EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104001/2024

Heard in Glasgow via Cloud Video Platform (CVP) on 17 September 2024

Employment Judge E Mannion

Mr E McGrath	**Claimant** **Represented by** **Mr B Mitchell -** **Lay Representative**
The Scottish Ministers	**Respondent** **Represented by** **Mr C McCracken -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for strike out of the claim under Rule 37 is granted. The claimant's application for amendment is dismissed.

REASONS

1. The claimant lodged a claim for unpaid holiday pay on 8 March 2024, stating that he was financially disadvantaged by taking holiday. The holiday relates to a 5 day period of 21-25 August 2023. The respondent disputed the claim.

2. A Preliminary Hearing on time bar was scheduled. At the outset of the hearing, Mr McCracken submitted that Mr Mitchell recently confirmed that there was no deduction from the claimant's pay for the relevant period and so could not see how the claim could proceed. Mr Mitchell confirmed to the Tribunal that the claimant had not suffered a financial deduction, but that the manner in which his annual leave in August 2023 was recorded as against his rostered work has resulted in a deficit of 5.5 hours. As a result, he will have to work those 5.5 hours "for free" if he is unable to make them up. In the latter situation if he is

unable to make these hours up when his employment should end, the 5.5 hours will be deducted from his final salary payment.

3. Mr McCracken submitted that if no deductions were made, there is no basis for the claim. He indicated that the respondent was seeking strike out under Rule 37(1)(a) found in Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") on the basis that there was no reasonable prospect of success. Mr Mitchell confirmed he was objecting. I decided to proceed with the strike out application. The parties were asked if they were ready to go ahead or would like an adjournment to prepare. Mr McCracken indicated he was ready to proceed. Mr Mitchell initially indicated he was ready to proceed but then asked for some time to prepare. An adjournment of 35 minutes was granted to allow the parties take instructions and prepare submissions.

Relevant Law

4. A Tribunal is required to have regard to the overriding objective, found in the Rule 2 of the ET Rules. The overriding objective states as follows: *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

a) *ensuring that the parties are on an equal footing;*

b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

c) avoiding unnecessary formality and seeking flexibility in the proceedings;

d) avoiding delay, so far as compatible with proper consideration of the issues; and

e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their

representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

5. The strike out provisions are set out in Rule 37 of the ET Rules which states:

> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)*

6. Where a strike out application is made on the ground of no reasonable prospects of success the Tribunal must take a view on the merits of the case and only where satisfied that the claim or response has no reasonable prospects of success can it consider exercising its power to strike out.

7. The EAT held that the striking out process requires a two-stage test in **HM Prison Service v Dolby** [2003] IRLR 694, and in **Hassan v Tesco Stores Ltd** UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim. The second limb of the test requires consideration of the overriding objective of the ET Rules, proportionality and whether a fair hearing is still possible.

8. It is necessary for the tribunal to take the claimant's case at its highest for the purposes of a strike out application under Rule 37(1)(a) as per **Malik v Birmingham City Council and another EAT 0027/19**. Consideration should be given to whether there are crucial facts in dispute where there has been no opportunity for evidence on those disputed facts. In such cases, strike out is unlikely to be appropriate.

9. Guidance on approaching strike out applications against litigants in person was provided by the EAT in **Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307 EAT**. Where a claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing an amendment, taking into account the relevant circumstances.

10. There is no specific Rule which covers amendment applications. Rather the power to amend a claim falls into the case management powers set out at Rule 29 and Rule 30 of the ET Rules. The lead case in this area is **Selkent Bus Co Ltd v Moore 1996 ICR 836,** which sets out the key factors which should be taken into account in an amendment application. When balancing the interests of justice and the relative hardship to the parties, a tribunal should consider the following factors when determining an amendment application:

    a) The nature of the proposed amendment

    b) The relevance of time limits

    c) The timing and manner of the application

    d) Any other relevant factors

Respondent submissions

11. Mr McCracken set out a brief timeline of events with reference to the Bundle prepared for the time bar hearing. He noted that on the 31 August 2023, the claimant received his wages for the period 1-31 August 2023. This payment

was for £3,088.56. During August 2023, the claimant took a 5 day period of leave from the 21 – 25 August.

12. The claimant is contracted to work 37 hours per week on average across a 17 week roster period. The weeks can be made up of different shift patterns such as five days of eight and a half hour shifts, or five days of seven and a half hour shifts. Irrespective of the amount of time worked each month, the salary payment is the same. If at the end of the 17 week period an employee has exceeded the average of 37 hours per week, those excess hours can be taken as time off in lieu. If an employee works less than the average of 37 hours per week in the 17 week period, the shortfall will be "banked" and the employee will be required to work the shortfall in the subsequent rostered periods.

