



EMPLOYMENT TRIBUNALS

Claimant: Mr J Moore
Respondent: HCL Workforce Solutions Ltd
Heard at: Manchester (remote public hearing via CVP)
On: 5 November 2021
Before: Judge Brian Doyle

Representation

Claimant: In person
Respondent: Ms A Rumble, counsel

RESERVED JUDGMENT

The claimant's complaint under Part 2 of the Employment Rights Act 1996 is not well-founded. The claim is dismissed.

REASONS

Introduction

1. This claim was listed as a short track claim for a 2 hours' final hearing before a judge sitting alone. Standard case management orders had been issued.
2. Although it was a slightly unusual example of a short track "Wages Act" claim, the parties cooperated, and the Tribunal managed the hearing, to ensure that the evidence and submissions were heard within the 2 hours allocated. The Tribunal then reserved its judgment. It wanted and needed to give care consideration to the witness and documentary evidence before it, which had not presented the Tribunal with an immediate and obvious solution to the dispute before it.

3. This is the Tribunal's reserved judgment with written reasons. References to the file of documentary evidence comprising 287 pages are in square brackets below.

The claim

4. Acas early conciliation commenced on 29 March 2021 and ended on 10 May 2021 [1]. The claimant's claim was presented to the Tribunal on 8 June 2021 [2-13].
5. The claim contains a complaint in respect of "other payments" (section 8.1 of the ET1). This is amplified in section 8.2 as being a complaint about (1) the correct rate of pay and (2) delay in payment of wages. The claim is for (a) money owed, (b) money lost as a result of payment being made late across two tax years and (c) expenses incurred. There is also a reference to obtaining a mortgage at an unfavourable rate because of delays in receipt of wage slips and the information contained within them.
6. In his witness evidence, the claimant complains of unauthorised deductions from pay to the sum of no less than £3,761.03 due to employer's national insurance contributions being unlawfully deducted from the claimant's pay. This has been calculated as: (1) 955 standard hours at £3.27 = £3,122.85; (2) 132.75 Saturday and "out of hours" hours at £4.02 = £533.66; (3) 26 Sunday/Bank Holiday hours at £4.02 = £104.52.
7. He also claims: (4) recompense for undue financial hardship caused due to consistently late payment of wages and failure to follow the ACAS Code of Practice to the sum of no less than 10% of the above, totalling £376.10; (5) compensation calculated at 20% of the unlawful deductions, due to the unreasonable failure to follow the ACAS Code of Practice and persistent failure to communicate in a clear and open way with the claimant and the undue stress caused by the above, totalling £752.21; (6) recompense for the loss of earnings due to personal tax allowance to the sum of no less than £1,522.80 due to unreasonably late payment of wages that should have been paid in the April 2020 to April 2021 tax year; and (7) 4 weeks standard pay of 4 x 26 hours per week at £27 per hour due to the poor conduct of the respondent throughout - for example, but not limited to, failure to provide a Statement of Terms and Conditions of the Employment as required by Section 1 of the Employment Rights Act 1996, failure to respond to a formal written complaint and for repeatedly missing deadlines in providing statutory information relating to these proceedings to the sum of £2,808.
8. The claimant also makes a complaint in respect of a subject access request. The Tribunal has no jurisdiction in respect of that complaint.

