EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr G A Idarraga Impata		Templewood Cleaning Services Ltd

REASONS FOR THE JUDGMENT
SENT TO THE PARTIES ON 7 SEPTEMBER 2018

1 These reasons are supplied pursuant to an order of the Employment Appeal Tribunal dated 17 December 2018.

2 At all relevant times the Claimant, an Ecuadorean national, was employed by the Respondents as a cleaner.

3 By his claim form presented on 24 February 2018, the Claimant brought claims for unpaid wages.

4 The case came before me on 4 September 2018 for final hearing. The Claimant was represented by Mr R O'Keeffe, a trade union representative, and the Respondents by Ms S Stuart, HR Manager.

5 Owing to an administrative error, the Tribunal failed to book an English/Spanish interpreter, as had been directed. The Claimant's grasp of English is very weak and I was not prepared to allow him to give oral evidence without an independent interpreter present. We seemed to be driven to adjourning the case but after discussions between the parties the difficulty was overcome because (a) I was just persuaded that the Claimant's command of English was sufficient for him to be able to assure me through Mr O'Keeffe that he had been taken through his witness statement and could confirm its contents and (b) Ms Stuart told me that she wished to raise no factual challenge to his evidence. On that footing, I proceeded to examine the claims without sworn evidence on either side.

6 There were two claims, called PQ ('Pay Query') 1 and PQ2. In addition, the claim form set out a third claim, based on the Claimant's alleged entitlement to work and be paid for 20 hours per week. It was said that he was being denied 5 hours per week.

7 After some discussion, Mr O'Keeffe on instructions abandoned PQ1.

8 PQ2 was put as a claim for £73.15, based on an alleged failure to pay for 6.5 hours worked and 3 hours taken as annual leave, all at the rate of £7.70 per hour. The Claimant had originally complained that pay for 36.5 hours was owing and the Respondents, having conducted a review, had accepted liability for 27 hours and made a payment accordingly. Since Ms Stuart (a) did not seek to challenge the Claimant's evidence (his witness statement gave details of the outstanding claim), or his figures, (b) did not pursue any time defence and (c) conceded in argument that the Respondents might have failed to account to him in full, at least in respect of holiday pay, but advanced no positive case as to the extent of their liability, I found PQ2 proven in the sum claimed.

9 I turned to the third claim. Mr O'Keeffe then applied to amend the claim form to claim unpaid wages in the form of the difference between what was said to have been the Claimant's contractual entitlement (20 hours' pay) and what he had received (15 hours' pay for 15 hours worked), from the date of presentation of the claim form to the date of the hearing. In other words, the application was to update the claim already made. Ms Stuart did not oppose the application on any procedural ground. She did maintain that the third claim was untenable (see below) and, by implication at least, opposed the application on the basis that there was nothing to be gained by extending the reach of a claim bound to fail. I considered it in keeping with the overriding objective to grant the amendment. If the claim was without merit, no prejudice would result from amending it. Conversely, if it had merit, granting the amendment would spare the parties the needless trouble and delay which fresh proceedings would entail.

10 As amended, the third claim was quantified in the sum of £1,647.15, being 22 weeks' pay (110 hours) at £7.50 per hour and 21 weeks' pay (105 hours) at £7.83 per hour. The arithmetic was agreed.

11 There was no dispute that the Claimant was at all relevant times willing and able to work the five weekly hours in dispute. The issue in relation to the third claim was whether he was entitled under his contract to 20 hours' work (and pay). In his witness statement he explained that he was recruited at a meeting in December 2012 by Franklin Tate, the Respondents' Area Manager, to work 20 hours' per week and that, until the date (in November 2017) from which the third claim runs, he worked a twenty-hour week. He stated that at the time of recruitment he was given some loose documents to complete and sign, including pages 1 and 5 of the Respondents' standard-form contract, but not the other pages. The papers which he received were not translated for him or explained to him. It was common ground that, from November 2017, he was allocated only 15 hours weekly, and paid for those hours but no more. He understood that he was entering into a 20-hours-per-week contract. Nothing was said about any right on the part of the Respondents to reduce his hours.

12 Ms Stuart relied on the written contract, signed by the Claimant on page 5. She drew attention to clause 5, which reads (there is no cl 5.1):

> **5.2 This is a zero hour's (sic) contract, you will be required work allocated hours set out in your availability matrix. Once you have agreed to these hour (sic)**

either verbal (sic) or by contract, failure to attend work will be dealt with under the disciplinary procedures.

5.3 You will be provided with notice of hours of work, however there may be occasions where you will be required to work at short notice.

5.4 any overtime agreed either verbally or contracted, you will be required to work, and failure to attend will be dealt with under the disciplinary procedures.

13 Ms Stuart also relied on the judgment of the Employment Appeal Tribunal ('EAT') in *Cortez v Templewood Cleaning Services Ltd and another* UKEATPA/0672/17/RN. The Employment Tribunal ('ET') in that case found that clauses 5.2-5.4, although poorly drafted, were effective to create an agreement which guaranteed no minimum number of hours, and was valid and not a 'sham' in the sense identified in *Autoclenz Ltd v Belcher* [2011] ICR 1157. The ET further found on the facts that there was no oral agreement providing for a set minimum allocation of hours and rejected an alternative claim based on a term said to be implied by custom and practice. This analysis was fatal to the claim based on a cut in the claimant's weekly hours from 30 to 15. The EAT held that there was no arguable ground of appeal.

14 I was satisfied on the evidence that the third claim was made out. By his evidence the Claimant had established an oral agreement under which the Respondents had undertaken to give him 20 hours' work per week and pay him at not less than the national minimum wage. He had been able and willing at all material times to work the contracted hours and was entitled to be paid accordingly. The Respondents had adduced no evidence to challenge his account of the terms under which he was engaged and, for nearly five years, worked without interruption. The written contract was of no effect. He was not given the three middle pages (on which the 'zero hours' clauses are to be found. There was no meeting of minds on those terms. He was given no reason to suppose that his signature committed him to terms which differed materially from the agreement outlined to him by Mr Tate.

15 On this reasoning, *Autoclenz* and implied terms arguments do not arise.

16 The Respondents should learn lessons from this case about the need to be very careful to ensure that all recruits to their employment (many faced with poor language skills or other disadvantages) enter into properly executed contracts which represent a proper, informed bargain to which the law will hold both sides.

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EMPLOYMENT JUDGE SNELSON
14 February 2019

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Reasons entered in the Register and copies sent to the parties on 14 Feb. 19

..... for Secretary of the Tribunals