EMPLOYMENT TRIBUNALS

Claimant: Mr A Lain

Respondent: Deloitte LLP

Heard at: in public by CVP from the Central London Tribunal

On: 26 February 2024

Before: Employment Judge Woodhead

Appearances

For the Claimant: Not in attendance

For the Respondent: Mr Zovidavi (Counsel)

JUDGMENT

1. The Claimant's application under Rule 20 is refused.

2. The Claimant's application for the Respondent's response to be struck out under Employment Tribunal Rule 37 is refused.

3. The Claimant's claims in respect of expenses payments pursuant to Section 15 of the Employment Rights Act 1996 ("**the ERA**") are struck out under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success.

THE ISSUES

4. In this judgment the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 as amended are referred to as "**the Rules**".

5. This hearing was originally listed for 26 and 27 February 2024 to determine the merits of the claim.

6. On 31 January 2024, having considered correspondence from the parties, EJ Webster considered that it was proportionate to have a case management hearing to determine preliminary points. The full merits hearing was therefore converted into a 3-hour public preliminary hearing on 26 February 2024 to

determine the following applications:

6.1 A Claimant application under Rule 20(2) registering objection to the Respondent's application for an extension of time under Rule 20 (22/12/2023) ("**Issue 1**")

6.2 A Claimant application under Rule 31 for the Respondent to make specific disclosure (26/12/2023) ("**Issue 2**")

6.3 A Claimant application under Rule 37 to have the Respondent's defence struck out (26/12/2023) ("**Issue 3**")

6.4 A Claimant application under Rule 30 for permission amend his claim (02/01/2024) ("**Issue 4**")

7. Following a further application, dated 13 February 2024, by the Respondent for strike out of part of the Claimant's claim, EJ Glennie on 15 February 2024 directed that […] "*the Respondent's application dated 13 February 2024 to strike out the claim for expenses shall* [which in this judgment I refer to as "**Issue 5**"] *be added to the issues to be determined on 26 February, and that the time allocated to that hearing shall be increased to 1 day*".

8. There were therefore five applications to be considered at the hearing. Issue 2 and Issue 4 are dealt with in a separate case management order.

THE HEARING

9. This claim was listed for a hearing of one day.

10. On the morning of the hearing, at 7:07, the Claimant wrote to the Tribunal as follows:

> *I am writing this morning to inform the tribunal that I am unfortunately too unwell to attend today's hearing. I have woken up with a very sore throat and other general symptoms of some kind of bug - I began to feel unwell yesterday but didn't expect my symptoms to worsen. I do not feel well enough to attend today's hearing and would like to respectively request an adjournment. I do not think I would be able to properly represent myself in the proceedings given how ill I feel.*
>
> *I believe it would be in the interests of justice to permit this adjournment and ensure that both parties remain on an equal footing. Furthermore, I believe it would be very prejudicial against myself, the Claimant, if I was unable to attend the hearing today. I do not expect this to be a recurring illness or prevent me from attending the hearing next time - for added context, I was also planning to take the day off work today for obvious reasons but I will not be working either.*
>
> *I am more than happy to request a letter from my GP to support my illness. I am living in London at the moment and my GP is still, for the time being, based back near Chorley where I used to live. I am relatively confident though that I can request a GP letter over the phone, so I will*

begin to make arrangements for this today. Please let me know if this is something you require as I believe there is a charge for it.

Given I am unwell, I will not be able to monitor emails continually throughout the morning. However, I will check again for a response later this morning and if I don't have a response, will phone the tribunal to check that my email has been received. I have also copied in the Respondent's legal representation to this email so they are aware of the situation this morning.

11. The Respondent responded as follows at 9:13:

The Respondent strongly objects to the application made by the Claimant.

The Claimant has provided insufficient notice and we consider there is insufficient evidence provided at this time to support the application. The Respondent is fully prepared for the hearing this morning and has already incurred the legal cost of preparing for the hearing and instructing counsel to attend the hearing.

It is the Respondent's view that each of the applications and their objections are fully detailed in the papers. There is no first hand evidence required by the Claimant in respect of the applications. The Respondent considers that the tribunal will be fully able to make determinations on each application based on the papers.

The Respondent considers that proceeding with the preliminary hearing is in line with the overriding objective of the tribunal in terms of seeking flexibility in proceedings and saving costs.

