EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Diop **v** **Shore Construction Group Limited (07852395) (Debarred)**

Heard at: Watford by CVP video **On**: **23 June 2022**
Before: Employment Judge R Lewis

Appearances
For the Claimant: In person
For the Respondent: No attendance of representation

RESERVED JUDGMENT

1. The claimant's claim for arrears of pay is upheld. The respondent is ordered to pay to him in respect of unlawful deductions the sum of £16.70.

2. The respondent may comply with the above or may have complied with the above by deducting and accounting to the appropriate authorities for statutory deductions. If it has done so, it is to send the claimant documentary evidence of having done so, but in the event of it failing to provide such evidence, the sum stated is due and payable.

3. The claimant's claim of race discrimination is upheld.

4. The respondent is further ordered to pay to the claimant the sum of £1,500.00 in respect of injury to feelings.

5. The respondent is further ordered to pay to the claimant the sum of £56.22 in respect of statutory interest on the above.

REASONS

1. This seemingly simple case has been complicated by procedural problems, I will therefore set out the following:

   1.1 Discussion of identity of respondent.

   1.2 The procedural history.

   1.3 Discussion of the claim for unlawful deductions.

1.4 Discussion of the claim for race discrimination.

1.5 Reference to reconsideration.

Identity of respondent

2. The claimant entered into early conciliation with The Shore Group. That was the first respondent named on the claim form.

3. In preparing for this hearing, I undertook a Companies House search of information in the public domain. That indicated that a company called The Shore Group Limited, NI651529, was a company incorporated in Northern Ireland in 2018 and dissolved on 31 March 2020.

4. The tribunal's file referred to Mr James Hobden as the proprietor and director of the respondent. Companies House information indicates that the only company of which he is Director is that of which the correct name and number is given at head of this judgment.

5. It appears therefore that the correct business name is "Shore Construction Group Limited" (which trades as The Shore Group).

Procedural history

6. The claimant entered into early conciliation on 11 March 2021; the certificate was issued on 25 March. The same dates apply to Vision Personnel Limited, previously the second respondent.

7. The claim was presented on 25 March. The ET1 ticked the boxes of race discrimination and other payments. The narrative was that the claimant had worked as a labourer for two days for the respondent, 25 and 26 February 2021, for nine hours a day at an hourly rate of £11, but had not been paid. It gave no clarification of the claim of race discrimination.

8. It was served on the respondent on 30 March. The address to which it was served (and with which the tribunal corresponded when sending mail by post) was that set out by the claimant at paragraph 2.2 of the ET1, which was given as 30 Crown Pl, The Bishops Avenue, London EC2A 4EB. The reference to The Bishops Avenue was plainly incorrect, as that was an address in London N2 where the claimant had actually been engaged to work (paragraph 2.4 of the ET1). The rest of the address was in accordance with the ECC, and with Companies House information.

9. The claim was also served on the same day on Vision Personnel Limited. I comment that that was the claimant's procedural error: It appeared to be a wholly different case and should have been the subject of a wholly different claim form. However, that claim was compromised, and was the subject of a judgment under Rule 52 of 18 October 2021.

10. No response was received from the respondent and on 10 July the tribunal wrote to it to state that in the absence of a response, a judgment could be issued in accordance with Rule 21.

11. On 19 July, on behalf of the respondent, Ms Perry emailed the tribunal to say that the notice of no response was "the first communication we have had about this case." She asked to be sent the claim form. Her email was not copied to the claimant. Ms Perry was People and Performance Director.

12. On 20 July the tribunal listed the claim for hearing at Watford on 7 September.

13. On 28 July the claimant wrote to the tribunal (not copied to the respondent) to say that he had settled his claim against Vision Personnel 'ONLY'.

14. On 28 August a number of tribunal staff emailed Ms Perry, in reply to her letter of 19 July, stating, "Attached service documents originally sent by post on 30 March 2021." The tribunal file contains an automatic reply from Ms Perry, indicating that Ms Huntley should be sent any urgent correspondence. Tribunal staff forwarded the same email to Ms Huntley a few minutes later.

15. The hearing listed for 7 September was adjourned (the file did not make the circumstances quite clear).

16. As set out above, the claimant settled his claim against Vision Personnel. Judgment under rule 52 was sent on 19 October.

17. On 19 October Ms Perry wrote to the tribunal and the claimant. The first sentence was to the claimant. She wrote:

    > "You have already confirmed we have paid you to amount that was owed and you agreed to settle the case on this basis.
    >
    > For the tribunal – please can you confirm that the dismissal judgment does indeed apply to The Shore Group as we do not feature on the documentation."

