



EMPLOYMENT TRIBUNALS

Claimants: Mrs L A Smith
Mr M Smith (deceased)

Respondent: Jason W Nicholson Solicitors

HELD AT: Hull

ON: 30 October 2019

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimants: Mrs L A Smith in person
Respondent: Mr J W Nicholson in person

JUDGMENT having been sent to the parties on 1 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the transcript of the decision given orally immediately upon the conclusion of the case:

REASONS

1. These are claims brought by Louise Smith on her own behalf and as the personal representative of her late husband Matthew who died at the end of last year.
2. Both Claimants were employed by the Respondent. Mrs Smith had already resigned (with effect from 2nd November 2018) by the time of her husband's death.

Jurisdiction

3. The claims brought on behalf of the deceased person cannot under section 206 of the Employment Rights Act 1996 include a complaint applying for a reference in respect of the terms that ought to be included in written particulars of employment. Nor can it include a claim under part II of the 1996 Act for unauthorised deduction from wages.

4. The only claims that can proceed, therefore, in respect of Mr Smith are in relation to a declaration that he was not provided with itemised payslips and a breach of contract claim under the Employment Tribunals Extension of Jurisdiction Order. That is because contract claims can subsist after death, that is provided for by the Law Reform Miscellaneous Provisions Act 1934.

Mrs Smith's complaints

5. Dealing firstly with Mrs Smith's own claims. She, it is accepted, was not provided with a written statement of terms and conditions when she started work for the respondent and she has properly applied for a reference under section 11 of the Employment Rights Act. That is for the Tribunal to determine what the agreement was in fact between the parties and so to identify those statutory terms.
6. However, unfortunately as of today's hearing I am not in a position to make that determination. It is common ground that Mrs Smith was employed on the same terms that she had with her former employer, Ingram's, although there was no continuity of employment as between her work for that solicitor's firm and for this respondent. Unfortunately, she does not appear to have a statement provided by Ingram's either. I have not heard evidence from her, but it is clear from general discussion that I would not be in a position to make a clear determination. In those circumstances I dismiss that application for a reference.
7. The claimant has now moved onto other employment and to be honest I can see little practical benefit in declaring what should have been the terms at the time she last worked for the respondent. I simply could not make that determination as of today's date, and it is not proportionate to adjourn to a further hearing..
8. Her next claim is in respect of unauthorised deduction from wages. It is agreed on the pleadings that her part-time pro rata entitlement, carrying on at the same level of pay that she would have with Ingrams, would be £12,300 per annum. The claimant has given me a slightly higher figure today to what she should be paid but I do not know where that arises from.
9. As pleaded the case is that her gross pay £12,300 divided by 12 would be £1,025. On a regular basis she was paid a sum which was £18.55 a month less than that and therefore over the nineteen months of her entire employment she assesses unauthorised deductions of over £300. However, a deduction, of course, to account for tax and National Insurance is not an unauthorised deduction as it is required by statute. It is accepted by the claimant that what she received was understood to be intended to represent the net amount payable. The sum properly payable to the claimant is what she was entitled to receive after these deductions. The real issue in this case is whether or not those sums which ought properly to have been deducted have in fact been paid over to the Inland Revenue. As was pointed out by Judge Maidment of the earlier preliminary hearing that matter is not for the Tribunal. Again, in the circumstances with no evidence that there had been an unauthorised deduction, and where there is certainly no financial loss to the claimant, I dismiss that claim.

10. The one claim that succeeds on the part of Mrs Smith is of no financial value to her unfortunately. I do make a declaration that the respondent is in breach of his obligations under part I of the Employment Rights Act to provide itemised payslips.
11. However, the only financial compensation I could award in respect of that breach would be to refund any unnotified deductions in the thirteen weeks prior to the issue of the claim. Over that period, which starts on my calculations on 11 November 2018, Mrs Smith was not in fact employed so there were no unnotified deductions from her pay within that quarter of the year. It is only the declaration that I can make.
12. Although she was not given a written statement of her terms and conditions of employment I cannot award the additional two weeks or four weeks pay in respect of that failure. That is because a breach of section 11 of the Act is not one of those specified claims which would give rise to that additional award. The additional award can only attach to successful claims and the only complaint that succeeds in respect of Mrs Smith is in relation to the declaration as to the respondent's failure to comply with legal obligations in respect of itemised payslips.

Mr Smith's complaints

13. So far as Mr Smith's claim was concerned there are various elements to this. Firstly, following his death, when his papers were returned to her Mrs Smith identified that he had started to fill out the paperwork which would have been submitted in due course to claim for his travel for that month of November of last year. He also would have claimed for his overtime payments, calculated at one half of the fee claimed against the legal aid fund by the respondent firm in respect of out of hours attendance at police stations giving advice. That means such attendances as were "out of hours" for the employee
14. This element can subsist as a breach of contract claim. The expenses claims can only be for a breach of contract. The claims in respect of overtime in my view, had the Tribunal had jurisdiction to deal with it, might have been classified as unauthorised deductions but they are equally sums due under the contract of employment as at the date of termination and still outstanding and therefore they are recoverable by the personal representative for the estate.
15. In relation to the travel claim for the last month, this is itemised on a schedule prepared by Mrs Smith sent to the respondent and incorporated within her claim form on behalf of her late husband. Those uncontested sums equate to £220.20 and £101.25. That is a total of £321.45 and I order that the respondent pay damages for breach of contract in that sum.
16. So far as the overtime claim is concerned, Mr Nicholson has given evidence that on scrutiny of those claims and by reference to those records available to him he identified that a number are not to be paid where the claim for the half fee was not validly due to Mr Smith.
17. I accept that there has been no documentation produced to support that but I have heard Mr Nicholson's evidence that he carried out the check at the time, just as he

might have done had Mr Smith submitted a claim himself and had it been subjected to scrutiny. Given that there was a history of Mr Smith's expenses claims being challenged, dating back to April that year, that might well have happened.