12. The Claimant replied at 10:11 as follows:

I am unable to reply at length because I am not well - but I find the comments below regarding insufficient notice and insufficient evidence particularly inaccurate given the obvious circumstances. Furthermore, I have not been given the opportunity to defend the application under Rule 37 that the Respondent issued last week. If the hearing goes ahead this morning, then it will be highly prejudicial to my case and not, as the Respondent infers, in the best interest of the flexibility and the overriding objective.

13. Rule 2 (Overriding objective) provides —*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

14. Rule 5 (Extending or shortening time) provides —*The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.*

15. Rule 30A provides—*(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known. (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where— […] (c) there are exceptional circumstances. […] (4) For the purposes of this rule— (a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date; (b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.*

16. Rule 37 (Striking out) provides—*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out). (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

17. Rule 47 (Non-attendance) provides- *If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*

18. The application for postponement was made on the morning of the hearing and the Respondent did not consent to it. I asked the Tribunal administration to call the Claimant to ask him to join the hearing. They attempted on a number of occasions but the Claimant's phone appeared to be turned off. The Tribunal administration also sent the Claimant an email asking him to attend the hearing. The Claimant's correspondence suggested that he would be accessing emails at times (he said: "*Given I am unwell, I will not be able to monitor emails continually throughout the morning")*. However, he did not attend the hearing. Other than a sore throat he did not detail his other symptoms.

19. There had been detailed and lengthy correspondence from the Claimant over the course of December 2023 and January and February 2024. The Claimant provided no medical evidence of his incapacity to attend and I was not persuaded by the basis on which he sought a postponement. His request for a postponement

and the seriousness of his health condition did not amount to exceptional circumstances nor did he attend the hearing to make his application to the Tribunal verbally.

20. Given the detailed written correspondence between the parties I concluded that it was in the interests of justice to proceed in the Claimant's absence to determine Issues 1-4.

21. As regards Issue 5 I noted that the Claimant had said "*I have not been given the opportunity to defend the application under Rule 37 that the Respondent issued last week. If the hearing goes ahead this morning, then it will be highly prejudicial to my case and not, as the Respondent infers, in the best interest of the flexibility and the overriding objective".*

22. Given that on 15 Feb 2024 the Claimant was told by EJ Glennie that the Respondent's application dated 13 February 2024 to strike out the claim for expenses shall be added to the issues to be determined and taking account of Rule 5, given the apparent merits of that application and taking into account the circumstances of the Claimant's non-attendance at the hearing I considered that it was in the interests of justice to determine the Respondent's application in the absence of the Claimant.

THE LAW

23. Rule 37 is set out above.

24. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), **Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT** is authority for the position that a tribunal will have regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. In that case the EAT held:

> ***16. …The tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser Ltd v Wilson [2001] IRLR 324 , 329, para 25 and Bolch v Chipman , para 55(2)***
>
> ***17. But it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.***

25. The Court of Appeal judgment in ***Blockbuster Entertainment v James [2006] EWCA Civ 684 IRLR 630*** relates to the approach to be taken in exercising the power to strike out under Rule 37 (b) (unreasonable conduct) but is nonetheless helpful in emphasising the draconian nature of strike out and that strike out must

be proportionate in order to be lawful. Having set out the predecessor version of Rule 37 contained in Rule 18 of the 2004 Employment Tribunal Rules, Lord Justice Sedley said as follows:

> ***"5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible.***
>
> ***If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."***

26. The Court of Appeal in also gave guidance on the question of proportionality as follows:

> ***"18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.***
>
> ***19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.***

> ***20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.***
>
> ***21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."***

27. As also summarised by the EAT in ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327***:

> ***26. If there are several possible responses to unreasonable conduct, and one of those responses is "less drastic" than the others in achieving the end for which the strike-out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are equal in terms of their efficacy in achieving the desired aim and equal in terms of any adverse consequences. However, in most cases there is likely to be only one proportionate response which would be the least drastic of the options available.***

28. Section 13 ERA (Right not to suffer unauthorised deductions) provides:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of* the deduction.

29. Section 27 ERA (Meaning of "wages" etc) provides:

> *(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
>
> *(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, […]*
>
> *but excluding any payments within subsection (2). […]*
>
> *(2) Those payments are—[…]*
>
> *(b) any payment in respect of expenses incurred by the worker in carrying out his employment […]*

30. Section 15 ERA (Right not to have to make payments to employer) provides:

> *(1) An employer shall not receive a payment from a worker employed by him unless—*
>
> *(a) the payment is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the payment.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer receiving the payment in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the receipt of a payment on account of any conduct*

of the worker, or any other event occurring, before the variation took effect.

