EMPLOYMENT TRIBUNALS

Claimants		Respondents
Ms A Deacon & Others	v	(1) Vertas Group Limited (2) Norse Commercial Services Limited

Heard at: Bury St Edmunds On: 20 September 2019

Before: Employment Judge Laidler

Appearances

For the Claimants: Mr D Hutcheon, Counsel.

For the Respondents: R1 - Mr D Chapman, Solicitor.
R2 - Mr N Ashley, Counsel.

RESERVED JUDGMENT

The claimants solicitors letter of 20 March 2019 being very unclear it did not have the effect of withdrawing all the claims of the six claimants referred to in it. The claim that holiday pay did not take into account additional hours/overtime of those six claimants thus remains to be determined.

RESERVED REASONS

1. The original claim issued on the 2 February 2018 for Angelina Deacon and others contained the following claims:

   Paragraphs 21 – 24 of the Particulars of Claim – less favourable treatment of part time workers

   Paragraphs 25 – right to statutory annual leave

   Paragraphs 26 – 30 – rights to annual leave payments in respect of voluntary overtime.

2. It was pleaded that each of the claimants worked in schools and were engaged on terms that provide for term time only working. In the circumstances each of the claimants was said to be a part time worker within the meaning of the Part Time Worker Regulations 2000.

3. Paragraph 9 set out how the HR Business Partner of the First Respondent had stated in correspondence of 12 October 2017 the amount of pay was calculated for part time workers. That, it was alleged, resulted in an under payment to those part time workers.

4. Paragraph 20 set out how the example in that paragraph 9 applied to certain specified claimants including the Nineteenth, Mr Sam Hepden. The paragraph went on:

> '…The remaining Claimants (except for the Nineteenth Claimant) have an equivalent under-payment in relation to their contractual annual leave entitlement…' (emphasis added)

5. By letter of 20 March 2019 the claimants' representative wrote to the Employment Tribunal withdrawing six of the claims. The full content of the letter was as follows: -

> "I write to confirm that I am instructed to withdraw the following six claimants who do not have claims under the Part-Time Worker Regulations and only have claims for miscalculated over-time under paragraphs 26-30, 32-33 of the amended Particulars of Claim against the First Respondent, Vertas Group Limited, in accordance with Rule 51 of the ET's (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("ET Rules").
>
> (1) Sam Hepden - 3303840/2018.
> (2) Terance King - 3303846/2018.
> (3) Julia Burt - 3303828/2018.
> (4) Royan Casford Smith - 3303830/2018.
> (5) Wendy Munro - 3303850/2018.
> (6) Corrina Warne - 3303659/2018.
>
> I have copied this to the First Respondent in accordance with Rule 92 of the ET Rules."

6. Pursuant to that withdrawal the Judge signed withdrawal judgments on the 8 April 2019 sent to the parties on 15 April 2019. No issue was taken by the claimants' representative in connection with those judgments at the time.

7. An issue has now arisen as Mr Hepden has issued a new claim (3319773/2019). The respondents seek to argue that he cannot now bring a further claim the original one having already been dismissed. In its

response the respondent has applied for an order that the new claim of Mr Hepden be dismissed and an order for costs made in its favour.

Submissions on behalf of the claimants

8. Counsel for the claimants' sought to rely on Segor v Goodrich Actuation Systems Ltd UKEAT/0145/11 and Campbell v OCS Group UK Ltd & another UKEAT/0188/16 although copies were not handed up. It was submitted that both of those EAT decisions are authority for the proposition that a concession or withdrawal cannot be binding unless it is clear, unequivocal and unambiguous. The claimants state that the letter was very ambiguous. It was not well drafted. It was argued that it was not clearly withdrawing all those six claimants claims. It refers to only certain paragraphs of the claim form. The fact that the word "only" is underlined, and the letter refers to certain paragraphs in the particulars of claim brings it into the ambiguous category. The claimants argue either that the judgment should be interpreted as dismissing all the claims except the claim in relation to annual leave for periods of overtime or in the alternative the tribunal should hear an application for reconsideration of that judgment.

9. Most of the claimants are part-year workers. What became apparent was that those six workers were part-time but not part of the year. They work the whole year round. The part-year claim did not therefore apply to them. They also however brought claims about overtime and that the respondents did not sufficiently account for it in payments of annual leave as that claim does not depend on part-year status. Everything else was being withdrawn, namely the Part Time Worker claim in full and the Working Time Regulations and/or unauthorised deduction claim with regard to term time working only. As counsel puts it in his note for this hearing at paragraph 21:

> "the Claimants' legal representative wrote to the ET indicating that six of the claimants were withdrawing their claims save in so far as the claims pertained to the 'overtime' component of their holiday pay. ET Rule 51 makes provision for informing the tribunal of an intention to withdraw claims or part of claims; the Claimants' intention in this instance was the latter. For this reason, the letter specifically noted that the Claimants continued to have claims in respect of overtime and identified the passages in the Particulars of Claim which addressed those claims"

10. The claims about overtime however were intended to continue. It was acknowledged that the letter of the 20 March 2019 was not a good letter. The authorities make it clear however that the Judge must be satisfied that the letter was unambiguous for it to have withdrawn all the claims.

