



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr W CUNLIFFE

**Respondent :** NORTH EAST AND NORTH CUMBRIA INTEGRATED CARE BOARD

**Heard at:** Newcastle CFCTC in person      **On:** 11<sup>th</sup> of December 2023

**Before:** Employment Judge Gowland

## **Representation**

**Claimant:** Mr. Lott – Solicitor

**Respondent :** Mr. Price - Counsel

# JUDGMENT

1. Mr. Cunliffe's Claim for breach of contract for non-payment of a contractual redundancy payment is not well founded and is dismissed.
2. The Claimant made a claim under section 11 ERA 1996 for declaratory relief, the claim is not well founded as the document provided to the Claimant on the 4<sup>th</sup> of October 2012 complies with what is required under s.1 ERA 1996. The claim is therefore dismissed.
3. The claim under section 13 ERA 1996 for deduction from wages is not well founded and is dismissed.

# REASONS

## 1. Introduction

1.1 By an ET1 presented on the 20<sup>th</sup> of April 2023 the Claimant complained of:

- a) an unlawful deduction from wages under section 13 of the ERA regarding a payment relating to the Claimant's redundancy.
- b) and requested a declaration under section 11 of the ERA regarding whether or not the Claimant was entitled to an enhanced redundancy payment.

1.2 The case was heard in person on the 11<sup>th</sup> of December 2023. Both the Claimant and Respondent were legally represented.

1.3 The Claimant was employed as a Secondary Care Clinician (Designate) by the Respondent until his employment was terminated on 11<sup>th</sup> January 2023. Early conciliation started on 17<sup>th</sup> February 2023 and ended on 23<sup>rd</sup> March 2023.

1.4 The claim concerns whether or not the Claimant is entitled to receive an enhanced redundancy payment calculated at £12,291.58 after deduction of the statutory redundancy payment, from the Respondent.

## 2. The Complaints and Issues

2.1 The Claimant complains that he was not given the required statement of initial employment particulars as required, and that there was an unlawful deduction from his wages or, following the applications below, in the alternative a breach of contract relating to non-payment of an enhanced redundancy payment.

2.2 The issues for the Tribunal to determine were:

- a) Whether the Claimant was given a statement of initial employment particulars as required by s.1 ERA 1996, and if this was not provided, what particulars ought to have been included or referred to in a statement so as to comply with s.11.
- b) Whether the NHS terms and conditions of service handbook also known as agenda for change applied to the Claimant.
- c) If that contract did apply whether the Respondent breached the contract in question namely "the NHS terms and conditions of service handbook" also known as agenda for change, in not paying an enhanced contractual redundancy payment calculated at £12,291.58.
- d) Whether there was an unlawful deduction from wages under s.13 of the ERA

1996 in respect of the contractual redundancy payment.

### **3. Agreed Matters**

3.1 The Claimant was employed by the predecessor of the Respondent, namely the Newcastle North, Newcastle North and East, Gateshead clinical commissioning groups (CCG's).

3.2 Upon the replacement of the CCG's with the North East and North Cumbria integrated care board, the Claimant's position was made redundant.

3.3 The Claimant was entitled to statutory redundancy pay which he received.

### **4. Applications and submissions by the Claimant**

4.1 The Claimant made a written application on the 14<sup>th</sup> of July 2023 to amend the ET1 to include a breach of contract in the alternative to a wages claim under s.13 of the ERA 1996.

4.2 The Claimant confirmed at the hearing that they wished for the written application to be determined by the Tribunal.

4.3 The Claimant submitted that the Respondent knew that the claim was a breach of contract claim from the outset and that the amendment to include a breach of contract claim was no more than re-labelling.

4.4 In addition to the written application, the Claimant made a verbal application on the day of the hearing to amend the ET1 to substitute the "terms and conditions-consultants (England) 2003" contract for the "the NHS terms and conditions of service handbook" also known as agenda for change.

4.5 The Claimant in their verbal application on the day of the hearing, in relation to the amendment of the relevant contract that was said to apply to the Claimant, made the following submissions:

4.6 The respondent knew of the relevant contracts that the Claimant was relying upon at an earlier stage in the proceedings when voluntary further and better particulars of claim were provided to them. The Claimant accepted that it may have been wise to make an application to amend the ET1 when providing the voluntary further and better particulars.

### **5. Respondent's submissions relating to the applications**

5.1 In relation to the written application, the Respondent confirmed that there was no prejudice to them in relation to this amendment to include a breach of contract claim and their only objection was that it was reasonably practicable for the Claimant to have made the amendment within the relevant time limit of 3 months.

5.2 In relation to the verbal application, the Respondent submitted that there was significant hardship and prejudice in relation to the Claimant's late amendment as to the relevant contract that applied, and that this late change meant that they were unable to defend the claim or call relevant witnesses in relation to the Claimant's assertion that the relevant contract was the terms and conditions-consultants (England) 2003 rather than the document known as agenda for change.

## **6. Application decisions**

6.1 The Tribunal had regard to the relevant tests set out in **Selkent Bus Company v Moore 1996 ICR 836 EAT, and Vaughan v Modality Partnership UKEAT/0147/20/BA (V)**.

6.2 The Tribunal firstly looked at the practical consequences of allowing an amendment and what these are if an amendment is either refused or granted, and also considered the following in order to assist in the balancing exercise:

- a) The nature of the amendment,
- b) the applicability of statutory time limits, and
- c) the timing and the manner of the application.

6.3 In relation to the **written application to amend dated the 14<sup>th</sup> of July 2023**, it is agreed that there is no prejudice to the Respondent even though it would have been reasonably practicable to have labelled the claim as a breach of contract from the outset.

