



EMPLOYMENT TRIBUNALS

Claimants: Mrs J Frudd
Mr I Frudd

Respondent: The Partington Group Limited

HELD AT: Manchester

ON: 3 August 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimants: In person

Respondent: Ms A Del Priore, Counsel

Judgment having been sent to the parties on 22 August 2017, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the follow reasons are provided:

REASONS

1. The Tribunal this morning has been considering an application made by the claimants for orders for specific disclosure, in relation to documents that they seek in connection with the claims that they make for arrears of wages, and in particular underpayments of the National Minimum Wage. These are claims that they have brought before the Tribunal and upon which there has previously been a Tribunal judgment, but which has been the subject of a successful appeal to the Employment Appeal Tribunal, and which is therefore to be re-heard before a different Tribunal in the near future. In the course of preparation for that re-hearing the claimants have asked the respondent for certain documents in correspondence and, not having been satisfied with the response that they received, although they received some of the documents that they sought, they made application originally by a letter dated 15 June 2017 to the Tribunal for orders for specific disclosure, under rule 31 of the 2013 Rules. The claimants today have been represented by Mrs Frudd, although Mr Frudd is also present, and the respondent has again been represented by Ms Del Priore of counsel.

2. In terms of the original application, that was for some 12 classes of documents, and they were set out in the claimants' letter to the Tribunal of 15 June 2017. However, following further communications between the parties and the

respondent's response to the claimants, some of those applications have fallen away, and consequently the applications are only pursued today in relation to items 2, 3, 5, 8 and 10 of the original application of 5 June 2017. The respondent's response to that application was set out in the letter to the Tribunal and the claimants of 5 July 2017, and the claimants further commented upon that response in a further letter to the Tribunal of 23 July 2017, all of which the Employment Judge has read. Mrs Frudd made her applications this morning and spoke to the applications made in writing and also prepared another document, which she described as a "statement" but was in many ways really the submissions that she wanted to make in relation to the various applications that were made. The Tribunal has read that document as well.

3. In terms of background, these claims arise out of the engagement of the claimants at the respondent's caravan park in Fleetwood, and the claims that they make in relation to what could be described as "on call time", and in particular call outs that they carried out during their working for the respondent, in respect of which they claim to be entitled to be paid in circumstances where they submit that their actual pay would fall below the National Minimum Wage if their rate of pay was assessed appropriately. That will be the main issue in the forthcoming re-hearing of these claims.

4. The claimants' positions were that they lived on site in a caravan and were required, and this is common ground between the parties, to carry out certain works of an on call nature when they were residing there and to respond to various emergencies and call outs occasioned by anything that occurred on site at the relevant time, and it is in connection with their activities and what they carried out when actually working that the claimants' applications are directed.

5. At the outset of the application the Employment Judge clarified with the parties as to whether there was any issue as to the relevance of the documents sought, and the respondent did not take any issue on the relevance of those documents. Consequently that has not been a feature of this application. The real issue has been why the relevant documents have not been disclosed, and whether they can and should be ordered to be disclosed at this stage.

6. Going through the various types of documents referred to and the enumeration in the letter of 15 June 2017, the first class under item (2) is copies of all call out payment claims during the emergency payment period as shown in payment records from March 2009 to March 2015, and Mrs Frudd explained to the Tribunal, which, of course, has not had the benefit of having heard the original claim or, indeed, having considered any of the evidence in the original claim, so she has helpfully explained to the Tribunal today the relevance and nature of these particular documents. She has been able to provide to the Tribunal examples of this type of document that the respondent has been able to provide to the claimants. These are payment claim forms which came into being in the course of the claimants' employment, when they were called out and wanted to submit for payments to be made this particular type of form, which is a weekly form, a pro forma document apparently, into which they would then enter details of any particular times that they had been called out, which they would then pass on to the manager to then pass on and process for payment purposes. There was only ever one copy of this document

it seems, and once it was passed on to the manager and then to the administration it would not be seen again, and indeed has not been seen again, in most instances, until these proceedings. The claimants' complaint is that whilst the respondents have disclosed some of these documents in relation to the relevant period they have not disclosed all of them, and there must be more of them and there are, as it were, gaps in the sequence of documents disclosed.

7. In relation to this class of document the claimants say, and it is not disputed, she knows that these documents exist or existed because in many cases she completed them. They would be compiled by her, in fact in most cases, and submitted to the manager, so she has had sight of these documents once, obviously going back some time, and so knows firsthand that they once existed. Indeed clearly insofar as the respondent has been able to disclose many of these documents, they did, and they agree that they did. The problem arises in relation to those which are missing.

