EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
1. Mr S D'Auvergne	v	Metroline Travel Limited
2. Mr K Dyte		
5. Mr P Coward		

Heard at: Watford by CVP **On**: 21 August 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants C1 & C2 : Mr P Wareing, Counsel
For the Claimant C5: Did not attend and was not represented

For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The claimants' claims are struck out.

REASONS

Events at this hearing

1. Mr Wareing asked for written reasons.

2. This was the hearing which I directed on 4 January 2023. It was originally listed to take place on 14 February, but due to a mistake for which I alone am responsible, and for which I apologise, was postponed to the present date.

3. After the hearing on 4 January it was confirmed by separate judgment that all claims brought by the former C3 and C4 (Mr Khan and Mr Chime respectively) were dismissed on withdrawal, and that all claims of all claimants against the former second respondent (Arriva) were also dismissed on withdrawal.

4. After the January hearing, I had directed Mr Coward (C5) to show cause in writing why his claim should not be struck out. He had been dismissed in April 2017 and these proceedings were presented in June 2020. His claim was

plainly out of time by over three years. There had been no reply from Mr Coward, and his claim was therefore struck out on grounds that it was presented significantly out of time, and the claimant had brought forward no material to show that it had not been reasonably practicable for it to have been presented within time; alternatively, the claimant was in default of the order of 4 January 2023 to show cause to the contrary.

5. This hearing proceeded on the basis that the only claimants were Mr D'Auvergne and Mr Dyte, and that Metroline was the only respondent.

6. At the end of the January hearing, there was uncertainty about the status of the claimants' appeal against the second judgement of Employment Judge Skehan. In April 2023 the EAT confirmed that a notice of appeal had been received, but that it was deemed 660 days out of time (a purported notice received within the primary time limit was incomplete). That matter remains in the hands of the claimants' solicitors to deal with. I proceeded on the basis that Judge Skehan's second judgement stands, at date of this hearing, as the final word about the claimants' first case.

7. On 14 February Mr D'Auvergne informed the tribunal that he was represented by Messrs Samuel Louis solicitors. Mr D'Auvergne failed to copy that email to the respondent, and the tribunal staff overlooked to do so.

8. At the end of this hearing, when arrangements were made for a costs hearing, Ms Norris expressed concern about the communication arrangements on behalf of the claimants. She said that she had not had confirmation from Messrs Samuel Louis of the identity of all their clients, and it was not clear if they represented Mr Coward today. Mr Wareing had confirmed that while he represented Mr D'Auvergne and Mr Dyte (both of whom were present by CVP) he did not represent Mr Coward.

9. For that reason, by separate order, I directed that Ms Norris is at liberty to correspond about this matter directly with Mr Coward, Mr Khan and Mr Chime. I will ask the tribunal office to do likewise. If it transpires that any of them is professionally represented, the arrangements can be changed.

10. At the start of this hearing, I asked Mr Wareing to categorise the heads of these claims. I drew his attention to the helpful categorisations given by Regional Employment Judge Byrne and by Judge Skehan in the claimants' first case, and I asked for the like information in relation to this claim. Mr Wareing did not have instructions, and I adjourned for an hour to enable him to take instructions. Having heard his submissions, and after a brief contribution from Ms Norris, the claims were struck out. Ms Norris applied for costs, and a separate case management order has been made, in which that application is listed. It is listed as against all five original claimants.

Background to this hearing

11. The background chronology is as follows: -

11.1 The claimants were bus drivers. They worked on the 168 London route which on 26 September 2015 transferred from Arriva to Metroline. It was agreed that that event was a transfer within the meaning of TUPE.

11.2 They presented their first ET1 on 14 August 2017. It was in short a complaint that before and following the transfer in 2015, their rights under TUPE had not been honoured. In particular, they complained that Metroline had not paid them fully or properly in accordance with their entitlements under Arriva's pre-transfer systems. The claimants acted in person, with Mr D'Auvergne as their lead.

11.3 A first preliminary hearing took place on 6 November 2017 before Judge Byrne. A number of claims were withdrawn. Judge Byrne explained a number of the legal errors in the ET1 and listed the hearing for July 2018.

11.4 The hearing came before Employment Judge Bartlett on 3 July 2018. It was not ready to proceed. Judge Bartlet obtained further clarification and re-listed the hearing for three days the following February. The matter came before Employment Judge Skehan on 11 to 13 February 2019. A number of the heads of claim were withdrawn. Judge Skehan determined the remainder of the claims, all of which failed except for a claim for meal relief allowance.