18. Mrs Smith unfortunately and inevitably is in a position where she cannot give any direct evidence as to whether those were valid claims, contrary to what Mr Nicholson asserts. The fact is that she brings the claim on behalf of her late husband and she, therefore, must prove the entitlement under contract. Set against the evidence of Mr Nicholson which she cannot positively gainsay, she is unable to do that. I appreciate the extreme sensitivity of this claim because there is a suggestion that in making those expenses claims Mr Smith was acting improperly. I do not necessarily by making this judgment endorse that view. I do not know why these errors which Mr Nicholson has identified have crept into his claim forms. Mr Smith may simply have made honest mistakes. I am certainly not stating that I have accepted the contention that he was acting deliberately and dishonestly. It is simply that Mrs Smith on his behalf is not able to substantiate a valid claim in respect of disputed items.
19. The total outstanding for the last month's overtime payments is therefore calculated as follows. It is £1,579.67 (that is the total sum claimed for overtime and mileage) less the sums already awarded for mileage which is £321.45, and also less the contested sums of £347.55 which gives an outstanding balance of £910.67 which is expressed as a gross figure, but as it is effectively by way of wages it is liable to tax. The mileage expenses of £321.45 are simply a reimbursement and as I understand are therefore not taxable.
20. The historic claims also relate to an alleged failure to pay all the contractual expenses, still leaving a balance outstanding. Over the period Mrs Smith has calculated that the claim forms put in by her late husband add up to £4,834.78 against which the respondent has only paid a contribution to mileage of £3,798. There is no explanation for that discrepancy. I consider that is a sum outstanding at the date of termination and in breach of contract. I order the respondent to pay damages of the balance which is £1,036.78. Again this is reimbursement of sums already paid, and not wages, so that the sums received ought to have corresponded to the gross amounts claimed.
21. A further part of the claim relates to alleged unauthorised deductions over the entire course of employment. This is essentially the same argument about deduction of tax at the appropriate rate. As pleaded the claimant has identified, set against an alleged gross salary of £30,000 per annum., that given what was paid regularly into his bank account there is a deduction on an ongoing monthly basis of £536.07. I accept that it is not satisfactory that there is still some confusion as to what the gross pay attributable to Mr Smith in fact was. However, I do not accept that the sums actually paid monthly into his account £1,963.93 represent a gross payment. Mrs Smith accepts that she was paid a sum which was intended to be a net amount I see no reason why the same situation should not have pertained in her husband's case. There is no suggestion that Mr Smith was to be liable for paying his own tax.

22. If that is right and if there is then a deduction from the gross amount (accepting for present purposes that this ought to be £30,000) again, tax and National Insurance are properly taken off and the only issue is whether they have been accounted for. That claim on behalf of Mr Smith is dismissed, for the same reasons as his wife's similar claim was also dismissed. He cannot show that he was in fact paid less than the net amount which was properly due under the contract. In both Mr and Mrs Smiths' cases I understand now that matters have been put in hand by the respondent to regularise the position with the revenue but that has still, unfortunately, not yet been finalised. Any adjustment of the Claimants' tax affairs, be it overpayment or underpayment of tax will therefore be determined by the relevant authority in due course.
23. The other claim historically arising during the course of Mr Smith's employment relates again to the overtime pay claimed. Mrs Smith has identified that on his overtime sheet the total sum allegedly due was £22,159.32 but the payments actually attributed to overtime on the bank statements are only £17,300 a shortfall of somewhere under £5,000. Mr Nicholson makes the perfectly valid point that the sum of £22,159 so calculated can only be a gross sum but if, as I accept he was, he was purporting to make a nominal deduction for tax and National Insurance subject to later clarification with the revenue then the £17,300 would be a net sum. Again, in those circumstances it has not been established that there has been any breach of contract where the claimant was contractually entitled to a higher sum than that which was in fact paid to him.
24. Mr Smith's estate will therefore receive the damages I have identified, somewhere in the region of £2,500.. He too is entitled to a declaration that there has been a failure to provide him with itemised payslips but once again there is no compensation resulting from that as his claim was not presented until 5th March 2019. In his case there was also a failure to provide a statement of written terms and conditions of employment and because the claims of breach of contract might potentially give rise to an additional award I have to consider that.
25. However, in all the circumstances of this case I consider it is exceptional and that I should not make any additional award to the estate. There is of course no practical value to Mr Smith himself. He made no complaint that he had not been provided with written particulars during the currency of his employment and indeed all the claims made on his behalf were initiated subsequently by his wife. He had not even made a complaint himself, as I understand it, that there had been any breach of contract during his employment and although the written particulars of that employment were still technically outstanding at the commencement of the claims they could not reasonably have been issued, even belatedly, after Mr Smith had died.

Employment Judge Lancaster

Date 4th December 2019