EMPLOYMENT TRIBUNALS

Claimant: **Mr K Kennaugh**

Respondent: **Jeff Ostle t/a K-9 Event Waste Management**

JUDGMENT

The remaining claims are struck out pursuant to rule 37(1) of the 2013 rules of procedure, because the Tribunal has no jurisdiction to make an award of the nature that the claimant seeks, and they accordingly have no reasonable prospects of success.

REASONS

1. By a claim form accepted by the Tribunal on 27 April 2018, being a claim that the claimant sought to have reinstated on 22 March 2018, the claimant brought claims against K-9 Event Waste Management for "arrears of pay" and "other payments". He also brought claims of discrimination on the grounds of religion or belief, and appeared to be seeking to claim automatically unfair dismissal. These claims arise out of a brief period of alleged employment of the claimant by the respondent at Solfest held in Carlisle in August 2013.

2. The claim has had a chequered history. The Tribunal initially sought clarification of the discrimination claims, and the claimant raised the possibility of adding a further respondent, Solfest Limited, which was ultimately granted.

3. No response was received from K-9 Waste Management, preliminary hearings were listed, but postponed, but one was held on 4 September 2018, which the claimant did not attend, nor did any respondent. At that hearing the claimant was ordered to provide further particulars of his claims, of his discrimination and unfair dismissal claims. Solfest Limited was joined as a respondent by Orders made following that hearing.

4. A further preliminary hearing was listed for 22 November 2018 to consider the preliminary issues of whether the claimant's discrimination and unfair dismissal claims could proceed. Solfest Limited was served with the proceedings, but did not respond.

5. Employment Judge Holmes held the preliminary hearing on 22 November 2018, at which no party was present or was represented. He made a number of

orders in relation to the correct identification of the original respondent, and proposed to strike out the discrimination and unfair dismissal claims. The claimant was invited to make written representations in relation to those proposals , Solfest Limited was removed as a respondent, and it was proposed to re-serve the claims upon Jeff Ostle trading as K-9 Waste Management.

6. The claimant duly made his written representations, and the Tribunal considered them. His discrimination and unfair dismissal claims were struck out by the Tribunal's judgment sent to the parties on 29 January 2019. In para.15 of the Tribunal's Reasons reference was made to the claimant's remaining claims of unlawful deductions from wages, and how a judgment would be issued if no response was then received after re-service on Jeff Ostle. In that paragraph the Tribunal made reference to the amount of the award that was being sought, which appeared to be £525.00. Reference was also made to the claim for £150 per day. The claimant was informed that h would need to establish a basis upon which he was seeking such an award. The paragraphs ends as follows:

> *"Presumably there was some discussion with Jeff Ostles (sic) as to what the claimant would be paid. He will need to establish how many hours he worked, and at what rate of pay."*

7. Jeff Ostle was duly served with the claim, and a copy of the Tribunal's judgement. He was given to 8 March 2019 to enter a response. He did not do so. By letter of 27 March 2019 the Tribunal informed the claimant of the failure of the respondent to enter a response, and reminding him of the need to provide the information referred to in para.15 of the Tribunal's judgment.

8. By e-mail of 2 April 2019 the claimant replied to the Tribunal. He asked why a "quantum meruit" should not be applied. In that email he set out , for the first time, the terms of the agreement that was made. The remuneration agreed, he said, was four tickets for the event, with all meals included. He went on to say that, if the Tribunal preferred to use the National Minimum wage calculations, he assessed his hours at 76 hours.

8. The Tribunal replied on 27 April 2019 to the effect that this the agreement would displace any quantum meruit application. The Tribunal sought to know the value of the tickets in question, as that, prima facie represented the value of what the claimant had lost, plus the cost of the meals, upon which a financial value also needed to be put. The claimant was asked to provide that information, and, alternatively, the hours worked , as opposed to being present on site. The claimant replied by e-mail of 1 May 2019. He said that he had no idea of what the ticket price was all those years ago, but said that this year's tickets were £94.56, but this was a discounted rate, and meals he put at £5 - £10 per person per meal.

9. The Employment Judge has given further consideration to these claims in the light of the information now provided by the claimant. In his e-mail of 2 April 2019, for the first time, he sets out clearly the actual contractual basis of the agreement he made with Jeff Ostle (or whoever he contracted with). In his claim form it is correct that he does say , in box 8.2 , :

> *"He agreed he would provide tickets to the event for myself, my partner and two children."*

10. Nothing is said about the provision of free meals, but be that as it may, it

was not clear from that narrative that the claimant's case was that that he was only to receive tickets and meals in return for his labour. The Tribunal assumed that the provision of these tickets was part of the remuneration agreed, but it now transpires that it was, with the provision of meals, the totality of the remuneration.

11. This has implications for the Tribunal's jurisdiction. The claimant's remaining claims have been treated and processed as unlawful deductions from wages claims, under Part II of the Employment Rights Act 1996 ("the ERA"). Those provisions refer to the protection of "wages". That term is defined in s.27 of the ERA. Section 27(5) provides:

> *(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is—*
>
> *(a) of a fixed value expressed in monetary terms, and*
>
> *(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).*

12. Thus, benefits in kind are expressly excluded from the definition of wages. The vouchers referred to are such things as luncheon vouchers or other forms of redeemable vouchers. The Tribunal does not consider that Festival tickets would fall outside this exclusion, and the provision of free meals certainly would not. In any event, the claimant , and his family, presumably were given free tickets to the Festival , or at least free admission, for part of it. This makes quantification of the loss even more problematic, and reinforces the inappropriateness of trying to fit this kind of arrangement into the definition of wages.

