EMPLOYMENT TRIBUNALS

Claimant: **Robert Opara**
Respondent : **440 Solutions Ltd**

Heard at: **London Central (by CVP)**

On: **24/4/2024**
Before: **Employment Judge Mr J S Burns**

Representation
Claimant: **In person**
Respondent: **Mr N Henry (litigation representative)**

JUDGMENT

1. The Respondent's response is struck out and the Respondent is debarred from further participation in the proceedings.
2. The claim for automatic unfair dismissal fails and is dismissed.
3. The Claimant's other claims succeed in the total amount of £12795.14[1] which is payable by 8/5/24.

REASONS

For striking out the response and debarring the Respondent.

1. The claim was presented on 7/8/23.

2. On 9/1/24 Alice Edwards who was then representing Mr Powell, (the Respondent's director) who was then the Respondent to these claims, sent an email to the Claimant "*please find attached the respondent's disclosure documentation*". Various documents pertaining to the claims as they were then understood by Mr Powell, were attached.

3. The matter came before me on a CMPH on 14/2/24 where Mr Powell and 440 Solutions Ltd were represented by Mrs Wood (a solicitor provided by the Croner Group). On Mr Powell's application. I substituted 440 Solutions Ltd for Mr Powell as Respondent, and released him from the claims. I gave permission for late service of the ET3. I also identified for the first time that the Claimant, who did not have 2 year's service before dismissal, was claiming automatic unfair dismissal contrary to section 104 ERA 1996, (contending that the reason or principal reason for his dismissal was that he had asserted a statutory right, namely his right to receive itemised pay statements (section 8 ERA 1996) and not to suffer unauthorised deductions from his pay (section 13 ERA 96)). I refused his application to

[1] The amount is gross of any tax and National Insurance contributions which may be due on them and the Claimant must account for any such sums to the Inland Revenue.

add an age discrimination claim but gave permission to him to amend to add a claim for a reference under section 11 and for compensation under section 12(4) Employment Rights Act 1996 in relation to the Respondent's failure to provide payslips to the Claimant.

4. I then issued directions which included the following:
"By 28/2/2024 the Respondent may if so advised serve on the Claimant Amended Grounds of Resistance.

By 14/3/24 the Claimant and the Respondent shall send each other lists and copies of all documents in their possession or control that they rely on in relation to any issue in the case, together with documents that support another party's case or which adversely affect their own or another party's case. ….

The Respondent has primary responsibility for the creation of a single joint bundle of documents for the trial but the parties shall co-operate in this regard.
By 28/3/24 the Respondent shall email to the Claimant a paginated indexed final trial bundle in PDF format.

By 4pm on 9/4/24 the parties shall exchange by email witness statements of the evidence of any witnesses (including the Claimant) they intend calling at the trial. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission

Under rule 6, if any order of the Tribunal is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

5. The Respondent did not serve Amended Ground of Resistance, so there is no response specifically dealing with the details of automatic unfair dismissal claim and the reference under section 12 EWRA 1996, which were "new" matters in the light of the hearing on 14/2/24 and not dealt with in the Grounds of Resistance. This was unreasonable conduct of the defence but as the directions did not oblige an AGOR to be served, I do not treat that as a breach of directions.

6. The Claimant complied strictly with the directions throughout insofar as he was able to do. The Respondent failed to comply with the directions pertaining to disclosure, creation and service of a joint trial bundle, and service of its witness statement.

7. As per the second paragraph of the directions quoted above, disclosure by list and copies was required by both parties by 14/3/24. When this matter was discussed on 14/2/24, Mrs Wood did not say that the Respondent would not have to comply because it had already done so. On the contrary, as the Claimant reminded me today, Mrs Wood stated during the hearing on 14/2/24 that she had documents to disclose and would be able to do so by the 14/3/24.

8. The Claimant sent his list and copies to Mrs Wood on 14/3 with a message "*I look forward to receiving your extra information"*. There was no response and no disclosure from the Respondent.

9. Mr Henry submitted today that the email on 9/1/24 should be regarded as adequate compliance with the direction for Respondent disclosure. I reject this submission. Such disclosure as was given on 9/1/24 was given on behalf of Mr Powell and not 440 Solutions Ltd, which has been the Respondent as from 14/2. Furthermore, it was given before the character of the unfair dismissal claim had been identified and before the Claimant had been given permission to add a claim. Therefore it would not necessarily have included all documents relevant to the claims going to trial. Furthermore this was not how the matter was understood and agreed by the Tribunal and the parties when the direction was given.