(4) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(5) Any reference in this Part to an employer receiving a payment from a worker employed by him is a reference to his receiving such a payment in his capacity as the worker's employer.

31. Section 16 ERA (Excepted payments) provides:

(1) Section 15 does not apply to a payment received from a worker by his employer where the purpose of the payment is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

ANALYSIS AND CONCLUSIONS

Issue 1 - An application under Rule 20(2) registering objection to the Respondent's application for an extension of time under Rule 20 (22/12/2023)

32. The ET3 was due from the Respondent on 28 November 2023. On 1 December 2023 the Respondent's solicitors applied for an extension of the time limit (page 74) and filed an ET3. Unfortunately the Respondent's application did not reach the Claimant because of an error in the email address used. This email address error is why the Tribunal, as referenced in its subsequent correspondence of 13 December 2023, said that the Claimant had not objected (but he had not had the opportunity to do so). I am satisfied that this was an inadvertent error on the part of the Respondent's representative. Unfortunately that error was repeated on 13 December 2023 by the Tribunal when it wrote to the parties as follows (page 76):

[…] Decision on Application for extension of time to submit response

[…] In the absence of any objection by the claimant , I have decided to grant the application.

Having considered all of the factors, and applying Kwiksave Stores v Swain, I have granted the extension of time to the 1st December 2023. The principal factors in her decision are:

1. The final hearing is not until the 26th February 2024 so that the claimant is not disadvantaged by the delay in the filing of the ET3.

2. By contrast, the respondent would be substantially disadvantaged if

not permitted to defend the claim.

3. The respondent has explained the reason for the delay which is credible.

5. It seems the ET1 did not come to the attention of the respondents Solicitors until the 29th November 2023 and so the respondent acted promptly once it was able to.

Under regulation 10A(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, because this decision has been made by a Legal Officer, a party may apply in writing to the Tribunal for the decision to be considered afresh by an Employment Judge. Such an application must be made within 14 days after the date this letter/decision is sent to the parties.

33. This came to the attention of the Claimant and on 19 December 2023 he sent correspondence on the matter to the Tribunal. On 21 December 2023 the Tribunal wrote to the parties on the instruction of EJ Nicolle as follows:

> *He has considered the claimant's objection of 19 December 2023 to the extension of time given for the respondent to file its response, and the notification given by the tribunal in its letter dated 19 December 2023 that the response has been accepted.*
>
> *Given that a decision has already been made for the claim to be accepted it would only be in exceptional circumstances that it would be appropriate for an employment Judge to reopen, and possibly reverse this decision. The discretion exercised to allow the response to be served, with an appropriate extension of time being granted, was not one which was obviously inappropriate given the chronology set out by the respondent. Further, where a respondent wishes to actively participate in a claim it would be unusual for there to be precluded from doing so where they have a potentially viable defence to the claim being advanced.*
>
> *In reaching this decision it is necessary to balance the respective prejudice to the claimant and the respondent. In the circumstances the respondent would suffer greater prejudice than the claimant as the only prejudice for the claimant would be the loss of opportunity for a default judgment, and if his claim is meritorious, he would suffer no prejudice.*

34. I have considered the correspondence that then followed from the Claimant on this topic (including his correspondence regarding his Rule 37 application referred to below). I agree with EJ NicolIe on this matter and consider that the prejudice to the Respondent of not having their response accepted, particularly in view of when the response was filed and the reasons for late filing (which I accept), would have been far greater than the prejudice to the Claimant and the decision to accept the Response was correct.

Issue 3 An application under Rule 37 to have the Respondent's defence struck out (26/12/2023) ("Issue 3")

35. The Claimant's application under Rule 37 was principally set out in lengthy correspondence dated 26 December 2023, 4 January 2024 and 14 January 2024. The Claimant relied upon Rule 37(1)(b) (manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious), Rule 37(1)(c) (instances of non-compliance with the Rules) and under Rule 37(1)(e) (no longer possible to have a fair hearing). He also quoted phrases from Rule 2 (the Overriding Objective). The main focus of the grounds on which strike out was sought can be summarised as follows:

    35.1 The Respondent's response including:

        35.1.1 The manner of submission (including the content (or lack of content) in its defence);

        35.1.2 its late submission (including use of an incorrect email address for the Claimant and misspelling the Claimant's surname as referenced above); and

        35.1.3 the reasons given for its late submission;

    35.2 The Respondent allegedly taking advantage of the Claimant's personal circumstances (including financial position), his lack of legal representation and his need for sign off by the Respondent of his ICAEW training file;