The response

9. The respondent's response was presented on 9 July 2021 [20-29].

10. The respondent is a leading recruiter of temporary and permanent health and social care staff throughout the UK, providing skilled professionals to NHS trusts, local authorities, and private and voluntary organisations since 2003. It agrees that the claimant has been employed by it as a Locum Pharmacy Technician through the respondent as an agency worker. He has been a PAYE member of staff since 28 January 2021.
11. It denies all claims brought by the claimant. Its position is that the claimant was employed as a worker in the capacity of a Locum Pharmacy Technician for an end client, Greater Manchester NHS Mental Health Trust. On 18 January 2021, prior to his start date, the claimant and Donna Mills (Divisional Manager) agreed and confirmed that the claimant would be paid through PAYE rather than a limited company. The claimant advised that he would for now be placed on PAYE as he would soon have his own limited company and he would switch to the limited company once this had been finalised.
12. The respondent's position is that Donna Mills confirmed in writing on 18 January 2021 with the claimant the breakdown of what this rate of pay would be for PAYE purposes and the contributions that would be deducted as part of PAYE, which equated to £27 as an overall hourly rate. The claimant did not respond to the email of 18 January 2021 to advise that he did not want to proceed with PAYE based on that breakdown of his hourly rate nor did he provide any details of an alternative limited or umbrella company through which he could be engaged and paid.
13. So far as delay in payment of wages is concerned, the respondent's position is that as part of the on-boarding process for new workers an agreed authorised rate card has to be provided by the agency but approved and uploaded for payment by the Resourcing Manager of the end client, who on this occasion would have been Greater Manchester NHS Mental Health Trust. The respondent on a number of occasions had provided the relevant information to the client and requested this to be processed accordingly to ensure that the claimant was paid correctly. The respondent had chased Greater Manchester NHS Mental Health Trust from the point of placement for the claimant up until April 2021 for confirmation the process had been completed and that the shifts would be authorised for payment. The respondent cannot allocate payment until the end client has completed the process from their end.
14. The respondent notes that the claimant alleges that he was not provided with a payslip and a breakdown of his wages. The respondent's position is that the necessary log in details to access his electronic payslip were provided by way of email to the claimant. However, these may not have been received due to being in his junk mail folder. The claimant does now have access to his payslips.

The evidence

15. The Tribunal heard evidence from the claimant on his own behalf and from Donna Mills on behalf of the respondent. Ms Mills has been employed by the respondent company for some 11 years. Her current role is Divisional Manager.

16. Both witnesses presented as honest and reliable witnesses. The essential facts of the case emerge from a synthesis of their witness statements, read against the documentary evidence, corroborative or otherwise. This is a case that relies heavily upon interpretation of that evidence and upon the application of the relevant law to the findings of fact.

Findings of fact

17. The respondent company is HCL Workforce Solutions Ltd. It is a recruiter of temporary and permanent health and social care staff throughout the UK, providing skilled professionals to NHS trusts, local authorities and private and voluntary organisations.

18. The claimant is Mr James Moore. Mr Moore is engaged as a Locum Pharmacy Technician for an end client, Greater Manchester NHS Mental Health Trust (the "Trust"). He carries out his duties in the pharmacies of both HMP Hindley and HMP Risely on this engagement.

19. The claimant was previously engaged by the respondent via his own limited company between October 2012 and June 2014. He was unable to provide his services to the Trust via a limited company for this engagement, as the Trust did not permit this for IR35 purposes. Therefore, he was engaged via the respondent's PAYE system as a worker.

20. Ms Mills emailed the claimant on behalf of the respondent on 30 November 2020 asking if he was available for locum work [34].

21. The claimant then approached the respondent on 4 January 2021 to see whether it could facilitate his engagement via NHS Professionals [34]. He had been offered locum work at HMP Hindley. Ms Mills asked whether a band rate had been confirmed [35]. The claimant indicated that his expectation was that it would be band 5 work and that the rate would be £27 per hour [36]. Ms Mills undertook to do her best to obtain that rate for him.

22. Ms Mills asked the claimant whether he wanted to be paid via PAYE or through an umbrella company [36]. The claimant said that he would consider that. He indicated that he had previously been paid £25 per hour on an employed basis and that a colleague had been paid £23 per hour (plus the agency's commission). It appeared that the pay for the work was an important consideration.

23. On 15 January 2021 Ms Mills confirmed to the claimant that she had set him up on NHS Professionals [37].

24. On 18 January 2021 she again asked him whether he wished to be paid via PAYE or via an umbrella company [38]. He replied that it would be via PAYE for now, but that in future it would be via an umbrella company [39]. Ms Mills replied in terms that suggested that she was doubtful that she could obtain £27 per hour for him via PAYE and that the NHS client was unlikely to agree to an

engagement via an umbrella company [39]. She then emailed him at 1.14pm the “breakdown” in the form of a table, showing “PAYE £21.17”; “WTR £2.56”; “NI £3.27”; “Limited or umbrella payment £27.00” and “Pension £0.71”.

