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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101698/2019 (A)

Heard by telephone on 19 January 2022 (A)

Employment Judge L Wiseman

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Mr D Cunningham

**Claimant
Represented by:
Ms C Finlay -
Partner**

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A Taste of Scotland

**Respondent
Represented by:
Mr K Tudhope
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The Tribunal decided to grant the respondent's application to strike out part of the claim. The claims in respect of (i) payment for overtime worked; (ii) payment at a higher hourly rate of pay and (iii) rest periods are struck out.

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(2) The claim in respect of holiday pay will now proceed to a hearing.

REASONS

1. This hearing was a Preliminary Hearing to determine the respondent's application for strike out of part of the claim.
2. The claimant presented a claim form in which he asserted he was an agricultural worker and he sought payments in respect of wages, holiday pay and lack of rest breaks.
3. The respondent entered a response in which it disputed the claimant was an agricultural worker, and denied any further payments were due to the claimant.
4. There have been two case management Preliminary Hearings to clarify and particularise the basis of the claim and make arrangements for a hearing. The claimant's representative, by email of the 18 August, confirmed the claim was in four parts and confirmed the sums sought were as follows:
 - the sum of £13,281.84 sought in respect of having worked 48 hours per week but having only been paid for 39 hours per week;
 - the sum of £2369.76 sought because hours worked should have been paid at a higher rate;
 - the sum of £3461.30 for holidays accrued but not taken during his employment and
 - the sum of £6357.12 for rest days which should have been made available.
5. The respondent's representative, by email of the 20 August 2021, made an application to strike out all parts of the claim except for one part of the holiday pay claim. Mr Tudhope, at the commencement of today's hearing, confirmed he made no application for strike out in respect of the holiday pay claim.

Accordingly, submissions were limited to strike out of three other aspects of the claim (overtime, hourly rate and rest days).

6. The issue of whether the claimant was an agricultural worker remains in dispute and it was made clear that it was not a matter for discussion or determination today.

The application for strike out

Respondent's submission – overtime hours

7. Mr Tudhope invited the Tribunal to strike out part of the claim, relating to wages for hours worked over 39 hours per week, because the claimant is not able to specify what hours were worked and when they were worked. The claimant, in response to the application for strike out, had noted that it “would be impossible to detail the work undertaken on a day to day basis”.

8. Mr Tudhope submitted the respondent could not defend itself in a claim for unspecified overtime over a two year period.

9. The fact the claimant could not say when he worked overtime hours was fatal to his claim. The claim had no reasonable prospect of success and should be struck out.

10. Mr Tudhope confirmed the claimant had been paid a salary and not an hourly rate. He submitted the claimant had determined his own working hours and brought in others to help out when necessary.

11. Mr Tudhope noted, in relation to the claimant's last point, that if the claimant was not an agricultural worker he would not be able to rely on the provisions made by the Agricultural Workers Board.

Claimant's submission – overtime hours

12. The claimant confirmed he had calculated the sum due in respect of overtime by using 9 hours per week overtime: this was the difference between his contract, which said his hours were not to exceed 48 hours per week and the agricultural wages board which referred to 39 hours per week.

13. Mr Cunningham submitted it would not have been possible to do all the work required in 39 hours. He suggested witnesses and email correspondence between himself and Mr Cooper would support his position and demonstrate the work could not be done in 39 hours.

5 14. Mr Cunningham also referred to the Agricultural Wages Board which provided for a contract to be set aside where the hours worked exceeded the salary paid.

Respondent's submission – rate of pay

10 15. Mr Tudhope submitted the claim was predicated on the claimant being an agricultural worker and the Agricultural Wages Order No 65 2018 applying to him. It was submitted that even if the claimant was an agricultural worker, the Order would not apply because, in terms of regulation 7 of the Order, a person had, in order to obtain the higher hourly rate of pay, to have a Scottish or National Vocational Qualification (as specified) in Agriculture. The claimant
15 had no such qualification.

16. Mr Tudhope submitted that even if the claimant came under the provisions of the Order, the hourly rate of £7.83 plus the additional hourly supplement of £1.20, did not equate to the £9.46 hourly rate sought by the claimant.

17. Mr Tudhope, in response to the claimant's submission, noted the Agricultural
20 Wages Board could not override or ignore the legislation. He further noted there was reference in the Order to a "certificate of acquired experience" and questioned whether this was what the claimant referred to.

