EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Ansari	**v**	Buckingham Nursery Limited

Heard at: Bury St Edmunds (by CVP)

On: 3 February 2021;
2 December 2021;
30 May 2022
30 September 2022 (claimant in person, respondent on CVP)

Before: Employment Judge Laidler

Appearances
For the Claimant: In person
For the Respondent: Mr C Plume, HR Representative

JUDGMENT

1. The claim for unpaid wages fails and is dismissed.

2. The respondent's application for preparation time costs is dismissed.

REASONS

1. The claimant commenced proceedings claiming unpaid wages on 6 June 2020 following a period of ACAS Early Conciliation between 5 May 2020 and 5 June 2020. The respondent denies the claims stating that the claimant had been paid all monies to which she was entitled.

2. The first Hearing in this matter took place on 3 February 2021 by the Cloud Video Platform (CVP). The claimant gave evidence, as did Mrs Kalhor, of the respondent. The claimant had not prepared a witness statement but it was agreed that a document she had filed setting out her comments on the Grounds of Resistance should stand as her witness statement. It transpired that the claimant had only just received Mrs Kalhor's witness statement and wished to be able to serve additional evidence concerning matters raised in it. In view of the late service of the witness statement, the Judge considered

it was only proportionate and in accordance with the overriding objective to allow the claimant to file other documents relied upon, within seven days of that Hearing. With regard to any WhatsApp or text messages not in English, then the claimant would need to provide translations of them. The respondent was also to disclose any other policies or procedures relied upon by it. Those Orders were summarised in a document sent to the parties on 14 February 2021.

3. The second Hearing in the matter took place on 2 December 2021. It then transpired that further witness statements had been served on behalf of Mrs Kalhor and also Mrs Al Katib, but the claimant had only recently received them. There was an adjournment whilst the Judge read the statements and encouraged the claimant to do likewise. On returning the claimant said that she was too upset to continue and although it was suggested that there be an adjournment until the afternoon, the claimant said she would not be able to attend due to work commitments. There was no alternative but to grant a further adjournment. The matter was re-listed for 4 February 2022, but unfortunately had to be postponed by the Employment Tribunal and was re-listed for 30 May 2022.

4. As set out in the separate document, there were too many connectivity issues with the claimant's connection to the CVP Hearing for it to continue. It resumed on the 30 September 2022 as a hybrid hearing with the claimant in person and the respondent on CVP.

5. The respondent concluded its cross examination and the claimant wished to cross examine the respondent's witnesses even though she had said on the 30 May 2022 that she could not cross examine them as 'as my culture stops me as have respect for people the age of my mother'. The claimant was given the opportunity to cross examine them at this Hearing. The judge had to stop lines of questioning that were not relevant to the issues.

6. The Tribunal dealt with the claimant's application to amend at the hearing on 30 May 2022 which was refused. The claimant then brought it to the tribunal's attention that she had applied for reconsideration of that decision by application of the 31 July 2022. This had never been referred to the judge and was not on the tribunal file. A copy was sent to the judge and it was considered and rejected. Reasons were given to the parties as follows.

Claimant's application for reconsideration of decision refusing leave to amend.

7. The relevant tribunal rules are contained at Rules 70 – 73 of the Employment Tribunal Rules 2013 which provide:

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision

("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

8. The judge was satisfied that there was no reasonable prospect of the decision being varied or revoked and the application for reconsideration was refused.

9. The claimant has asserted that the decision was based on her being a lawyer and has produced documents in relation to her qualifications to demonstrate she is not qualified in the UK. However, that was not the sole or principal reason for the refusal of leave to amend.

10. The judgment and reasons sent to the parties on the 22 July 2022 following the Hearing on the 30 May 2022 show that the principal reason was that there was no suggestion in the original ET1 that the claimant considered she had been unfairly dismissed. Having issued the ET1 on the 6 June 2020 and having attended 2 Hearings the claimant had waited until February 2022 to suggest that she was dismissed for asserting a statutory right. The claimant was dismissed on the 8 June 2020 and any such claim would therefore be significantly out of time a factor the tribunal can take into

account in considering an application for leave to amend. The claimant as a qualified lawyer (albeit in another jurisdiction) is better placed that most litigants in person to research her rights. In a letter of 8 June 2020 the claimant referred to needing advice from the CAB so she was aware of its existence.

