Case No: 2219206/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms C Chambers

Respondents: (1) London Borough of Islington
(2) Venn Group Ltd

Heard at: London Central (by remove video hearing) **On:** 4 July 2024

Before: Employment Judge B Smith (sitting alone)

Representation
Claimant: In person
Respondents: (1) Mr Harding (Counsel)
(2) Mr Crow (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claim of unauthorised deduction of wages is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

2. The complaint of a breach of regulation 5 Agency Workers Regulations 2010 against the second respondent is struck out because it has no reasonable prospect of success.

3. The complaint of a breach of regulation 5 Agency Workers Regulations 2010 in respect of non-payment of a national pay award increase is struck out because it has no reasonable prospect of success.

4. The application to strike out the complaint of a breach of regulation 5 Agency Workers Regulations 2010 in respect of holiday pay and bank holiday pay is refused.

5. The complaint of a breach of regulation 5 Agency Workers Regulations 2010 in respect of holiday pay and bank holiday pay was presented within the applicable time limit. If this is wrong, it is just and equitable to consider the complaint. The complaint will therefore proceed.

Employment Judge Barry Smith
5 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 July 2024
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FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. The claimant was supplied by the second respondent ('R2'), a recruitment agency, to the first respondent ('R1') a local authority, as a Senior Internal Comms and Engagement Officer between 20 April 2022 and 11 August 2023. Early conciliation with R1 started on 24 October 2023 and ended on 23 November 2023. Early conciliation with R2 stated on 21 November 2023 and ended on 23 November 2023. The claim form was presented on 22 December 2023.

2. By order of EJ Green dated 23 April 2024 a preliminary hearing was held to determine the following questions:

    a. Should the claims or any part of the claims against the first respondent be struck out because it has no reasonable prospect of success?

    b. Does the claim or any part of it against the first respondent have little reasonable prospect of success? If so, should the claimant be ordered to pay a deposit of between £1 and £1000 as a condition of continuing with it?

c. Was it reasonably practicable to present the claims against the second respondent within the time limit? If not, was it presented within a reasonable period?

3. The hearing also included, without objection, the second respondent's application to strike out the claims (alternatively, for a deposit order) on the same basis. Also, the time limit issue was amended (by agreement) to correctly reflect the law, namely whether it would be just and equitable to effectively extend the time limit if the claims were presented out of time.

4. The claimant briefly gave evidence under oath about why the claims were brought out of time and the respondents given the opportunity to cross-examine, although this was not necessary.

5. The claimant was given a break during the hearing to consider the second respondent's written skeleton argument. All parties made oral submissions. No adjustments were required by the participants.

6. The hearing bundle was 177 pages long. I also took into account the claimants response by email to the second respondent's strike out application dated 19 June 2024. It was confirmed during the hearing that the claimant's 'additional info' bundle had been incorporated into the hearing bundle. During the hearing, the R1 adduced the 'Statement of Particulars' dated April 2022 which is a blank relevant standard terms and conditions in place at R1 at that time. No objection to this was raised and it was adduced in response to a question by the tribunal about the terms and conditions of the comparator.

The claims

7. The parties agreed that for the purposes of the Agency Workers Regulations 2010 ('AWR'): the claimant was an agency worker, R1 was a hirer, and R2 was a temporary work agency.

8. On clarification, no party asked for another respondent to be added to the claims, even though there were two others who potentially could be. In those circumstances I decided that no other party should be added the claims. This is because no party seeks to claim against them, and it was not otherwise in the interests of justice to add additional respondents to this case.

9. At the start of the hearing it was necessary to clarify exactly what the claims were. The claimant confirmed that no claim for notice pay was made and this appears to be an error in the CMO of EJ Green dated 23 April 2024. The claimant also clarified that she did not bring a separate unlawful deduction of wages claim about sums which were purportedly deducted by someone in respect of national insurance contributions. These were only included in the claim form because it was a query about this that triggered her wider enquiries. It follows that there is no standalone unlawful deduction from wages claim.

10. The claimant confirmed that her claim was limited to those amounts made in the claim form. These are for alleged breaches of the AWR as follows:

    a. £3,675.26 holiday pay. This is because the claimant was only paid holiday pay at a rate of between 9.28 and 9.33%, whereas she says that she should have been given 33 days holiday between 22 July 2022 and 1 April 2023 (at 14.54%) and then 34 days holiday (at 15.04%;

    b. £2,600 in respect of 8 bank holidays for which she was not paid; and

    c. £2,727 for two pay awards made to direct employees (£1,925 awarded in November 2022 and backdated to April 2022, and £802 awarded in April 2023 and pro-rated to her leaving date).