10. After 14/3, the Claimant became increasingly concerned and sent the following email to the Tribunal copied to Ms Edwards and Ms Woods on 29/3/24 "*It is now Friday 29th March 2024. The respondent want (sic) order by Employment Judge Mr J S Burns under paragraph 11 of the case management orders to send myself the claimant a paginated indexed final bundle pdf by Thursday 28th March 2024. I have not received one and have been waiting all day to receive one. I do not know what I am supposed to do in this situation as it is now past the deadline that was given by the judge."*

11. On 2/4/24 the Claimant emailed both the Respondent and the Tribunal stating that the Respondent has neither sent over any new information nor the complete bundle and asking for advice.

12. On 3/4/24 Mr Henry, who had taken over the conduct of the case from Mrs Wood on behalf of the Respondent, replied to the Claimant's email and to the Tribunal stating that the Claimant had been sent the Respondent's documents on 9/1/24, and applying for an unless order on the false ground that the Claimant not sent the Respondent his documents. This was an error made by Mr Henry who was unaware at that stage that the Respondent had in fact received the Claimant's documents on or about 14/3.

13. On 4/4/24 at 4.51 pm Mr Henry who had discovered the true situation emailed the Claimant to confirm that his documents had been received, and informing the Claimant "*I will dig through the pages of disclosure and will include only pages relevant to the issues…"*

14. On 5/4/24 the Claimant emailed the tribunal asking it to strike out the respondent's response due to it not complying with any case management orders.

15. On 9/4/24 the Claimant filed and served his witness statement and again asked the Tribunal to strike out the Respondent's response.

16. On 10/4/24 Mr Henry sent the Claimant a draft bundle under cover of the following message "*Please find attached a draft bundle of documents for the hearing. You may recall from my earlier correspondence that the list of issues for the Tribunal to decide is limited (See "Schedule of Claims) page 85 of the bundle).The bundle has therefore been arranged in Chronological order to represent only those documents that will be relevant to the issues. You are asked to agree that the documents represent the case you are bringing. The rules of the Tribunal provide that if you wish to adduce additional documents, you should make an application to the tribunal indicating why the documents are relevant to the matters to be decided."*

17. The Claimant did not respond to this as he had already filed his witness statement and was waiting for the Tribunal to respond to his applications to strike out.

18. On 19/4/24 Mr Henry emailed the Claimant again stating that he would exchange statements with the Claimant on 22/4/24 and that the Claimant should amend his witness statement to make it consonant with the bundle served on 10/4. The Claimant did not respond to this.

19. Mr Henry finally served Mr Powell's witness statement on 23/4/24, on the eve of the Final Hearing. It is a three-pages in length but dense and contentious. The Claimant said he had not had enough time to read it before the trial started at 10am on 24/4/2024.

20. The bundle which the Respondent has presented as the trial bundle consists of 307 pages. It is not agreed. It omits various documents which the Claimant had disclosed and which he wished to rely on. It includes documents which had not been disclosed to him before.

21. It is apparent from the foregoing that the Respondent/its representative/s
    - did not provide disclosure of its documents by 14/3/24 or at all
    - made no effort at all to create a trial bundle until 4/4 at the earliest, whereas the bundle was supposed to be finalised by 28/3
    - before the Claimant served his witness statement on 9/4, made no attempt to agree with the Claimant or suggest to him that the date for witness statement exchange should be delayed
    - failed to serve its witness statement on 9/4 as directed and waited until the eve of the trial before serving it, by which time it would have had two weeks opportunity to read and digest the Claimant's witness statement
    - waited until after the date for exchange of witness statements (9/4) and after it had received the Claimants witness statement before sending a draft bundle to him
    - when it did send it on 10/4, sent it without apology, and without any invitation to the Claimant that he could suggest additions or alterations to the bundle - rather the Claimant was informed that if he wished for any additional documents to be added, he would have to make an application to the Tribunal - notwithstanding the fact that the trial was only 10 days away, and
    - made no application to the Tribunal for an extension of time or variation in the directions in order to ensure that orderly and fair trial preparation could take place.

