



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

and

Respondent

Mr V Atanasui
Mrs M Atanasui

Mr Samir Gad Salama

OPEN PRELIMINARY HEARING

HELD AT London South

ON 15th May 2017

EMPLOYMENT JUDGE FRANCES SPENCER

APPEARANCES

For the Claimants: In person, (Mrs M Atanasui)
Interpreter for Mr Atanasui, Ms M Suecan

For the Respondent: Mr J Shale, counsel

JUDGMENT ON A PRELIMINARY HEARING

The Claimant's claim of direct marriage discrimination is struck out as it has no reasonable prospect of success and is dismissed.

The remaining complaints will proceed to a hearing of liability and remedy for 2 days commencing at 10.00 a.m. on 27th July 2017. A Romanian interpreter will be provided for Mr Atanasui.

Although the remaining issues in dispute are matters which would ordinarily fall to be determined by an Employment Judge alone, given the number of factual matters in dispute I consider, pursuant to Section 4(5) of the Employment Tribunal Act 1996, they should be heard by a full Tribunal.

CASE MANAGEMENT ORDER

1. The Claim and issues are set out in a case management order made on 13th February 2017, save that the claim for marriage discrimination has been dismissed.

Clarification of wages claim

2. On or before 23rd May 2017 the Claimants shall send to the Respondent (with a copy to the Tribunal) a Schedule for each Claimant showing the dates and times that each alleges that he/she worked for the Respondent, how much they were paid and on what dates.
3. On or before 6th June 2017 the Respondent will send to the Claimants a counter-schedule setting out the dates and times that he says that each of the Claimants worked for the Respondent, how much they were paid and on what dates.

Disclosure of Documents

4. Disclosure has taken place in part. There is an ongoing duty of disclosure and this relates to documents relevant to remedy as well as to liability.
5. The Claimants shall on or before 6th June 2017 send to the Respondent:
 - a. All documents evidencing earnings from any source from 30th July 2016 to date. This is to include payslips, contracts of employment, offer letters.
 - b. Evidence of all attempts to find alternative employment to replace earnings lost following the termination of their employment with the Respondent, including job centre records, all job applications, emails to agencies and prospective employers etc.
 - c. Applications for housing benefit and working tax credit together with all subsequent communications with the benefits agency or HMRC relating to changes in circumstances since the date of application.
6. If the Respondent intends to run a defence of illegality it shall on or before 30th June 2017 send to the Claimants and the Tribunal the legal and (alleged) factual basis of any submissions that they intend to make at the full merits hearing.

Bundles of Documents and video recordings

7. The Claimants continue to have primary responsibility for the hearing bundle and shall ensure that the bundles produced for the hearing are updated to include all relevant documents, whenever disclosed.
8. If either party intends to rely on CCTV or other recorded evidence it shall bring to the Tribunal the necessary equipment (laptop/CD/memory stick) to enable that evidence to be played and seen by the Tribunal.

Witness Statements

9. Witness statements have already been exchanged. However, none of the witness statements which I had brief sight of dealt in sufficient detail with the issues to be determined by the Tribunal. Accordingly I have ordered that the parties prepare and exchange new witness statements containing all the evidence in chief on which that witness wishes to rely in support of his or her case. Those statement should refer by page number in the bundle of documents to any document mentioned in the statement. Such witness statement shall be exchanged on 6 July 2017.

Evidence without a Witness Statement

10. No evidence-in-chief may be given by a witness other than the evidence contained in the written statement of that witness without the permission of the Tribunal. No witness may be called by a party to give evidence at the Tribunal hearing other than a witness in respect of whom a written witness statement has been prepared and exchanged or with the permission of the Tribunal.

REASONS

1. This was a Preliminary Hearing listed by EJ Tsamados to consider :
 - (1) Whether any or all of the Claimant's claims should be struck out under the provisions of rule 37 on the grounds that the claims have no reasonable prospect of success.
 - (2) Whether any specific allegation or argument in the claim has little reasonable prospect of success and whether to order the Claimant to pay a deposit as a condition of continuing to advance that allegation or argument.
2. Mr Shale, for the Respondent, submitted that the whole claim should be struck out on the basis of an abuse of process. He submitted the Claimants were claiming illegal benefits at the time of their employment and not declaring their earnings. Mr Atanasiu in particular had declared his earnings as zero for the purposes of housing benefit while Mrs Atanasiu, by her own admission, had only declared earnings from other sources and not her earnings from the Respondent. In relation to working tax credit they had under declared their income. He also

submitted that the Claimants were, on their own case, complicit in agreeing to be paid less than the national minimum wage and relied on the principle that they could not benefit from their own wrongdoing.

