EMPLOYMENT TRIBUNALS

Claimant: **Dr Jose Penalva**

Respondent: **London School of Commerce and IT Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **15 November 2022**

Before: **Employment Judge Townley**

Appearances

For the Claimant: **In person**

For the Respondent: **Mr A Otchie (Counsel)**

JUDGMENT having been sent to the parties on 15 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Procedural history

1. By a claim form presented on 25 May 2022, Dr Penalva (the Claimant) brought claims for breach of contract and unlawful deduction from wages. The Respondent was initially named as Dr Anwarul, Dean of the London School of Commerce and IT Limited. The ACAS Early Conciliation certificate was issued with the prospective respondent identified as 'London School of Commerce and IT lsci.org.uk.' Subsequently an Employment Judge reviewed the claim form and determined that the Respondent could be identified as London School of Commerce and IT and not Dr Anwarul.

2. In the claim form, the Claimant stated that he was contracted to provide a specific number of lessons (six hours per week for 16 weeks) during the 2021 – 22 academic year but that the Respondent had terminated the contract earlier, through no fault on the Claimant's part, and the Respondent had failed to pay him for the contracted number of lessons. He claimed that he had addressed the matter to the Dr Anwarul but he did not reply. The Claimant claimed a total of £2880.00 (which equated to 12 weeks wages

where he worked 6 hours per week).

3. The claim form was initially rejected because the Claimant failed to provide an address. He provided an address in Turkey and the claim form was accepted and deemed received on 24 March 2022. On 30 March 2022, the Claimant wrote to the Tribunal stating that 'I am in Turkey at the moment' and that it would be difficult for him to attend a hearing and therefore he requested the hearing be online. He did not copy the Respondent into that correspondence.

4. On 7 April 2022, the Tribunal sent out the Notice of a Claim Form to Dr Anwarul requiring a response by 5 May in error. That mistake was realised and the parties were informed on 21 April 2022. A Notice of Claim was then sent to the Respondent on the same day, requiring a response by 19 May 2022.

5. On the same day, the Claimant asked the Tribunal whether the notice of hearing meant that he did not need to be physically on the Tribunal site for the hearing. He was told on 10 May 2022 that he did not as telephone hearings were remote. Nothing was said about the difficulty or potential difficulty of giving evidence from abroad.

6. The Respondent failed to enter a response by 19 May 2022.

7. The Tribunal wrote to the Respondent on 18 June 2022 noting it had failed to enter a Response and warning it judgment may be issued. It was asked to confirm its position by 4 July 2022. It did not do so but no judgment was entered.

8. On 5 July 2022, solicitors for the Respondent came on record having been instructed that day.

9. A Response was filed on 6 July 2022 which included a Draft Response to Draft ET3. It denied that the Claimant was an employee and describe him as a 'private contractor'. It averred that he did 12 hours work in October 2021 after which complaints from students were received about him. It averred that he demanded payment to a Turkish bank account and although he said during interviews that he was in Turkey for a short period, it understood he would be moving to the UK 'soon' and as such his failure to disclose his status in Turkey constituted a serious misrepresentation. However, the Respondent avers that it did not terminate the contract but the 'Claimant effectively served upon the Respondent notice of termination' because he said he would no longer carry out services if fees were not paid into his Turkish account. It avers that he discontinued/abandoned further tuition of his own volition.

10. On 8 July 2022 the Tribunal informed the Respondent that the Response was received out of time and it had not made an application for extension of time, it did so on 11 July 2022. The matter was listed for a final hearing before EJ Sugarman on 4 August 2022.

11. The Claimant sent to the Tribunal and 'Dr Anwar' (not the Respondent's legal representative and not in the same name as that identified on the ET1) on 22 July 2022 a 'Written representation for consideration at the hearing'. It referred to various documents which had not been seen by the employment judge or counsel for the Respondent.

12. At the start of that hearing, the Claimant confirmed that he was a Spanish national currently residing in Turkey and that he was in Turkey conducting the hearing.

13. The Claimant confirmed that he had provided written representations to the Tribunal on 22 July 2022. He said that he had sent in documentary evidence in support of his claim on 30 May (this had not made its way to the judge). Counsel for the Respondent made an application for extension of time under Rule 20 and the Claimant responded. During the course of that application, the judge was forwarded by the clerk, the Claimant's email of 30 May which attached a 11.9 MB zip file of documents containing nearly 30 separate files (many of the documents contained video and audio extracts). The judge ruled that the Response ought to be accepted weighing all the relevant factors and the overriding objective, even though he did not consider that there to be a good reason for the delay. The judge vacated the hearing and ordered that it be re-listed for a three hour hearing (rejecting the Respondent's suggestion that the matter be listed for one day on the basis that it was not proportionate), ordering that the Claimant transcribe any relevant parts of the video/audio extracts relied on by 1 September 2022.