22. As a result of the Respondents default, the situation at the beginning of the trial was that that the purported trial bundle was not agreed and not referred to or cross referenced in the Claimants witness statement because the latter was finalised before the former. Documents which the Claimant regards as important are missing from it. He has been deprived of the opportunity of considering the voluminous documentary evidence in a systematic way before finalising his witness evidence. If the trial was to proceed it is likely that significant additional oral evidence would have to be taken in chief - making it unlikely that the two-day listing would be sufficient. The Claimant has been prejudiced by being deprived of a reasonable opportunity to consider Mr Powell's witness statement. No explanation has been put forward for the extreme delay in serving this. Under the scheme of the directions the parties were intended to have 15 days to consider the witness statements of the opponent, not 12 hours.

23. As a result of the Respondents failure to comply with the directions, (which Mr Henry explained was caused by "turmoil with Croner in March"), it is impossible to have a fair trial on a contested basis without an adjournment, which adjournment neither side is applying for in any event.

24. The directions issued on 14/2 included a warning as to the possible consequences of breach of the directions.

25. In the circumstances and for the above reasons I struck out the Response under Rule 37(1)(b) *unreasonable conduct* (c) *non-compliance with an Order* and (e) *fair trial of the response no longer possible*; and I ordered that the Respondent was debarred from further participation in the hearing.

<u>For the judgment on the claims</u>
<u>Trial process</u>

26. I turned off Mr Henry's and Mr Powell's microphones and heard evidence on oath from the Claimant, asking him questions so as to elicit the main facts about the matters which I needed to decide. I found the Claimant to be apparently trustworthy and honest and doing his best to provide accurate evidence to me. Apart from the handful of documents in the Respondent's purported trial bundle which the Claimant referred to, and which I have referred to below, I did not feel it appropriate to give much weight to the rest of it because it was not a bundle produced in accordance with my directions, not agreed, put forward on a unilateral basis by the Respondent which was debarred from defending, and not explained to the extent necessary by Mr Powell, who was debarred from giving evidence, or by Mr Henry, who was debarred from making submissions. I adopted the same approach to Mr Powell's witness statement.

27. After taking the Claimant's evidence and announcing my judgment, before closing the hearing I turned on Mr Henry's microphone so we could exchange valedictory pleasantries, whereupon he took the opportunity to make a submission that the Claimant's weekly rate of pay should be calculated on the basis of an average over 12 weeks prior to dismissal, rather than on the basis of the less nuanced approach I had adopted. On reflection and reconsideration after the hearing ended, I have decided that this is correct and I have accordingly applied the method I describe below in calculating the Claimant's week's pay and damages, which are now lower than the figures I mentioned during the hearing.

28. Mr Henry also took the opportunity to start making submissions "*that the Claimant was lying"* etc. I regarded this as impermissible in the light of the debarring of the Respondent and cut him off and ended the hearing shortly thereafter.

Background facts

29. The Respondent is a limited company number 13043317 which trades as private security business. The Claimant was an employee of 440 Associates Ltd from 14/10/2021. The Claimant's employment transferred to 440 Solutions Ltd (the Respondent) on 1/4/22. On 3/6/23 he was summarily dismissed when Mr Powell sent him a message "*wishing him all the best*", which was intended by Mr Powell and understood by the Claimant to inform the latter that his employment was ended on a summary basis with effect from that day.

The Claimant's weekly pay.

30. The Claimant worked full time on average 42.5 hrs per week at an hourly rate which started at £11 per hour but which had risen to £13 per hour by 3/6/23. Sometimes he earned an overtime rate of £26 per hour. His hours and pay fluctuated. The Claimant kept a running record on an excel spreadsheet of his hours worked throughout his employment and the applicable rates of pay. This appeared at page 258 onwards in the Respondent's bundle. The last working day as per the record on page 273 was 27/5/23. The period from 28/5/23 to 3/6/23 (the EDT) is therefore not typical in that no recorded work was done during that period. This appears to have been a chaotic period leading up to the dismissal. I have therefore taken 27/5/23 as the correct calculation date. The period of 12 weeks ending on 28/5/23 started on 25/3/23. I have calculated using the Claimant's own record that the total gross pay earned by the Claimant for that period was £5297 which divided by 12 weeks gives an average gross weekly wage of £441.41

The automatic unfair dismissal claim.