13. The Tribunal's view , therefore, was that the claimant's claims cannot succeed as claims for unlawful deductions from wages, and it proposed to strike them out on that basis.

14. The Tribunal has considered whether the claims could be sustained on the basis of the National Minimum wage. The problem with that is that the Tribunal would have to find that the claimant was a worker, that there was then an implied obligation to pay him at the rate of the national minimum wage, and to consider what hours the claimant actually worked (which he still has failed to specify). This claim, however, would still be an unlawful deductions from wages claim, and the Tribunal as no jurisdiction as such to enforce the NMW.

15. Further, any such claims are dependent upon the claimant having at least worker status. The arrangement as now clarified by the claimant appears simply to have been that the claimant and his family would be afforded free access to the Festival, and free meals, in return for his labour. It is highly questionable whether this loose arrangement would meet the requirements of even "worker" status, as in reality it appears simply to have been an agreement whereby the claimant got free Festival admission and meals in return for some labour. The Tribunal cannot see how the parties could reasonably have been considered objectively to have been entering any form of employment , or similar , agreement with the necessary

attributes to satisfy the requirements of worker or employee status. Whatever the agreement, the terms have to be reasonably certain, and have to contain the minima for either employment or worker status. The Tribunal cannot see how, on the facts alleged by the claimant, he has any prospect of establishing the necessary status.

16. In terms of whether the claimant actually received prior the what he would terms the wrongful and premature termination of this arrangement (in fact he resigned telling the respondent that he quit) , it is far from clear that the claimant has any claim for anything. The claimant has in reality , it seems to the Tribunal, been seeking damages for breach of contract. This is a different sort of claim to the very specific and restricted claims for unlawful deductions from wages as referred to above. The claimant can seek to bring a contract claim in the Employment Tribunal, but only if he was an employee, i.e. more than a worker, which is highly doubtful, but, more importantly, such a claim under the Extension of Jurisdiction Order 1994 for liquidated sums, outstanding on the termination of the employment. There is no such sum claimed, or claimable here. The claimant would be seeking damages based on value of the benefits in kind which he says formed the basis of the remuneration he agreed with the respondent, which were then not provided to him after the allegedly wrongful, constructive, termination of the arrangement. If, as appears likely, he was provided with those benefits up until the date of termination, he would have no claim prior to the termination.

17. He could (and still can, there is a 6 year limitation period) bring such claims in the County Court, where it would not matter if he was not an employee or worker, its contractual jurisdiction is not so limited, but the Tribunal cannot see any basis upon which it can entertain any contractual claim.

18. The Tribunal proposed, therefore, to strike out the claims, but , pursuant to rule 37(2), the claimant by letter of 24 June 2019, was afforded the opportunity to request a hearing, or to make written representations as to why this course should not be taken.

19. The claimant replied by email of 25 June 2019. In that email he did not seek a hearing, but asked a number of questions, addressed to the Employment Judge, which he will not answer, but will consider the issues that they raise.

20. The claimant queried what difference there would be between luncheon vouchers and the vouchers provided by the respondent to exchange for meals? The answer to that is that luncheon vouchers (which are probably now no longer in circulation) were, the Employment Judge considers, a form of currency, in that the scheme permitted redemption at a number of outlets which accepted them. They had a face value. That is doubtless the reason why, exceptionally, they were considered a form of remuneration which satisfied the definition of wages. That was a very specific and narrow exception, which should, the Tribunal considers be construed narrowly. The vouchers in question here, presumably, had no greater negotiability than within the festival, and the Tribunal has no evidence of their face value. They may not have had one.

21. The claimant also raises the point that festival tickets could have been sold to a third party. That may be so, but that does not make them wages. The scheme of the Act is to protect wages, and to exclude benefits in kind. That a benefit in kind can be sold on does not bring it within the definition of wages.

22. To fall within the exception, the vouchers in question must have “a fixed monetary Value”. That means that, for example, a meal voucher would have to have a face value, similarly the festival tickets, if, indeed, there were tickets issued to the claimant, as opposed to some form of wristband, or pass, allowing him and his family entry.

23. Finally, the claimant seeks to argue there was a contract of employment, or he at least had worker status. He argues that the respondent , a large man, had control over him, and said he was “his boss”. That may well be so, but that does not, in the Tribunal’s view affect its view that this very lose arrangement , whereby labour was exchanged for benefits in kind , the main one of which was entry into the festival, falls short of a contract of employment or a contract for personal services which gave the claimant worker status.

23. That, however, is not the primary basis of the Tribunal’s determination of whether the claims should be struck out. It is the nature of the alleged remuneration which the Tribunal considers has no reasonable prospect of satisfying the definition of wages.

24. The claims are accordingly struck out.

Employment Judge Holmes

16/07/2019

JUDGMENT SENT TO THE PARTIES ON

19 July 2019

FOR THE TRIBUNAL OFFICE