11. The claimant also says that the above amounted to an unlawful deduction from wages because she was entitled to those amounts by virtue of the AWR and was not paid it.

The law

Strike out / deposit orders

12. A tribunal may strike out all or part of a claim under rule rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 if it has no reasonable prospect of success.

13. A tribunal may make a deposit order under rule 39 of the above rules if a specific allegation or argument in a claim has little reasonable prospect of success. The tribunal must take into account, having made enquiries, of the paying party's ability to pay when deciding the amount of the deposit.

14. Tribunals should not be deterred from striking out a claim that may involve a dispute of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established. As held by the Court of Appeal in *Ahir v British Airways plc* [2017] EWCA Civ 1392 para [16] (Underhill LJ):

'16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.'

15. The claimant's case must ordinarily be taken at its highest and if the question of whether a claim has reasonable prospects of success turns on

factual issues that are disputed, it is highly unlikely that strike-out will be appropriate*: Cox v Adecco Group UK and Ireland and ors* 2021 ICR 1307.

Unauthorised deductions from wages

16. The right not to suffer unauthorised deductions from wages is found in Employment Rights Act (ERA) 1996, which so far as is relevant states:

13.— Right not to suffer unauthorised deductions. (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.

… (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

17. The relevant question is whether the amount is properly payable which clearly connotes a legal entitlement: *New Century Cleaning Co ltd v Church* [2000] IRLR 27 CA.

Agency Workers Regulations 2010

18. Regulation 5 AWR provides:

(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

(a) other than by using the services of a temporary work agency; and

(b) at the time the qualifying period commenced.

(2) For the purposes of paragraph (1), the basic working and employment conditions are —

(a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;

(b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where—

(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

(b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

[…]

19. Regulation 6 AWR provides:

(1) In regulation 5(2) and (3)"relevant terms and conditions" means terms and conditions relating to—

(a) pay;

(b) the duration of working time;

(c) night work;

(d) rest periods;

(e) rest breaks; and

(f) annual leave.

(2) For the purposes of paragraph (1)(a), "pay" means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

20. Regulation 14 AWR provides:

(1) Subject to paragraph (3), a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(2) The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

[…]

21. In *Kocur v Angard Staffing Solutions Ltd* UKEAT/0181/17/BA it was held that where regulation 5 refers to 'the same' this means 'at least' those of employees (at [18]). The case also involved consideration as to whether or not when deciding whether or not regulation 5 AWR is breached the tribunal must consider the 'whole' package, such as if less favourable rest periods can be offset or otherwise compensated by higher rates of hourly pay. The EAT in *Kocur* rejected that approach; a 'term-by-term' approach is required:

'[27] We agree with both counsel that a term-by-term approach is required by the AWR. The structure of the AWR, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (e.g. annual leave) by conferring a greater entitlement in respect of another (e.g. rest periods), drive one to that conclusion. However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker

is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave.

28. However, the analysis in the preceding paragraph is subject to an important caveat. That is that the payment mechanism deployed must be transparent and the agency worker must be able readily to ascertain precisely what aspect of his remuneration relates to annual leave. In our judgment, if it is clear on the facts that an agency worker receives remuneration in respect of annual leave which is at least that which employees receive, then, notwithstanding that this may be achieved by a different mechanism, the requirement under Regulation 5(1) AWR would be met.'

22. The relevant time period to bring AWR claims is three months from the date of infringement or breach plus Acas conciliation. Where an act or failure to act is part of a series of similar acts of failures comprising the infringement it is from the last of them (regulation 18 AWR). The tribunal can consider a complaint that is out of time if it is just and equitable to do so (regulation 18(5) AWR).

23. I took into account the authorities referred to in R2's skeleton argument. It is not necessary to repeat those here. However, when deciding whether or not it is just and equitable to consider a claim such as this out of time, it was important that I take into account the reason for any delay, and the respective prejudice to both sides.

