Claimant: Edwin Thompson

Respondent: The House of Commons Commission

Heard at: **London Central via CVP** **On:** **29 February 2024**

Before: **Employment Judge H Clark**

Representation
Claimant: In person
Respondent: Mr A Burrow - Counsel

JUDGMENT

1. **The claimant's claims for a breach of section 1 of the Employment Rights Act 1996 and breach of contract are struck out as they have no reasonable prospects of success.**

REASONS

1. This hearing was listed to consider jurisdictional aspects of the claimant's claim for damages for breach of contract and the provision of an historic statement of main terms and conditions of employment. At a case management hearing on 13 December 2023, the issues were identified as follows: "to consider employment status prior to 1 August 2012, jurisdiction and whether the claim should be struck out on the basis that it has no reasonable prospect of success." This was broken down to a series of preliminary issues as follows:

1.1 The claimant accepts that he now has written particulars. Can the claimant bring a claim for a breach of s1 ERA in 2000 to 2012 when has subsequently been given written particulars?
1.2 If he can, was he a worker rather than an employee from 2000 to 2012?
1.3 If so, does the Tribunal lack jurisdiction to hear a claim for breach of s.1?
1.4 In any event, does the Tribunal have jurisdiction to award damages in respect of the alleged failure to pay pension contributions?

Conduct of the Hearing

2. For the purposes of this hearing, the Tribunal was provided with a bundle of documents running to some 188 pages, a witness statement of the claimant's Trade Union representative, Martin Wittekind and written submissions from both parties. The Tribunal was expecting that the claimant would have filed a witness statement (and this appears to have been contemplated at the case management hearing on 13 December 2023), since the Tribunal was tasked with making a determination of the claimant's status in his role from 2000 to 2012. There was limited documentary evidence relevant to employment status dating back to 2000 in the bundle, so the claimant's oral evidence was needed for the Tribunal to determine the issue.

3. Had the claimant been professionally represented, his lawyer would have prepared a witness statement on his behalf. In these circumstances, the Tribunal sought the respondent's agreement to his giving oral evidence in response to some questions from the Tribunal. Mr Burrow was, quite reasonably, concerned that the lack of advanced notice of the claimant's evidence might prejudice the respondent. The Tribunal, therefore, proceeded to hear the claimant's evidence on the basis that if the respondent were prejudiced, the Tribunal would consider whether an adjournment might be necessary. As it was, the Tribunal took a fifteen minute break after the claimant's evidence in chief for Mr Burrow to consider his cross-examination. In the event, there was no real challenge to the evidence given by the claimant.

4. The start of the hearing was delayed by half an hour as the Tribunal had difficulty in downloading the joint bundle from the Document Upload Centre. The claimant experienced occasional temporary freezing of his screen. When he raised this during Mr Burrows submissions, the submissions were summarised for him. As both parties had provided full written submissions, the claimant was satisfied that he knew the case which the respondent was putting forward.

5. Given the number of legal issues to consider and the fact that the hearing itself had taken two hours, the Tribunal reserved its decision.

Factual Background

6. The claimant started working for the respondent as a Fire Safety Officer on or about 1 September 2000 on a part-time basis. He was also (and remains) employed in the Fire Service. The claimant was not issued with a written contract or statement of particulars relating to this engagement with the respondent until September 2004. At that time he was issued with a contract which described him as a "casual Fire Officer". Such a designation meant that the claimant was not enrolled in the respondent's pension scheme from the start of his work for the respondent or granted paid annual leave. This changed with effect from 31 August 2004, when the claimant was given paid annual leave.

7. The 2004 contract made it clear that work would be offered to the claimant on "*an ad hoc basis as and when there is work to be done. You are free to accept or decline such offer of work. You are not guaranteed continuous engagement and the department is under no obligation to offer you further engagements or re-engagement."* The written terms provided that "*you can, with the agreement of the manager, arrange for another suitable casual worker to cover any shifts you have accepted but ultimately cannot work."* At this stage, the claimant had the option to join a stakeholder pension, but he was only paid for hours worked and there was no barrier to his working for other employers.