11. The application for reconsideration to amend to claim unfair dismissal was refused and the Hearing proceeded to deal with the claim for wages.

12. The Tribunal heard from the claimant and from Mrs F Kalhor and Mrs J Al Katib on behalf of the respondent.

13. From the evidence heard, the Tribunal finds the following facts.

The Facts

14. The respondent is a Montessori Nursery and at the time employed approximately 20 staff.

15. The claimant commenced working for the respondent as a Nursery Assistant on 24 February 2020. The Claimant had no experience or qualifications in working in a Nursery and the Tribunal saw from a reference provided for her from a previous employer that since 2018 she had worked with and lived with a Mrs Sandra Lambros, described as a friend. The Claimant had helped at the Church in several areas. The reference said she had,

> "engaged with the children in the church who seemed to react very well with her".

16. In the tribunal bundle, was the respondent's probation period policy and also a document which the Claimant had signed saying that she had been made aware of the probation period. The Tribunal accepts the evidence given on behalf of the Respondent that it always offered a probation period because it needed to assess the suitability of the new employee, but also to give that person an opportunity to decide whether the work was suitable for them.

17. The Tribunal is satisfied that the claimant was taken on with a zero hours contract, or as "bank staff" as shown on the payroll records seen in the supplemental bundle at page 5. Whilst this shows the claimant working nine hours a day in her first few weeks of employment, the Tribunal is satisfied that was because that was required by the respondent at that point to cover for absent staff and not that they had agreed to employ the claimant on fixed hours. The Tribunal is satisfied that the respondent would not have made that offer as it required bank staff to cover for absences and did not have a position for the claimant at that time which required her to provide fixed hours and nor were they in a position to offer it.

18. The rota also shows at the bottom of the page that the claimant had a day of induction. Mrs Kalhor confirmed and the tribunal accepts that the claimant was not working with the children on that day but given time to read

through all the policies. The claimant and Mrs Kalhor have the same native language and the tribunal accepts Mrs Kalhor's evidence that had the claimant had any difficulty in reading these policies she could have spoken to her. She did not. Neither did the respondent witness any difficulties with the claimant's use of English and ability to understand it during her time with them.

19. The claimant gave evidence that she had lived with Mrs Kalhor. This led to the supplemental statement which Mrs Kalhor submitted, in which she explained that due to personal difficulties the claimant had experienced (which do not need to be set out in this decision) she and her husband had offered the claimant a room at their property but that this was only ever for a few nights to help the claimant over her emergency situation. From the evidence heard and the WhatsApp messages received, the Tribunal is satisfied that that was for the period 12 – 14 March 2020 only. The tribunal accepts her evidence that she had not wished to write about this in her first witness statement as she was frightened by the references the claimant had made to criminal gangs who were targeting her and who would likewise target Mrs Kalhor and her family if they knew they were assisting the claimant.

20. Again, from Mrs Kalhor's evidence the Tribunal is satisfied that there was then a few days when the claimant either did not attend or was not fit to work. On 18 March 2020 the Claimant was at work but told Mrs Kalhor that she was feeling sick and left work at 9.30. She failed to attend work for the shifts the next day.

21. On 20 March 2020, the claimant came to the nursery at about 6pm. It was at that point that it was necessary to advise the Claimant that due to the Covid-19 situation the nursery was going into lockdown and would be closed from the Monday, so there were no roles to offer the Claimant.

22. Whilst the respondent wrote to the claimant stating that she had been put on furlough, it subsequently transpired that as the claimant had not been on the company payroll, submitted to the Inland Revenue before the required deadline of 19 March 2020, she did not meet the necessary criteria of the Coronavirus Job Retention Scheme. The claimant had only started with the respondent on the 24 February 2020. In any event, as she was on a zero hours contract and there was no obligation to provide work.

