



EMPLOYMENT TRIBUNALS

Claimant Miss Ann Palmer

Respondent Surrey and Sussex Healthcare NHS Trust

Heard at Croydon (by video) **On** 18 January 2024

Before Employment Judge Fowell

Representation

Claimant In Person

Respondent Amy Stroud of counsel, instructed by Bevan Brittan LLP

JUDGMENT

Rule 37(1)(a) Employment Tribunal Rules of Procedure

1. The claim is struck out in its entirety on the basis that each of the claims advanced has no reasonable prospects of success.

REASONS

Background

1. Miss Palmer was a healthcare assistant working for the Trust as part of their bank staff and not therefore, she accepts, an employee. She was a worker on a zero hours contract.
2. Her claim form, submitted on 9 June 2023, ticked the relevant boxes for discrimination on grounds of sexual orientation, holiday pay and arrears of pay. The discrimination claim, she says, was an error and she should have ticked the box for sex discrimination/equal pay.
3. In section 8 of the claim form she explains that the Trust has a practice of paying holiday pay at 12.5% to its bank staff in addition to the normal hourly rate. She says that this is unlawful.

4. She also says that it is discriminatory because permanent members of staff get paid 5% more than staff like her when they do extra shifts on the bank. This is therefore an equal pay claim.
5. The next claim is under section 27A Employment Rights Act 1996 which is a provision which precludes any provision of a zero hours contract which prevents the worker working under another contract or arrangement. She says that when she was suspended from work (or not offered further shifts) from about 4 May 2023 onwards she was not allowed to work in any capacity at the Trust, so that was a breach of this clause.
6. Subsequently she has sought to amend her claim to add claims of constructive dismissal, unlawful deduction from wages and victimisation.

Rolled up holiday pay

7. Dealing with those claims in turn, the first is the alleged breach of the Working Time Regulations 1998 concerning rolled up holiday pay. It is clear that this was the practice and was operated transparently. Her payslips show monthly entries for “WTD pay” at 12.5%.
8. In **Robinson-Steele v R D Retail Services Ltd** [2006] IRLR 386 the European Court of Justice held that Working Time Directive did not permit a rolled-up pay arrangement, although such rolled-up payment may be set off against any liability for holiday pay providing that it was paid transparently and comprehensibly as holiday pay.
9. In **Lyddon v Englefield Brickwork Ltd** [2008] IRLR 198, the Employment Appeal Tribunal decided that the payments in that case met this test, even though Mr Lyddon was not given any information when he started about the rate of holiday pay, or how it was to be calculated, and he did not receive a written contract. It was enough that his pay packet showed the amount of holiday pay that had been added to his basic wage.
10. In those circumstances I conclude that there is no reasonable prospect of the Tribunal finding that the arrangement was unlawful and that credit should not be given for the holiday pay received.

Equal Pay

11. The Trust did not understand quite what was being alleged in the claim form and so were not able to confirm or deny at this hearing whether employed staff received a 5% bonus if they carried out a bank shift. However, there is no obvious difference in pay here based on gender. In fact, it is (on Miss Palmer’s case) expressly not because of gender but because of the contractual position of those in question. An obvious ‘material factor’ defence is available to the Trust

and there is no reasonable prospect of Miss Palmer succeeding in this claim either.

Section 27A

12. Section 27A (3) provides that:

Any provision of a zero hours contract which –

- (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
- (b) prohibits the worker from doing so without the employer's consent

is unenforceable against the worker.

13. It therefore deals with the terms of the contract. It is not suggested that any such term was included in the contract.

14. Miss Palmer says that she could have done other work for the Trust such as working as a cleaner or in admin, and that by suspending her the Trust was in breach of this clause.

15. Taking her case at the highest, i.e. that she was suspended rather being told that she would not be offered further shifts while she was under investigation and that her existing shifts were cancelled, this clause still has no application. Firstly, the Trust was not obliged to offer her work elsewhere. Secondly, the words “under another contract or under any other arrangement” must, I conclude, refer to work for other employers. Otherwise any attempt to give notice to or dismiss a zero hours worker would be invalid. Thirdly, it only applies to the terms of the contract not to management instructions or decisions like suspension or dismissal.

16. Again, therefore, this claim has no reasonable prospect of success.

Claims which are sought to be added by amendment.

17. At the same time as defending the application to strike out her claims, Miss Palmer has sought to add some new claims by amendment. Those applications have been refused, largely because they too have no reasonable prospect of success and hence that there is no prejudice to the claimant in refusing the application.

18. The first application was to add a claim of constructive dismissal, but this is only open to employees. Miss Palmer argued that the Trust was in repudiatory breach of contract, but claims of breach of contract are also only open to employees.

19. The second application was to add a claim of unlawful deduction from wages on the basis of discrepancies which she has noticed in pay statements for February

and April 2021. However, the claim was issued on 9 June 2023 so these claims are considerably out of time (nearly two years) and these discrepancies do not form part of any pattern or series continuing after that date.

20. A third application was to add a claim of victimisation, but this relied on the fact that the claim form itself was a protected act. Logically, any detriment which she suffered before then cannot have been because of the claim form.
21. Finally Miss Palmer sought to add four named individuals as respondents to the claim. That was also refused on the basis that it was now rather late in the process and there was no real prejudice to her in doing so since the Trust was liable for their actions. However, there are now no remaining claims to which they could become a party.
22. Accordingly, all of the claims before the Tribunal are struck out.

Employment Judge Fowell

Dated: 19 January 2024