8. In August 2012 the claimant was issued with revised terms and conditions of employment, which confirmed his status as that of a permanent employee. He had set hours and a basic salary, his notice period increased to 5 weeks and permission was required for him to work for other employers. The claimant could no longer arrange for someone else to cover his work (known as the right of substitution). The respondent's HR records (the House Administrative Information System "HAIS") recorded the claimant's role as "permanent", so the claimant was led to believe that he should have been classed as an employee from the start of his work with the respondent. It is the respondent's case that the description on the HAIS system referred to the role of Fire Officer, but that it did not refer to status of the person performing the role.

9. In his oral evidence, the claimant explained that he applied for the role of Fire Officer through an advertisement in July 2000 and initially the hours were not guaranteed. He was told when he would be needed. As things turned out he worked from August 2000 to late October 2000 then there was no work for him for November and December 2000. He had a call at the beginning of January 2001 and worked consistently until the beginning of December 2001, when he was told he was not required. There was then a short break until February 2002 when he worked for three or four weeks into March 2002. He was not needed at the end of March until June 2002. Since then he has been working consistently for the respondent, albeit his hours varied somewhat (they were generally between 18 and 20 hours a week but occasionally 27). At the beginning of 2008 things changed and the claimant reduced his hours to approximately 9 per week. In August 2012 the claimant's position was made "permanent" (using the language of his workplace).

10. Between the 2000 and 2004 the claimant had no annual leave allowance and he would broadly manage his own workload. If he was ill there would be no one to replace him and that the claimant was not paid. If he were to arrive late for work prior to 2012 he would not be paid for the time he was not present but nothing in particular would happen if were late. The claimant was told that he was a casual employee who was working on a week's notice for the first 12 years. He was told that it was a zero hours contract and the claimant himself described this as having "no safety net with work".

11. On 13 August 2014 the claimant successfully raised a grievance concerning his historic annual leave, as there was an inconsistency between what he was originally offered (30 days) and what he was paid for. This was corrected in 2015. In the course of the grievance and the claimant's appeal, it was noted

that the claimant's treatment, "*left much to be desired*", but that the claimant's employment between 2000 and 2012 was, nonetheless, "casual". The claimant's written terms and conditions issued in 2004 were different from those provided in 2012 when he was regarded as a "permanent" employee.

12. The claimant has continued to raise the pension/status issue internally and received a report from an HR advisor, Mr Meekums on 1 September 2022. The claimant lodged another formal grievance in November 2022, which the respondent maintains was determined by Mr Bunn on or about February 2023. The claimant suggests that aspects of his grievance have still not been resolved. The respondent disputes this, although that is not an issue for this Tribunal.

13. The claim for which the claimant seeks damages relates to the lack of provision of a pension and other benefits when he joined the respondent. There is a related claim for the respondent's failure to issue the claimant with a statutory statement of terms and conditions of employment back in 2000. On his case this failure has led to a loss of accrued pension and other rights (for instance, continuous employment). As set out in paragraph 44 of the case management hearing of the 13 December 2023, the claimant has not brought a claim for unlawful deduction of wages under Part II of the Employment Rights Act 1996.

The Law

Breach of Contract

14. Whilst the employment tribunal does have jurisdiction to hear claims for breach of contract under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994, this is only in relation to such claims which arise or are outstanding, "*on the termination of the employee's employment*" (article 4(c)). It is the County Court (or High Court) which has jurisdiction for claims of breach of contract whilst employment is ongoing. Mr Burrow referred the Tribunal to the case of *Capek v Lincolnshire County Council* [2000] ICR 878 in support of this proposition. In that case, the employee presented a claim for breach of contract before his employment had ended (during a notice period).

Statement of initial Particulars

15. Section 1 of the Employment Rights Act 1996 gives employees the right to a statutory statement of initial employment particulars. There are certain prescribed particulars which such a statement should contain, which any normal working hours, the date when the employment began and any terms and conditions relating to pension provision. With effect from 6 April 2020, this right was extended to workers (Employment Rights Miscellaneous Amendments) Regulations 2019/731 regulations 1 & 5). It is well established law that this statutory statement does not constitute the contract between the parties, but is good evidence of its terms.

