Case Numbers: 3200935/2020 – 3200937/2020
3200940/2020 – 3200942/2020
3200944/2020 – 3200946/2020

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr MT Chowdhury**
(2) Mr MO Faruq
(3) Mr ME Hossain

Respondent: **Mr. Toslim Ahmed trading as "Universal Solicitors"**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 November 2020**

Before: **Employment Judge A Ross (sitting alone)**

Representation

Claimants: Mr Saleem, Legal Representative
Respondent: Mr A Aslam, McKenzie Friend

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent made unlawful deductions from each Claimant's wages.**

2. **The Respondent breached the contract of employment of each Claimant.**

3. **When the proceedings were begun, the Respondent was in breach of his duty to each Claimant under section 1(1) Employment Rights Act 1996. It is just and equitable to increase the award made to each Claimant by the higher amount within section 38(4)(b) Employment Act 2002.**

4. **The Respondent shall pay the First Claimant (Mr. M.T. Chowdhury) £2,918.92 (net and without deduction for any tax or national insurance) assessed as follows:**

4.1. Damages for unpaid net wages for November 2019: £1200;
4.2. Damages for notice pay of 1 week: £276.92;
4.3. Higher award under section 38 Employment Act 2002: £1217.

5. The Respondent shall pay the Second Claimant (Mr. M.O. Faruq) £2,918.92 (net and without deduction for any tax or national insurance) assessed as follows:

5.1. Damages for unpaid net wages for November 2019: £1200;
5.2. Damages for notice pay of 1 week: £276.92;
5.3. Higher award under section 38 Employment Act 2002: £1217.

6. The Respondent shall pay the Third Claimant (Mr. M.E. Hossain) £3,837.38 (net and without deduction for any tax or national insurance) assessed as follows:

6.1. Damages for unpaid net wages for 1-19 November 2019: £1140;
6.2. Damages for notice pay of 1 week: £415.38;
6.3. Higher award under section 38 Employment Act 2002: £2032.

7. The Claimants' applications for Preparation Time orders and Costs orders are dismissed.

8. The name of the Respondent is amended to: "Mr. Toslim Ahmed trading as "Universal Solicitors""

REASONS

1 By claims presented on 3 April 2020, the three Claimants brought claims for the following against their former employer:

1.1 breach of contract or unlawful deduction from wages.

1.2 Notice pay.

1.3 Holiday pay.

2 Prior to presenting the claim, each Claimant had followed the requirement for early conciliation.

3 The Respondent failed to file an ET3 response. A judgment under Rule 21 was made by Employment Judge Burgher on 6 November 2020. This hearing was converted to a remedy hearing. The parties were ordered to provide the Tribunal with the sums that they claimed. The Claimants each filed a document entitled "Schedule of costs and the Claimants claim". In addition, the Claimants filed a bundle consisting of four sections,

which was unpaginated and to which little reference was made during the hearing.

4 Before me, Mr Ahmed appeared in the purported capacity of McKenzie Friend. My understanding is that a McKenzie Friend is not able to represent a party in the capacity of representative. In any event, I permitted him to make submissions on behalf of the Respondent firm as a lay representative might do.

5 I explained that the Respondent could only participate in the hearing to the extent that I permitted in my discretion in view of the Rule 21 judgment and the Respondent's failure to file an ET3 response. Mr Aslam sought only to make submissions, and did not apply to cross-examine the Claimants nor call evidence on behalf of the Respondent. Mr Saleem for the Claimants agreed that Mr Aslam could make submissions on behalf of the Respondents. Therefore, I agreed that the Respondent could be involved in the hearing to the extent of making submissions.

6 For reasons given orally at the hearing, I determined that the application to reconsider presented by the Respondent on 10 November 2020 should be determined by Employment Judge Burgher who made the Judgment under Rule 21. In addition, for reasons given orally, I determined that this remedy hearing should proceed and determine remedy and should not be postponed until the reconsideration application was determined.