Analysis

24. In this claim, the claimant carried out work for R1 under R1's direction. R1 contracted with another entity Matrix SCM Ltd ('Matrix') for the provision of that work. Matrix then contracted with R2. R2 contracted with an umbrella company 'Parasol'. C's contract of employment was with Parasol. It was not

the case that Parasol was R2's agent. There is no suggestion that R2 was the claimant's employer and this is reflected in a document signed between the claimant and R2. The claimant was paid a daily rate of £325. This is said to include rolled-up holiday pay. A small deduction was made from this as payment to Parasol. Under the claimant's contract with Parasol she was entitled to the equivalent of 5.6 weeks' paid annual leave or any such enhanced paid annual leave entitlement as set out in an Assignment Schedule. No such Assignment Schedule was included in the evidence. I have therefore proceeded on the basis that the claimant only received 5.6 weeks' paid annual leave. The claimant's pay slips from Parasol include notification of basic pay, holiday pay on basic pay, commission, holiday pay on commission, and deductions including a deduction to Parasol (eg. £28.50 on pay of £1,328.76 for the week of 11 January 2023 to 17 January 2023).

25. The claimants claim, in essence, was that she was not paid the same holiday pay as direct employees doing the same job because (a) they received 33 days (34 days from April 2023) at 14:54% and 15.04%, (b) they were paid for bank holidays, and pay was different because (c) they received annual two annual pay awards. The holiday entitlement was taken from figures obtained in correspondence between the parties after the claimant raised concerns about a separate issue with national insurance. The annual pay awards do not appear to be contractual entitlements from the wording of the standard terms and conditions I was provided with.

26. The respondents resist the claims in part on the basis that at the claimant's daily rate she was always going to receive substantially more pay, including holiday pay, than the direct employee comparator. The documents provided to me show that the relevant grade was PO3-4 with highest possible salary of £48,500 (gross) for the year 2023/24. The claimant's rate of pay was £325 per day (gross) less deductions. I accept that, from the payslips provided in evidence, the deductions made by Parasol were minimal and would not materially change the outcome of the difference in pay between the claimant and the direct comparator. Assuming 5.6 weeks of holiday (as per the claimant's contract with Parasol), this suggests that she had 46.4 weeks of

potential earnings, which would be potential gross earnings of £75,400 (46.4 * 5 days * £325) before deductions. This is considerably in excess of the direct comparator. Even once the comparator's higher rate of holiday is taken into account at 34 days, I accept R2's calculation that this would give the equivalent of 6.8016 weeks annual leave. This gives 45.1984 potential weeks where the claimant could have been working, which (when multiplied by 5 days and the claimant's daily rate of £325) gives potential earnings of £73,447.40. Even if the claimant did not work every day, as she may not have done, it is appropriate to compare the yearly earnings and holiday pay so that we are comparing like with like.

Conclusions

Unlawful deductions from wages

27. I find that the claim that any of the complaints amounted to an unlawful deduction of wages under ERA 1996 has no reasonable prospects of success, and so that claim is struck out. This is because the claim confuses the fact that various entitles may be liable for breaching the AWR but this does not establish that the claimant is entitled to, for example, those wages. An unlawful deduction of wages claim should be for wages (etc.) that is properly payable to the claimant. However, a claim for breaches of AWR is one that the claimant's contractual entitlements were not the same they should have been under regulation 5 AWR. To present this AWR claim as also an unlawful deduction of wages claim is misconceived, and also adds nothing to the principal claim made.

Claims against R2

28. R2's liability in this case is solely under the AWR. R2 did not exercise any control of the claimant's work at R1. The claimant accepted during the first case management hearing before EJ Green that the pay rates were set by R1 (as recorded at [41]). The contract between the claimant and Parasol confirmed that the rates were agreed with R1 by Parasol on the claimant's

behalf (clause 3.1 of that contract). In those circumstances, it cannot be said that R2 had any responsibility for the alleged breaches. However, R2 can only be liable to the extent that it had responsibility under regulation 14(1). It is appropriate to include within 'rates' the holiday pay, and holiday, entitlement. This is because there is no suggestion that R2 could influence this factor at all.

29. After the pay issues were raised by the claimant correspondence between the various entities involved suggests that R2 did make reasonable efforts to establish whether or not the claimant was being treated worse than a comparator.