23. The claimant's evidence has in a number of respects been confusing and contradictory. At the first Hearing, she explained to the Tribunal that she was a qualified lawyer in her own country, Iran, and that ten days prior to the first Hearing in this matter, she had passed the qualified lawyers' transfer scheme meaning that in six months she would be a fully qualified Solicitor in this country. When making her application to amend, however, at a Hearing on 30 May 2022, the claimant when it was put to her that she had some legal knowledge and would therefore have been in a better position than most litigants in person to find out about her rights and to make her application to amend in a timely manner, the claimant stated that she was

due to take the qualified lawyer exam on 21 July 2022. This contradicts what she said on the previous occasion.

24. The issue of the claimant's qualifications came up again at the Hearing on 30 September 2022 in relation to the claimant's application for reconsideration. With that she submitted documents and stated that she had not passed the transfer test. When the above evidence she had given previously was put to her the claimant stated she had used the wrong words and had meant that she had 'taken' the test and 'might' be qualified in 6 months. The tribunal did not find her explanation credible.

25. The respondent had also obtained a copy of another ET1 claim form which had been submitted by the claimant to the Watford Employment Tribunal, relating to other employment. This stated that she had worked as a lawyer for a period between October and December 2019.

26. After the first lockdown commenced the respondent asked the claimant to sign a form on 15 April 2020, (page 58 and 59 of the Bundle) confirming her agreement to being placed on furlough. The document stated:-

> "By placing you on furlough your terms and conditions will be amended on a temporary basis such that you will not be required to work and your entitlement to claim benefits would be limited to the amount of 80% of your earnings up to the maximum of £2,500 per month. All other terms and conditions of your Contract of Employment would continue to apply".

27. The document stated that the proposed change was intended to commence on 21 March 2020 and at that time the employer did not know how long the furlough period would last. It also provided that by agreeing to be placed on the furlough scheme, this would enable the employer,

> "To take advantage of the Coronavirus Job Retention Scheme".

28. That had been designed as stated to help employers like themselves avoid any potential redundancies. Under the scheme, HMRC would reimburse 80% of the Claimant's salary up to a cap of £2,500. They also explained,

> "During any period of furlough you are not able to carry out any work for the company. It has been confirmed that payments to employees from the scheme would be subject to tax and national insurance contributions.".

29. At the bottom of the declaration, the Claimant signed that:-

> "My employer would designate me as a furloughed employee.
>
> I have been notified of the change of my status as that of a furloughed employee.
>
> I have agreed to temporary change in my Terms and Conditions of employment that enable my employer to implement a period of temporary layoff and reduce my pay to the levels payable under the Scheme, until such time as I am no longer considered a furloughed employee."

30. On the 5 June 2020 the claimant was sent a contract of employment by the respondent's HR advisor who has appeared at these hearing for it. This showed quite clearly that the claimant was not being offered any fixed hours and that the hours were as and when required by the business based on the needs of the service of the business. The contract also provided (in accordance with the probation policy) for a 3 month probation period.

31. As the claimant did not agree to these contractual terms by letter of the 8 June 2020 the respondent terminated her employment. She was given one weeks notice but not required to work it. She was required to take her accrued annual leave during that period which was calculated as 7 days and paid for all those seven days. She was also paid a statutory guarantee payment of £150.

Conclusions

32. The claimant is claiming for what she says was 80 days of lockdown at £40 per day. It appears from the document filed in response to the ET3 that she is trying to assert that there was an implied term that the respondent was obliged to provide her with a minimum number of hours per day and that these should have been all the weekdays Monday to Friday 9 am to 7 pm. She stated at paragraph C of that document:

> '…the implied term did exist due to a regularity of hours….So this is clear that there was an implied term between us by conduct although nothing was written'

33. There was no such implied term. The arrangement between the parties is quite clear that the respondent required its staff to be flexible to fit in with the needs of the business and to cover staff absences and to ensure that the required ratio of staff to children was maintained. The respondent was not in a position to offer a set number of hours. The fact that the claimant did work for a few weeks a set number of hours a day was purely because that was the cover the respondent needed at that time.

34. The respondent's documents, the rota, the probation policy, the contract that was subsequently offered all demonstrate that it was not offering or obliged to offer fixed hours to the claimant.