    That email indicates that the respondent had received the dismissal judgment against Vision Personnel and queried why there was no parallel document in relation to its position.

18. On 17 December the claimant was directed to set out the financial calculation of his claim, which he did by reply of 22 December, not copied to the respondent. In it he wrote as follows:

    > "I would like to say that in September I received an email from the Respondent saying that fund was transferred into my bank account. I told them that I kindly declined it and I did not recognise any payment as we had a court hearing and my claim was not just confiscated wages and if it was the case, it could be traced."

19. The expectation of the tribunal, when sending the ET1 to Ms Perry and Ms Huntley, was of receipt, after perhaps a short delay, of what would normally follow: an application to respond out of time, with a completed form ET3 and draft grounds of resistance. None of those were received, and on 2 March 2022 I signed judgment under Rule 21, the terms of which were:

    > "The claim succeeds and the remedy to which the claimant is entitled will be determined at a remedy hearing."

20. Judgement was sent on 18 March.

21. Notice of the present hearing was sent on 26 March, by email to the claimant and by post to the respondent, using the same address as given above.

22. On 11 May and again on 24 May Ms Perry wrote to ask for clarification of why the case had been listed, as she understood it had been settled. The file shows that Mr Hobden was copied in, the claimant was not.

23. Regrettably it was not until the evening of 21 June that the tribunal replied to explain the position, broadly that set out in the above chronology. In that document, the parties were notified for the first time that this hearing was converted to be held by CVP.

24. On 22 June Mr Hobden wrote to the tribunal to say that the respondent had paid all sums due to the claimant on 23 August 2021, and would not attend. He submitted a set of papers. Particularly important was an exchange between Mr Hobden and the claimant on 23 August, copied to Ms Perry. Mr Hobden wrote:

> "We confirm that funds have been released to yourself… Please can you be kind enough to confirm that this matter is now resolved?"

25. The claimant's reply of the same date was:

> "Now I kindly do not accept or recognise anything from you. It is the court to decide on the hearing. And my claim was not just an unlawful and illegal confiscation of my wages but any inconvenience caused by your actions due race."

26. On the day of hearing, I was working from home (it was a national train strike day), but the claimant travelled to Watford by public transport, stating that his inbox was full and he had been unable to receive the email notifying him of a CVP hearing.

<u>The deductions claim</u>

27. The claimant said that he had his bank statement with him. It showed that he had received a payment on 23 August of £181.30 from a source called Boospay.

28. The claimant said that he had not checked his bank statement between September 2021 and June 2022: I find that difficult to believe, as his work pattern was entirely short-term self-employed contracts. He said that he did not recognise Boospay by name, and he declined to concede that this was a payment from the respondent. When I asked if he could identify any other source of that payment, he could not.

29. Given in particular that that payment was received on the same day as Mr Hobden's email of 23 August, I find that that payment was made to the claimant by the respondent. The claimant stated that the entire sum due to him was 18 hours pay at £11.00 an hour, a total of £198.00. I asked the

claimant if the Boospay payment might be £198.00 net of deductions. He declined to agree.

30. I have therefore issued judgment for the balance of the claim, and made provision for the balance not being payable because it represents proper deduction.

The race discrimination claim

31. The claim of race discrimination had not been clarified. Indeed, from the contents of the ET1 alone, it was not clear whether that claim was pursued against this respondent or against Vision Personnel Limited. However, it was apparent that on 23 August, the claimant had informed the respondent that there remained a live issue in relation to race discrimination.

32. He claimant gave the following clarification of his claim of race discrimination:-

    32.1 He is black African from Senegal;

    32.2 When he applied to the respondent for employment, he provided it with sufficient documentation about his address, identity, National Insurance Number, and Home Office reference, as enabled it to offer him employment;

    32.3 He had understood his engagement was for three weeks but he was not asked to continue after his second day, apparently because there was not enough work;

    32.4 After he finished, the respondent declined to pay him, stating that he needed to provide, on separate documents, his name and address and his National Insurance details.

    32.5 The claimant had already provided these details, and was not aware why they needed to be provided again or on separate items.

    32.6 The claimant went through early conciliation and the tribunal process, the payment was delayed for a fraction under six months. (The claimant worked on the Thursday and Friday: assuming that pay was due the following Friday, 5 March, the period of delay was 24 weeks and 1 day.)