30. Taking the claimant's case at its highest, there are no facts which suggest that R2 was responsible for any breach of regulation 5 which may have occurred. Although I consider it premature to find that a further defence under regulation 14(3) (which relates to obtaining information), the efforts made by R2 after the dispute arose are relevant to demonstrating its lack of control over the rates of pay and holiday pay. In circumstances described I find that the claim that R2 was responsible for any breach have no reasonable prospects of success.

Claims in respect of pay awards

31. It is common ground that the claimant was paid at a significantly higher equivalent daily rate than her direct comparator employee. The direct comparator's pay award was not something that they were contractually entitled to, rather it was an increase in their contractual entitlement. However, it did not put them at a higher rate of pay than the claimant, even taking her case at its highest. I do not consider that the AWR requires that if a hirer gives a discretionary pay increase to its permanent employees it is bound to give the same increase to all agency workers. That situation would only arise if the pay increase would leave the agency workers worse off than their comparators when their pay is compared. The claimant's case, at its highest, does not suggest that the pay awards took the direct comparators to a higher level of overall pay than she had.

32. In those circumstances, the complaint that the claimant did not have the same, meaning 'at least' basic working and employment conditions as the direct employees because they were given pay rises during that time has no reasonable prospects of success. That aspect of the claimant's complaints is therefore struck out against both respondents.

33. The above approach is consistent with that taken in *Kocur* (above) which stated that (for holiday pay) if it is clear on the facts that the agency worker receives remuneration which is at least that which the employees receive then the duty under regulation 5(1) AWR is met.

Claims in respect of holiday pay and bank holidays

34. The respondents submit that the aspects of the complaint about holiday pay should be struck out for the same reasons. I consider that it is very likely that a tribunal at a final hearing will consider that the claim in respect of holiday pay will fail for exactly the same reasons, namely that, once everything is considered, although the claimant was paid holiday pay under a different mechanism, she was paid the same or more than direct employees.

35. However, I consider that there is a slight difference between overall pay and holiday pay. Firstly, the claimant raises a distinction between 8 bank holidays and her overall entitlement. Secondly, there is a clear difference between the claimant's annual leave (5.6 weeks) and the comparator's annual leave entitlement (33/34 days). Also, the EAT in *Kocur* made it clear that for a claim to fail on that basis the payment mechanism used must be transparent and the agency worker must be able readily to ascertain precisely what aspect of the remuneration relates to annual leave. It was not clear to me, on the information available, that this was necessarily the case. Although the calculations made by the respondents are compelling, I am not satisfied at this stage, and taking into account the need for caution before striking out a claim, that it is currently clear on the facts that the claimant received remuneration in respect of annual leave which was at least what the direct employees received.

36. In those circumstances the applications to strike out that element of the claim (which only remains against R1 after the above conclusions) are refused. However, given how high the claimant's daily rate was, I consider that her claim about holiday pay (including bank holidays) has little reasonable prospects of success.

37. Taking into account the available information on the claimant's means, and bearing in mind the need for the amount of a deposit order not to unduly restrict the claimant's ability to pursue her claims, and proportionality with the amount of the holiday pay claims, I consider that a deposit of £100 should be paid for it to proceed. This encompasses both aspects of the holiday pay-AWR claim.

38. The consequences of non-payment of the deposit, or if the claims fail for the same or substantially the same reasons as outlined here, were clearly explained to the claimant, particularly that she would be treated as having acted unreasonably in pursuing the allegation for the purposes of awarding costs against her.

Time limits

39. In light of the fact that the claims remain only against R1 and the dates of early conciliation are different between the respondents if the effective date of termination was 11 August 2023 then the claim form appears to have been submitted on time against the first respondent. Any claims for holiday pay, or in respect of the bank holiday, would amount to a series ending on the last day.

40. However, if I am wrong on the above analysis, I consider it just and equitable to consider the claims in the alternative. This is because the delay has not caused any identifiable prejudice to the respondent. I consider from the available documentation that there was genuine confusion on the part of the claimant about her pay arrangements and it was not necessarily obvious from the arrangements who her employer was and whether or not she was

in fact receiving at least the same terms and conditions as her direct comparator. There was a reasonably considerable amount of post-termination correspondence on all of the relevant issues and, in those circumstances, it is just and equitable to consider the AWR claim out of time.

41. It is not necessary to consider time limits about the other claims in light of my conclusions above.

Employment Judge Barry Smith
5 July 2024

SENT TO THE PARTIES ON

10 July 2024
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FOR THE TRIBUNAL OFFICE