16. There are two potential remedies for a breach of section 1, one is that the Tribunal can declare what particulars should have been included in a statutory statement (section 11 of the Employment Rights Act 1996) and the other is an award of 2 – 4 weeks' pay where an employer was in breach of the duty under section 1 in certain circumstances (section 38 of the Employment Act 2002). It is clear from *Govdata Ltd v Denton* UKEAT/237/18 that an award cannot be made under section 38 against an employer who has complied with the requirement to provide a written statement of particulars at the time of commencement of proceedings. Further, the power to make this award only arises where an Employment Tribunal has found in favour of the claimant in at least one of a number of claims to the Tribunal (specified in Schedule 5 of the Employment Act 2002). One such claim is for breach of contract.

Employment Status

17. The law as to status that the Tribunal has to apply is set out in section 230 of the Employment Rights Act 1996, where an employee is defined as:

    "*an individual who has entered into or works under or where the employment has ceased worked under a contract of employment*"

    A contract of employment is defined *as a*

    "contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

    There is no dispute that the claimant was, as a minimum, a worker from the start of his work with the respondent.

18. For an employment relationship to exist the case law suggests that a number of minimum features are required: a contract (not necessarily in writing); an obligation to perform work personally (albeit a limited or occasional power of delegation might not be fatal); mutuality of obligation, that is to say an obligation on the employer to provide work and an obligation on the employee to accept and perform the work offered and an element of control over the work by the employer. If these features are present, the contract might be a contract of employment but it is not necessarily so. The Tribunal would then look at all the other features of the relationship, such as who provided the equipment, whether the worker hires staff, the degree of financial risk taken by the worker, whether the work done is an integral part of the employer's business, the intention of the parties, the method of remuneration and taxation, whether payment is made for sickness or holiday, whether there are pension arrangements and whether there is a disciplinary or grievance procedure which applies to the worker.

19. Where documentary interpretation is not involved, it is generally a question of fact whether a contract is one of service or services. No single issue is conclusive so one cannot simply say that because the claimant was described

as “permanent” or “casual”, he was or was not, therefore, not an employee. The Tribunal must look at the reality of the situation.

20. The respondent referred the Tribunal to *Nursing and Midwifery Council v Somerville* [2022] ICR 755 at paragraph 46 in which the Court of Appeal held that the lack of obligation on the respondent Council to offer or pay for work to the claimant and the absence of any obligation on the claimant to provide services meant the contract between the parties could not be one of employment. This is consistent with the House of Lords’ decision in Carmichael v National Power plc [1999] ICR 1226 in which it was held that Power Station Guides, who were engaged on “casual as required basis” were not employees, as there was no mutuality of obligation to provide and perform work.

Unlawful Deduction from Wages

21. For the sake of completeness, although the claimant has not brought a claim for unlawful deduction from wages, there would be a number of legal issues arising should he seek to amend his claim to add this jurisdiction. The most obvious would be a time limit issue, given that a claim for unlawful deduction from wages should be brought within three months of the last relevant deduction. The alleged deductions about which he complains (of pension contributions) took place between September 2000 and March 2010 when the claimant joined the respondent’s pensions scheme. His claim would, therefore, be more than twelve years out of time. Further under section 195 of the Employment Rights Act 1996, part II of the 1996 Act (related to protection of wages) does not apply to House of Commons staff. The claimant is such an member of staff. Further, pension contributions do not fall within the definition of “wages” in any event. Section 27(1)(a) of the 1996 Act which defines “wages” makes clear that this relates to sums payable to the worker and not, therefore, to a third party pension provider. *Somerset County Council v Chambers* EAT 0417/12, to which the Tribunal was referred by the respondent, confirms this.

Strike Out

22. The Tribunal’s power to strike out a claim is set out in rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in circumstances which include “*where a claim is scandalous, vexatious or has no reasonable prospects of success*”. There remains a discretion as to whether to strike out a claim. Such discretion is subject to the overriding objective in the 2013 Rules to do justice between the parties.

Submissions

23. The claimant’s case is that the respondent’s failure to provide him with a written contract of employment (or a statutory statement of particulars of employment) when he joined the respondent has meant he has missed out on some of the employment benefits afforded to his permanent colleagues. This includes annual leave, automatic pay reviews, promotions and enrolment in a pension scheme.