13. Where an employee takes ad hoc annual leave of five days or more, the annual leave is recorded at 37 hours per week. This is whether the employee is in fact rostered for more or less hours than 37 hours that week and in line with collectively bargained terms and conditions. In the claimant's case, he was rostered to work 42.5 hours for the week of 21 – 25 August but was only credited for 37 hours. Had he been rostered to work 30 hours that week, he would have been credited for 37 hours. There was no deduction from his wages as his salary is paid in 12 equal monthly installments.

14. As it has been agreed that there is no unlawful deduction as a result of the annual leave taken in August 2023, this is a claim that is bound to fail and has no reasonable prospect of success.

15. Mr McCracken referred to Cox v Adecco, specifically the quotation that no one gains by a hopeless case.

16. Mr McCracken submitted that striking out the claim is in line with the overriding objective. From the respondent's position, there is no less draconian measure the Tribunal can take. It is bound to fail at a final hearing.

17. In respect of the amendment application, Mr McCracken countered that it remains the respondent's position that there is no merit to the claimant's case.

His weekly hours are averaged over a 17 week period requiring to work 37 hours per week. Weekly hours can fluctuated between 42.5, 37 and 30 hours per week and generally even themselves out over the period. It is incorrect that he is prevented from taking leave. If he applied for annual leave, this would be approved. If he took annual leave on a week where he was rostered to work 30 hours, this would be recorded as 37 hours. He is choosing not to take annual leave.

18. In respect of the submission that a less draconian measure is to amend the claim, this would introduce an entirely new head of claim. Mr Mitchell has been noted as adviser on the ET1. The respondent sought confirmation of the claimant's case from Mr Mitchell on previous occasions but got no response. When speaking last week about the case Mr Mitchell did not indicate that he sought to amend the claim or that there was a different legal basis of claim. To change the head of claim now would result in prejudice for the respondent, as additional witnesses might be required and evidence could be affected by the passage of time.

Claimant submissions and evidence

19. It was submitted that the crux of the case is the policy and practice of banking hours in respect of annual leave. Had the annual leave policy that applies in other prisons but not Barlinnie been applied, the claimant would not have suffered a detriment. This is specifically in relation to annual leave of five or more days absence.

20. Mr Mitchell submitted that when the claim was lodged, the claimant did so by himself as a lay litigant and so may not have been clear in his wording. He confirmed that he was providing the claimant with advice from the point when the claimant contacted Acas, albeit that was not in a formal capacity. He noted that he is on the ET1 as a contact for the claimant and confirmed that he had a formal sit down discussion and review of the papers to advise the claimant after Acas had been contacted.

21. Mr Mitchell accepted that there is no financial loss to the claimant but that he has suffered a detriment as a result of taking annual leave. He is now required

to work for free. His annual leave has not been credited based on the hours rostered. There is merit to the claim and should not be struck out. The respondent recognised at the grievance stage that there was an issue that should be reviewed at national collective level.

22. Mr Mitchell submitted that a less draconian measure would be to allow an amendment to the claim – that the respondent's annual leave policy is in breach of the Working Time Directive and that the claimant in not permitted to take leave under the contract. Mr Mitchell was not able to cite the specific breach of the Working Time Directive the respondent has breached.

Decision

Amendment

23. I will deal first with the question of amendment. Mr Mitchell confirmed the claim should be amended as follows:

    a) The policy of recording annual leave at 37 hours rather than rostered hours is preventing the claimant from taking holidays as to do so would build up a deficit in hours. This is in breach of the Working Time Directive.

    b) The claimant is not permitted to take leave and this is a breach of contract.

24. No further detail was provided as to when these alleged breaches took place. Mr Mitchell was unable to point to a specific section or regulation under the Working Time Directive which the claimant alleges the respondent breached.

25. Although the initial claim and the amendment both deal with annual leave, there are marked differences in the factual basis for each claim and the legal question being asked. One concerns pay and is a discrete set of questions about how much the claimant should have been paid, how much was he actually paid at the time to determine if the respondent made an unlawful deduction of wages. The proposed amendment goes beyond the discrete question of pay and instead considers the application of the annual leave

policy itself, specifically the recording of annual leave for period of leave of more than 5 days, the practice of banked hours and the impact for the claimant. As such the proposed amendment goes beyond correcting clerical errors or adding factual details to existing allegations. It instead consists of two new heads of claim which rely on new factual allegations.

