 4 October 2016?*

The claim for unpaid wages

3.5 *Does the claimant have standing to advance the claim as either an employee or a worker?*

3.6 *If so, did the claimant work for the respondent for the 5 days 26-30 September 2016 inclusive and 3 and 4 October 2016?*

3.7 *If so, for how long and what was the rate of pay due to the claimant?*

3.8 *Should any award be made gross or net of income tax and national insurance contributions?*

The claim for unpaid holiday pay

3.9 *I note and record that it is common ground that the parties did not enter into any form of written contract.*

3.10 *Does the claimant have standing as either an employee or a worker to advance this claim pursuant to the 1996 Act and/or the 1998 Regulations?*

3.11 *Did the parties make any oral agreement in respect of holiday pay?*

3.12 *In any event, how much holiday pay is the claimant entitled to pursuant to the provisions of Regulations 13-17 (inclusive) of the 1998 Regulations.*

Notice Pay and Expenses claim

3.13 *Does the claimant have standing as an employee (not a worker) to advance this claim pursuant to the 1994 Order?*

3.14 Did the parties make any oral agreement in respect of notice pay?

3.15 How much statutory notice pay is the claimant entitled to pursuant to section 86 of the 1996 Act?

3.16 Is the claimant entitled to recover expenses in respect of protective clothing? If so, in what amount?

Other issues

3.17 If the claimant was an employee, was the respondent in breach of the provisions of sections 1-4 of the 1996 Act when these proceedings were instituted? If so, should any award be made to the claimant pursuant to section 38 of the Employment Act 2002?

3.18 Should any award to the claimant be increased or reduced pursuant to the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

1.5. Pausing there, the matters under “ Other Issues” had not been specifically raised in the claim form , but Employment Judge Buchanan elicited them from it and in furtherance of the overriding objective ensured they would be included. Rule 2 of the Employment Tribunal Rules of Procedure 2013 (“the Rules”) provides:

The overriding objective of these Rules is to enable Employment Tribunals to deal with **cases** fairly and justly. Dealing with a case fairly and justly includes, in so far as practicable –

- (a) ensuring the parties are on an equal footing
- (b) dealing with a case in ways which are in proportionate to the complexity or importance of the issues
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings
- (d) avoiding delay , so far as compatible with proper consideration of the issues
- (e) saving expense

A Tribunal or Employment Judge shall seek to give the effect to the overriding objective in interpreting, or exercising any power given to it by the Rules The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal

1.6. As far as relevant today, Employment Judge Buchanan then wrote as follows :

Other matters

4.2 The amounts claimed by the claimant are clearly set out in the claim form (section 9.2) and so I do not make provision below for a further Schedule of Loss.

4.3 For the respondent, Mr Simpson stated that he considered the claimant to have been self-employed. I explained to the parties the difference between a self-employed person, an employee and a worker. The claimant will say that he was an employee of the respondent but failing that, a worker.

4.4 I referred the parties to the definition of “employee” and “worker” contained in section 230(1)-(3) of the 1996 Act. I explained that in seeking to identify an “employee” the Tribunal will give consideration to factors such as the degree of control exercised by the respondent, the exclusivity of the engagement between the parties, the duration of the relationship, the method of payment, whether equipment was provided to the claimant by the respondent and if so, what equipment, and the level of risk undertaken by the claimant. It will be relevant to consider whether the claimant could have sent someone else to carry out his duties for the respondent had he so wished.

In looking at the distinction between a worker and a self-employed contractor, I referred the parties to the guidance of the Employment Appeal Tribunal in Byrne Brothers (Formwork) Limited –v- Baird 2002 ICR 667 where it was said; “the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm’s length and independent position to be treated as being able to look after themselves”.

When the Tribunal considers if the claimant was a worker then all or most of the same considerations that apply when distinguishing an employee from a contractor will be in play but with the boundary pushed further in the individuals’ favour. The parties should include in their witness statements any evidence they wish the Tribunal to consider in deciding the status of the claimant and they should do so by reference to all relevant factors including those referred to earlier in this paragraph.

4.5 I explained that the claimant would have standing to advance his claims pursuant to the 1996 Act and the 1998 Regulations whether he was an employee or a worker but that his claim under the 1994 Order could only be pursued if he was an employee. If the claimant was a self-employed contractor, then he has no standing to advance any of the claims he seeks to bring to the tribunal.

