



# EMPLOYMENT TRIBUNALS

**Claimant:** Beverley Morrison

**Respondent:** London Borough of Southwark

**Heard at:** London South (by CVP)      **On:** 8<sup>th</sup> September 2023

**Before:** Employment Judge Rhodes

## Representation

Claimant: In person

Respondent: Mr McCombie (counsel)

# JUDGMENT

1. The claimant's complaint of breach of contract relating to a failure to enrol the claimant in the respondent's pension scheme is dismissed upon withdrawal.
2. The Tribunal has no jurisdiction to hear the claimant's complaint of breach of contract relating to her holiday entitlement which is struck out.
3. The respondent's application for costs is refused.

# REASONS

## Issues

1. It was clarified at the start of the hearing that the claimant was complaining about two matters. The first was a failure by the respondent to enrol her in its pension scheme following her TUPE transfer from Lambeth Council in 2020. The second was an incorrect calculation of her holiday entitlement.

## Law

2. The claimant remains employed by the respondent and the Tribunal therefore had no jurisdiction to hear a breach of contract claim because it

can only hear such a claim which arises or is outstanding on termination of employment and is brought within the three month period beginning with the effective date of termination (**Articles 3 and 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**). The Court of Appeal in **Capek v Lincolnshire County Council [2000] ICR 878** held that a claimant cannot pursue a breach of contract claim in respect of an ongoing employment contract.

3. Employer's pension contributions do not constitute wages (as per **Somerset County Council v Chambers UKEAT/0417/12**) so the claimant's complaint about the respondent's failure to make contributions could not be pursued as an unauthorised deduction from wages complaint.

### **Findings and conclusions**

4. The respondent accepted that a payroll software error in June 2020 had led to the claimant being enrolled but then un-enrolled in the pension scheme. The appropriate forum for the claimant to pursue her complaint appeared to be via the respondent's internal dispute mechanism and, thereafter, the Pensions Ombudsman.
5. After a break to consider how to proceed, the claimant withdrew her complaint about pension enrolment.
6. I considered whether I should not dismiss that complaint on withdrawal and invited submissions on the point. Counsel for the respondent submitted that a dismissal of the complaint would not prevent the claimant from pursuing her complaint before the Pensions Ombudsman. He referred me to the language of Rule 52 of the Rules of Procedure and submitted that the effect of a withdrawal would be to prevent the claimant from commencing "*a further claim against the respondent raising the same, or substantially the same, complaint*" and that a complaint to the Ombudsman would not amount to a claim.
7. I accepted that analysis and dismissed the claim to prevent the claimant from bringing further legal proceedings in respect of this matter. It is not however intended to prevent her from making a complaint to the Pensions Ombudsman.
8. As for the complaint about the incorrect holiday entitlement, the amount of the entitlement at issue exceeded the claimant's statutory entitlement under the Working Time Regulations and there was no complaint about a failure to pay holiday pay. The only potential complaint therefore was breach of contract but, for the reasons given above, the Tribunal did not have jurisdiction to hear such a complaint. It was therefore struck out.

### **Respondent's application for costs**

9. The respondent made an application for costs under Rule 76 on the basis that the claimant had acted unreasonably by commencing these proceedings and/or by pursuing her complaint to a full hearing. Alternatively, on the basis that the claim had no or little reasonable prospects of success.