25. The Tribunal interprets this breakdown to mean that if the claimant could be paid via an umbrella company, then the payment to his company would be £27.00 per hour (plus the respondent’s commission of £2.86 on top). However, if he was to be paid via PAYE, he would be paid £21.17 per hour, subject to tax and national insurance, with rolled-up holiday pay of £2.56 per hour banked for his future use, and employer’s national insurance credited as £3.27 per hour. The pension payment of £0.71 per hour was optional in either case. The PAYE rate plus rolled-up holiday pay and employer’s national insurance contribution added up to £27.00 and the respondent would charge the NHS client £29.86, inclusive of its commission.
26. The respondent’s evidence, which the Tribunal has no reason not to accept, is that the “card rate” for this work was no more than £29.86. If the claimant’s PAYE rate was to be £27.00 per hour, then it would cost the respondent more than it would earn in commission to service the engagement because its NHS client would not pay more than the “card rate” of £29.86 per hour. Although the claimant argued that other agencies were able to command a higher fee than this respondent relies upon in its evidence, the Tribunal has no other evidence that might call into question Ms Mills’s evidence in this regard.
27. The claimant’s email reply at 1.35pm to that breakdown is a little ambiguous. Its meaning is not immediately clear [40]. It appears to mean that the claimant was only concerned with £27.00 per hour being paid to him, subject to PAYE income tax and employee’s national insurance, and that the respondent would expect to be paid its commission on top of that (and would itself pay the employer’s national insurance contribution).
28. Nevertheless, at 2.00pm Ms Mills asked the claimant whether he was happy to go with PAYE based on the breakdown she had provided. She accepted that her commission would be less than her apparent expectation [40].
29. The claimant replied at 2.30pm to the effect that it was up to her to see whether both he and the respondent could be paid what they wanted [41]. He indicated that he would be happy if his gross hourly rate (exclusive of the respondent’s fees) was £27.00 [42].
30. Ms Mills requested the claimant’s bank details on 25 January 2021 for payroll purposes [44].
31. It does not appear to the Tribunal that the question of the claimant’s hourly rate was ever definitively resolved or, at least, resolved to the mutual satisfaction of the parties. Ms Mills believed that the claimant had agreed to carry out the locum work on 18 January 2021. She relies upon the email thread at [38-42]. In her view, she had provided a table that made it clear that he would be engaged on a PAYE rate of £21.17 per hour, plus £3.27 employer’s national insurance contribution and £2.56 per hour rolled-up holiday pay (which it is said

the claimant has used by taking annual leave). In her analysis, the table provided was “absolutely clear” as to what would be paid to the claimant and that he accepted and commenced work shortly thereafter.

32. A PAYE rate of £27.00 per hour, however, would not have been a financially viable proposition, as the respondent only received a gross payment per hour from the Trust of £29.86. If the claimant were paid a gross hourly PAYE rate of £27.00, the respondent would also have to pay employer’s national insurance contributions on top of that, as well as its other operating costs, resulting in the respondent suffering a substantial loss in respect of the claimant’s engagement. Consequently, the respondent would never have engaged the claimant on that hourly rate as it would have been losing money in so doing.
33. Nevertheless, on 22 February 2021, the claimant queried whether his pay had been sorted out [45]. This appears to be an enquiry about the payment for shifts completed rather than a pursuit of any question as to the rate of pay. Ms Mills promised to sort it out [46]. She replied on 23 February 2021 [47].
34. Whatever the position on pay might have been, the claimant did commence his assignment to the Trust at HMP Hindley and HMP Risely via NHS Professionals. The respondent thereafter had no day-to-day control over the claimant and the conduct of his duties or the shifts that he worked. The Pharmacy Managers employed by the Trust at the prisons in which the claimant worked arranged directly with him which shifts he was offered. The respondent was not involved in that process. The Trust was not obliged to offer the claimant any shifts and, if the Trust did so, the claimant was not obliged to accept them.
35. In her witness statement, Ms Mills explained the procedure to be followed for the claimant to be paid. Her evidence, which she qualified in questions to her, was that the claimant was expected to send her details of the shifts he had worked. She then completed a retrospective form for him detailing those shifts and she submitted it to the Trust’s staff bank, NHS Professionals (“NHSP”), by email. The claimant provided such details roughly every 3 weeks on average. NHSP then sought confirmation from the respective Pharmacy Managers at each prison that the claimant had worked the shifts claimed. Once confirmation had been given, NHSP released those shifts to the respondent and the claimant is paid for them shortly thereafter.
36. Ms Mills’s evidence is that NHSP is not very efficient or swift in confirming that the claimant had actually worked the shifts that are claimed for and in then releasing those shifts for payment. This has caused delays in some of the payments to the claimant. However, once the Trust has approved the shifts the claimant has worked, payments are made by respondent to the claimant for them promptly thereafter.
37. The documentary evidence shows that some substantial payments were made to the claimant on 15 October 2021 after a number of shifts he had worked, primarily in August and September 2021, were approved and released by NHSP. Those payments, amongst others, are recorded at [278]. This shows that he was paid a total of £4,182.58 on 15 October 2021 broken down as