4.6 It may be relevant for the Tribunal to know the amounts paid to the claimant by the respondent during the few months of their relationship and the parties should produce on disclosure such information as they have to evidence all payments made to the claimant.

1.7. Employment Judge Buchanan then made orders for disclosure of documents , preparation of a trial bundle and exchange of witness statements , He listed the case for a full merits hearing today . I noted from the Tribunal file the claimant had sent in various emails about disclosure and attached to one on 19th March photocopies of 12 pay packets none of which were dated but did show a “ pay week” . The amounts were either £67 or £78 . The earliest was pay week 10 which would fall in early June and the

latest pay week 23 which would fall in early September. There is nothing for weeks 12 and 13 . The claimant says he did work for the respondent from 25th April to 4th October 2016 as a driver.

1.8 On 24th March Mr Simpson e-mailed the Tribunal

From: john [mailto:johnsimpson08@live.com]
Sent: 24 March 2017 11:05
To: NEWCASTLEET
Subject: Mr. M Lachut v John Simpson Civils Ltd. case 2501299/2016

Good Morning

Without prejudice.

After consultation and advice from Avensure, the company we use for our Employment issues, we have decided not to continue to defend the above case.

We are not admitting to any failure, but feel that enough time has been spent by all parties, on trying to reach a conclusion on this matter.

We have no problem regarding the PPI , and if it could be returned along with the Invoice, this can then be sorted.

We would like to thank the Court and the Judge for their time and consideration.

Regards

John Simpson.

John Simpson Civils Ltd.

1.9. On 28th March Employment Judge Johnson indicated a judgment without a hearing under Rule 21 may be issued but he required detailed calculations of sums claimed . The figures the claimant provided on 2nd April bear no resemblance to the figures on the copy pay packets. On 5th April Regional Employment Judge Reed declined to make a Rule 21 judgment without first obtaining the respondent's comments, which is exactly what the law requires in my view .

1.10. On 6th April , the claimant e-mailed raising a complaint that the Tribunal had acted unfairly to " cancel defendant's decision", was biased against him because the case was between, in his words " *our countryman and a foreigner*" . He asked for the case to be moved "to London or elsewhere far away from the North East ". Correspondence about a without prejudice offer had been placed in sealed envelopes on the file. On 7th April , Employment Judge Johnson caused a letter to be sent to the claimant asking whether he intended to accept the offer and saying the hearing on 28th April would deal with remedy if he did not . On 12th April the claimant e-mailed asking whether the Tribunal was " *going to make a decision regarding my complain and regarding my demand to move the case to another Tribunal*" . Easter intervened and on 20th April Regional Employment Judge Reed responded to the claimant.

1.11. I have had nothing to do with this file until I read it yesterday in preparation for today . The passages in Regional Employment Judge Reed's letter which are relevant to the decision I have to make are numbered 3 and 4 , which make it clear today's hearing was still to proceed because there were matters , especially as to the sums claimed which needed to be clarified by evidence from the claimant .

1.12. The claimant did not attend today but Mr Simpson did .

1.13. Rule 47 says

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

2 Today's Hearing and My Conclusions

2.1. I can state these comparatively briefly. When I read the file yesterday , I made a few notes . My preliminary views were:

(a) the contract was unlikely to be tainted with illegality applying the Court of Appeal decisions in Hall v Woolston Hall Leisure Limited and Vakante v Addey & Stanhope School but I **did need sworn evidence** from the claimant to be satisfied.

(b) The claimant was very likely to satisfy the statutory definition of "employee" during the hours he was working applying the tests in a case called Ready Mix Concrete v The Ministry of Pensions Mutuality of obligation in between periods when work is being done is simply not a problem as was explained by Mr Justice Elias in Stephenson –v- Delphi Diesel Systems. The mutuality test only comes into play when it is being sought to establish the existence of a contract whereby people required to do work only on an intermittent basis seek to maintain the status of an employee throughout. It appeared the claimant was an employee with no fixed hours of work but I **did need sworn evidence** from the claimant to be satisfied. If I was , he should have had a statement of terms and conditions under s1 of the Act and I would probably make a further award under s 38 Employment Act 2002 of 2 or 4 "week's pay".

2.2. When I expressed this view to Mr Simpson today, he said it was the same as the advice he had received from his employment consultants . He did not seek to change his decision no longer to argue the claimant was "self employed".

