



EMPLOYMENT TRIBUNALS

Claimant: Miss C L McCloskey

Respondent: Mersey and West Lancashire Teaching Hospitals NHS Trust

Judgment and reasons were sent to the parties on 27 November 2023.

By e-mail dated 11 December 2023, the claimant applied for reconsideration of the judgment.

JUDGMENT

The claimant's application is refused.

REASONS

Procedural history

1. Most of the procedural background to this claim has been set out in earlier written reasons.
2. The claim included various complaints of unauthorised deductions from wages and claims for damages for breach of contract. The respondent has used the collective term, "money claims" to describe all these complaints.
3. A preliminary hearing ("the July PH") took place on 17 and 18 July 2023. The notice of hearing informed the parties that one of the purposes of the preliminary hearing would be to decide whether or not any part of the claim should be struck out on the ground that it had no reasonable prospect of success.
4. Mr S Gorton KC represented the respondent at the preliminary hearing. In preparation for the hearing, he submitted an opening note containing a submission that all the money claims should be struck out. In short summary, his point was that the claimant's remuneration was expressly agreed and, in those circumstances, there was no room for an implied term.
5. One of the money claims under consideration was the claimant's complaint that the respondent had made an unauthorised deduction from her wages by paying her 1.0 PA for administration work. Her case was that an additional 0.5 PA of wages

were properly payable for each week. The detail of that claim was set out in Row 2 of a document that has consistently been described as “the Money Claims Table”.

6. The parties made detailed oral submissions at the July PH. These included setting out their positions on the question of whether or not the claimant had been sent a written contract of employment.
7. At the July PH, amongst other decisions, I struck out the wages claim for administration time. I gave oral reasons for that decision.
8. Whilst giving my oral reasons, I told the parties that it was highly likely that the tribunal would find that there was an express term in her contract that her total remuneration would be the contractual salary, based on a timetable of 10 paid PAs. I also said that it was highly likely that the respondent would prove that it sent an unsigned copy of a contract to the claimant enclosed in a letter dated 9 March 2006. I observed that there was no evidence that the claimant signed it, but no evidence that she objected to it. My conclusion was that the tribunal would inevitably find that there was no express term entitling the claimant to an additional 0.5 PA of wages for administration time.
9. For various reasons, once I had announced my judgment at the July PH, there was insufficient time left for me to consider the strike-out application for the remainder of the money claims. A further preliminary hearing (“the November 2023 PH”) was listed to take place on 9 November 2023, so that that application could be considered.
10. During the November 2023 PH, the claimant made oral submissions as to why the money claims should not be struck out. The claimant began her submissions by repeating the argument that she had made at the July PH, which was that she had not signed a written contract of employment. I intervened, and made a note of what I said:

“Let’s proceed on the assumption that there wasn’t an agreed job contract.”
11. With some prompting from me, the claimant then told me about the implied terms on which she relied.
12. During her submissions, the claimant drew my attention to Schedule 12 of the Terms and Conditions – Consultants (England) 2003. It was her case that these provisions expressly entitled her to additional remuneration for travel time. At a different point in her submissions, she accepted that her employment was subject to the national terms and conditions.
13. I announced my judgment orally at the November 2023 PH. My decision was that all the money claims should be struck out, with the exception of the claim for damages for breach of contract related to travelling time. The judgment and written reasons were sent to the parties on 27 November 2023.
14. I found that it was “overwhelmingly likely” that the tribunal would find that the claimant had been sent an offer letter when she successfully applied to be a consultant. The offer letter stated the claimant’s contractual salary and incorporated the Terms and Conditions – Consultants (England) 2003.
15. At paragraph 31 of the written reasons, I observed:

“It is also virtually certain that the tribunal will find that the respondent’s Human Resources Director, Anne-Marie Stretch, wrote to the claimant on 9 March 2006 enclosing copies of a contract of employment.”

16. Paragraph 38 of the written reasons read as follows:

“There is a dispute about whether the claimant signed and returned her copy of the contract that was sent to her. That dispute is highly unlikely to affect the outcome of the claim. The claimant has never suggested that she raised any objection to the proposed terms at the time. As she pointed out, that is not what newly-appointed consultants tend to do. She carried on working in her role for about another 13 years. The only reasonable conclusion that the tribunal would be able to draw is that the claimant accepted the terms offered to her in the 2006 contract.”

The reconsideration application

17. The claimant has submitted a table of arguments as an attachment to an e-mail to the tribunal on 11 December 2023. The table is headed, “Complaint of the court processes of Employment Judge Horne ... & Details for reconsideration of 9 November 2023 Preliminary Hearing decisions made by Employment Judge Horne...”

18. So far as the strike-out judgment is concerned, the claimant’s table appears to be advancing the following grounds for reconsideration:

Ground 1 – “express Terms & Conditions”

19. The first reconsideration ground, as I understand it, is that she had an express term in her contract entitling her to additional pay. The claimant says, “Common Practice Law allows me to have a contract as an employee”. According to the claimant, the respondent “committed an illegal act by not giving me a contract and I now have the same express rights terms and conditions as my other comparators”. I am not entirely sure what the claimant means by this, but I take her to be arguing that she was expressly entitled to additional pay, because that is what her contract would have said if she had been given one.

