



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
BETWEEN:

Mr G Sinclair

Claimant

AND

Interserve (Facilities Management) Ltd

Respondent

ON: 10 February 2020

Appearances:

For the Claimant: Mr C Kennedy, counsel

For the Respondent: Mr N Bidnell-Edwards, counsel

JUDGMENT

The Judgment of the Tribunal is that the respondent has complied with the requirement to provide an itemised pay statement under section 8 of the Employment Rights Act 1996 and accordingly the claim fails and is dismissed.

REASONS

1. This decision was given orally on 10 February 2020. The claimant requested written reasons.
2. By a claim form presented on 10 October 2019 the claimant Mr Gary Sinclair brought a claim under section 8 of the Employment Rights Act 1996 for failure to provide him with itemised pay statements.
3. The claimant is employed as a Head Porter at one of the respondent's client sites. He has continuous service since 1 January 1988.
4. The respondent is a provider of contract cleaning, portering and security services throughout the UK.

The issues

5. The single issue for the tribunal is whether the respondent has complied with the right in section 8 of the Employment Rights Act 1996 to provide the claimant with an itemised pay slip in relation to his pay for July 2019.

6. By a letter dated 6 December 2019 the tribunal wrote to the parties and drew their attention to the case of **Anakaa** (referenced below) and asked the claimant to say in the light of that authority whether the claim was to proceed and if so on what basis, or whether it was to be withdrawn.
7. The claimant's response was that he had difficulty in accessing his payslip and therefore the claimant says that the respondent was obliged to find an alternative method of providing the information, otherwise the employer was in breach of section 8.
8. On 31 January 2020 the respondent made a strike out application under Rule 37, relying on **Anakaa**. There was insufficient time prior to this hearing for that application to be dealt with separately.
9. The claimant had union representation when he presented his claim. From 13 January 2020 solicitors went on record for the claimant.

Amendment application

10. There was an application to amend made at the start of this hearing to include the August, September and October 2019 payslips as these were not referred to in the ET1 presented on 10 October 2019. The claimant said that this was the case that the respondent was meeting and that the claimant had referred to this in his statement. The claimant said there was no prejudice to the respondent who knew how to meet this case and it was a point of principle and it did not complicate the claim but affected potential remedy under section 12(4). The claimant accepted that the pleaded case was only for July 2019 and it was open to the claimant to plead the other months when the claim was presented.
11. The respondent said that this was an amendment of new facts and there was not enough evidence on the point and it was incumbent on the claimant to give a good reason for the delay in making the amendment application. The respondent said it was an "ambush". There is another claim brought by the claimant, in case number 2203912/2019. The claimant believed that it included a claim under section 8.
12. The respondent said given the short listing it was inappropriate to deal with it now. The claimant was represented at the time he presented his claim.
13. This is accepted by the claimant as a point of principle claim. He was represented by his union when the ET1 was presented, he has had solicitors on record for about a month, the application to amend was not made until within the hearing itself. This goes to the timing and manner of the application.

14. There is also a further claim which was believed to include a section 8 claim which is relevant to the issue of any prejudice to the claimant.
15. As this was described as a point of principle claim and there is a further claim brought by the claimant, I refused the application to amend. My further reason is that this was a two hour listing and there was insufficient time to expand the claim and further factual matters would need to be covered. Although not stated orally, I also considered that this went to the balance of hardship to the respondent who was not on notice to needing additional evidence to cover the subsequent months. I therefore refused leave to amend and confined this case to the pleaded case of the July 2019 pay slip.

Witnesses and documents

16. The tribunal heard from the claimant and from Mr Colin Read, a Sector Director, for the respondent.
17. There was a bundle of documents of 48 pages from the respondent and a similar small bundle from the claimant.