14. Within the Case Management Order dated 4 August 2022, sent to parties on 9 August 2022, EJ Sugarman made the following notes about case management discussions regarding the Claimant's presence in Turkey:

> **'18. I explained the provisions relating to giving of evidence from abroad. The Claimant was unaware of the difficulty and said it had not been explained to him previously. Turkey has not given permission for oral evidence to be given from Turkey within the UK courts and tribunals….**
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> **25. When we discussed case management, I explained to the Claimant that he could not give oral evidence whilst in Turkey. He asked about Germany, but I explained it has not given permission either. He said he may be content just to rely on a witness statement and documentary evidence and not given oral evidence. I explained to him that if he did, a Tribunal would likely place less weight on his evidence as it would be untested.**
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> **26. The Claimant is to consider his position and has been asked to confirm his intention prior to the relisted hearing, which will take place by CVP'**.

15. On 5 August 2022 the Claimant wrote to the Tribunal saying that he wanted to appeal against the case management order of 4 August 2022 on the basis that the Tribunal had had to write to the Respondent on 18 June 2022 saying that it had not responded to the Claimant, whereas the Claimant had presented all his claims on time. The Claimant did not state any grounds on which he sought to appeal the order. This letter was not placed before an Employment Judge until the final hearing. The Claimant sent a further email to the Tribunal on the day before final hearing saying that he wanted

to appeal against the Case Management Order on the ground that EJ Sugarman was biased against him as a non-British citizen.

The hearing

The Claimant's application to postpone and rulings on the conduct of the hearing

16. I was provided with a bundle with a total of 1134 pages by the Respondents. Witness statements were supplied by the Claimant and by Dr Nasrullah Khan. I observed that this was disproportionate to both the scope of the case and to the time available, but would consider any documents to which I was referred during the course of the hearing.

17. The Claimant appeared in person via CVP from Turkey. I asked the Claimant if he was aware that he could not give evidence under oath from Turkey. He then asked if he could give evidence from Gibraltar. The Claimant said that he could not travel to the UK due to work, and that it was 'not worth it' because of the amount that he was claiming, and that he would rely on his statement.

18. I referred him to the Case Management Order which stated that he could not give oral evidence from Turkey and explained the reasons why. I told the Claimant that he would be permitted to address the Tribunal to open and to close his case, to refer to any documents within the bundle that he wanted the Tribunal to consider, and to cross-examine the Respondent's witness. However, he could not give sworn evidence and that his statement would therefore be afforded less weight evidentially because it was untested. The Claimant said that EJ Sugarman had not explained this to him at the Case Management Hearing and that he had not understood the case management order. He also said that EJ Sugarman was biased against him because he was a non-British citizen and that EJ Sugarman should have recused himself from the case management hearing.

19. I told the Claimant that if he wished to give evidence in person that he would have to apply for the hearing to be vacated. The Claimant said that he wanted to apply for a postponement. The Respondent objected. I refused the Claimant's application to vacate because he had made a decision not to attend in person – on the basis that he was working and also because he did not consider it was worth the cost of the trip given the amount of his claim. Therefore he had made an informed decision not to attend because the travel costs would have been disproportionate to the amount that he was claiming. This was an informed choice which indicated that he was aware of what his options were. He had also not raised any issues of alleged judicial bias in his email to the Tribunal of 5 August.

20. The Claimant opened his case and said that he would rely on his witness statement. Counsel for the Respondent declined to cross-examine the Claimant. I heard evidence from Dr Nasrullah Khan, Director of the Respondent. The Claimant was permitted to cross-examine Dr Khan, refer to documents in the bundle, and to close his case. The hearing lasted for just under 3 hours (which was the time estimate stated in the Case Management Order), after which I retired at 1255 pm, stating that I would

return to give judgment at 3 pm.

21. An oral judgment was given on the day of the hearing and a judgment without reasons followed. This judgment provides the full written reasons following the Claimant's correspondence with the tribunal in relation to his intention to appeal.