35. When the country went into the first national lockdown and the Job Retention scheme was launched the claimant agreed to be furloughed. She also signed to accept that she would only receive such sum as was paid under the Job Retention Scheme. As she was not on the payroll at the relevant date the 80% payable did not apply to her. But further during that time she had no entitlement to fixed hours of work.

36. The claimant's claim must therefore fail and is dismissed.

Respondent's application for preparation time costs

37. The respondent made an application for preparation time costs for work carried out by its HR advisor since May 2020. The schedule was calculated in minutes totalling 2647, which equates to approximately 44 hours for which £41 per hour has been claimed making a total claim of £1808.78. In submissions at this Hearing however it was stated that the claim was for 34 hours at £42 per hour (the rate since May 2022). Costs had not been claimed for attending the hearings.

38. The respondent relied on two 'Costs Warning' letters dated 1 February 2021 and 16 November 2021 in which it set out, as in its Grounds of Resistance its arguments as to why the claim had no reasonable prospects of success. It was also argued that the claimant had acted 'vexatiously, abusively, disruptively or otherwise unreasonably' within the meaning of the Rules. The matters relied upon for making that assertion appeared to be that the claimant had, without evidence, written to the tribunal on the 14, 19 and 24 February 2021 claiming that Mrs Kalhor was seeking to mislead the tribunal and had made 'false statements'.

39. At this Hearing it was submitted by the respondent that the claims never had any reasonable prospects of success and that the claimant is a vexatious litigant. The tribunal's decision very much reflected the points it had made in its costs warning letters. The claimant has good legal knowledge and should not have brought the claims. She was fully aware of the costs consequences and it would be wholly reasonable to award the sums claimed.

40. The claimant reminded the tribunal that two of the hearings had been postponed due to late service of evidence by the respondent. She maintained that the claim had had reasonable prospects as she was on fixed hours. She has been on Universal Credit for a year. She works as a volunteer at the CAB. She lives in a rented property and has not passed the solicitors qualifying exam. Although she had previously stated she could not attend a hearing if it continued in the afternoon due to work commitments she sometimes works but than has to resign.

The tribunal's conclusions on costs

41. The relevant Rules are as follows:

Costs orders and preparation time orders

75.— (1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

The amount of a preparation time order

79.—(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

Ability to pay

84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

42. Whilst the tribunal has been shown an ET1 the claimant brought against another employer it has no evidence from which it can conclude that she has been vexatious even if she has now lost this claim. It has no other details about the other claim.

43. The Rules and the authorities are clear that the tribunal must focus on the making of the claim and that it had no reasonable prospects.

44. In Radia v Jefferies International Ltd EAT/0007/18 the EAT emphasised that the test is whether the claimant had no reasonable prospects of success, judged on the basis of the information that was known or reasonably available at the start. The tribunal must consider how, at that earlier point the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained and evidence it has seen by virtue of having heard the case that may properly cast light back on that question but it should not have regard to information or evidence which would not have been available at that earlier time. The existence of factual disputes that can only be determined at trial does not necessarily mean that the tribunal cannot conclude that the claim had no reasonable prospects from the outset.

45. The tribunal is satisfied it should have been clear to the claimant from the outset that the claim had no reasonable prospects and that contrary to the position advanced by her she had no reasonable prospects of establishing she had been offered fixed hours.

46. Further the claimant signed the furlough agreement in which she accepted that she was only entitled to be paid that which the respondent received under the Job Retention Scheme and unfortunately in the claimant's case that was to be nil.

47. The claimant does however make a relevant point that some of the postponements were occasioned by late service of evidence by the respondent. At the Hearing on 3 February 2021 the claimant only received the respondent's witness statement that morning and Mr Plume accepted it was an oversight on his part and apologised. The tribunal therefore felt it had to adjourn to allow the claimant to bring further evidence in rebuttal to points made that might go to credibility.

48. There would therefore be an issue about the extent of preparation time costs that could be recovered

49. Rule 84 however states that the tribunal may have regard to the ability to pay of the paying party. It did so and finds that the claimant is on Universal Credit and has limited means. In all the circumstances the tribunal does not exercise its discretion to award preparation time costs against the claimant.

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Employment Judge Laidler

Date: 10 October 2022

Sent to the parties on:

13 October 2022

For the Tribunal Office.