Findings of fact

18. It is not in dispute that on 11 June 2019, following consultation with the full workforce, the pay date changed from 28th day of the month to the 11th day of the month.
19. When they moved the payroll date, the payroll provider did not automatically pick up the need to continue to send paper payslips.
20. The claimant received his payslip for June 2019 without any issue. It came by post. His case was that at the date of issue of his claim he had not received his payslip for July. His evidence was that it was not until 6 November 2019 that he received his payslips for June, July, August, September and October 2019. The July payslip was at page 39 of the claimant's bundle.
21. Since about May 2016 the respondent has had a system of electronic payslips. The claimant was not provided with instructions on this until 31 January 2017. The system is such that the payslips are uploaded to a secure portal between 9am – 5:30pm the day before pay day. The respondent's case is that the claimant's July 2019 payslip has been available since 10 July 2019.
22. There was in place an opt out system, to opt out and continue receive pay slips in the post. The online system was available, but certain employees chose to continue to receive a paper payslip. There was no evidence to show that the reason they did so was because of difficulty in accessing the online system.

23. The claimant was told in March/April 2017 that he could opt out of receiving payslips electronically. He said Ms Sarah Cooper his line manager told him he could opt out and he told her he wished to opt out. I saw at page 37d an internal email from the respondent which said that some people had opted out of the online option and wanted paper copies, which was said to be a "*common theme*".
24. It was put to Mr Read, the Sector Director, that if employees had opted out, they were not accessing online. He did not agree. It was suggested that the obvious inference was that they wanted paper copies because they could not access online. Mr Read said they may want paper copies for their own records and peace of mind. I find that it does not show that they could not access on-line. Many individuals can access information online but like to receive a paper document if it is available to them. This does not mean that they are unable to access online. It means they like to have a paper copy if that choice is open to them.
25. The claimant was given full instructions on how to access his payslip via the portal. This included the website address, the company ID, user ID and the claimant's password. He accepts that on 31 January 2017 he was provided instructions on how to access his on-line payslip. The instructions were at page 29-30 of the claimant's bundle. The claimant said that he never accessed his payslip on-line because he was receiving them in the post.
26. The respondent accepts that that the claimant did not receive his hard copy paper pay slip on or before the pay date in July 2019 because of the error on the part of the payroll provider.
27. The payroll provider told the respondent that the claimant accessed the website to view his electronic payslips on 25 October 2019 at 09:49 hours. This was denied by the claimant. In any event this was after the July pay date. No log-ins were shown for July. Mr Read said he understood and had been advised that it is only the last log-in is shown but he did not have first-hand knowledge. He had also been told that if the payroll provider had accessed the claimant's pay roll, it would show this. This was not his own first-hand knowledge and it had come from PPS (the provider) via HR to Mr Read.
28. Mr Read spoke to the claimant on the morning of 30 October 2019 (as shown in an email on 15 November 2019 page 38a). Mr Read asked why the claimant had issued an ET1. The claimant said he was not sure what to do and had spoken to his union. The claimant said that he could not access the online system. This led to the respondent's enquiry and the discovery of an access to the claimant's details on the system on 25 October 2019. Mr Read had no reason to disbelieve the claimant that he had not had his July 2019 paper pay slip, but was surprised that he had gone down the ET route and had not spoken to his line manager.

29. There was no evidence to support the claimant's contention that he verbally told his manager Ms Cooper that he could not access online. The claimant said he was "tech-savvy" enough to do his job, he was not a "super geek" he was an "average geek". He said in evidence he could have accessed his payslip on-line if he had been given the relevant training. But he also accepted that he did not have that conversation with anybody at the respondent. I find that he did not tell anyone at the respondent that he needed more training in order to access his payslips in accordance with the instructions at page 29-30.
30. The claimant has computer access at work and can print documents at work if he needs to.