Findings of fact

7 I heard oral evidence from each of the Claimants on affirmation. I found the following relevant facts:

7.1 Mr Chowdhury and Mr Faruq were employed from 30 September until 30 November 2019 as caseworkers.

7.2 Mr Hossain was employed by the Respondent's firm from 30 September 2019 to 19 November 2019.

7.3 The Claimants did not take any holiday during the course of their work with the Respondent's firm and they had not been paid any holiday pay following the termination of their employment.

7.4 The Claimants had each resigned for the unprofessional conduct of the Respondent as set out in the Claim and in evidence. Accordingly, I found that these employees were constructively dismissed and entitled to damages for breach of contract, consisting of their notice pay.

7.5 The Claimants were not provided with a contract of employment or a statement of terms and conditions despite several requests made by each of them. They were not provided with payslips. On the evidence they gave, I found that they were fobbed off when they made requests for contract of employment.

7.6 The Claimants and the Respondent did not agree a contractual notice period. From the evidence I heard, particularly from Mr. Hossain, there was, on balance, no actual agreement as to the notice period to which each employee was entitled; but there was evidence that the Respondent had requested that the Claimants provide two months' notice if they were to leave their role. The fact that such a request was made did not amount to a contractual term about the notice that the employer was required to give these employees.

Submissions

8 I listened to all the submissions of the representatives for the parties. I had to point out to Mr Aslam several times that I was not able to entertain his client's argument that the Claimants were not employees. This was because the Rule 21 Judgment created an issue estoppel on that point. The questions of whether they were employees, and workers within the definition within the Working Time Regulations 1998, was effectively determined by the Rule 21 judgment. Only employees can bring a breach of contract claim; and this complaint had been upheld by the Rule 21 Judgment.

9 In submissions, Mr Aslam agreed with the Claimants' evidence that Mr Toslim Ahmed was the sole practitioner and owner of the practice trading as Universal Solicitors. He did not dispute that an amendment of the title of the proceedings to show the correct Respondent was necessary.

Conclusions

Unpaid salary

10 Having accepted the Claimants' evidence about their work for the Respondent and the fact that they were not given contracts of employment despite requests, I accepted that the Claimants were all entitled to payments for the periods worked during November 2019. In respect of Mr Chowdhury and Mr Faruq their damages are assessed as their net pay for the whole month being £1,200 each.

11 In respect of Mr Hossain, he is entitled to payment for 19 days because he resigned on 19 November 2019. Therefore, I assess his entitlement to unpaid wages as damages of £1,140.

Notice Pay

12 As I have explained, all the Claimants were constructively dismissed for the reasons that they gave. In particular, Mr Hossain had the key taken from him and was told to resign on 19 November 2019. The Claimants are all therefore entitled to notice pay. However, the Claimants are not entitled to two months salary as notice pay because there was no contractual term agreed that the notice period would be two months. The Respondent had put off the provision of contracts of employment despite requests for contracts of employment being raised by the Claimants.

13 In those circumstances, I find that each Claimant was entitled to statutory notice under Section 86 of the Employment Rights Act 1996. Mr Chowdhury and Mr Faruq are entitled to damages for breach of contract for notice pay in the sum of £276.92 each.

14 In respect of Mr Hossain, he is entitled to damages for breach of contract for failure to pay notice pay in the sum of £415.38.

15 The Claimants do not have a claim for unfair dismissal. The Tribunal has no power to hear such a claim from them given their length of service was less than two years. Therefore, the Claimants cannot succeed in their claims for loss of earnings beyond the notice period.

Holiday pay entitlement

16 The Claimants are each entitled to accrued but unpaid holiday pay under The Working Time Regulations 1998. After an adjournment for the parties to discuss what these figures should be, which extended to 1325, it was agreed that the holiday pay due was as follows: £250 for Mr Hossain and £225 each for Mr Chowdhury and Mr Faruq.

Award under Section 38 Employment Act 2002

17 None of the Claimants received a statement of terms and conditions pursuant to Section 1 of the Employment Rights Act 1996. I raised with Mr Aslam whether the Claimants were entitled to an award under Section 38 of the Employment Act 2002 because the evidence of all the Claimants was that they did not receive a contract of employment despite requests for them and despite promises from the Respondent that they would be provided. His only argument was that the Respondent's case was that the Claimants were not employees.