6.4 The Tribunal finds that the claim was clearly for breach of contract at the outset and the Respondent was aware of this when they received the ET1. The amendment is one of re-labelling and the underlying facts remain the same. The written application to amend to include reference to a breach of contract in the alternative is therefore granted.

6.5 In relation to the **verbal application made at the hearing**, the Tribunal firstly looked at the practical consequences of allowing an amendment and what these are if an amendment is either refused or granted, as part of the balancing exercise.

6.6 The Claimant gave honest and straightforward evidence in relation to the applicable contract and confirmed that the agenda for change contract did not apply to him but that it was the consultant's contract that applied to him.

6.7 If the amendment is allowed, this would mean that the Claimant would be able to proceed with his claim and have his right to an enhanced contractual redundancy payment determined by the Tribunal. This would mean that the Respondent would not have the opportunity to fully prepare their defence or call relevant witnesses as to the applicability of the consultant's contract.

6.8 Not allowing the amendment would effectively end the breach of contract claim in relation to the consultant's contract and not allow the Claimant to have

his right to an enhanced redundancy payment determined by the Tribunal. This would mean there would be potentially no financial outlay for the Respondent.

6.9 The Tribunal also considered the following matters:

a) The nature of the amendment.

It is a substantial amendment as it is changing the basis of the claim from a breach of the agenda for change contract to a breach of the consultant's contract.

b) The applicability of statutory time limits.

In this instance, the core claim of breach of contract would be capable of being determined given the finding on the written application.

c) The timing and the manner of the application.

6.10 It is a late application made on the day of the hearing and could properly have been made at an earlier date and certainly by the time a witness statement was taken from the Claimant on the 6<sup>th</sup> of September 2023.

6.11 The Tribunal reminded itself of the comments in **Chandhok v Tirkey [2015] ICR 527** ; as Langstaff J observed:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning ... the claim as set out in the ET1"

6.12 Having considered the relevant matters, and carried out a balancing exercise, the verbal application is refused. This is because if the Claimant is allowed to change the contract that they said had been breached to an entirely different contract, this would severely prejudice the Respondent's defence, given that they have defended the claim and called witnesses based upon the agenda for change contract that was specified in the ET1.

## **7. Matters remaining to be determined following the determination of the applications**

7.1 Following determination of the applications, the Claimant's case is as follows:

a) A breach of contract in relation to the terms known as agenda for change,

b) An unlawful deduction from wages in respect of the redundancy payment under s.13 ERA 1996,

- c) Whether the Claimant was given a statement of initial employment particulars as required by s.1 ERA 1996, and if this was not provided, what particulars ought to have been included or referred to in a statement so as to comply with s.11.

7.2 The Tribunal proceeded to determine these matters

## **8. A breach of contract in relation to the terms known as agenda for change**

8.1 The Claimant in their own evidence, confirmed that the terms known as agenda for change, did not apply to them.

8.2 The claim for breach of contract is therefore not well founded and is dismissed.

## **9. A claim made pursuant to s.11 for declaratory relief**

9.1 The Claimant received a letter from the Respondent dated the 4<sup>th</sup> of October 2012. This document confirmed the position offered, and the rate of pay and the Claimant was asked to sign and return a copy in order to accept the position, which he did.

9.2 The Claimant says in their position statement, that this letter was the only contractual documentation provided to the Claimant and that it does not satisfy the requirements under s. 1 of the ERA 1996. The Claimant did not specify what terms should have been provided to him in this document other than to assert that he was a consultant and that those terms, in the consultant's contract, which included a contractual redundancy payment, applied to him.

9.3 The Claimant did not refer the Tribunal to any particular part of s.1 of the ERA 1996 other than a bare assertion that any terms should have included reference to a redundancy payment. The Claimant did not specify which part of s.1 ERA 1996 should be read so as to include a contractual redundancy payment and fell back on the fact that without any specific contract for the role, the consultant's terms applied to the Claimant.

9.4 The Respondent says that this document does satisfy the requirements and that if the Tribunal disagrees, that the power under s.11 ERA 1996 does not require that particulars regarding redundancy pay are given. They confirm that when applying the business efficacy test, the contract was workable and that is evidenced by the fact that the Claimant undertook the relevant role until his redundancy with no apparent problems.

9.5 The Respondent also submits that since the particular role did not require the Claimant to currently be a consultant, but rather to be or have been a consultant within the last 10 years, that the consultant's contract and the terms relating to redundancy therein do not apply. They produced in evidence draft contracts for other roles with the CCG, although there was no draft for the

Claimant's particular role. None of these contracts had a contractual redundancy payment clause.

9.6 The Tribunal considered all of the evidence, the submissions and considered the letter from the Respondent dated the 4<sup>th</sup> of October 2012, provided to the Claimant upon commencement of the relevant employment. The Claimant's case was that without a specific full contract for his role, the applicable contract was the consultant's contract. It is the Tribunal's finding that this was not the case as the particular role did not require the Claimant to currently be a consultant. In the alternative there was a bare assertion by the Claimant that a term regarding redundancy arrangements should be implied. No submissions were made as to which part of s.1 ERA 1996 should be read so as to include a redundancy payment clause. It is the Tribunal's finding that no such clause should be included as to redundancy arrangements as it is clear from the draft contracts provided to other CCG employees that no such clause was included.

9.7 It is the Tribunal's finding that this document complies with what is required under s.1 ERA 1996 and that the Respondent did not have an additional requirement to give particulars relating to redundancy payments.

9.8 The claim is therefore not well founded and is dismissed.

#### **10.A claim made under s.13 for unlawful deduction from wages**

10.1 In respect of the claim under section 13 ERA 1996 this claim is not well founded as redundancy payments are excluded by way of section 27(2)(d) ERA 1996. This claim is therefore dismissed.

Employment Judge Gowland

Date: 13<sup>th</sup> January 2024

#### Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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