The relevant law

31. Section 8 ERA provides as follows

(1) *A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*

(2) *The statement shall contain particulars of—*

(a) *the gross amount of the wages or salary,*

(b) *the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,*

(c) *the net amount of wages or salary payable, . . .*

(d) *where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment, and*

(e) *where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—*

(i) *a single aggregate figure, or*

(ii) *separate figures for different types of work or different rates of pay.*

32. The case of **Anakaa v Firstsource Solutions Ltd 2014 IRLR 942** (Northern Ireland Court of Appeal – NICA) dealt with the question of electronic itemised pay slips. It is not in dispute that this decision is not binding on this tribunal but is of persuasive value. Paragraphs 20 to 22 say as follows:

The appellant's contention was that at no point during his employment did he receive an itemised pay statement. The employer accepted that the appellant was not given a written itemised pay statement but contended that in keeping with what it suggested was modern industrial practice employees were given online accessible payslips. They were accessible because according to Mr

David Cairns, a witness who impressed the tribunal, he trained the appellant and other new employees in how they could access their payslips online by means of a specific password system. Employees who forgot their passwords then had an option to obtain a new password which would last for 24 hours – at the same time they would receive an e-mail informing how to create a new password. The tribunal was satisfied that this system was the same for all employees in the appellant's position though it appeared that for some reason he had some difficulty in accessing his payslip despite the training given by Mr Cairns.

The court had some unease about whether the respondent had complied with the strict provisions of Article 40 of the 1996 Order ie the requirement to give a written itemised pay statement. However, in his submission Mr Warnock drew our attention to s.46(1) of the Interpretation (Northern Ireland) Act 1954 which provides:

“writing”, “written” or any term of like import shall include words typewritten, printed, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in a visible form.’

We accept that in the context of current standards of information technology the requirement to provide a written itemised pay statement is complied with if words are reproduced in a visible form on a computer screen. To that however we would add this caveat – if an employer is aware that an employee is having difficulty of any sort in actually accessing a payslip in this way, the employer is obliged to find an alternative method of providing information in accordance with the statutory requirement. Notwithstanding this caveat we agree that the tribunal was correct in law to dismiss this aspect of the appellant's claim.

33. In Schedule 1 to the Interpretation Act 1978 it states that “Writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.
34. Section 12 ERA deals with remedy and at subsections (4) and (5) states:
 - (4) *Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of [the worker] during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay [the worker] a sum not exceeding the aggregate of the unnotified deductions so made.*
 - (5) *For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving [the worker], in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.*
35. Guidance published by the Department for Business Energy & Industrial Strategy titled: “Payslips: Guidance on legislation in force from April 2019” says “A payslip may be provided in either a physical format or an electronic format that the worker can print.”

Conclusions

36. I had to decide whether the respondent complied with the requirement to provide an itemised pay statement on or before the time when any payment of wages or salary is made to him. On the facts of this case that means on or before 11 July 2019.
37. The respondent accepted that that the claimant did not receive his hard copy paper pay slip in the post on or before the pay date in July 2019 because of the error on the part of the payroll provider.
38. I have made a finding above that the respondent gave its employees the information needed to access online (pages 29-30) which the claimant accepted he received.
39. I find based on **Anakaa** which I take as persuasive authority, that the employee must actually have difficulty in accessing his payslip electronically, and as per the caveat mentioned in paragraph 22 of that judgment, the employer must actually be aware of this difficulty.
40. I do not accept the submission that because the claimant wished to continue to receive a paper payslip, that means he was unable to access his payslip online. He described himself as an average geek who is reasonably tech savvy. The instructions are not difficult to understand, he had received them and he could have asked for another copy if he needed it. He accepted that the payslips were available online and that prior to July 2019 he did not actually tell his employer that he was unable to access online.
41. The facts of **Anakaa** deal with events in 2012. The facts of this case are seven years later when the modern industrial practices, referred to in that case at paragraphs 20 and 22, have moved on even further. Whilst I agree that it would have been good practice for the respondent to have given the claimant a reminder that the change of pay date might give rise to a need to log on electronically, the claimant accepted that he knew that this option existed.
42. I find that the burden must not be placed too high. Certainly if an employee makes it clear that he does not know how to access online then there is a requirement on the part of an employer to look for an alternative method, but on my finding this claimant had not done so. I find that the respondent has complied with the requirement to provide an itemised pay statement under section 8 ERA 1996 in relation to the July 2019 payslip, which was the subject of these proceedings and therefore the claim fails.

Employment Judge Elliott

Date: 10 February 2020

Judgment sent to the parties and entered in the Register on: 11/02/2020 : :

_____ for the Tribunals