18 In my judgment, the Claimants are entitled to awards under Section 38 of the Employment Act 2002 for the following reasons:

18.1 The fact that they were employees was determined in the Rule 21 default judgment. I conclude that the Rule 21 judgment prevents any argument at this hearing as to whether the Claimants were employees. This is because that issue is implicitly determined by the Rule 21 judgment which upholds the complaints of breach of contract; and under the Employment Tribunal (Extension of Jurisdiction Order) 2004 only employees are entitled to bring a complaint of breach of contract. In any event having not participated in the process by filing an ET3 response the Respondent is simply unable to raise an argument now which could have been raised prior to the judgment being entered.

18.2 In any event, from the evidence that I heard, the Claimants were employed by the Respondent. For example, they requested contracts of employment and were never told that they were not employees. The Claimants themselves demonstrate in their Claims that they are employees because they refer to their salaries and the Claimants also

referred to their "employer" at Section 8.2. Their Claims were upheld.

18.3 The Respondent clearly failed to provide the statement of terms and conditions including any provision in respect of salary or notice pay to the Claimants. This was a real disadvantage to the Claimants because they did not know what had been agreed, for example, in respect of notice pay nor exactly when they would be paid nor anything about their holiday entitlement.

18.4 In my judgment, the failure of this Respondent to provide these Claimants with a statement of terms and conditions (or contracts of employment having that effect) was an egregious breach of the statutory requirements because (a) the Respondent is a firm of solicitors and should either have known the law or have been able to ascertain the relevant law; (b) the Claimants requested contracts of employment several times; (c) the Respondent fobbed the Claimants off saying that they would deal with it but failed to do so.

19 In my judgment, for all the above reasons, it is just and equitable for each Claimant to be awarded four weeks gross pay under Section 38 of the Employment Act 2002. I calculate the relevant figures to be as follows.

20 Taking Mr Hossain's net pay of £1,800 per month, I calculate this is equivalent to £26,409 per annum gross, which means that he received £2,032 gross every four weeks.

21 For Mr Chowdhury and Mr Faruq, I calculated that their gross annual earnings were £15,821 therefore the award under Section 38 of the Employment Act 2002 to each of them is calculated as follows. £15,821 ÷ 52 x 4 which equates to £1,217 each.

Claim for negotiating time and costs

22 I considered that the claim for negotiating time was an application for a preparation time order under Rule 76 of the Employment Tribunal Rules of Procedure. I directed myself to Rule 76. Each Claimant claimed for negotiating time and for legal costs of £500. The Claimants' case was that the Respondent had had plenty of opportunity to resolve matters, but there had been no attempt made, despite correspondence from the Claimants, correspondence from ACAS and correspondence from the Tribunal within these proceedings, to resolve these Claims.

23 Mr Aslam disputed any entitlement to costs or a preparation time order arguing that it was not unreasonable conduct of the response to the claim for the Respondent to simply did nothing until this hearing and recent application for reconsideration. He referred me to the well-known case of *Gee v Shell UK Ltd. [2003] IRLR 82*.

24 I have no doubt that in the County Court an award of costs would have been made against the Respondent. In the Employment Tribunal, however, the power of the Employment Tribunal to award costs is restricted by the terms of Rule 76. It is necessary for a Claimant to show one of the threshold conditions before the Employment Tribunal

has the power to make an order of costs. In this case, the Claimants have not pointed to any particular acts of the Respondent which were vexatious, disruptive or otherwise unreasonable in the conduct of the proceedings. In my judgment, simply putting in an application for a reconsideration of the Rule 21 judgment is not sufficient; and that application was put in within 14 days of the making of the judgment and that is in compliance with Rule 71 of the Rules of Procedure.

25 Therefore, I dismissed the application for costs and a preparation time order.

26 Of course, the Respondent may be found to have acted unreasonably in future in the conduct of these proceedings if, for example, he pursues an application for reconsideration which has no reasonable prospect of success. This will be a matter for Employment Judge Burgher to determine.

Employment Judge A Ross
Date: 16 November 2020