follows: £569.74; £569.74; £284.87; £854.61; £1,049.01; and £854.61. In addition, claims for the shifts on the following dates have been made and the respondent awaits confirmation from NHSP that the claimant has indeed worked those shifts and for those shifts to be released, after which payment will be made to the claimant: 9 July 2021; 1 September 2021; 21 September 2021; 22 September 2021; and 30 September 2021.

38. As Ms Mills explains in her evidence, the claimant's pay slips are at [204-277]. He continues to work and any shifts worked in October 2021 will be claimed for, if not already. Once NHSP has approved and released those shifts, the claimant will be paid for them as well.
39. The claimant has also provided a spreadsheet of shifts worked and paid for [286-287]. He has included shifts worked on 6, 8, 12, 17 and 21 October 2021, for which the claimant has not yet claimed payment for these shifts. If and when he does, the respondent will claim for the shifts from NHSP, and when they approve and release the shifts, the claimant will be paid for them.
40. The claimant's first work shift at HMP Hindley was on 28 January 2021.
41. The claimant received the first payment for his employment on 19 March 2021 as an "advance". No pay slip was provided. The first pay slip is dated 7 April 2021. See the pay slips at [277-280]. This pay slip had the claimant's previous address from his prior employment with the respondent which ended in 2014. The next four pay slips also had the old address.
42. On 27 March 2021 the claimant complained by letter to the respondent's HR department and the respondent company's directors, stating his wish to be paid £27 gross per hour, exclusive of agency fees. He also complained about delays to payment of his earnings [74-75].
43. On 29 March 2021 the claimant notified ACAS of his dispute with the respondent.
44. The first pay slip issued by the respondent lists a process date on 7 April 2021. Net pay is recorded on this pay slip as £0.00 and two advance payments of £901.84 and £2,002.71. The claimant had received £901.84 on 19 March 2021 and the payment of £2,002.71 was received on 1 April 2021. A rolled-up total holiday fund was listed as £189.50 with no indication of how this had been calculated. NI deductions of £106.02 were also listed.
45. On 19 April 2021 the claimant contacted Ms Mills and requested access to his pay slips. Access to the respondent's pay slip portal was provided on the same day [76]. The claimant regarded this as unreasonably late payment, meaning that the claimant was unable to check the payments he was receiving against the amount of money he expected to receive until 10 weeks after his employment commenced.
46. On 20 April 2021 the claimant contacted Ms Mills. He recorded that his rate of payment was incorrect and asked that it be rectified "to the agreed £27 per hour

standard rate as discussed before I started employment” [77]. Ms Mills replied: “Please remember that when we spoke that you also accumulate holiday pay when being paid PAYE, so when you want that released to you all you have to do is let me know - this should also be shown on your pay slip. I will inform payroll now regarding the wrong address, would you like them all corrected and be resent?” [77]. No attempt was made to clarify the actual rate of pay or working rate of pay.

