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EMPLOYMENT TRIBUNALS

Claimant: Mr B Kelsey

Respondents: (1) The Logistics Partnership t/a Drivelink Network
(2) DSV Road Limited

Before: Employment Judge Reid

Members: Mr M Rowe
Ms L Conwell-Tillotson

JUDGMENT ON RECONSIDERATION

1. The Second Respondent's application dated 14th December 2017 for reconsideration of the judgment sent to the parties on 27th November 2017 is allowed on the basis that a claim against the Second Respondent under Regulation 13 of the Agency Worker Regulations 2010 (rights of agency workers in relation to access to employment) was not included in the Claimant's claim form presented on 28th June 2016.
2. Accordingly, the findings of fact at paras 27—36 of the Tribunal's Judgment and the conclusion at para 49 no longer apply. The Judgment otherwise stands as regards the dismissal of the Claimant's claim against the First and Second Respondent under Regulations 5 and 6 of the Agency Workers Regulations 2010 (rights of agency workers to same basic terms and conditions as regards pay).
3. The remedy hearing listed for 9th April 2018 to consider a Regulation 13 claim is therefore no longer required and is therefore cancelled.

REASONS

The application for reconsideration

1. The Second Respondent's solicitors made an application by letter dated 14th December 2017 to have the judgment recorded as sent to the parties on 27th November 2017 (the November judgment) reconsidered. The Tribunal accepted that application as being in time within Rule 71 of the Tribunal Rules 2013 because there was evidence on the Tribunal file that

there had been a delay in them being sent and then receiving a complete copy of the November judgment and that accordingly under Rule 4(6) their application had been made in time.

2. The sole issue for determination in the reconsideration application was whether a claim under Regulation 13 of the Agency Workers Regulations 2010 (rights of agency workers in relation to access to employment) had been included in the Claimant's claim form. It was in the interests of justice under Rule 70 to reconsider the November judgment because the Second Respondent was arguing that the Tribunal had decided a claim which had not in fact been brought in the claim form; though it had then appeared in an early version of the Claimant's list of issues the Second Respondent's case was that such a claim had nonetheless in any event not proceeded after a hearing on 24th October 2016 which limited the claim to a claim under Regulations 5 and 6 (rights of agency workers to the same basic terms and conditions as regards pay). Thereafter there had been no application by the Claimant to amend his claim to add in a Regulation 13 claim.
3. When contacted under Rule 72(1) for their views as to whether there needed to be a hearing none the parties considered there needed to be one. The parties were then asked under Rule 72(2) to provide any further written representations but no further representations were received.

Was a claim under Regulation 13 brought by the Claimant in his claim form?

4. The Claimant's claim form stated in box 8 that he was bringing a claim for unlawful deduction of his wages, in breach of the AWR. In box 9.2 he stated that he wanted to be compensated for the 'wages and conditions' not paid or applied to him. He attached a timeline to his claim form. The Tribunal finds that that timeline addressed the Claimant's complaints about his wages but did not refer to considering he had not been told of permanent driver vacancies at the Second Respondent in the period when assigned there, either expressly or implicitly. The claim form therefore when read as a whole did not include a claim under Regulation 13 either because of what it expressly stated or by saying something from which such a claim could be inferred. Although there was no written summary of the case management discussion on 24th October 2016 expressly discussing and deciding this particular issue, such a decision was consistent with the then agreed list of issues going forward – see below.
5. A case management hearing was held on 24th October 2016 attended by all the parties. Prior to this hearing the First Respondent's solicitors had sent in a draft list of issues on 13th October 2016 on behalf of both Respondents, which list identified the claim as being in relation to working and employment conditions (ie under Regulations 5 and 6) and made no mention of a Regulation 13 claim, consistent with what had been in the Claimant's claim form. The Claimant also sent in his draft list on 14th October 2016 which referred additionally to not being informed of driver vacancies at the Second Respondent. Following the hearing, case

management orders were made recording (para 1.1) that the Respondents' joint list of issues was agreed by all parties. It was unfortunate that it was not expressly recorded that the additional claim under Regulation 13 mentioned by the Claimant in his list of issues was not in his claim form and was not proceeding. The Claimant however by agreeing to the list of issues accepted at that stage that a claim under Regulation 13 was not included in any event as a claim to be determined by the Tribunal, consistent with it not being a claim included in his claim form (see above). He made no subsequent application to amend his claim form to include a Regulation 13 claim. The subsequent preliminary hearing judgment on the time limit point sent to the parties on 13th February 2017 found that 'the claims' were submitted in time but did not refer to what the particular claims were. In fact there was only one, the Regulation 5 and 6 claim.

6. Notwithstanding this the Claimant in his witness statement (page 3) referred to a claim about not being told about driver vacancies (ie a Regulation 13 claim). Mr Horton of the Second Respondent also stated in his witness statement (para 5) that there were no vacancies for permanent drivers in the relevant period. Mr Horton also elaborated on this in his oral evidence (see November judgment paras 28-33).
7. Taking into account the above findings, the Tribunal finds that whether a claim under Regulation 13 had been included was a matter which had already been decided in the 24th October 2016 hearing. The Claimant was on notice from the hearing on 24th October 2016 that it was not included but did not make an application to amend his claim to add in such a claim. Although the issue of a Regulation 13 claim wandered back in in the Claimant's witness statement and in the witness statement and oral evidence of Mr Horton, it was a claim which the Tribunal had already decided he had not brought.

Relevant law

8. *Ali v Office of National Statistics [2005] IRLR 201* decided that whether a claim form contains a particular claim has to be decided by looking at the claim form as a whole (para 39). A claim form which appears to set out the entirety of the claims would be deceptive if an employer cannot rely on it as encompassing all the claimant's claims. Whether or not a claim form includes a particular claim is a question of fact (*Redhead v London Borough of Hounslow UKEAT/0409/11*, para 11). Although a degree of latitude is allowed to a litigant in person the claim being alleged to have been made must emerge expressly from the claim form or there must be something in the claim form from which it can be inferred (*Parekh v London Borough of Brent EAT 0097/2011*, para 18).
9. *Chandhok v Tirkey [2015] ICR 527* sets out the requirement that a claimant set out his or her case in their claim form and that a claimant cannot expand their claim at a later stage but is limited to what had been set out in their claim form (para 17). The case makes the point that to allow otherwise would mean that the purpose of the amendment process would be defeated.

10. As regards a list of issues, in *Remploy Limited v Abbott* UKEAT/0405/14 it was held that the list of issues is a case management tool but is not a pleading (ie it is not the claimant's claim form nor the respondent's response to the claim). A list of issues cannot extend the issues beyond those contained in the pleadings (para 79).

Reasons

11. The Claimant's claim form did not include a claim under Regulation 13 of the AWR 2010. This was a matter decided in October 2016 following which and consistent with which the agreed list of issues did not contain such a claim. The fact that it was raised in the Claimant's own October 2016 list of issues does not mean it was retrospectively raised in his claim form. In any event his draft list was superseded by the agreed list going forward which did not contain such a claim following which he did not make an application to amend his claim. Accordingly this Tribunal did not have jurisdiction to hear a Regulation 13 claim and therefore the November judgment should not have included findings and a decision on such a claim.

The Tribunal thanks the parties for their patience in waiting for this reconsideration decision. The delay was caused by the employment judge not sitting for personal reasons.

Employment Judge Reid

12 March 2018