24. Whilst the documents received by the claimant maintain that he was a "casual" worker, the claimant suggests this descriptor in his September 2004 contract is at odds with what was set out in an email between Ron Bentley and Jane Grieveson dated 16 October 2000 which had a handwritten response implying that employment for over 12 months would give an entitlement to leave, pension rights etc. Further that the status on the respondent's internal HR system (HAIS) suggests that his employment was "permanent". The claimant was also referred to in a reference provided by the respondent on 20 April 2017 as a "permanent" part-time member of staff since 1 April 2001.

25. The respondent submits that the Tribunal has no jurisdiction to hear any of the claimant's claims, for a variety of reasons. It maintains that the designation of the claimant as "permanent" on the HAIS system related to the permanence of the role itself, not the holder of the role. Given the claimant's continued employment, the Tribunal does not have jurisdiction to make an award of contractual damages to the claimant. The only possible route to an award of damages would be via section 38 of the Employment Act 2002, which is not open to the claimant, as he has had a statement of particulars since 2004 at the earliest and 2012 at the latest. He has not brought a claim for unlawful deduction from wages and could not do so as section 95 of the Employment Rights Act 1996 excludes House of Commons employees from the wage protection provisions in the Employment Rights Act 1996. There is no other possible route to the damages sought by the claimant. Such a claim would also be significantly out of time. The particular aspect of the disadvantage highlighted by the claimant relates to his diminished pension provision. However, payments made to a pension provider do not qualify as "wages" for the purposes of the Employment Rights Act 1996.

Conclusion

26. The employment tribunal does not have a general power to resolve all employment disputes, or to provide a higher level appeal against an unsuccessful grievance outcome. Its powers are delineated by primary and secondary legislation. The claimant's claim (as confirmed in his written submissions) is for loss of (various) accrued benefits which he would have received had been regarded as a "permanent" employee of the respondent since he started work at the House of Commons in 2000. His claims are for breach of contract and a determination of what particulars ought to have been included in a section 1 statement of initial particulars of employment in 2000 when he joined the respondent (section 11 of the Employment Rights Act 1996).

27. The Tribunal does not have jurisdiction to hear the claimant's breach of contract claim, as he remains in the respondent's employment. As set out above, the Tribunal's ability to hear such a claim is restricted to claims which arise or are outstanding "*on the termination of the employee's employment*" (Article 3(c)) Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994).. There is, therefore, no route to damages open to the claimant via a claim for breach of contract. The claim for breach of contract is struck out as it has no reasonable prospects of success.

28. The claimant has not brought a claim under part II of the Employment Rights Act 1996 for unlawful deduction from wages and, in any event, is prevented from doing so as a member of the House of Commons staff by section 195 of the Employment Rights Act 1996. The Tribunal, therefore, turns to whether section 11 of the Employment Rights Act 1996 might provide a mechanism for the claimant to prove that he has lost out on the benefits of employment status with the respondent by virtue of his being regarded by the respondent as a "worker" rather than an "employee" between 2000 and 2012.

29. Whilst the Tribunal does not wish to stray into the substance of this claim, it is questionable whether the use of section 11 of the Employment Rights Act 1996 would achieve what the claimant in certain respects. The Tribunal's function under section 11 is to declare what has been agreed between the parties and, therefore, what should have been set out in the statutory statement, not to impose terms on either party which were not agreed, still less decide what the parties ought to have agreed. The claimant's case is that he should have been offered the opportunity to participate in the respondent's pension scheme (amongst others things), not that it was agreed that he would receive a pension, but that agreement was not reflected in a statutory statement.

Statutory Statement

30. The Tribunal would not have the power to make an award under section 38 in the absence of a successful specified claim by the claimant. His only substantive claim is for breach of contract, for which the Tribunal does not have jurisdiction. Further, the case of *Govdata Ltd v Denton* UKEAT/237/18 clarifies that an award of between 2 and 4 weeks' pay cannot be made under section 38 against an employer who has complied with the requirement to provide a written statement of particulars at the time of commencement of proceedings. As Mr Burrow submitted, such an award is an enforcement mechanism, which provides an incentive for employers to comply with their obligations under section 1 of the Employment Rights Act 1996. It is common ground that the claimant was given a statement of employment particulars in 2012, which reflected his employment status, so the respondent was not in breach of section 1 of the Employment Rights Act 1996 in failing to provide a statutory statement when the claimant presented his claim to the Tribunal on 26 September 2023.

