



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr A Naylor

v

**Respondent:**  
G Seal Limited

**Heard at:** Nottingham (via CVP)

**On:** 10 May 2022

**Before:** Employment Judge Fredericks

## Appearances

For the claimant: Mr M Taylor (Lay Representative)

For the respondent: Mr C Wood (Solicitor)

## JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant's complaint of constructive unfair dismissal is dismissed upon withdrawal.
2. The portion of the claimant's claim for unlawful deduction from wages relating to travelling to and from his place of work is struck out because it has no reasonable prospects of success.
3. The surviving element of the claimant's claim for unlawful deduction from wages is dismissed upon withdrawal.
4. The respondent's applications for deposit orders in respect of the claimant's claims fell redundant as a result of the above and so were not considered.

# WRITTEN REASONS

## Introduction

1. These written reasons are produced at the claimant's request following one portion of his claim being struck out at this hearing. The judgment, without written reasons, was endorsed by me on 24 May 2022.
2. By a claim form received 20 December 2021, the claimant brought claims for constructive dismissal and unlawful deduction from wages. The claimant worked as a Sealant Applicator from 30 May 2006 to 24 November 2021, when he resigned with immediate effect and then brought his claims. The respondent denied that any money was due and asserted that the claimant had been claiming pay for work not completed at construction sites. The exact overpayment was yet to be finalised, but the respondent says it has calculated that the amount is in excess of anything that may be due to the claimant.
3. The respondent made applications for the claimant's claims to be struck out under rule 37 because they had no prospects of success. Alternatively, the respondent applied for the tribunal to make deposit orders in respect of the claimant's claims because they had little prospects of success.
4. At the outset of the hearing, the claimant clarified that he was not pursuing a claim for constructive dismissal and so this claim was withdrawn.
5. This left the claimant's claim for unlawful deduction from wages, which were advanced broadly as two parts:
  - a. first, the claimant claimed that he was owed wages in the sum of £28,900 in respect of the time spent travelling to and from work; and
  - b. second, the claimant claimed he was owed wages and holiday pay in the sum of £1,200, which had been earned but withheld by the respondent.<sup>9</sup>

## Striking out the claim for unpaid wages relating to travel time

6. The claimant relied on the decision of *Federacion de Servicios Privados del Sindicato Comisiones Oieras v Tyco Integrated Fire & Security Corporation Servicios SA (Case C-266/14) [2015] (D) 55 (Sep)* to claim that he should have been paid for time spent travelling to and from work for the period of his employment. In that case, the European Court of Justice held that an employee's travel time to and from work should be counted as 'working hours' with reference to the European Union Directive concerning working time. Mr Taylor argued that the inclusion of travel time as 'work' should automatically mean that that time falls to be paid time. Since the claimant had not been paid for that time, he said, the respondent must have unlawfully deducted from the claimant's wages.
7. The respondent resisted that application of the principles held by *Tyco*. Mr Wood noted that the decision was in respect of working time and not pay. He noted that the decision specifically stated that whether or not such time is counted as 'paid' time

is a matter for the member states themselves to determine with national legislation. Mr Wood directed me to Regulation 39(1) National Minimum Wage Regulations 2015, which states very clearly that time spent travelling to and from work is not considered 'output work', and so it is not to be considered work which would become properly payable under the Employment Rights Act 1996.

8. I could not disagree with Mr Wood's analysis of the application of Tyco to work done in England and Wales, and so it follows naturally that that portion of the claimant's claim must have no reasonable prospects of success. The argument the claimant sought to run was specifically excluded by the National Minimum Wage Regulations, as was contemplated as being possible and permitted in Tyco. Consequently, I struck out the claimant's claim under Rule 37(1)(a) Employment Tribunals Rules of Procedure.

### **Withdrawal of remainder of claim for unlawful deduction from wages**

9. This left the portion of the wages claim which related to one week's pay in hand and two weeks of holiday pay. Mr Wood also submitted that this claim should be struck out as having no reasonable prospects of success or, alternatively, that I should make a deposit order because the claim had little prospects of success. Following the striking out of the travel time portion of this claim, the balance of the claim stood at £1,200. I reminded the claimant of the implications on costs should I make a deposit order in respect of the claim.
10. The respondent contended that this portion was not due to the claimant because the claimant had claimed pay for work he had not completed. To assist evidencing this, the respondent produced photographs showing incomplete or unbuilt plots for which the claimant had claimed to have fitted units. The work is clearly not complete in the photographs. The claimant admitted that he had, to a degree, invoiced for work not yet done, but said that it was a common practice at the respondent. The respondent denied this. Plainly, any wages claimed by the claimant must be 'properly payable', and if the work is not done then wages are not due. The respondent estimated the overpayment to the claimant is in the region of £7,000, which is clearly far greater than the £1,200 the claimant claimed.
11. I was not prepared, though, to determine this part of the claimant's claim without hearing evidence and having that evidence tested. The parties were not prepared to offer evidence on the issue in relation to the alleged premature invoicing. Whilst I had photographs which looked persuasive, I had no witness evidence to assist with context and no cross examination had been prepared. The respondent had also not yet finalised the amount it said that the claimant had been overpaid. I considered that it would be premature to conclude that this claim had no reasonable prospect of success. This is a claim for which evidence should have been heard for it to be determined and was a very different situation to the travel time claim which was struck out.
12. However, I could not ignore the apparent weight of material which indicated that the claimant had been overpaid and I was mindful that the respondent only had to show that the claimant had been overpaid by no less than £1,200 for the wages to have been lawfully deducted in their entirety. Consequently, I indicated that I considered this claim had little prospects of success and was intending to make a deposit order

for the claim to continue. The claimant took the opportunity to adjourn to consider if he wished the deposit order to be made. The claimant did not return following the adjournment but his representative confirmed that he wished to withdraw the remainder of his claim which had not been struck out./

13. For completeness, I add that the claimant's withdrawal of claims, and the striking out of part of his unlawful deduction from wages claim, meant that I did not need to make any of the deposit orders requested by the respondent.

**Costs**

14. At the end of the hearing, Mr Wood indicated that the respondent intended to pursue the claimant for costs in light of the claimant's late withdrawals and the strike out. I invited him to make any such application in writing having given the claimant notice of it, if indeed that is what the respondent continues to want to do.

7 June 2022

Sent to the parties on:

.....

For the Tribunal Office:

.....