8. In addition to that class of document under item (3), relating to it is any other document or record which would relate to the call out payments. The claimants were paid, and records have been disclosed of payments made to them in respect of a number of call out occasions, and what the claimants have been seeking, either through the payment claim forms I have referred to, or any other form of documents, is the supporting documentation which, as it were, would marry up with the payments made. They require this to demonstrate the range of duties that they carried out on these various call outs, pointing out that the reason for the call out could vary from anything as serious as the police attending, to someone having difficulty with their lights or something of a more mundane nature, but they want to use this material to demonstrate the range of activities that they were actually carrying out on the occasions when they were called out. This second class of document at item (3) is a further class in that the claimants have seen some weekly hours sheets described as "manager's weekly hours sheets" which are not the manager's own hours, but are records apparently compiled by the manager in question at any given time of the hours worked by the staff as a whole, including the claimants, and that would also include hours when they had responded to calls, and this is another route by which the claimants would seek to identify not only when they were called out, but also why they were called out, and some of the documents that have been disclosed of this nature would assist in that regard as well.

9. The respondent's response to both of these classes of documents is simply that yes, they did exist and it is accepted that, both in relation to the payment claim forms and the weekly hours' records, there would indeed once have been such documents. The respondent's difficulty is that search though they might, and they claim that they have done, they cannot find the missing ones and consequently cannot disclose them. This is not to be read as in any way sinister, but down probably to human error, but despite searches being made and the solicitor for the respondent making repeated requests of the respondent, they have been unable to locate these missing documents.

10. The Tribunal has been told of the nature of the respondent's business, which is a relatively small one. There is a Head Office a little way up the road from the site where the claimants worked. There is one person responsible for the administration

of the payroll which is done internally, and that is a Sadie Welch. She has searched for the records in these documents but simply cannot find them. There is no explanation the respondent can give for this, other than perhaps human error, but there is no event relied upon, in terms of any catastrophe or anything of that nature affecting the business , that might explain why these records are incomplete.

11. The next item sought by the claimants at item (5) on the list are records, notes or documents relating to the service supplied by the company to its customers who had Ramtech alarms. Mrs Frudd explained to the Tribunal that this is a reference to an optional service provided to owners or renters on the caravan park who would have installed the Ramtech alarm system as part of which there was a monitoring service which the claimants in fact provided, because these were silent alarms and there was a pager which would go off and consequently the claimants would respond to any such alarms going off and the purpose of this request is to seek disclosure of any relevant contractual terms between the respondent and the caravan owners who had Ramtech alarms. The respondent says there are no such documents. Mrs Frudd was able to explain that she herself had some involvement in this matter because whilst she was working there, certainly up until 2012, she caused letters, and indeed drafted or used a template of a letter, to be sent to the relevant owners charging them for this particular service, but she accepts that this ceased after 2012. In terms of anything thereafter she is unable to point to any actual documents but says there must be some because the owners were being charged for this service. There has apparently been a leaflet referred to by the respondent which relates to this service, but other than that there has been nothing further that has been disclosed.

12. In terms of the purpose of this request, again it relates to the claimants' contentions as to the nature of the work that they did, and the call outs that they responded to, and, particularly in the light of the Employment Appeal Tribunal's ruling in relation to the legal test to be applied, they wish to demonstrate that in performing this service they were discharging what would be a legal obligation between the respondent and the owners, and that they were consequently providing this in circumstances that would be relevant to the determination of their entitlement to the National Minimum Wage in respect of this element of their working time. So that is the purpose of the application, but in terms of the issues, there seems no issue but that there were contractual arrangements between the owners and the respondent in relation to the provision of this alarm service. There also seems no dispute that it was part of the claimants' duties to attend to those alarms when they were on call, and in terms of any issue being taken as to whether this was or was not pursuant to any legal obligation between the respondent and their customers, the respondent has not, on the face of it taken any point on that, but obviously if that was an issue and a serious issue this may have greater importance. For the present, however, given the respondent's position in relation to that, and that it seems no real issue turns upon it, whilst there may well have been further communications between the respondent and their customers about these terms, at the end of the day it seems to the Tribunal these documents would not advance the matter very much further, and, in any event, the respondent says again there are no such documents. After 2012 Mrs Frudd is unable to establish that there in fact are, although she contends again that there must be.

13. Similarly in relation to item (8) this too relates to the Ramtech alarm system and relates to the cancellation of that contract. This was apparently in 2015 but Mrs Frudd clarified that none of the claimants' claims are based on the provision of these services after that date, and it is the claimants' case that this contract was cancelled, and indeed the respondent agrees that that is the case. As to whether the respondent has supplied actual evidence of the cancellation there seems to be issue, although the respondent apparently has disclosed something that may be no more than a request about cancellation, but it is the claimants' case that this contract was cancelled and the respondent's case, as far as one can tell at this stage, is that that is the case. So to that extent this seems to be something of a non issue. Again the respondent says they have disclosed what they have and there is simply no more.

