



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr H Wilkins

The Royal Devon and Exeter
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

ON 29 November 2017

EMPLOYMENT JUDGE A Goraj

MEMBERS Mr P Gregory
Mr J Howard

**RESERVED JUDGMENT IN RESPECT OF THE OUTSTANDING ISSUE
RELATING TO SECTION 38 OF THE EMPLOYMENT ACT 2002 IDENTIFIED
AT PARAGRAPHS 46 -47 OF THE REMEDY JUDGMENT WHICH WAS SENT
TO THE PARTIES ON 2 OCTOBER 2017**

The unanimous Judgment of the tribunal is that the tribunal does not make any award pursuant to section 38 of the Employment Act 2002.

REASONS

1. This Judgment is issued further to the Judgment dated 27 September 2017 relating to remedy which was sent to the parties on 2 October 2017 ("the remedy Judgment"). The tribunal raised at paragraphs 46 -47 of the remedy Judgment the question of whether the claimant was entitled to receive any compensation pursuant to section 38 of the Employment Act

2002 as it was unclear whether the respondent had, at the relevant time, complied with the terms of section 1 of the Employment Rights Act 1996 ("the Act"). The parties were therefore invited to make written representations limited to this issue which is the only outstanding matter in these proceedings.

2. The tribunal has regard to the following written representations which were received from the parties:-
 - (1) The email dated 13 October 2017 and accompanying documents from the respondent's representatives.
 - (2) The emails dated 20 October 2017 and accompanying documents from the claimant.
 - (3) The email from the claimant dated 22 October 2017 and accompanying documents.

THE FACTS

3. The tribunal is satisfied in the light of the documentation and the representations with which it has been provided that :-
 - (1) The claimant was issued with a statement of terms and conditions of employment by the respondent (then known as the Royal Devon & Exeter Healthcare NHS Trust) on 4 February 2004 ("the Particulars") which were accepted by him on 11 February 2004 (prior to the commencement of his employment with the respondent on 14 June 2004). The claimant's date of appointment was originally stated in the Particulars as 24 May 2004 but was subsequently amended in manuscript to 14 June 2004 (the correct start date). The date of the claimant's continuous employment for the purposes of his entitlement to statutory employment rights was also stated in the Particulars as 24 May 2004 but was not subsequently amended in manuscript.
 - (2) The respondent wrote to the claimant in October 2004 regarding the proposed implementation of the Agenda for Change programme and associated arrangements.
 - (3) The claimant was subsequently provided with a detailed Job description in respect of his job title of Medical Physics / Radiation Protection Adviser (which was accepted by the claimant on 30 November 2004).
 - (4) The claimant was issued on 12 December 2004 with a letter advising him that his pay and terms and conditions would in the future be

determined under the new NHS Agenda for Change pay system and associated provisions including that he could access a copy of the Agenda for Change Agreement on the respondent's intranet site or by contacting his manager. The claimant was further advised that (a) the letter represented a variation to his existing contract of employment and (b) the new arrangements did not affect his accrued statutory or NHS entitlements or any trust agreed terms and conditions not described in the Agenda for Change Handbook.

- (5) The employer was identified in the documents referred to at paragraphs (2) - (4) above as the respondent Foundation Trust.

The representations of the parties

4. In summary, the respondent contended in its email dated 13 October 2017 that the respondent had complied with its obligations pursuant to section 1 of the Act and further that any changes to the Agenda for Change Handbook were notified to employees on an ongoing basis by pay and conditions circulars and notices in the NHS Workforce Bulletin.
5. In summary, the claimant contended in his email dated 20 October 2017 that the respondent had breached section 1/ 4 of the Act including in particular as (a) the respondent had failed to provide a copy of the Particulars to the tribunal previously in the proceedings (b) the alleged failure by the respondent to discuss with the claimant/ amend his job description to amend changes to his role between 2004 and 2015 and (c) that the respondent had failed to provide the claimant with further written particulars where there had been changes to the Particulars (unspecified save in respect of the reference to his job description/ grading). The main focus of the claimant's e mail dated 20 October 2017 (and his subsequent email dated 22 October 2017) related however to the alleged failure of the respondent to understand the nature and importance of his role and to adhere to the provisions of the Agenda for Change Handbook including with regard to the evaluation of his post.
6. The claimant acknowledged in his email dated 20 October 2017 that (a) he had received the Particulars (b) that he was familiar with the Agenda for Change Handbook and (c) that information regarding changes to the Agenda for Change Handbook were readily available.