47. The claimant responded: “I’m really frustrated what I would like to see is a flat rate that I can calculate without an accountant. I just don’t trust that this is right at this point” [78]. No reply was received.
48. On 22 April 2021 the claimant again contacted Ms Mills. He provided an example of a rate card that he believed set out clearly the rates and deductions, again stating that he did not understand his current rates: “There isn’t any wiggle room here it’s £27 per hour.... currently it does not add up.... I would not work for less than £27 per hour with your fees to be procured outside of that. I’m yet to receive any form of contract still” [80]. He further stated: “If there is anyone else who would be better for me to communicate with then I would gladly do so... I can’t be piggy in the middle to this when it is so simple” [80].
49. Ms Mills replied: “We are paying you a bit more than the below. Also don’t forget your owed holiday pay too” [81]. Attached to this email was a “rates card” [82]. This rates card appears to show a total hourly rate of £27 per hour, but had included the employer’s NI contributions, which the claimant regarded as misleading. No further clarity or breakdown of rates or fees was offered. No contract of employment or assignment details correspondence was provided.
50. On 27 April 2021 Ms Mills contacted the claimant: “I just wanted to share with you the breakdown as to what we spoke about at the beginning of the placement. If you work PAYE deductions will be made from the £27.00 as agreed and it will never show £27 on your payslip - below is the breakdown that I sent you. If you was to work via an umbrella company then the full £27.00 would be sent to them and they would make the necessary deductions including their fees” [82]. The same “rate breakdown” table was provided as had been provided in previous correspondence.
51. On 4 May 2021 the claimant again contacted Ms Mills: “The breakdown you linked isn’t what I am looking for...I can’t calculate things for myself” [85]. The claimant was not happy with the pay rate he was receiving, and he did not understand the deductions. In his view he had not agreed to the deductions and the deductions remained unauthorised. In his view, the respondent had no right to be charging him the employer’s NI contribution.
52. On 12 May 2021 the claimant received confirmation via ACAS that confirmed that the “NI contributions” were employer’s and not employee’s NI contributions. The claimant did eventually receive an email from the respondent dated 22 July 2021 [130-131] “and yes below are the gross rates before NI & tax deductions” and listing a standard rate of £21.17.

53. On 26 May 2021 the claimant messaged Ms Mills: "...the thing that stands out most is the rate of pay. I stated from the start (and numerous times since) that it was £27 per hour (gross and excluding HCL fees) or I wasn't interested. I think that needs sorting before anything else. I 100% expect that to be rectified" [167].
54. On 20 September 2021, the claimant asked Ms Mills for a copy of the contractual documentation evidencing his assignment [42-43].
55. The claimant received a form of contract of employment for his work at HMP Hindley on 20 September 2021. This document listed an "all-inclusive rate of pay £21.17 PAYE" without providing any further details [193]. This document appears to have been created on that date [194]. It is not signed or dated.
56. The respondent has also produced a generic document - "PAYE Candidate Terms". This casts no further light on the claimant's rate of pay [182].
57. Whatever the dispute about the correct rate of pay, the evidence points to the fact that the claimant's wages have regularly been paid later than he expected or desired. He has not been paid consistently on a weekly basis. He has never been told in advance that there will not be payment in any particular week, contrary to the respondent's own documentation [188]. The claimant's pay slips evidence the dates upon which payments have been made [204-277]. Those dates are not reproduced here.
58. Between 29 January 2021 and 22 October 2021 there were 39 weeks, on which the claimant should have been paid on 39 separate occasions, in his account. The claimant has been paid on 11 occasions. Between April and June 2021, when ACAS was involved, the claimant was paid consistently and regularly. Thereafter, payments slowed down and then halted again. As at 27 September 2021, the claimant had not been paid for any work done after 8 August 2021, with the exception of some holiday pay that he had requested. The total amount owed to the claimant at that time was £7,772.44, using the rate of pay the claimant was actually receiving of £23.73 per hour. The claimant accepts that he has now been paid the bulk of that outstanding money and that the payments are more up to date.
59. Some of the delays to payments have been over 6 weeks. See the claimant's spreadsheet [286-287]. It shows that there have been numerous occasions when the claimant has been waiting in excess of 30 days for payment of wages owed. These delays have meant that the claimant has on more than one occasion been owed a sum as high as £8,000. This has undoubtedly caused him financial hardship.
60. The claimant has also spent time contacting the respondent to obtain payment of monies owed and to clarify his rate of pay and his working conditions. This is evidenced in the email chains at [34-160]. The claimant's position is that had the respondent simply said to him "you are not being paid £27 an hour, you are being paid £23.73 after our deductions", for example, then the claimant would have ceased working for the respondent until a new rate of £27 was negotiated.