31. That is not an end to the claimant's claim under section 11, however, as the Tribunal has the power to determine what particulars should have been included in a statutory statement. There is nothing in sections 11 or 12 of the Employment Rights Act 1996 to suggest that the power is limited to a claimant's particulars of employment at the time of the Tribunal claim. The claimant's case is put on the basis that it was the absence of compliance with section 1 of the Employment Rights Act 1996 in 2000 which has caused his financial losses. The respondent maintains he was not entitled to such a statement in 2000 because he was not an "employee" then, but a "worker".

32. The Tribunal notes that, on the claimant's case, the particulars with which he was issued in August 2012 were not, in fact, accurate. This point was not argued before the Tribunal, but section 1(3)(b) and (c) outline that the date

when the employment began (1(3)(b) and the date on which continuous employment began (1(3)(c)) are required in a statutory statement. The claimant's 2012 statement show these relevant dates to be in 2012. On his case, they should be recorded as 2000 and a correction to that date would partly address any potential loss of service (for the purposes of a redundancy payment by way of example). As one of the issues for determination in this hearing is the claimant's status between 2000 and 2012, this might be academic. If the claimant was a worker between 2000 and 2012, the 2012 statutory statement is accurate and he would have had no right to a statutory statement in 2000. The Tribunal, therefore, turns to consider the claimant's status.

Employment Status

33. The right to a written statement of initial particulars of employment under section 1 only applied to employees as defined in section 230 of the Employment Rights Act 1996 in 2000. The parties' own descriptions of a person's status are not conclusive. A reference to a member of staff as "casual" does not determine their status for the purposes of section 230 of the Employment Rights Act 1996, neither does the use of the word "permanent". Such designations are not used in section 230 of the Employment Rights Act 1996. Whilst inconsistent terms have been used to describe the claimant's relationship with the respondent prior to 2012 and this has caused the claimant to question his true status, the Tribunal's focus is on the reality of the parties' relationship, having regard to any oral or written agreements and how those agreements worked in practise. Sometimes contractual documents do not accurately reflect the reality of the parties' working relationship and the Tribunal must be astute to the possibility of a sham contract, where written terms might be imposed on a worker which create a wholly inaccurate picture.

34. The first time the terms of the claimant's relationship with the respondent were put down in writing was in September 2004. The claimant gave oral evidence about the terms on which he worked from 2000 to 2004 and they were entirely consistent with the 2004 written terms. The claimant was engaged on the basis that he would work for the respondent as and when required. The respondent was not obliged to offer him any work and the claimant was not obliged to accept the work offered. The claimant would not be disciplined if he did not attend work or arrived late, he simply would not be paid when absent.

35. By and large regular work was offered and accepted, but the hours were variable and there were some significant gaps in November and December 2000, December 2021 to February 2002 and in April and May 2002. In legal terms this amounts to a lack of mutuality of obligation between the parties, which is inconsistent with employment status. Whilst most of the other features of an employment relationship were present, mutuality of obligation is an essential requirement of an employment contract, so the Tribunal is satisfied that the claimant was not an employee of the respondent when he started work there in 2000 or when issued with written terms in 2004. The formal change in the claimant's status in 2012 may well have been a recognition that the reality of the parties' relationship had changed over time, even if the written terms had not been up-dated. The Tribunal is not, however, satisfied that the claimant has proved that

his legal status changed from that of a worker to that of an employee on a particular date prior to August 2012, when his "permanent" status was confirmed.

36. The implication of the claimant's being classed as a worker from 2000 to 2012 is that he was not entitled to a statutory statement of particulars of employment prior to August 2012, so his application for a section 1 statement has no reasonable prospect of success and is struck out under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Whilst the terms of the claimant's work for the respondent were not required to be reduced into writing in 2000, this case is a good example of why it would have made legal and administrative sense to do so.

Employment Judge H Clark

11 March 2024

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

21 March 2024

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