26. With regard to the time limits, there was little detail on when these breaches occurred, save as to assert that the breaches are ongoing. No submission was made about any specific instance of detriment or prevention outside of the annual leave taken between 21 and 25 August 2024. Mr McCracken's submission for the respondent on on this point is that the claimant is not prevented from taking leave but rather is choosing not to take leave. Mr Mitchell submitted that the claimant cannot take annual leave as he will continue to accrue a deficit of hours.

27. It is noted that the amendment application was only made in response to the strike out application made by the respondent. Amending the claim was not something previously raised by the claimant, even when discussing whether monies were in fact due to the claimant.

28. I accept Mr McCracken's submission that if the amendment is permitted, there will be a delay to the case and accept that the respondent has been preparing a case relating to the payment of holiday pay for the relevant period. It will be necessary for the respondent to formally respond to the new claim, identify relevant witnesses and speak to them. Given the brief nature of the amendment, it is likely that further particulars of claim will also be required. If the amendment is not accepted, it may be that claimant will not be in a position to continue to enforce his claim.

29. I must also have regard for other relevant factors such as the merits of the proposed amendment. The first amendment introduces a claim of a breach of the Working Time Directive, with no specific section referred to. The Working Time Regulations 1998 implement the Working Time Directive into UK employment law. Regulation 30 of the Working Time Regulations 1998

outlines the complaints an employee may raise as they relate to annual leave. These are:

(a) The employer has refused to permit him or her to exercise any right he or she has under Regs 13 (basic annual leave) or 13A (additional annual leave) — Reg 30(1)(a)

(b) failed to pay the whole or any part of any amount due by way of payment in respect of statutory annual leave under Reg 16(1) — Reg 30(1)(b), or

(c) failed to pay the whole or any part of any amount due by way of payment in lieu of untaken leave upon termination of employment under Reg 14(2) — Reg 30(1)(b).

30. The parties acknowledge there has not been a failure to make the appropriate payment to the claimant. The only potential claim therefore available to the claimant is a breach of Regulation 30(1)(a). No detail was provided as to when the alleged refusal took place, by whom or the reasons for refusal. Rather Mr Mitchell's submission was that the claimant cannot take annual leave, as to do so would accrue further banked hours, rather than the employer is refusing to allow him to take annual leave.

31. The second amendment introduces a claim of breach of contract claim. The claimant continues to be employed by the respondent. There is no jurisdiction for the Employment Tribunal to hear a breach of contract claim where a claimant remains employed.

32. Having balanced the relevant factors as set out above as against the interests of justice and hardship to the parties, as well as the overriding objective I have decided not to grant the application to amend the claim.

Strike Out

33. On the first limb of the test, I find that Rule 37(1)(a) has been established, in that there is no reasonable prospects of success. The claim made is for an unlawful deduction of wages under Section 13 of the Employment Rights Act

1996. A claim of this kind presupposes in the first instance that a claimant has been paid incorrectly, that an amount has been deducted from his pay. In this particular case, it is alleged that the deduction from pay related to annual leave taken in August 2023. The claimant confirmed to the Tribunal that there was in fact no deduction from his pay in August 2023, the payment period during which annual leave was taken. There are no facts in dispute in relation to that claim. The respondent asserts that the claimant was paid correctly in August 2023 and the claimant agrees. As there has been no deduction from the claimant's pay for the period of annual leave taken in August 2023, there is no reasonable prospects of that claim, being an unlawful deduction of wages claim, succeeding at a final evidential hearing.

34. On the second limb of the test, I am conscious of and have considered that the overriding objective is to deal with cases fairly and justly and so far as practicable, avoid delay and save expense to the parties.

35. Taking the case at it's highest, there are no facts in dispute. Both sides acknowledge and accept that the claimant was paid correctly in August 2023 when he took annual leave. Taking the case of an unlawful deduction of wages at its highest, the claimant is not seeking payment of an amount of money he claims should have been received.

36. While the claimant is not a litigant in person and has had the assistance of a HR consultant since lodging his Acas Early Conciliation Claim, the guidance in **Cox v Adecco** is helpful to consider. I have considered whether, if properly pleaded, the claim would have reasonable prospects of success. However, this does not get past the fact this is an unlawful deduction of wages claim where no deductions have been made. I have dealt with the amendment point above.

37. In light of the circumstances set out above and the case law, and having regard to the terms of the overriding objective, I am satisfied that it is appropriate for me to strike out the claim on the basis that there is no reasonable prospect of success.

E Mannion

Employment Judge

27 September 2024

Date

Date sent to parties 02 October 2024