    35.3 The Respondent's conduct (including deadlines imposed) in respect of:

        35.3.1 expenses submitted by him post-employment (including questions as to whether expenses alleged to have been improperly claimed had been refunded to the client that had paid for the expense);

        35.3.2 outstanding expenses claims he said were due to him;

        35.3.3 post-employment meetings/investigations and correspondence related to expenses and a Respondent counter-claim;

        35.3.4 seeking the withdrawal of claims by the Claimant and reference to applying for costs if he did not; and

        35.3.5 ACAS early conciliation.

36. I do not consider that the Claimant has demonstrated a ground or grounds on which the Respondent's Response could be struck out under Rule 37. I do not therefore need to go on to consider whether it would be proportionate to strike out.

37. If I am wrong and the strike out powers are triggered under Rule 37 I nonetheless do not consider that it would be proportionate or in the interests of justice to exercise that power of strike out against the Respondent.

Issue 5 – an application to strike out the claim for expenses

38. As noted in a separate case management order that I have issued, I allowed an application by the Claimant under Rule 30, which was not opposed by the Respondent, asking for permission to amend his claim (pages 120-121 asking for the 'Particulars of Claim' document at pages 50 to 69 of the PH bundle to be adopted as the details of the claim).

39. As a consequence the Claimant's claim for expenses, instead of being brought under Section 13 of the Employment Rights Act 1996 ("**ERA**") (right not to suffer unauthorised deductions), is instead brought under Section 15 ERA (Right not to have to make payments to employer). To provide additional detail on this, paragraph 5 (ii) at page 50 of the PH bundle says (my emphasis of the relevant phrase):

> 5 ii) Unlawful deduction of wages under s13 of the ERA 1996 given the Respondent has withheld monies promised to me following my dismissal by way of my annual bonus and s15 of the ERA 1996 given the Respondent's actions in relation to withholding my expenses effectively have forced me to make payments to them.

40. Para 71 at page 66 of the PH bundle says:

> *71. By withholding payments owed to me in respect of expense payments, the Respondent is effectively breaking s15 of ERA 1996 regarding payments being made to employers and in what context these are lawful.*

41. Para 79 (iii) at page 68 of the PH bundle says:

> iii) Cessation of the post-employment harassment that the firm continues to carry on with. The firm continues to pursue me for expenses that have been approved for almost 12 months. It is not interested in a fair and open discussion on these because the data it sends me over them is poor and cobbled together. The firm continues to write to me as though I am an employee of theirs when it references internal disciplinary meetings. The firm has no evidence to suggest I have made further demeanours in relation to expenses and all this new matter suggests to me is that the Respondent has sought "leverage" of sorts in this case. The firm initially approached me about these in July, but as recently as in the middle of December emailed me again demanding the same attendance. The firm reported me to the ICAEW in October 2023, 4 months after I left the firm. In that report, the Respondent dishonestly told the ICAEW that I had been dismissed for gross misconduct. If the firm truly believed my dismissal was worthy of report to the institute, then it would not have waited until October to tell them. The firm, faced with the reality that I am very serious about having this Tribunal case heard, is merely flicking levers of power that it believes it still has open to it in an attempt to retaliate.

42. The Respondent's application to strike out the Claimant's claim under Section 15

of the ERA, was founded in Rule 37 (1) (a) ([…] has no reasonable prospect of success).

43. I struck this claim out because I accepted that it has no reasonable prospect of success. The Claimant is not alleging that the Respondent has received any payment from him (a prerequisite of Section 15 (1)) . The expenses were incurred by the Claimant to third parties.

44. Further, Section 16 ERA (Excepted payments) makes clear that the protection of Section 15 is not afforded to an individual in respect of an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker. It may be that the Respondent is now seeking to recover from the Claimant expenses incorrectly paid to him but a claim in respect of any such payment actually paid to the Respondent by the Claimant is brought out of the scope of Section 15 by Section 16 ERA.

45. Had I not accepted the Claimant's amendment I would also have struck the claim out under Section 13 ERA as having no reasonable prospects of success because Section 27 ERA makes clear that expenses are one of the categories of payment by employers to workers which are specifically excluded from the definition of wages (meaning that a worker cannot seek recovery of such payments by bringing an unlawful deduction from wages claim under Section 13 ERA).

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Employment Judge Woodhead

Date 26 February 2024

Sent to the parties on:

20 March 2024

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For the Tribunals Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/