11.5 The respondent appealed against the judgment on meal relief allowance. The claimants were represented by counsel in the EAT. By judgment of 30 January 2020 the EAT allowed the appeal. The claim for meal relief allowance was remitted to the same Judge for re-hearing.

11.6 In September 2020 a third preliminary hearing took place, to make arrangements for the remitted hearing.

11.7 On 21 February 2021 Judge Skehan heard and rejected the remitted claims for meal relief allowance. The claimants' out of time appeal against that judgment is referred to above.

11.8 C2, C3 and C4 have at all times remained employed by Metroline. C1 was dismissed in 2020 and C5 was dismissed in 2017.

11.9 The present claim was presented on 8 June 2020 ie, within three months of Mr D'Auvergne's dismissal, and while the remitted hearing awaited listing. All five claimants are named on the claim form.

11.10 On 7 April 2022 Mr Dyte submitted the second claim, in which he is the only claimant. It seemed to me a continuation of his complaints in the 2020 claim, without any new factual or legal claim.

Discussion

12. The heart of these claims is straightforward. All the claimants have claimed that following the transfer of September 2015, Metroline has miscalculated their pay, and that as result they have been significantly underpaid, by comparison with their earnings before the transfer, and therefore that since the transfer, they have not received the sums to which they were contractually entitled.

13. The claimants have acted in person. They have formulated these complaints as claims of breach of contract, or in the alternative as claims for unlawful deductions.

14. It is apparent from the orders of Judge Byrne, and from the judgements of Judge Skehan, that both judges took great pains to translate the simple complaint of having been underpaid into types of claims in law which the tribunal has jurisdiction to hear. Judge Byrne took considerable steps to categorise the claims as they were expressed to him, and Judge Skehan's judgements, which are lengthy, and which I do not seek to summarise, dealt with separate categories of the underpayment claims in detail.

15. Both Judge Byrne and Judge Skehan approached the first case on the basis that, making every allowance for the claimants as litigants in person, the 2017 claims were viable only as claims for unlawful deductions, and went forward on that basis.

16. In the present 2020 claim, Mr Coward's claim was significantly out of time on any view. Messrs Dyte, Khan and Chime remained employed by the respondent at date of presentation of the ET1, and therefore could not bring claims for breach of contract; and none of the claimants had status to bring a claim under the provisions of TUPE. As Ms Norris correctly put it in submission, the only claimant whose claim of breach of contract was both in time and within the jurisdiction of the tribunal was Mr D'Auvergne. I agree that as a result the only claims in the 2020 ET1 which the tribunal had power to hear were claims for unlawful deductions brought by all claimants, and Mr D'Auvergne's claim for breach of contract.

17. The two claim forms before me at this hearing were expressed in broad general language. They referred to a TUPE transfer and to an alleged breach of TUPE obligations. They complained that pay obligations had not been met, and therefore that the claimants had been underpaid, but neither ET1 gave any indication of how that general complaint was made up in money terms. For that reason, I adjourned so that Mr Wareing and the claimants could answer my question, which was, broadly, how do you classify or categorise the sums which you say are owing to you.

18. After the adjournment, Mr Wareing gave the following answers. Dealing first with legal classification, he said that the claims of Mr D'Auvergne and Mr Dyte were pursued as claims of unlawful deductions, alternatively in Mr D'Auvergne's case as a claim for breach of contract. The claims were that the

deductions followed from the 2015 TUPE transfer, and the claimants as litigants in person may have mistakenly described them as claims brought under TUPE.

19. Mr Wareing then turned to the factual classification. He explained that the claims related in their entirety to the system of payment. He explained that each claimant had a period of seven hours 36 minutes on duty for which he received basic shift pay. The claimants contended that before the transfer Arriva paid them additional sums, expressed as a range of allowances, for time worked in excess of seven hours 36 minutes per shift. Their complaint was that following the transfer, the claimants were not paid for more than seven hours 36 minutes per shift. Mr Wareing illustrated the consequences starkly and clearly: working an eight-hour shift meant having to work for 24 minutes unpaid; a 10-hour shift meant two hours 24 minutes unpaid; and a 12 hour shift meant four hours 24 minutes unpaid. The claimants assert that this has been the case since 2015.