Findings of fact

22. The Claimant is an experienced lecturer who holds a number of higher education qualifications, including a doctorate. The Respondent is a registered higher education provider. It offers courses, including NVQ courses, which are normally taught at its premises in east London. However, in common with many other higher education providers, classes were being taught via online teaching platforms due to the pandemic in the autumn of 2021. The Claimant answered a job advert placed in an online forum by the Respondent seeking an experienced teacher for its NVQ Level 5 diploma course.

23. Mr Hasina Haque, the principal of the Respondent, invited the Claimant for a face-to-face interview on 11 October 2021. The Claimant replied stating 'I am not in the UK at the moment. I can attend an online interview' (email 11/10/21; Bundle C2). A copy of the job description was sent to the Claimant on 12 October and an online interview was arranged for 14 October. During the interview the claimant mentioned that he was in Turkey. Following the interview, a Dr Siddiqui on behalf of the Respondent, made the claimant the following offer by email (email 14/10/21; Bundle C6) insofar as relevant:

> **'As agreed your hourly rate for teaching will be £35.00 per hour … if you formally agree to the job offer then please confirm by returning email and we will send you the class timetable and finalise your employment contract'.**

24. The agreement between the Respondent and the Claimant was that the Claimant would provide his teaching services to the Respondent and would invoice the Respondent for services provided at the agreed hourly rate. The Claimant had responsibility for submitting invoices at the end of each month to the Respondent.

25. The Claimant accepted the Respondent's offer and enclosed his certificates and passport. On 20 October 2021 the Respondent informed the Claimant by email that he would be teaching two groups of students – one of which was already part way through the course and the other cohort had ongoing classes until mid-March 2022 (this amounted to around 16 weeks of teaching).

26. The Claimant began teaching classes online from 21 October 2021. Soon after he had commenced teaching, the Respondent received a number of complaints about the Claimant's manner from his students. They said that the Claimant was rigid, hostile and impolite towards them and that he had also begun to block some students whom he did not like from attending his classes (which contravened the Respondent's equality and diversity policies). The Claimant also conducted his classes through Google

classroom rather than via other online methods, such as Zoom, with which the students were more familiar. In spite of these complaints, the Respondent continued to provide to support to the Claimant and the Principal and Dean of the Respondent convened a meeting with the students to defuse the tension that had built up between them and the Claimant.

27. On 29 October 2021 the Claimant sent the Respondent the details of his Turkish bank account asking that his fees be paid into that account. The Claimant did not receive any response from the Respondent until 16 November 2021 when the Respondent advised the Claimant to submit his October invoice for payment. The Respondent also asked the Claimant to provide an account number and sort code of a UK bank account into which his monthly professional fees could be paid.

28. On 17 November 2021 there was a discussion over the Whatsapp application over pay between the Claimant and Dr Anwarul (Dean of the Respondent) (Whatsapp messages of 17/11/21; Bundle C113 – 115). During that conversation the Claimant said that he could no longer go on teaching if he could not be paid in Turkey. He then asked whether the issue was about the fee payable for paying him in Turkey. Dr Anwarul said that it was not about the fee but about regulations and it was too late and they would have to find a replacement. The conversation ended amicably, with the Claimant telling Dr Anwarul that he hoped that he found someone and that he wished him all the best.

29. On 19 November 2021 the Claimant informed the Respondent that he would no longer use the official email that the Respondent had allocated to him and that he would no longer continue to teach its students.

30. The Respondent arranged to pay the Claimant for the hours that he had worked, which came to a total of £1080.00. This money was paid into the Claimant's bank account in Turkey with the Respondent paying the bank fees due for the overseas transfer.

The law to be applied

31. No specific points of law were drawn to the Tribunal's attention by either party. I note that the burden is of proof rests on the Claimant to establish first, that a relevant contractual term existed between himself and the Respondent and, second, that the Respondent has breached that term. The burden of proof is also on the Claimant to establish that the Respondent has made any unlawful deduction of his wages (Employment Rights Act 1996, s 13).

The submissions

32. Both parties made oral submissions.

33. The Claimant argues that there was a contractual term in existence under which he was to conduct teaching for a total of 16 weeks. The Claimant submits that the Respondent breached that term of the contract by not paying him on time for his teaching in October 2021 – that he should have

been paid at the end of October for the two weeks that he had taught classes in October and he was not. He also argues that the Respondents were in breach of contract by not agreeing to pay his fees into his Turkish bank account. He claims a total of £2,880.00, arguing that he was entitled to be paid for the remainder of the teaching time left on the course on which he had been employed to teach (namely a further 12 weeks).