Instead, the respondent simply re-sent the original table that appeared to show a total rate of £27, but it did not clarify the deductions being employer's and not employee's national insurance contributions. The position was exacerbated by the respondent's failure to provide any employment contractual documentation or assignment documentation until 20 September 2021 [193].

61. The Tribunal notes the respondent's position that the problem arose from delays in its NHS client confirming the shifts that the claimant had worked so that the respondent could approve payment to the claimant on a basis that it could then make a claim for payment under its contract with the NHS client. The suggestion was that this a process that did not require the claimant to provide timesheets, but simply required information that was capable of being drawn down from the client's computerised system. The Tribunal notes that the evidence of Ms Mills does not appear to be clear and consistent on this point.
62. The Tribunal also notes that the delays in payments to the claimant created difficulties for him in utilising his annual tax allowance efficiently and to his advantage as between two separate tax years. The claimant was returning to work after a period of unemployment and so he had not used any of his personal tax allowance for the 2019-2020 tax year.

Relevant law

63. Section 13 of the Employment Rights Act 1996 addresses the right not to suffer unauthorised deductions from wages. The following provisions of that section may be relevant to the present dispute.
64. An employer shall not make a deduction from wages of a worker employed by it unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction. In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
65. Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by it to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of section 13 as a deduction made by the employer from the worker's wages on that occasion. This does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

66. Section 1 of the 1996 Act provides for the provision of a statutory statement of employment particulars by an employer to a worker. Similarly, section 8 makes provisions for itemised pay statements to be given to workers by their employers. The Tribunal also reminds itself of the provisions of section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992; sections 23-26 of the Employment Rights Act 1996; and section 38 of the Employment Act 2002.

Submissions: Respondent

67. The respondent's counsel reminded the Tribunal that there were two issues for its determination: (1) delay in payment and (2) rate of pay.

68. As to (1), Ms Rumble submitted that there was an informal agreement in place because the claimant had previously worked for the respondent. On this occasion, a formal contract of employment had not been concluded. Instead, the email exchanges between the claimant and Ms Mills on 18 January 2021 largely set out the relevant terms. Those terms were later amplified by the Candidate Terms document, although not signed by either party.

69. The respondent accepts that it aimed to pay the claimant within 7 days. However, as the evidence of Ms Mills explains, there was a problem with the information being obtained from the respondent's NHS client. The respondent's position is that it has paid for all the shifts that have been recorded up to 5 October 2021. Ms Mills confirmed as much, and the claimant accepted that. There was a delay in payment, but it was not unreasonable in the circumstances. There were no unlawful deductions made and no loss arising.

70. As to (2), the respondent relies upon the agreement made on 18 January 2021. There may have been some miscommunication between the parties, but the respondent contracted with the claimant on the basis of the evidence that appears at [40] (the breakdown table provided by Ms Mills in her email to the claimant). The only question was whether the claimant was to be paid upon a PAYE basis or through an umbrella company. The appropriate rate was as set out in the table. The intended contractual basis was clear – that in the absence of an umbrella company the claimant would be paid on the PAYE basis – and that was the position that was reached as a result of Ms Mills's email at the bottom of [40].

71. Counsel accepted that if the Tribunal was against the respondent on this analysis, then the rate would be £27 gross per hour; the claimant's section 13 complaint would succeed; and compensation for losses would follow. However, her submission was that the section 13 complaint does not succeed.

72. To the extent that the claimant relies upon a breach of section 1 (statutory particulars of employment), the respondent's position is that the claimant was a worker and that the particulars are contained in the Candidate Terms, that were sent to him. In addition, the respondent relies upon the terms set out in the emails in January 2021 and subsequently in the respondent's booking form.

There is no compensation to be paid, but in any event this is not a complaint that has been raised in the ET1 claim form.

73. Counsel reminded the Tribunal that it had no jurisdiction to deal with the claimant's complaint concerning his subject access request.

Submissions: Claimant

74. The claimant submitted that he did not seek to be dealt with informally. He wanted to be treated as a regular worker engaged by the respondent agency. He complains that he has tried to use many channels to try to resolve this dispute. He is only asking to be paid what he believes was agreed – £27 gross per hour – and that he be paid promptly. He has been entirely reasonable. The respondent should have adjusted the rate of pay, but instead it has “gaslighted” him. The onus was on the respondent to make matters clear.