18. ***Claimant's submission – rate of pay***

25 19. Mr Cunningham submitted the Agricultural Wages Board recognised "grandfather rights" whereby older, experienced workers, who did not have qualifications, but who had experience could benefit from the higher hourly rate of pay. Mr Cunningham acknowledged this was not stated in the Order, but insisted it was recognised by all.

Respondent's submission – rest days

20. Mr Tudhope noted the claimant had, when providing further particulars of his claim, calculated he ought, during the period of his employment, to have had 104 rest days. The claimant had not provided any specification of when those days ought to have been granted.
21. Mr Tudhope referred to regulation 11 of the Working Time Regulations regarding rest periods and to regulation 30 regarding remedy and invited the Tribunal to have regard to the wording of regulation 30 which referred to a situation where an employer has “refused to permit [a worker] to exercise any right he has ..” and where a claim had to be presented before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted.
22. The claimant had not identified when he should have had a rest day but his employer refused to let him exercise this right. The claim could not succeed and should be struck out.

Claimant's submission – rest days

23. Mr Cunningham acknowledged that his claim was not so much that his employer did not let him have a rest day, but the issue was who would provide cover if he had a rest day. Mr Cunningham accepted he had not ever requested a rest day.

Discussion and Decision

Overtime hours

24. I firstly had regard to the fact there is a fundamental dispute between the parties regarding the issue of whether the claimant was an “agricultural worker” in terms of the Agricultural Workers (Scotland) Act 1949. The claimant believed he was an agricultural worker and that accordingly the Agricultural Workers (Scotland) Wages (no 65) Order 2018 applied to him. The respondent disputed this and placed reliance on the claimant’s contract of employment as governing the terms of the relationship. This dispute is not

one to be determined today, and Mr Tudhope accepted that for the purposes of the strike out application, the claimant's case had to be taken at its highest.

25. I next had regard to the application to strike out that part of the claim relating to payment for hours worked in excess of 39 hours per week. The claimant, in the claim form, expressed the claim in terms that he had worked 56 hours per week for 40 weeks of the year (being 17 hours of overtime per week for 40 weeks) and had worked 16 hours per day during calving for 12 weeks (being 8 hours overtime per day for 12 weeks).
26. The claimant, following a call by the respondent for specification of the dates overtime was worked, and following a direction given by an Employment Judge at a case management Preliminary Hearing, clarified that he was seeking overtime for all hours worked in excess of 39 hours per week. The claimant confirmed he was prepared to limit this to 9 hours of overtime each week (being the difference between 39 hours per week and 48 hours per week). The claimant's position was, accordingly, that he worked 48 hours each week but was paid for 39 hours per week.
27. Section 13 Employment Rights Act provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract. In particular, section 13(3) provides that *"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 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."*
28. The Tribunal determining this claim would be required to establish the total amount of wages "properly payable" to the claimant. The Tribunal, in order to determine the amount of wages properly payable to the claimant, would need to hear evidence regarding the hours worked by the claimant. The claimant accepted he did not keep a diary or note of the hours worked and he did not

clock in/out. The claimant also accepted it “would be impossible” to detail the work undertaken on a day to day basis.

29. The claimant intends to support his position by arguing that he could not have done the work expected of him in 39 hours. The difficulty with the claimant’s position is that the nature of his work was varied: he would not be doing the same tasks every day or indeed every week or for the same proportion of time each day/week. I did not doubt the list of duties the claimant may have been expected to carry out would be lengthy, but he would not be required to carry out all of those duties every day. There would be a combination of daily tasks (for example, feeding animals) and other tasks to be done as and when necessary (for example, repairing a fence). There would also be other factors which would have a bearing on the work able to be done, for example, the weather and the time of year.

30. The claimant referred to calling witnesses to support his case, but there was no suggestion those witnesses had any better evidence of hours worked, or that they accompanied the claimant at work on a daily basis. My understanding was that the witnesses would be called to support the claimant’s position that his hours of work were dictated by the amount of work he had to do, and that the amount he had to do could not have been done in 39 hours per week.

31. Mr Tudhope’s submission was focussed on there being no reasonable prospect of the claim succeeding in circumstances where the claimant sought to argue that he had worked unspecified overtime over a two year period. He questioned how the respondent could defend such a claim.