3. In relation to the claim under section 104A of the Employment Rights Act he submitted that it was quite clear from the video evidence that the Respondent dismissed the Claimants because Mr Atanasiu had taken money from the till and not because of any claim to be paid the national minimum wage.
4. In respect of the claim for marriage discrimination, Mr Shale submitted that this claim had no reasonable prospect of success. In *Hawkins –v– Atex Group Ltd 2012 ICR 1315* the EAT was clear that the question in these cases is whether the Claimant suffered the less favourable treatment because he or she is married which needs to be distinguished from treatment because of a close relationship with a particular person.
5. Mrs Atanasiu said that the Respondent had produced 6 employees to say they had never worked at the fish and chip shop and they were all lying. She and her husband had worked there in 2014 and they knew them all. Mr Salama now accepted that she had worked there on occasion - in contrast to his response to the claim in which he said he had never met her. She had properly declared her income for working tax credit and for housing benefit. In relation to housing benefits she could not declare her income from the Respondents as they had not provided payslips or an employment contract. She had subsequently done so. They had been dismissed on 8th October by telephone saying that Mr Atanasiu had been caught stealing money from the till and not to come back but this was in reality because they had demanded the national minimum wage. He had taken money but this was for tips.
6. Having heard submissions from both parties I concluded that the claim for marriage discrimination had no reasonable prospect of success. On their own case the Claimants had been dismissed because they had demanded the national minimum wage and on the Respondent's case because Mr Atanasiu had been caught stealing from the till. Neither case would suggest that Mrs Atanasiu was dismissed because she was married, rather than because of her close relationship to Mr Atanasiu. In view of the detailed consideration given to the issue in *Hawkins v Atex Group Ltd* (above) and in the absence any suggestion that there was "marriage specific" treatment I concluded that there was no reasonable prospect of this aspect of Mrs Atanasui's claim succeeding.
7. In relation to the remaining complaints I declined either to order the payment of a deposit or to strike out the claims. Mr Shale submits that the Claimants were complicit in agreeing to be paid less than the national minimum wage. However the Claimants' case is not that they were complicit in agreeing to be paid less than the minimum wage. As they say in their Claim to the Tribunal they agreed to be paid £5 (Mr

Atanasui and £5.50 (Mrs Atanasui) net of tax and had understood that the difference between this and the national minimum wage would be paid to the tax authorities. Secondly and in any event, as a matter of public policy, an argument along the lines put forward by Mr Shale would emasculate the NMW legislation. Any employer who paid less than the NMW could escape liability by claiming illegality in performance. No employee would accept less than the national minimum wage if the employer was willing to be pay more.

8. The Respondent also seeks to claim illegality on the basis that the Claimants had deliberately sought to defraud the public purse by not declaring their earnings from the Respondent for the purpose of their claims for housing benefit and working tax credit. Issues of illegality are not straightforward issues and require careful findings of fact. I was unable on the limited evidence before me to make any such findings. Moreover it appeared that what Mr Shale was submitting in relation to benefits and tax credits (even if true) related to illegality occurring outside the contract which would not necessarily make the employment contract illegal in performance, but would be a matter between the Claimants and the benefit agency and /or HMRC. I therefore declined to strike out the matter or to order the payment of a deposit on the basis that the claim is an abuse of process. If the Respondents wish to proceed with this argument at the full merits hearing they should set out in advance the basis of that submission (as set out in the case management order above) so that the Claimants may take advice and have time to prepare their response.
9. Mr Shale also suggested that there should be a strike out or a deposit order because the witness statements provided by the Claimants were inadequate and did not set out clearly facts relevant to the causes of action and much of the material they had set out was irrelevant. I reject that submission. While the witness statements are indeed insufficient the Claimants are litigants in person and I note also that Mr Salama's witness statement is similarly short on detail. I consider that these matters can be remedied simply by ordering the provision of more detailed statements as set out above.
10. Finally in relation to the submission that the video evidence was clear that Mr Atanasui was dismissed for theft, I have not seen this evidence. At the time I gave this judgment Mrs Atanasui told me that they also had not seen it (though the Respondent disputes this). There is in any event a clear factual dispute as to what happened and the reason for the dismissal, which can only sensibly be determined at a full merits hearing.
11. Having given my Judgment I made the case management orders set out above. As the case had been listed to commence on 29th May, which is a bank holiday, I relisted the hearing for 27th and 28th July 2017.

12. There has clearly been limited co-operation to date between the parties in the preparation of the case to hearing. I have explained to the Claimants the importance of calm and measured co-operation with those that represent the Respondent.

Employment Judge Frances Spencer
16th May 2017 London South