31. The claim is that that, contrary to section 104 ERA 1996, the reason or principal reason for his dismissal was that he had asserted a statutory right, namely his right to receive itemised pay statements (section 8 ERA 1996) and not to suffer unauthorised deductions from his pay (section 13 ERA 96). However, the Claimant in his evidence said that the reason for the dismissal was Mr Powell learning that the Claimant was working for a third-party company namely Blackrose Security, a matter which the Claimant had concealed from Mr Powell previously. That is a reason not falling within section 104 so without more the UD claim fails.

Unauthorised deduction from wages (sec 13 ERA 1996 and or breach of contract)

32. The Claimant told me and I accept that there was a shortfall between his due pay and the amounts he was paid by the Respondent. The Claimant complained repeatedly about this to Mr Powell during his employment. The shortfall cannot be accounted for by tax and national insurance contributions deducted and paid on his behalf under PAYE, because the Claimant has learned that the Respondent did not register his employment with HMRC or pay tax or NICs on his behalf. I find that the shortfall in pay is **£7416** which is calculated

by taking the Claimant's calculated figure of £9004.38 on page 223 of the bundle and deducting from it the sum of £1588.38 the receipt of which is not shown on that page but which the Claimant on checking found he had been paid in November 23 as per the payslip dated 31/5/23 (page 243 of the bundle).

Pay in lieu of holidays not taken (reg 30 WT Regs 1998 and or sec 13 ERA 1996).

33. Although the Claimant's contract provided he was entitled to 28 days holidays per year, in practice he did not take any paid holidays. When he asked Mr Powell if he could take a holiday Mr Powell said he could not. Under the WTRs it is possible to claim pay in lieu of untaken holidays when employment ends and where the employee has been deterred from taking statutory holiday the claim can be carried forward from one pay year to the next– King v Sash Window Workshop Limited [2018] IRLR 142. The Claimant accrued the right to 6,61 weeks paid holidays during his employment and was due pay in lieu calculated as 6.61 x £441.41 = **£2917.72** . While £441.41 is the average weeks pay over 12 weeks rather that 12 months, I have not been provided with the 12 month figure and having regard to the Claimant's records I think that £441.41 is likely to be about correct

Notice pay

34. The Claimant was entitled to one weeks statutory/contractual notice when dismissed - but was not paid this …so this claim succeeds in the sum of **£441.41**

The reference under section 11 and for compensation under section 12(4) Employment Rights Act 1996 in relation to the Respondent's failure to provide payslips.

35. This is limited to any unnotified deductions in the period of 13 weeks prior to the date of presentation of the ET1 which was 7/8/23. The only relevant payslip within this period identified by the Claimant is the payslip dated 31/5/23 (page 243 of the bundle) which the Claimant received only on 21/11/23. In fact the Respondent made a complete deduction of the Claimant's pay on 31/5 because it did not pay him at all in relation to that payslip until November 2023. When it was received it showed deductions of £254.37. As a consequence of the late provision of the payslip, the deduction was unnotified to the Claimant for over 6 months. According to the Claimant there had been a pattern of the Respondent either proving no payslips or providing inaccurate payslips. I find that it is just to award the Claimant the sum of **£254.37** under this head.

Section 38

36. When the proceedings were begun the Respondent was in breach of its duty under section 1(1) or 4(1) of the ERA 1996 (failure to provide a statement of initial or changed employment particulars). Although the Claimant was provided with a written contract by 440 Associates Ltd, he was not issued with a new contract or revised terms of employment when his employment transferred to 440 Solutions Ltd (the Respondent) or when his pay rate increased to £13 per hour. The Claimant was prejudiced by this omission - for example earlier in these proceedings he was confused as to the identity of his employer. I find that

it is proper to award him the higher amount referred to in section 38 of The Employment Act 2002 - ie 4 x £441.41 = **£1765.64**.

Summary of sums due	
Wages	£7416.00
Holidays	£2917.72
Notice pay	£441.41
Late payslip	£254.37
Sect 38	£1765.64
Total	**£12795.14**

Employment Judge J S Burns
24/04/2024

For Secretary of the Tribunals

9 May 2024
Date sent to parties