75. The claimant complains that the respondent never tried to renegotiate the rate with its end client or to explain to the claimant that he could not be paid the rate that he sought and why. Instead, this has resulted in months of stress. There is no issue with his preferred rate of pay with another agency. The respondent has not acted fairly or proactively. In addition, it has failed to provide contractual documents or respond to his subject access request. Furthermore, it could have acted to pay him sooner and apologised for the state of affairs and compensated him for his financial losses. The effect on his mood and his enjoyment of life has been negative, leaving him completely aggrieved. His cash flow has also been adversely affected. See his remedy statement.

Discussion and conclusion

76. The Tribunal considers that the only jurisdiction that it is exercising is one under section 13 of the Employment Rights Act 1996 (Part 2 of the Act). The parties are agreed. That is in respect of complaints about (1) the proper rate of pay agreed at the outset of the claimant's engagement and (2) delays in payment of wages.

77. Although there is a reference in the ET1 to wage slips, there is no free-standing complaint under section 8. In any event, the Tribunal is satisfied that itemised pay statements were supplied contemporaneously, even if the claimant may not have been aware of that because of an old address being used at first or possibly because of emailed statements being directed to junk folders.

78. In the claimant's evidence, there is also a reference to the respondent's failure to provide contractual documentation, but the ET1 does not contain a stand-alone complaint that there has been a breach of section 1 that is actionable under Part 1 of the 1996 Act. A failure to provide a written statement of employment particulars may lead to an award of compensation being made against the employer, but only if a claimant has successfully brought another claim against the employer. See section 38 Employment Act 2002.

79. The starting point is to ascertain what was agreed between the parties as to the claimant's rate of pay for being provided by the respondent as an agency worker to the respondent's end client, the NHS Trust in question, via NHS Professionals. That is a matter of construction of the contract. What was the relevant express term as to pay?
80. As with any other legally enforceable contract, a contract of employment is the product of an agreement between the relevant parties. That agreement arises from the successful conclusion of a process of offer and acceptance (and sometimes as a result of counter-offer and acceptance). The agreement is then legally enforceable as a contract of employment if it is made with the intention to create legal relations, is supported by consideration (usually the provision of work by the employer undertaken by the worker in return for the payment of wages) and has the necessary degree of certainty.
81. Neither party has here suggested that there was no agreement between them as a result of the emails exchanged between the parties in January 2021. Neither party suggests that the agreement lacks certainty or has been vitiated by mistake or by misrepresentation. Neither party suggests that the relationship lacked contractual force, not least because it is clear that the claimant has performed his duties and in return the respondent has paid him for those duties (although the dispute is whether it has paid him correctly and timeously).
82. In the Tribunal's judgment, the exchange of emails in January 2021 supports only one probable conclusion (although there are other possible conclusions that are relatively less supportable). That is that the respondent was willing to pay the claimant £27 gross per hour if, and only if, his engagement was via an umbrella company, and if this was acceptable to its end-client. Otherwise, he would have to be paid at a lower gross rate of pay via PAYE and that took into account rolled-up holiday pay, the respondent's employer's national insurance contributions and the respondent's reasonable expectations of its fees on top (and within the cap created by what the end-client would be willing to pay). That interpretation is necessary because (a) the respondent could not be expected to countenance an arrangement for which its costs and expenses would outweigh its expected return from its end client and (b) where the claimant had not provided any details of an umbrella company through which he would be paid as an alternative to PAYE.
83. That is what resulted from the exchange of emails, particularly on 18 January 2021; Ms Mills's provision in tabular form of the breakdown of the rate that she proposed if the claimant was to be engaged on PAYE terms; the claimant's subsequent failure to make a counter-offer based upon him being ready, willing and able to contract via an umbrella company; and the fact that he commenced the work in question. That analysis is not sufficiently undermined by the respondent's subsequent delays in making payments or the claimant's continued adherence to the view that he had agreed a gross rate of £27 per hour and would be unwilling to work for a rate of pay that was inferior to that.
84. On the first issue, therefore, the Tribunal concludes that the rate of pay properly payable to the claimant, all other things being equal, was and is £21.17 per

hour, subject to tax and national insurance, with rolled-up holiday pay of £2.56 per hour banked, and employer's national insurance credited as £3.27 per hour. The pension payment of £0.71 per hour was optional and the claimant did not opt into it.