2.3. I also noted in one of the claimant's e-mails a request for some compensation for the time he had to spend on this case which he said was caused by the unreasonable conduct of the defence by the respondent . I considered he had an arguable claim for a make a preparation time order which would have been £34 for each hour I decided was properly spent other than at the final hearing. Moreover, he would have an unanswerable claim for the respondent to pay his Tribunal fees.

2.4. What I could not do without **some evidence** from him was:

(a) be satisfied on balance of probability (i) of the points in 2.1 above (ii) of what , if any, payments were due as wages (iii) what , if any, compensation for untaken annual leave to award (iv) what his “week’s pay” was applying the provisions of s224 of the Act relating to employees with no normal working hours (v) what expenses could be claimed as breach of contract damages.

(b) decide what if any preparation time order to make

(c) decide whether any uplift to awards could be made under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

2.5. In short, all the claimant needed to do today was attend and give satisfactory answers to the points “ flagged up “ in paragraphs 4.4 – 4.6 of the case management summary of Employment Judge Buchanan in order to win his case . He may then have been awarded less, or maybe more, than the sums he claimed.

2.6. This e-mail from the claimant was brought to me this morning at about 8.30 am

From: naprzod2@wp.pl [mailto:naprzod2@wp.pl]

Sent: 27 April 2017 20:48

To: NEWCASTLEET

Subject: Mr M Lachut V John Simpson Civils Ltd (John Simpson Civils Ltd) - Case 2501299/2016

Dear Employment Tribunal,

1. The reasons to move the case to another Tribunal:

a) since ACAS was involved in this case nobody has questioned the fact the respondent owes me at least 400 pounds. So The Tribunal knows the respondent keeps my money (in the post roman world we call it stealing) and does nothing about it.

b) last time I was at hearing I was told I should have agreed with the respondent or I might end up with nothing. In the post roman world we do not compromise with thieves.

c) when the respondent gave the case up The Tribunal encouraged me to keep a dispute with him.

Astounding !

The thief and the liar tries hard to get away of the consequences and I suppose to talk to him ? A achieve what ? Is that my legal obligation ?

d) The Tribunal ordered to carry on another hearing tomorrow and I do not know the reasons for that: nothing is going to be heard, neither me nor him is going to say anything new. The Tribunal did not ask me to send the evidences when the respondent was giving his right up to proof I was a liar. What is the point to ask him to come ? To convince him there is still a hope ?

e) Throughout last several years I have had an experience with Norwich E.T. and Watford E.T. At that last on I did not win, nevertheless I didn` t feel at all The Tribunal helped the opposite side.

2. I am able to proof on 6-04-2017 I sent 3 emails to The Tribunal.

3. No, I do not want an interpreter. I want to feel The Tribunal does not do everything possible to help the respondent. I lost my trust that is the case.

4. The simplest solution - in my opinion - would be: The Tribunal makes an order and instructs me how I may appeal.

Regards Maciej Lachut

2.7. I asked the Tribunal clerk to telephone the claimants mobile number. It went to voicemail but he did ring back urgently as requested . He said his e-mail made clear he was not going to attend. The clerk informed him I was **considering** dismissing the case under Rule 47, and he simply asked whether he would get that in writing .

2.8. I regard dismissal under rule 47 as a step to be avoided if at all possible. I considered whether I could issue a judgment even on liability only with no evidence from the claimant and decided I could not. I considered postponing but the claimant had given no sign he would attend if I did. Mr Simpson said he had already taken time away from his work and did not want to take any more. My duty is to be fair to both sides, not just the claimant.

2.9. My reason for emboldening the word “ cases” in the extract from the overriding objective in paragraph 1.5 above is that it is not only this case which I and my fellow Employment Judges have to manage and Tribunal staff have to deal with. The overriding objective is a concept created when the Civil Procedure Rules were reformed under the direction of Lord Woolf in the early 1990s. His Lordship emphasised in a number of cases, notably , Beachley Properties v Edgar, the concept of ensuring just handling of cases was not confined to the case in question. The proper administration of justice was not to be disrupted by parties’ failure to comply with orders or other forms of unreasonable behaviour. Similar points were made by the Court of Appeal in Arbuthnot Latham Bank v Trafalgar Holdings and Adoco Limited v Jemal.

2.10. I have therefore decided it would not be just to allocate more Tribunal time to a claim, in which it was made crystal clear to the claimant he had to attend to prove it , in circumstances where his absence is a conscious decision not the result of some confusion or mishap .

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28th APRIL 2017

SENT TO THE PARTIES ON

5 May 2017

G Palmer

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FOR THE TRIBUNAL