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EMPLOYMENT TRIBUNALS

Claimant: Mr D Bailey

Respondent: ISS Facility Services Limited

Heard at: London Central **On:** 3 March 2017

Before: Employment Judge Hodgson

Representation
Claimant: In Person
Respondent: Ms N Siddall-Collier, Employment Law Specialist

JUDGMENT having been sent to the parties on 16 March 2017 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 originally issued proceedings in this matter on 18 July 2016. The claimant seeks to claim for the unlawful deduction from wages. He also refers, generally, to TUPE breach of employment contract.

2. The matter came before me on 10 November 2016, and I do not intend to repeat in detail the matters identified on that date, but suffice to say the respondent accepted that some sick pay had not been paid and judgment was entered for the admitted amount. There remained a question about unlawful deduction from wages and I recorded, specifically, that there were no claims pursuant to Section 11 of the Employment Rights Act 1996 or Regulation 30 of the Working Time Regulations 1998 and I noted that the Tribunal has no jurisdiction to rule on standalone claims.

3. The claimant is still employed and has set out no particulars in any event. As the claim was unclear, I gave an order that the claimant must do so by 1 December 2016 for the purposes of this oral judgment I am not going to

recite the terms of 3.2.1, 3.2.2 and 3.2.3, as the parties are familiar with them, however, they are incorporated within the reasons.[1]

4. By order 3.4 of the order of 10 November 2016, I set out an unless order, that if the claimant failed to comply with any part of the order at 3.2 by 4:00pm, 1 December 2016, to provide documents and information, the entire claim, save for the matter decided by consent, should stand as dismissed, and there should be no need for any further order.

5. It is clear on the face of it that any failure of compliance would lead to the claim being struck out. Today, 3 March 2017, I heard from both parties and I spent some time today ascertaining what compliance there had been with the directions. It is clear that, on 30 November 2016, the claimant did undertake some compliance, I have received a document headed contracted earnings, this essentially sets out, by reference to each two week period, the following: the total sums paid, the hourly rates, and the total hours worked. It then sets out three further columns, the first entitled "inflated hours (48-60)," then "inflated basic," and then the "estimated loss." Essentially, what the claimant says is that he was permitted to work a number of hours, but that it was his contractual right to work 60 hours a week. Hence, he takes the pay rate applied, takes the sum actually earned, postulates what the sum would be if he worked 60 hours a week, and the difference he claims as a deduction from wages.

6. He also sets out in a further document his claim for ongoing employee pension. He claims the rate of 14% rather than 4% actually contributed, and then he estimates the loss on that basis.

7. Having regard to the above, what he is claiming is clear.

8. He was also asked to provide copies of the written contracts on which he relied. Unfortunately, there has only been part compliance. The claimant seeks to rely on a documentation headed Pay and Conditions of Employment from Group 4 which is dated 1 July 2001. A copy of that was sent, but one of the pages, which I understand to be page 3, was not sent by the claimant. It is clear from what he says to me today that he knew that the page was missing. He tells me that there were difficulties; he was excluded from his house following a divorce, but he sought the assistance of his children. Whilst some documentation was produced in time, he says he did not receive the additional documents until sometime in January, when he eventually lodged it, which is of course after the period allowed.

9. In fact, the document was sent on 17 January 2017. He says that the document was at some stage produced by his children from the house, although and the exact circumstances of that remain obscure. It is clear that the document was in his possession, on the claimant's own case, albeit he may not have had ready access to it.

10. Page three of the document is important because the claimant relies specifically on clause B2 which reads:

[1] See appendix 1 below.

> **The normal hours are determined by a duty roster which shall provide for not less than two days off per week on average.**
>
> **It is normal for the roster to require hours in excess of 40 per week to be worked.**

11. The claimant also relies on the next page of the same documents and the clause for holiday pay under C2a.

> **A week's holiday is equal to the basic hourly rate of pay for 60 hours except that for Receptionists and Receptionists (Berkeley Square) a week's holiday pay is equal to the basic hourly rates of pay for 40 hours.**

12. He relies on this holiday pay clause to say that he had a right to work 60 hours each week.

13. The only other document that he specifically relies on before me today is a letter from G4S of 19 August 2015 written to the claimant when he was not employed by G4S. There is a heading G4S Pension Scheme (Group 4 Section). It goes on to say:

> **I can confirm that the member contribution rate of 4.5% until 5/4/2003, changing to 9.7% from 6/4/2003.**
>
> **The employer contribution rate was 14% throughout your employment. Please note that as the scheme is a defined benefits scheme the levels of contribution have no effect on the level of benefits that you will receive.**

14. The claimant did file a letter on 30 November 2016 which identified a number of documents. It identified clauses 1a, and 2a from the Group 4 pay conditions of employment and it identified the letter I have referred to; it also identified the original letter from Mitie letter of 13 February 2009.