14. Finally in relation to item (10), this is a request for records of the hours worked by security, security in fact being one person, a person called Steve, who provided security services, probably as a direct employee, and certainly in that role in 2014. Again the respondent has given partial disclosure of his working times but there is a gap of the weeks between weeks 9 and 18 in these records as well. Again the respondent says this is a gap that it cannot plug and it cannot find the relevant records and consequently cannot disclose what it does not have. There is a suggestion, however, that there was an email in relation to a change in this person's hours, and although an application was previously made before the original hearing for this document, it has not been pursued, and it is not one of the matters that is sought in this hearing today, but to the extent that there may be a relevant email at least showing a change of hours, which again Mrs Frudd advances because she had seen it, then it may well be that that can be unearthed, but it is not actually one of the matters before the Tribunal today; it is the record of the hours for the missing weeks that is.

15. So in essence that is the application, and the resistance to it. In terms of whether an order should be made, the Tribunal predominantly, of course, considers relevance: if a document is relevant it should be disclosed.

16. In terms of whether an order should be made, on the other hand, a Tribunal cannot and should not order disclosure of a document unless satisfied that it is in the possession or control of the person against whom the order is sought, in this case the respondent.

17. In relation to three of the classes of documents referred to in this application: the payment claim forms, the weekly hours records and the working hours of the security guard, the position is that there has been partial disclosure but there are gaps, and acknowledged gaps, in that disclosure and it is those gaps in relation to which the claimants make three of these applications.

18. No evidence has been put before the Tribunal from Ms Welch or anybody else about the non availability of these documents, and clearly Mrs Frudd is able to point to their likely existence, which is conceded by the respondent. But in the absence, however, of any evidence to the contrary the Tribunal has no reason at this stage to doubt the respondent's bona fides in simply saying that these documents cannot be found. That is ultimately perhaps a question of fact and the Tribunal could stand the

matter down for that to be determined and evidence to be called, but that seems to me to be an unnecessary delay, and can be dealt with, if appropriate, in the final hearing. It may well be, as Ms Del Priore has suggested that evidence should be given about the absence of these documents, and it may well be that if a witness statement from Ms Welch setting out the searches and enquires she has made and why she believes the documents are no longer available to be found that that will satisfy the claimants, but in terms of the evidence before me today the Tribunal is satisfied that the respondent, on the face of it, does not have these documents, not least of all because they have given partial disclosure and the point made by Ms Del Priore is a good one: if the respondent was seeking to hide significant pieces of evidence why would it disclose partial pieces of this evidence but not other parts?

19. Further in any event the point is made, and again it is a valid one, that ultimately the absence of this documentation will rebound not upon the claimants, but upon the respondent. In terms of what they seek to establish, particularly in terms of what work they carried out, which is really what all of this is directed to, they will give evidence about that in their witness statements and in their oral evidence before the Tribunal, and to the extent that that is challenged, and it seems a little unclear at the present as to the extent to which it has been but to the extent that that is challenged, the respondent without the documentary evidence that it has failed to disclose may be in a difficult position to challenge the evidence of the claimants as to what they actually did.

20. Bearing in mind, particularly in relation to the National Minimum Wage, section 28(2) of the 1998 Act does provide that where a complaint is made, for example as this is, of unauthorised deduction from wages, it shall be presumed for the purposes of the complaint so far as relating to the deduction of that amount that the worker in question was remunerated at a rate less than the National Minimum Wage unless the contrary is established. So if there is any doubt as to whether or not the claimants have been paid the National Minimum Wage, the burden is upon the respondent to show that they have, not upon them to show that they have not. To that extent, therefore, the absence of the documentary evidence from which they may seek to establish that will rebound upon the respondent and not upon the claimants, a point which the respondent is doubtless well aware of. Ultimately, disclosure is a matter for them, and if they cannot disclose those documents they must accept the consequences.

21. Those seem to me to be very good reasons why, notwithstanding the claimants' obvious concern at the absence of these documents and the desire to have them to establish their case, (because in many ways that is what they are seeking to do: they are looking for these documents effectively to back up what they say) the tribunal should not make an order.

22. In terms of whether the Tribunal should make any orders today the Tribunal concludes that it should not order disclosure, primarily, of documents that the respondent does not on the face of it have, but in any event, even if that is doubtless and may open to question, the non disclosure of these documents ultimately is a matter that should not impede the claimants' case and is more likely to impede that of the respondent.

23. For those reasons the application for specific disclosure is dismissed.

Employment Judge Holmes

Dated 5 September 2017

REASONS SENT TO THE PARTIES ON

6 September 2017

FOR THE TRIBUNAL OFFICE