    32.7 The claimant could see no explanation for this refusal and the delay other than race;

    32.8 The claimant in consequence felt estranged and hurt to have been treated as he was because he was a black foreigner. He did not identify any further financial loss or inconvenience flowing from discrimination.

Discussion

33. I considered this a claim of direct race discrimination. Section 13 of the Equality Act 2010 provides:

> "A person discriminates against another if because of [race] A treats B less favourably than A treats or would treat others".

34. When comparing treatment, comparison may be made with an actual person (whom the claimant could not and did not name) or with a hypothetical person in the claimant's position but of a different race.

35. Section 136 provides as follows:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred."

36. At the end of the case, it seemed to me that there were three possible conclusions.

37. The first would be to adjourn, in terms which invite the respondent to apply out of time to submit a response (originally due 27 April 2021), responding in particular to the clarification of the claimant's case set out above.

38. The tribunal file indicated that the respondent said that it had not received notice of the claim until 28 August 2021. The respondent is an employment business, and the tribunal paperwork was sent to Ms Parry, whose job title is given above. It had been told by the claimant on 23 August that he felt that a claim of race discrimination remained live. The respondent did not appear to have engaged with or understood the process of the tribunal, and I could make no prediction as to what its application for an extension of time would contain, or how the tribunal would respond. Even if it explained its failure to submit a response before the end of August 2021, it would struggle to explain the delay after the end of August 2021 to this hearing, 10 months later.

39. The respondent had made no application for an adjournment. I was concerned that taking the above course would step outside the impartiality of a judge, and in effect take onto my shoulders the responsibilities of solving problems for the respondent created by the respondent. That did not seem to me in accordance with the tribunal's duty and impartiality.

40. A second response was in light of the evidence to state that the claimant had made a bare assertion, and that there was no objective fact which linked the detrimental treatment (delayed payment) with race. Delays in payment, and complaints about payment, are the everyday currency of the employment tribunal. There may have been countless reasons, wholly unconnected with race, which explained the delay, but I have not heard any of them because the respondent had not defended the claim.

41. The point which most troubled me was that the clarification of the race discrimination claim set out above had never been put to the respondent in those plain terms to answer. It had had the ET1, showing the race discrimination box ticked. The only clarification seen by the respondent was in the claimant's email of 23 August. It was a layman's outline, written in a second language. It would have been very little work indeed for a respondent to challenge it, or to ask for clarification, or at that point to have submitted an out of time response and request for extension of time.

42. At the final stage, I considered the application of s.136(2). I could not say that on its face this was an allegation which was fanciful. I could say that the allegation appears unlikely, but the wording of the sub section is mandatory: it states that the tribunal "must conclude." In these circumstances, I consider myself bound by those words, and with misgivings I uphold the claim of race discrimination.

Remedy

43. The claimant gave a very modest account of injury to feeling. He referred (English is not his first language) to "inconvenience." I accept that delay in proper payment for work done is an inconvenience. I accept that the claimant was hurt that this had happened on grounds of race. I accept that the bargain of labour for payment is at the heart of the employment relationship. The relevant Vento band started at £900, and it seemed to me that the correct award in light of the claimant's evidence is £1,500.00.

44. This is an award entirely for injury to feelings. Interest is governed by SI 1996/2803. The rate is 8%. I take the date of contravention to be 5 March 2021, and the date of calculation to be 23 June 2022. However, Regulation 6(2) requires me to reduce the interest period to the date of payment, which I find to be 23 August 2021. That is a period of 171 days. The statutory rate is 8%. The interest calculation is £56.22. (I calculate one year's interest on £1500 at 8% to be £120. I then calculate: 120 -:- 365 x 171 = 56.219).

Reconsideration

45. When this judgment is sent to the parties, they will, in accordance with the normal practice of the tribunal, be advised of the procedures for applying for reconsideration and/or appeal. I do not advise a party on how to proceed; that is a matter for them.

46. I know that I decided this case on the basis of incomplete information. There was no contribution from the respondent and I was not shown by either side any relevant employment related documentation. I do not invite an application for reconsideration, but my mind is open to the possibility that there may be more to the events in question than I was made aware of.

47. The previous paragraph should not be taken by the respondent as a disapplication of Rule 21, under which it was and remains debarred from taking part in the proceedings.

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Employment Judge R Lewis

Date: 08 July 2022
Sent to the parties on: 15/7/2022
N Gotecha – For the Tribunal Office