15. It is fair to say that the claimant has attempted to comply or did comply with parts of the order at 3.2. Unfortunately, he did not fully comply, he failed to provide a full copy of the Group 4 Pay and Conditions of Employment as he failed to send the relevant page. Nevertheless, he did identify Clause 2a, being the one which was missing from the actual written document. The question arises as to whether or not there was non-compliance with the unless order, and whether the claim stands automatically struck out.

16. I have reached the view that there was, technically, a failure to comply, but that said there can be no doubt that the document itself had already been disclosed to the respondent, and it was identified. In the circumstances, I take the view that there was sufficient compliance such that the claim should not stand and struck out automatically pursuant to the unless order.

17. In the alternative, the compliance was sufficient to found an application for relief from sanction. I therefore decline to declare the claim as struck out pursuant to the unless order.

18. I have today been asked to order the case should be struck out as having no reasonable prospect of success; I am in a position to deal with that application.

19. Does it have any reasonable prospect of success? First, in relation to the wages claim, the respondent submits there was no specific contractual right to work 60 hours a week and that on the claimant's own admission he was paid for all the hours that he worked.

20. I have looked at the Group 4 documentation. The hours to be worked are set out at B2, the normal working hours are determined by the duty roster which shall provide for not less than two days off per week. It is normal for the roster to require an excess of 40 hours per week to be worked. It is clear the claimant did work more than 40 hours per week, but he did not work 60 hours per week.

21. I note that the holiday pay is calculated by reference to an hourly rate of 60 hours per week, that is a matter for holiday pay, but there is no basis for implying a term that an individual must be paid for a total of 60 hours per week when not on holiday. There is no basis for saying that there is a right to work hours a week.

22. The claimant overlooks clause B1, which concerns the basic working week. This provides, "The basic working week as covered by this agreement is 40 hours." Therefore, the claimant's contention, that the basic normal working hours are 60, is clearly erroneous. I note that there is a conflict between the clause about the normal working week and the clause about holiday pay. It may be there are reasons for that; it may be that there is an enhancement for holiday pay as some form of policy decision, but that is not something that I have to consider.

23. The claimant's case is that he was entitled to work 60 hours per week, but the clear documentary evidence is against that; there is no reasonable prospect of him establishing that he had a right to work 60 hours per week. It follows, therefore, that as he accepts that he was paid for all the hours that he did work, there is no prospect of him recovering those additional hours he said he should have been allowed to work. There is no arguable case of unlawful deduction from wages. He was paid for the work that he did.

24. The second part of the remaining claim is the pension element. The claimant is seeking to claim that he should receive from the current respondent, who is ISS Facility Services Limited, employer contributions of 14%. This is based on the agreements with Group 4. The reality is Group 4 transferred the claimant's employment to Wilson James, and Wilson James then transferred it to Mitie. It was then transferred to ISS Facility Services Limited. There is no obligation on the face of it to honour that 14% payment. Be that as it may, I do not need to decide that point, the difficulty is the claimant has already, on his own admission, litigated about this and failed. He is seeking to litigate about it again, that is an abuse of process, that is what is technically known as res judicata. He is not permitted to litigate again. It seems inevitable that if the matter has to be decided, that the case would be struck out as an abuse of process. I am not going to strike out as an abuse of process today because I have not got all of the relevant documents before me; however, I have sufficient before me, on the basis of the statement of the position from the respondent, and the agreed position as accepted by the claimant, to say that there is no reasonable

prospect of success in the pension claim. If only for the fact that there is no defence advanced to the abuse of process allegation: that is sufficient to say there is no reasonable prospect of success.

25. It follows that I am going to dismiss the claim in its entirety for the reasons that I have given.

Employment Judge Hodgson
8 June 2017

Appendix 1

3.2 The claimant shall on or before **4.00 pm**, **1 December 2016** provide further and better particulars in writing with a copy to the tribunal and shall provide the further documents as set out below.

3.2.1 The claimant will provide all written documents said to contain any contractual terms on which he relies other than the letter from Mitie dated13 February 2009.

3.2.2 The claimant shall set out a written schedule of all the documents containing contractual terms on which he relies (including the letter from Mitie of 13 February 2009), and he shall state in relation to each document the specific contractual term relied on and shall confirm if it is alleged copies have been sent to the respondent.

3.2.3 The claimant shall detail the sums claimed as unlawful deduction from wages. The claimant will confirm by reference to each 2 week pay period for which he was paid any failure to pay wages to include the following:

3.2.3.1 the number of hours worked in that 2 week period;
3.2.3.2 the rates or sum the claimant alleges should have been paid (and the reason why that rate or sum applied);
3.2.3.3the rate or sum actually paid;
3.2.3.4any sum he identifies as having been deducted; and
3.2.3.5the alleged loss for that week.