THE LAW

7. The tribunal has had regard to the following statutory provisions namely, sections 1- 4 of the Employment Rights Act 1996 ("the Act") and section 38 of the Employment Act 2002 ("the 2002 Act") and Schedule 5 thereto.

8. The tribunal has also had regard to the Judgment in **Birmingham City Council v Wetherill and others 2007 IRLR 781 CA** (relating to the manner of the notification of changes in terms and conditions).
9. The tribunal has reminded itself in particular as follows:-
 - (1) Section 38 of the 2002 Act requires, save in the circumstances referred to at (2) below, a tribunal to award compensation to an employee where, upon a successful complaint being made in respect of any relevant jurisdiction (which includes unfair dismissal) it becomes evident that the employer was in breach of its duty to provide full and accurate particulars pursuant to section 1 of the Act. The tribunal is required in such circumstances to increase the relevant award of compensation by the minimum amount (two weeks' pay) and may, it considers it just and equitable, increase such monies by the higher amount (four weeks' pay).
 - (2) The tribunal is not however required to make such an award if there are exceptional circumstances which would make such an award or increase unjust or equitable.
 - (3) The relevant date for determining whether an employer was in breach of the requirements for the purposes of section 1 / 4 of the Act is the date on which the main proceedings were begun by the employee. In this case the claimant presented his claim form to the tribunals on 2 February 2016.
 - (4) Section 38 of the 2002 Act does not give employees a free standing right to claim compensation for any failure to provide written particulars. Further section 38 of the 2002 Act does not give employees the right to pursue any claim in respect of the application/ failure to apply or the interpretation of such particulars.

THE CONCLUSIONS OF THE TRIBUNAL

10. Having given careful consideration to all of the matters referred to above the tribunal is satisfied that :-
 - (1) The claimant was provided with the Particulars referred to paragraph 3 (1) above prior to the commencement of his employment with the respondent. The claimant has not identified any failure by the respondent to comply with sections 1-3 of the Act in respect thereof.

Further the claimant did not contend that the employment policies of the respondent and/or the other agreements referred to paragraph 1 of the terms and conditions of employment contained in the Particulars were not reasonably accessible to him.

- (2) It is however apparent from the face of the Particulars that the date of the claimant's continuous employment for the purposes of his entitlement to statutory rights was incorrectly stated as 24 May 2004 (which was not amended when the date of appointment was amended in manuscript to 14 June 2004).
 - (3) The Particulars state the claimant's job title and the claimant was subsequently issued with, and accepted, a comprehensive job description in November 2004 which incorporated his principal duties as the Director of Medical Physics/ Radiation Protection Adviser.
 - (4) The claimant was subsequently advised of relevant changes to his terms and conditions in accordance with the Agenda for Change programme/ Handbook including of the process and associated changes to his terms and conditions (paragraphs 3 (2) (4) and 6 above).
 - (5) That any information relating to any subsequent changes to the Agenda for Change Handbook was readily available (paragraph 6 above).
 - (6) The additional matters to which the claimant had refers in his written representations including with regard to the evaluation of his post, the detailed examination of his job description and his doctorate are not relevant to the matters which the tribunal is required to determine for the purposes of section 38 of the Act.
11. In all the circumstances, the tribunal is not satisfied, on the basis of the evidence, that the respondent was at the date of the commencement of the proceedings in breach of its duty pursuant to sections 1 or 4 of the Act for the purposes of section 38 of the 2002 Act save in respect of its failure correctly to state in the Particulars the date of the commencement of the claimant's continuous employment with the respondent.
12. The tribunal is however satisfied that the provisions of section 38 (5) of the 2002 Act apply in this case including that there are exceptional

circumstances which would render it unjust and inequitable to make an award in respect to the failure referred to at paragraph 11 above.

13. When reaching the above conclusion the tribunal has taken into account in particular that (a) the date of the claimant's appointment with the respondent was amended in manuscript to insert the correct date and the failure to amend the date of continuous employment in line with such date of appointment is clearly an oversight (b) there has been no material dispute between the parties regarding the date of the commencement of the employment of the claimant (including of the commencement of his continuous employment).
14. In all the circumstances the claimant is not awarded any compensation pursuant to section 38 of the 2002 Act.

Employment Judge A Goraj
Dated 1 December 2017

Judgment sent to Parties on