Ground 2 – Telling the claimant she had no contract

20. The claimant advances a number of grounds based on what I told her at the preliminary hearing. She says:

20.1. The written reasons for the strike-out judgment are inconsistent with my saying that there was no agreed job contract; and

20.2. By telling her that she did not have an agreed job contract, I refused to consider the claimant’s case that it was an express term of her contract that she was entitled to additional pay.

21. Under this heading, I have also considered whether my remark deprived the claimant of a reasonable opportunity to make representations at the hearing. Did she think that she did not need to say anything about whether there was an express agreement about pay, because I had indicated that I would find that there was no written contract between the claimant and the respondent?

Relevant law

22. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment “where it is necessary in the interests of justice to do so”.
23. The making of reconsideration applications is governed by rule 71.
24. Rule 72(1) states that an employment judge must consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.
25. If the application is not refused under rule 72(1), it must be dealt with in accordance with rule 72(2), which provides:
26. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.
27. When considering a reconsideration application, the tribunal must take into account the importance of finality in litigation: *Outasight VB Ltd v. Brown* UKEAT 0253/14.
28. Rule 37(2) provides, relevantly:

“A claim ... may not be struck out unless the party in question has been given a reasonable opportunity to make representations... at a hearing”.

Conclusions

29. I have considered each ground in turn.

Ground 1 – express Terms and Conditions

30. In my view there is no reasonable prospect of my revoking or varying my strike-out judgment on the ground of any alleged express term in her contract. There was no express contractual entitlement to any pay over and above her contractual salary. I did not understand the claimant to be arguing that there was one. She had told EJ Serr that her case “lay in custom and practice” and that there was no written document setting out her entitlement to remuneration. Her case at the November 2023 PH was that she was entitled to a job plan that properly reflected the work she did. Even if I have misunderstood the claimant’s case, there is still no prospect of my altering the judgment. The claimant’s salary was indicated in her offer letter. The Terms and Conditions – Consultants (England) 2003 set out the express contractual mechanism by which salary might be increased. It is done through an agreed job plan.

Ground 2 – Telling the claimant she had no contract

31. My written reasons do not indicate a finding that the claimant signed her written contract. They do, however, indicate that the tribunal would almost certainly find that she agreed to its terms by remaining in employment.
32. The claimant would have a reasonable argument for saying that that part of the reasons was inconsistent with my saying, “Let’s proceed on the assumption that there wasn’t an agreed job contract”. In my written reasons I departed from that assumption.

33. If that was inconsistent, I must examine whether the inconsistency now raises any reasonable prospect of the strike-out judgment being varied or revoked. I do not think that there is any such prospect. This is because;
- 33.1. My remark to the claimant was intended to encourage the claimant to tell me about the implied terms on which she appeared to be relying. It was not an indication that I was going to find that her contract did not have any express terms about pay. I had already informed the claimant at the July PH that it was highly likely that the tribunal would find that the respondent had sent the unsigned contract to her and that there was no evidence that she had objected to it.
- 33.2. In any case, the main contractual significance of the written unsigned contract was to specify the claimant's salary, to incorporate the Consultants (England) 2003 terms and conditions, and to make clear that, apart from payment for additional PAs in accordance with Schedules 13 and 14, there was no entitlement to extra remuneration. The claimant acknowledged during the November 2023 PH that the Consultants (England) 2003 terms and conditions were incorporated into her contract, indeed she relied on them. The claimant did not suggest that there had been any express written agreement to pay her additionally to her salary. Nor did she rely on any express oral agreement. She could not seriously dispute that there was an express term fixing her salary. It was in her offer letter. Consultants' salaries are collectively negotiated.
34. The claimant was entitled to a reasonable opportunity to make representations about why the money claims should not be struck out. I do not think that my remark deprived her of that opportunity. It is not realistic to think that the claimant held back from making an important point because she already thought she was going to win on any particular issue. She had already made submissions at the July PH about the express contractual framework. She had already made plain that her case was that she had never agreed to the terms set out in her draft offer letter, because she had not signed it. In support of that argument she had referred repeatedly to the respondent's late disclosure of the draft contract and the prior order of Employment Judge Hill, and asked me to conclude from the procedural history that the draft contract had never actually been sent to her. I told her at the July PH that those arguments were highly likely to fail. The claimant also knew that she would have to deal with the impact of the Terms and Conditions - Consultants (England) 2003. At both preliminary hearings, the claimant knew that the respondent's case was that there could not be any implied terms entitling her to additional pay, because they would be inconsistent with the express contractual framework by which remuneration for additional PAs was determined.
35. Ground 2 does not, therefore raise any reasonable prospect of the original judgment being varied or revoked.

Disposal

36. In those circumstances I must refuse the claimant's reconsideration application.

Case Number: 2414204/2019

Employment Judge Horne

4 March 2024

ORDER SENT TO THE PARTIES ON
18 March 2024

FOR THE TRIBUNAL OFFICE