20. I record that I expressed some scepticism about this. I was surprised, given the job market for bus drivers in London, that Metroline could retain drivers who were regularly called upon to work up to in excess of four hours per shift without pay. I added my scepticism that the trade unions which represent drivers (traditionally Unite and the GMB) would acquiesce in such a system.

21. However, that was not the matter before me. Mr Wareing's first point was that this claim of underpayment had, as a result of the mistakes and misunderstandings of litigants in person, been put to Judge Skehan as a claim brought under TUPE. He said that the reality was that it should have been advanced as a claim of unlawful deductions, but was not. The present claim was therefore not an attempt to re-litigate the 2017 claim.

22. I could not accept that submission. The first line of the first paragraph of Judge Skehan's first Reserved Judgement reads: "The claimants' claims for unauthorised deductions from wages contrary to section 13 ..." That was plainly the jurisdiction engaged by her judgement.

23. I then went on to consider whether the factual substance of these claims had been engaged and decided by Judge Skehan. The bundle contained her 16-page judgement, and while I do not set out every reference, I note her paragraph 2.3, which states: "All claimants claim that their pay has been calculated incorrectly..".

24. Of greater substance was the portion of Judge Skehan's judgement headed "calculation of pay" which occupied paragraphs 29 to 38 and 46 to 57 inclusive. It stands and speaks for itself, and I do not seek to repeat or paraphrase. I comment only that her description of the respondent's pay system as "convoluted" seems, by some distance, a flattering understatement.

25. Taken as a whole, it seemed to me clear that Judge Skehan had before her (1) the issue of basic shift time (the seven hours 36 minutes); (2) the related issue of designation of time worked beyond the seven hours 36 minutes, and (3) the

central issue of whether, and how, that additional time was to be paid for. In her analysis, she has repeatedly written that the respondent's methods of calculation are correct, and she repeatedly rejected the claimants' submissions as to how payments should have been calculated. She did not uphold any claims for sums due and outstanding, apart from the claims for meal relief allowance.

26. I find that the issues which the claimants asked to be determined in the present case have been litigated before, and determined by, Judge Skehan; and, with one exception, were not the subject of the first appeal, and therefore were not pursued by any claimant before the EAT.

27. The same is true of meal relief allowance, with the qualification that the EAT remitted that question to Judge Skehan for a second decision. Having upheld the claim at the first hearing, she rejected it after the remittal at the second hearing; and that judgment is now the subject of a significantly out of time appeal. I proceed on the basis that it is a claim which has been determined, and I make no allowance for the existence of the appeal.

28. In detailed submissions, Ms Norris had written that the issues presented in the present case should not be permitted to proceed by application of the principles of issue estoppel; and / or of the principle of *res judicata*; and / or by application of the principle in Henderson v Henderson.

29. These approaches express a simple principle: a claimant has the right to fight their case once and once only, and, if dissatisfied with the outcome, has rights of appeal; but having pursued those avenues to their conclusions, no claimant has the right to re-litigate the same claim or substantially the same claim more than once; and that any attempt to do so is an abuse of the process of the Court or tribunal.

30. I accept Ms Norris's submission that consideration of the claimants' case, in the light of Mr Wareing's explanation and clarification today, leads to the same conclusion, whichever of those routes is followed. It seems to me that the issues which the claimants wish to litigate in the present cases have been litigated and determined in their 2017 case, and that their attempt to re-litigate them is an abuse of the process. Both claims are therefore struck out in their entirety.

31. I considered whether to take a slightly different course in relation to the meal relief payment, and whether to stay that part of the claim pending the outcome of the EAT appeal proceedings. It did not seem to me in the interests of justice to do so.

32. I noted in particular the respondent's concession to Judge Byrne, to the effect that if any claims were successful, they would be paid up to the date of the final hearing before Judge Skehan. This would avoid the claimants having to resubmit claims every three months. Ms Norris did not have express instructions on how and where that concession stood today, but it seemed to me to form part of Judge Skehan's judgement, and may need to be revisited in

the event of the outstanding EAT appeal proceeding to a successful outcome for the claimants.

33. I add that it made no difference to this analysis or outcome that Mr D'Auvergne's claim was expressed in the alternative as a claim for breach of contract, as Judge Skeehan had concluded that all sums contractually due had been paid to him.

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Employment Judge R Lewis

Date: 4 September 2023

Sent to the parties on: 2 October 2023

For the Tribunal Office