10. On 21<sup>st</sup> February 2023 (before the proceedings were brought), the respondent emailed the claimant with an offer to rectify the pension issue, which the claimant had failed to respond to or engage with. The respondent submitted that it was unreasonable for the claimant to have ignored that offer and commenced the proceedings.
11. The claimant denied having received that email and her position was that the respondent had completely ignored her complaint of 13<sup>th</sup> February 2023 (page 76 of the bundle). Upon closer analysis of the electronic hearing bundle, I could see from hovering my cursor over the addressee hyperlink that that email had been sent to the claimant at her old Lambeth Council address which she had not used since leaving Lambeth in 2020. On this basis, I concluded that the claimant did not receive that email and that it was reasonable for her to have been under the impression that the respondent had ignored her complaint.
12. The respondent's alternative submission was that there were various stages in the proceedings when it was unreasonable for the claimant to have continued to pursue them.
13. First, upon receipt of the response to the complaint from which, the respondent submits, it ought to have been clear to the claimant that there was no complaint that she could reasonably pursue in the Tribunal.
14. Second, there were a number of emails in the bundle which evidenced the respondent's willingness to resolve the claimant's complaint: for example, 22<sup>nd</sup> May 2023 (page 102), 1<sup>st</sup> June 2023 (page 99), 7<sup>th</sup> August 2023 (page 97), 23<sup>rd</sup> August 2023 (page 97) and an open offer made on 1<sup>st</sup> September 2023 (page 47).
15. The respondent submitted that it was unreasonable of the claimant to have failed to engage with its attempts to resolve matters.
16. In response, the claimant submitted that she was not legally trained. She said that she had been making enquiries about her pension and holiday entitlements for a long time with no satisfactory resolution. She felt that nobody had even acknowledged her complaints and that the first time she had seen the 21<sup>st</sup> February 2023 email (which had been sent to her old email address) was when it was disclosed in these proceedings. As far as she was concerned, the respondent was ignoring her and, in the meanwhile, she had no pension provision for her and her family through no fault of her own. She felt that she had no choice but to bring this claim.
17. As for her means, the claimant said that she has a variable rate mortgage and her monthly repayments are currently £1,300 and increasing. She has a loan repayment of £240 per month and lives on her £250 overdraft. She said that she had £30 to her name.
18. I concluded that the claimant had not acted unreasonably in bringing this complaint. Although the Tribunal did not have jurisdiction to hear it, the claimant is not legally trained and it was not necessarily unreasonable of her to think that a complaint about her employer ought to be made in an Employment Tribunal. In determining unreasonable conduct, a Tribunal

should not judge a litigant in person by the same standard as someone who is legally qualified (*AQ Ltd v Holden 2012 IRLR 648*).

19. The 21<sup>st</sup> February 2023 email was wrongly addressed and the claimant did not receive it. From her perspective, it would have appeared that the respondent had ignored her 13<sup>th</sup> February 2023 complaint.
20. The incorrect addressing of that email rippled through what happened subsequent to that: for example, the emails of 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 invited the claimant to return the PF1 form which was attached to the 21<sup>st</sup> February 2023 email which she did not receive.
21. For these reasons, I did not consider that the claimant had behaved unreasonably in bringing or continuing these proceedings.
22. Although the complaints did not have reasonable prospects of success, because of the lack of jurisdiction on the Tribunal's part to consider them, this does not of itself automatically lead to the making of a costs order. The Tribunal has a wide and unfettered discretion to award costs and I did not exercise my discretion in favour of making one for the following reasons.
23. Underlying these proceedings is a genuine grievance. The claimant has not been an active member of the respondent's pension scheme since joining the respondent in 2020 as a result of a payroll problem and through no fault of hers. That error has potentially serious long-term financial consequences for the claimant and she is entitled to have it rectified. It has also caused – and continues to cause - her considerable anxiety. Arguably, it took the claimant's pursuit of these proceedings to spur the respondent to start to address the issue. It would be unjust to make a costs award against her given this context.
24. Further, I took account of the information available as to the claimant's means. Her (in)ability to pay the amount claimed (£7,629.40), or any meaningful sum, was also a factor in deciding not to exercise discretion in the respondent's favour.
25. Finally, as noted above, the Tribunal should not judge a litigant in person by the same standards as someone who is legally qualified.

Employment Judge **Rhodes**  
Date: **11<sup>th</sup> October 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON  
Date: **31<sup>st</sup> October 2023**

FOR THE TRIBUNAL OFFICE