34. Mr Otchie on behalf of the Respondent submitted that there was no contract of employment and no contractual term, either express or implied, whereby the Claimant was required to teach for the Respondent for a period of 16 weeks. Therefore, there could be no breach of contract. The agreement between the parties was a contract for services whereby the claimant was paid by the hour for any teaching that he had undertaken and that he subsequently invoiced for. The school had to be cautious about transferring money to Turkey due to regulations and, in any event discussions about how the Claimant would be paid were still ongoing up until the 17 November when the Claimant withdrew his services. The Respondent had paid the Claimant in full for all the hours that he had worked and therefore there had been no unlawful deduction of his wages.

35. The Claimant did not dispute that he had been paid £1080 for the hours that he had completed his teaching.

Conclusions on the law

Was there a contractual term that the Claimant carried out teaching for a period of 16 weeks and, if so, did the Respondent breach that term by terminating the contract early?

36. The agreement that existed between the parties was as set out in the Respondent's job offer and the subsequent dealings between the parties, namely, that the Claimant would provide teaching services to the Respondent and would submit invoices to the Respondent for payment at the agreed hourly rate. The Claimant had responsibility for submitting his own invoices for his hours worked at the end of each month. Therefore, there was no such term was in existence. Furthermore, as the arrangements between the parties were clear, there is no basis on which to imply such a term. It follows that there was no breach of contract by the Respondent in failing to pay the Claimant for a further 12 weeks of teaching that had not been performed by the Claimant. The Claimant elected to withdraw his services after completing four weeks of teaching and he is not entitled to be paid for weeks when he did not work. There was no evidence of any agreement to pay the Claimant via his Turkish bank account and the Respondent was entitled to ask the Claimant to provide details of a bank account in the UK given that it was a UK operated and regulated education provider. Therefore, the claim for breach of contract is dismissed.

Was there any unlawful deduction of the Claimant's wages?

37. The Respondent has paid the Claimant in full for all the hours for which he provided his teaching services and it follows that the claim for unpaid wages is dismissed.

The Application for Costs

38. Mr Otchie made an application for costs on behalf of the Respondent under R 76(1)(a) of the Employment Tribunal Rules of Procedure. He drew the Tribunal's attention to correspondence that had been sent to the Claimant on 26 July 2022 on a 'without prejudice' basis. The Respondent had offered the Claimant, by way of full and final settlement, the full amount of his claim (£2880.00). The Claimant had refused to accept that offer. The Respondent had written to the Claimant again on 13 November stating that it would not pursue costs if he withdrew his claim. The Claimant replied via email (email of 14/11/22 at 805am) 'I invite you to go threaten your mother'. Mr Otchie for the Respondent argued that the Claimant had been abusive in his conduct of the proceedings based on the language and tone of this response.

39. The Claimant objected to the application and said that the Respondent had sent him 11 emails harassing and threatening him and that it had been using Mafia tactics against him. He also said that the Employment Tribunal always found in favour of British citizens and that he intended to report the Respondent to the University's Council. He referred me to an email that he had sent to the Tribunal overnight before the hearing saying that all Tribunal judges should recuse themselves from hearings as they were biased against non-British citizens.

40. I asked Mr Otchie to provide a schedule of costs and there was a delay of some 10 minutes in receiving that schedule from the Respondent's solicitors. I asked the parties to wait in the CVP room and asked the Claimant to prepare a statement of his means and his ability to pay while he was waiting as that was something that I had to consider when making any decision on whether to award costs.

41. The Claimant then signed-out of the hearing and did not return. I checked with the clerk whether any messages had been received from him and there had not. Therefore the claim for costs was considered in the Claimant's absence without my having heard any submissions about his means or ability to pay.

42. Mr Otchie presented a schedule of costs in the sum of £10,268.80. I awarded costs based on the Respondent's schedule of preparation time in the sum of £9721.60 pursuant to R 76(1)(a) of the Tribunal Rules on the basis that the Claimant had acted unreasonably in refusing to accept the offer of the full amount of his claim and instead had elected to go to a final hearing.

43. The Claimant was given leave to apply, in writing, within 14 days from the date of receipt of the judgment without reasons, for the decision in relation to costs to be reconsidered. Any such application must be accompanied by a statement of the Claimant's means and ability to pay any costs order. The Claimant should also give an explanation as to why he left the hearing and

provide any evidence in support of that reason.

Employment Judge Townley
Dated: 7 June 2023