85. In the Tribunal's judgment, the total amount of wages paid on any occasion by the respondent to the claimant, as a worker employed by it, was not less than the total amount of the wages properly payable by it to the claimant on that occasion (after deductions). There was no deficiency to be treated as a deduction or non-payment. There was no deficiency attributable to an error of any description on the part of the respondent affecting the computation by it of the gross amount of the wages properly payable by it to the claimant on that occasion. It follows that the respondent has not made any unauthorised or unlawful deductions contrary to section 13 when paying the claimant at a rate that was less than £27 gross per hour.
86. Turning to the second issue, has there been an unlawful deduction from (or non-payment of) wages on any occasion on which the respondent has failed to make a timeous payment of wages to the claimant?
87. The answer to that question also requires a consideration of whether on any particular occasion the total amount of wages paid (or not paid) to the claimant by the respondent is less than the total amount of the wages properly payable by it to the claimant on that occasion (after deductions).
88. The situation here is unfortunate and regrettable because ordinarily a worker in the claimant's position would be entitled to expect to be paid at regular intervals – perhaps weekly or monthly, usually in arrears – and in regular amounts.
89. The respondent's evidence here was not always consistent as to whether the claimant was expected to account to the respondent and/or to the end-client for the actual shifts he had worked and when; or whether the end-client was expected to furnish that information to the respondent; or whether the respondent was supposed to pull that information off the portal between it and the end-client (and could do so). Whatever the position might actually be, in the Tribunal's judgment, the respondent could not know what wages were properly payable to the claimant until it was made aware, by whoever and by whatever means, what shifts the claimant had worked in any particular period, and that this had been confirmed by the end-client. It is apparent from the evidence (of Ms Mills, in particular) that despite its efforts, the respondent was hampered in obtaining that knowledge and confirmation, in all probability by the end-client or its systems. In the end, it was the provision of information by the claimant himself, backed up by a running spreadsheet, that brought about an eventual catching up with wage payments due to him, albeit not at the rate of pay he was contending for.
90. The Tribunal, therefore, with some reluctance and regret, concludes that the irregularity of the wage payments, and the inherent time-lag between the shifts worked and the payments for them being made, did not result from the

respondent making unauthorised or unlawful deductions from (or non-payment of) wages that were otherwise properly payable to the claimant at the relevant times. There was no unreasonable delay in making payments once the respondent had the necessary information and confirmation that it required to permit it to make payments to the claimant that would allow it to recover those payments (and its fees) from the end-client.

91. It follows that the claim cannot succeed and it must be dismissed. It also follows that, although there had been a breach of section 1 of the 1996 Act in respect of the claimant's entitlement to a timely provision of employment particulars, he cannot recover compensation for that breach via section 38 of the 2002 Act. The conditions for an uplifted award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 are also not present.

92. The claim is thus not well-founded and it is dismissed.

Observation

93. This observation does not form part of the Tribunal's decision or reasons.

94. The claimant has not succeeded in his claim to the Tribunal because it has found that the conditions for a successful complaint under section 13 and Part 2 of the Employment Rights Act 1996 have not been satisfied. It follows from that that the Tribunal is unable to make a separate award of compensation or an uplifted award under section 38 of the Employment Act 2002 or section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

95. Nevertheless, the respondent can take little comfort from its handling of its dispute with the claimant: either in the negotiation of his rate of pay or in responding to his concerns about that matter or in the delays in payment of wages to him (regardless of whether those delays might be explicable or reasonable). The claimant was entitled to feel aggrieved by how his engagement as an agency worker was handled by the respondent, even if ultimately that sense of grievance could not be accommodated within the statutory framework of Part 2 of the 1996 Act, which was the only claim within the Tribunal's jurisdiction that was before the Tribunal for determination.

Judge Brian Doyle
Date: 11 November 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
15 November 2021

FOR THE TRIBUNAL OFFICE

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