11. The claimants had given notice to certainly the first respondent that it was their intention to continue with the reduced claim. Reference was made to correspondence with the respondents and an email of 25 February 2019 in which the claimants' solicitor wrote to the respondents' representatives attaching comparator schedules stating she would send a list of remaining claimants who only have claims under the Working Time Regulations 1998. She asked them to note that all claimants with part-time workers claims also make claims regarding miscalculation of leave in respect of overtime.

12. In an earlier email of 21 January 2019, the claimants' representative had listed 33 claimants and their comparators and confirmed that all the claimants have claims under the Part-Time Workers Regulations and all but Turkentine have claims for miscalculated overtime. At the end of the list of claimants was added:-

> "The following 4 claimants do not have claims under the Part-Time Workers Regulations and only have claims for miscalculated overtime.
>
> 34. Sam Hepden.
> 35. Terance King.
> 36. Julia Burt.
> 37. Royan Casford Smith.
>
> I am awaiting instructions from the remaining five claimants and will confirm these as soon as I receive the information."

13. If it is found that the letter was clear, and it withdrew all of the claims the tribunal still has jurisdiction to re-consider that judgment in the interests of justice and restore the claims. The first respondent was always aware that this was the claimants' intention.

Submissions on behalf of the first respondent

14. On behalf of the first respondent it was accepted that there was some discussion between the parties but as can be seen from the correspondence some of the claims were withdrawn in their entirety. By the time of the 20 March letter it was clearly the end of the matters insofar as those claimants were concerned and there was nothing equivocal about it.

15. Any application for reconsideration should have been made within 14 days of the judgment being sent. No such application has been made and still has not been made today. It has only been suggested in the claimants' counsel's opening note.

16. The first respondent was entitled to assume that the claims were being withdrawn. It is not alleged that annual leave was not paid on overtime earnings but that the percentage calculation was in error. The sums for

these claims are tiny and these are existing employees. It would not therefore be a surprise to the respondent to find that some employees did not wish to continue to sue their employer for relatively small sums.

Response on behalf of the claimants

17. The claimants' primary position is they do not need to make an application for reconsideration as there was no equivocal withdrawal. If, however the tribunal does not agree then they do make application for reconsideration. The tribunal can use rule 5 to extend time or the Judge could decide to reconsider the judgments of her own initiative under rule 70. To do so and to extend time would be in the interests of justice. The matter only became apparent when the new claim of Mr Hepden was submitted and contested by the respondents.

Relevant Law

18. The courts have made clear in both Segor and Campbell that a tribunal faced with an application to withdraw should consider whether the material available amounts to a clear, unambiguous and unequivocal withdrawal of the claim or part of it. Although there is no obligation on tribunals to intervene in such a situation, they are entitled to make such enquiries as appear fit to check whether a party who is self or lay represented intends to withdraw. If the circumstances give rise to concerns then the tribunal is entitled to make such enquiries as appear appropriate to ensure that the purported withdrawal is clear, unambiguous and unequivocal.

19. As was stated in Campbell there is nothing in Rule 52 that requires tribunals as a matter of course to invite representations from the parties before concluding that the proceedings should be dismissed. Tribunals are however empowered to regulate their own procedure and to conduct hearings in a manner considered fair having regard to the overriding objective. It is therefore a matter for judgment of the tribunal to decide whether it is necessary to make further enquiries of the withdrawing party before making a withdrawal.

Conclusions

20. The letter of the 20 March 2019 was referred to the judge by way of standard administrative referral. It was assumed that the letter meant that those named claimants did not have Part Time Worker claims and were withdrawing all other claims. The judge dismissed the claims by a judgment sent to the parties on the 15 April 2019. No issue was taken about that dismissal judgment until the ET3 was filed to the new claim of Mr Hepden.

21. As has been acknowledged at this hearing the letter of the 20 March 2019 is 'not a good letter'. It is far from clear and not particularly helped by the

pleadings and the failure to distinguish between different types of claimants. That the six listed in that letter are not term time workers appears only recently to have come to light.

22. Whilst the judge had taken the letter as withdrawing all claims of those claimants the fact that there has had to be detailed argument on what that letter meant demonstrates that it was not an unambiguous letter. The judge has therefore had to conclude that as it was not 'clear, unambiguous and unequivocal' that it did not withdraw all the claims of those six claimants.

23. To try and understand what that letter meant it has been necessary to track through not only the pleadings (and amended pleadings) but also correspondence which was not seen by the judge at the time of the referral of the 20 March 2019 letter. The letter of the 21 January 2019 stated that the four named claimants (including Mr Hepden) only had claims for 'miscalculated overtime.' Even that wording was ambiguous (and was adopted again in the 20 March letter) as the claim in fact is that in calculation of holiday pay the respondent failed to include elements of additional hours/overtime pay.

24. The judge has no alternative but to conclude that the letter 20 March 2019 being very unclear it did not have the effect of withdrawing all the claims. The claim that holiday pay did not take into account additional hours/overtime of those six claimants thus remains to be determined.

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Employment Judge Laidler

Date: ……22 October 2019…….

Sent to the parties on: .30 October 2019.

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For the Tribunal Office