



EMPLOYMENT TRIBUNALS

Claimant: Mr K Giannopoulos
Respondent: Sherwood Forest Hospitals NHS Foundation Trust
Heard at: Midlands (East) Region by Cloud Video Platform
On: 4 February 2022
Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: No appearance
Respondent: Oliver Lawrence of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The claim for non-payment of wages is withdrawn and dismissed.
2. The issue of the costs of the Respondent will be dealt with on the papers.

REASONS

Background to this claim

1. The Claimant presented his claim to the Tribunal on 15 September 2021. He said that he had been employed by the Respondent from 15 June 2021 to 18 June 2021 as a Locum Senior House Officer at King's Mill Hospital.
2. He said that he had been employed for a week through a Company called Total Assist, a locum agency and had anticipated working four-night shifts.
3. He said that after a dispute about his duties, they cancelled him for the rest of the week and his claim was for the three nights that he did not work that he says he was not paid for.

4. He had also made a claim for unfair dismissal, but that claim had been struck out by my colleague, Employment Judge Ahmed, on 12 October 2021 because the Claimant did not have two years' service.
5. In their Response, the Respondent informed the Tribunal that the Claimant was engaged as an agency worker and had only completed one nightshift on 14-15 June 2021.
6. There was no direct contractual relationship between the Claimant and the Respondent, and he was not an employee of the Respondent. His claim for arrears of pay was therefore fundamentally misconceived and bound to fail.
7. The non-payment of wages claim was listed for hearing today.
8. The Claimant prepared a witness statement in respect of his claim. In that witness statement he indicated new issues of race discrimination, sex discrimination and less favourable treatment as a fixed-term employee. These matters had not formed part of the Claimant's pleaded claim and he had not made an application to amend it.
9. When the matter was reviewed at the Rule 26 stage by my colleague, Employment Judge Adkinson, he determined that at the commencement of the hearing the Employment Judge should consider the issue of whether the Claimant was an employee or worker.
10. On 27 January 2022, the Respondent made an application to strike out the Claimant's claim pursuant to Rule 37 of the Employment Tribunals Rules of Procedure 2013.
11. They forwarded to the Tribunal a bundle of documents and said that it was clear from the documents that there was never any contractual relationship between the Claimant and the Respondent. The Claimant had specifically requested that he be engaged by the Respondent outside of the normal direct engagement procedure. He was not directly engaged by the Respondent and his only contract is with the Agency, Total Assist.
12. It was said by the Respondent that in a rare case that an employment contract is to be implied between an agency worker and an end user, such a contract is only to be implied when the Tribunal is able to properly conclude that agency arrangements no longer adequately reflect how the work is actually being performed. There was nothing in this situation which indicated that this was anything other than an agency agreement.
13. The Respondent's position was that the claim was fundamentally misconceived because there was no contractual relationship between the Claimant and the Respondent.
14. They made an application to strike out on the basis that the claim had no reasonable prospect of success.
15. They also said that they had notified the Claimant that his claim was "manifestly misconceived" and that they intended to pursue costs under Rule 76(1)(b) of

the Tribunal Procedures.

16. At 15:53 yesterday, the Claimant wrote to the Tribunal as follows;

“ ...

I withdraw my claim 2602286/2021.

The reason is, I am on call tomorrow on the labour ward and unfortunately I can't change this. Also it is unfair for me that I am a litigant in person while the hospital has solicitors on board.

...”

17. It was clear from this correspondence that the Claimant was withdrawing his claim.

18. At 18:21 yesterday, the Respondent wrote to the Tribunal to say they wished to pursue an application for costs against the Claimant. They sent a copy of that application to the Claimant. The basis for the application was;

19.1 the Claimant had acted unreasonably in the way the proceedings had been conducted, and/or

19.2 the claim had no reasonable prospect of success.

19. The claim for costs was;

19.1 £9,165.50 plus VAT legal costs;

19.2 £1,220 disbursements for counsel fees and courier costs.

20. They attached a schedule.

21. In response to this, the Claimant emailed the Tribunal today at 01:06. He said;

“It was the defendants choice to pay solicitors.

The employment tribunal is a no cost court.

I am now asking for a different date for the hearing as the hospital could not find an alternative doctor to cover the shift.”

The Law

22. Under the Tribunals Rules of Procedure, the provisions for withdrawal are as follows;

“End of claim

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

- (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
- (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.”

The hearing today

23. The Claimant did not appear at the hearing today. The Respondent did and was represented by Mr Lawrence of Counsel. I was not able to hear further from the Claimant, but I was able to discuss the case with Mr Lawrence and heard his submissions.

Conclusions

24. The Claimant having by his earlier letter withdrawn his claim, the claim has come to an end subject to any application for costs. The Claimant cannot change his mind. The claim will stand dismissed.

24. There is still of course the issue of costs and at the hearing today, Mr Lawrence asked me to determine the question of costs. I declined. I decided that the Claimant should be provided with an opportunity to make written representations in respect of the claim for costs and I will consider those representations and any further representations the Respondent may make before dealing with the application on the papers.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

- 1. The Claimant is to provide to the Tribunal his written representations regarding the application for costs and the amount of costs claimed made by the Respondent within 14 days of this order being sent out to the parties.
- 2. If the Respondent is so advised, they may submit any further written representations of their own 14 days thereafter.

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:

<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>

(v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so*”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Hutchinson

Date: 10 February 2022

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