32. I, in considering the application for strike out of this part of the claim, had regard to the fact the claimant, in bringing the claim, bears the onus of demonstrating that he worked 48 hours per week. The claimant has no documentary evidence to support his claim: he cannot, for example, produce a note or diary of his work or hours. He has said it would be “impossible” to detail the work undertaken on a day to day or hour by hour basis. How then

can the claimant discharge the onus of demonstrating that he worked 48 hours per week?

5 33. The respondent's representative would be entitled to question the claimant about what he did on a week by week basis: so, for example, what did the claimant do in the week commencing 23 October 2017? On the basis of what the claimant has said, he will be unable to answer that question other than by giving a general breakdown of things he may have been required to do that week. I considered that would not be sufficient to discharge the onus on him.

10 34. I was satisfied the claim has no reasonable prospect of success because the claimant is not able to demonstrate when he worked overtime hours or what he did during those hours. I decided, for that reason, to grant the respondent's application to strike out this part of the claim because it has no reasonable prospect of success.

Higher rate of pay

15 35. I next considered the application for strike out of that part of the claim relating to hours worked being paid at a higher rate of pay. The claimant argued that "grandfather rights" applied to recognise his experience and allow him to be paid at the higher rate of pay for hours worked.

20 36. I, in considering this issue, had regard to the terms of Agricultural Workers (Scotland) Wages (no 65) Order 2018. Paragraph 5 set out the minimum hourly rate applicable to agricultural workers other than apprentices. Paragraph 7 provides for an additional sum to be paid in the following circumstances:

"where a worker to whom article 5 above applies, holds either

25 (a) *a Scottish or NVQ in an agricultural subject at level 111 or above or*

(b) an apprenticeship certificate approved by Lantra (formerly ATB Landbase) or a certificate of acquired experience, they shall be paid, in addition to the sum specified in article 5 ... a sum no less than £1.20 from 1 April 2018."

35. The claimant did not suggest he held a Scottish or NVQ in an agricultural subject, nor did he suggest he had a “certificate of acquired experience”. The claimant spoke of “grandfather rights” which applied to recognise his experience.
- 5 36. I acknowledged there is provision within regulation 7 for acquired experience to be recognised, but a certificate of acquired experience has to be held. The claimant does not hold a certificate of acquired experience; and there was no provision within the Order, and no suggestion, that acquired experience was automatically recognised as entitling a worker to the additional sum.
- 10 37. I concluded that in the absence of the claimant coming within the terms of regulation 7, his claim that he was entitled to be paid the additional sum for hours worked, had no reasonable prospect of success. I accordingly decided to strike out this part of the claim.

Rest periods

- 15 38. I next considered the application for strike out of that part of the claim relating to weekly rest periods. The claimant, in the claim form and further particulars, calculated that he should have been allowed 104 days off, and he sought payment for those days. The claimant, in his submission to the Tribunal today, said that *“it was not so much that he didn’t let me have a rest, it was who*
- 20 *would cover”*. The claimant acknowledged he had never asked for a rest day.
39. I, in considering the respondent’s submission, had regard to the terms of regulation 11 of the Working Time Regulations 1998, which provides that a worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven day period during which he works for his employer. Regulation 11
- 25 sets out the remedy to which a worker is entitled if the claim is successful. Regulation 11 provides that a worker may present a complaint to an Employment Tribunal that his employer has “refused to permit him to exercise any right he has under ... regulation 11(1)..” Further, the time limit for presenting the complaint is “before the end of the period of three months

beginning with the date on which it is alleged the exercise of the right should have been permitted ..”

40. I also had regard to the case of ***Miles v Linkage Community Trust Ltd 2008 IRLR 602*** where the EAT held that the term “refusal to permit” in regulation
5 30 meant a distinct act in response to a worker’s attempt to exercise his or her right.

41. The claimant, as stated above, did not ever attempt to exercise his right to a rest period. This, accordingly, was not a case where there had been a refusal
10 by the employer to permit a rest period. I concluded, accordingly, that the claim did not have a reasonable prospect of success, and I decided to strike it out for that reason.

15 Employment Judge: Lucy Wiseman
Date of Judgment: 08 February 2022
Entered in register: 09 February 2022
and copied to parties

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