



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104817/2019

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Held by Cloud Video Platform  
on 26 and 27 April 2021

Employment Judge M Robison

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**Mr P Laczynski**

**Claimant  
in person  
Ms A Kocela  
Interpreter**

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**Option A Ltd**

**Respondent  
Represented by  
Mr G Bathgate  
Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims for unpaid wages do not succeed, and the claim is therefore dismissed.

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### REASONS

1. The claimant lodged a claim in the Employment Tribunal on 13 April 2019 claiming arrears of pay, as well as unfair dismissal, redundancy payment and race discrimination. The respondent entered a response resisting the claims.
2. It was accepted that as the claimant did not have two years' service he could not proceed with the claim for unfair dismissal or redundancy payment. After a lengthy procedure (which included four preliminary hearings on 25 September 2019, 2 March 2020, 27 July 2020 and 22 December 2020), the claim for race discrimination was dismissed, and this hearing was listed to deal with the arrears of pay claim.

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3. I should record that this hearing was conducted in very challenging circumstances, where the claimant gave evidence through an interpreter, and the whole hearing was conducted remotely by CVP, with consequent unavoidable technical issues; and the claimant was required to consult a large number of documents on his mobile phone because of difficulties in accessing documents on his laptop while also participating in the hearing.
4. I wish to thank all parties involved for their forbearance in ensuring that this hearing could be concluded in the two days which it was allocated.

### **Preliminary issues**

5. This hearing had been listed to deal with the arrears of pay claim only, and case management orders had been issued at a previous preliminary hearing on 27 July 2020, at which it had been decided that this hearing could take place remotely by CVP. At this hearing, the claimant was assisted by an interpreter Ms A Kocela.
6. While I understood the only issue for determination to be the question of arrears of pay, I asked Mr Bathgate whether there was an issue of time bar to be considered. He understood from previous preliminary hearings that the claimant was given some latitude since he was an unrepresented party and that as this claim was proceeding as a breach of contract claim (as opposed to or in the alternative to an unlawful deduction of wages claim) then the matter of time bar did not arise.
7. Mr Bathgate did however advise that he had two preliminary matters which he requested be addressed prior to the commencement of the hearing.
8. First, he advised that the respondent had written to the claimant a letter which was translated into Polish regarding the possibility of settlement negotiations. Mr Bathgate asked if he could have a definitive response from the claimant, and sought the assistance of the interpreter to do that. Although I advised that I was prepared to allow an adjournment to facilitate any settlement negotiations, after some discussion, the claimant confirmed that he did not wish to enter into settlement negotiations.

9. Mr Bathgate also raised the matter of a claim which the claimant had set out in his written case for wages from the termination of his employment until the date the claimant asserts that he received his P45. This is contrary to the claimant's claim form where he states that his employment commenced on 5 29 March 2017 and terminated on 21 January 2019. Mr Bathgate argued that the claim for unpaid wages during this period was incompetent because it related to a period after the claimant had been dismissed. He submitted that it should not be permitted to proceed.
10. Mr Laczynski in response advised that he was relying on his P45. Although 10 his P45 had not been lodged (Mr Bathgate advised that the claimant had not sent him any documents to include in the bundle), he referred to it and showed it on screen. He advised that the P45 did not specify the end date and in particular did not state a termination date of 21 January 2019. Rather the P45 was dated 22 March 2019 (which corresponds with the date of the 15 last payslip (page 116) which relates to a payment for outstanding holidays only).
11. Mr Bathgate confirmed that the letter of dismissal (page 47) unequivocally 20 stated that the claimant's employment terminated on 21 January 2020. The P45 did not relate to the claim before the Tribunal, but rather to the tax position. Further, the claimant had stated in his ET1 that his employment had ended on 21 January 2020.
12. Mr Laczynski confirmed that his employment ended on 21 January 2020. 25 However, when he had sought to register at the job centre, the fact that his P45 did not include that date had caused some confusion. He also suggested that it might have involved him being double taxed.
13. The claimant subsequently pointed out that he had raised this matter with 30 another employment judge at a previous preliminary hearing, who had apparently accepted that for the purposes of continuous service, the date of the P45 would be the relevant date, so that he was only a few days short of having two years' service for an unfair dismissal claim by the 22 March 2019.

14. After hearing both parties, I decided that I had sufficient information to allow me to rule on the matter. I did not require to hear evidence on the matter given the key facts were not in dispute.

5 15. I accepted Mr Bathgate's submission that the claimant's claim in respect of wages following on from his dismissal was incompetent and could not proceed. I gave reasons for my decision at the hearing which can be summarised as follows:

1. the claimant had set out the dates of his employment in his ET1;
- 10 2. the respondent had lodged a letter of dismissal confirming the date of termination of employment;
3. the claimant confirmed at the hearing that his employment ended on 21 January 2019;
4. although the P45 may have been wrong or have a date missing, this is not relevant to the claim which the Tribunal has to decide;
- 15 5. I could find no reference to any alternative date in the PH notes of the other judges; except that the claimant had confirmed that his employment had ended on 21 January 2019 at the preliminary hearing which took place on 25 September 2019, and that was subsequently confirmed in other PH notes;
- 20 6. In any event, no employment judge had previously ruled on the matter;
- 25 7. While I appreciated that the claimant may have subsequently had problems with registering at the job centre and in respect of taxation, this was not a matter which this Tribunal has power or entitlement upon which to adjudicate. The claimant may be able to seek advice about the consequences of any error on a P45 from another source, such as HMRC, but this is not something with which this Tribunal can assist;

8. There is no employment law which would give the claimant the right to claim wages after the end of his employment when he had not worked.
16. It was thereafter confirmed that there were three components to the claimant's claim for unlawful deduction of wages, as previously set out in writing by the claimant, and that related to a claim for 93 hours of overtime, and a claim for wages during two separate periods when he says he was suspended.
17. With regard to the documents to be relied on, there was a good deal of confusion prior to the commencement of the hearing of evidence over whether and what documents the claimant had received.
18. Mr Bathgate confirmed that he had forwarded a file of documents to the Tribunal and to the claimant by e-mail, and that he had also sent these by post to the claimant.
19. The claimant advised that he had not received the documents by post (and indeed it may be that these were sent to the claimant's old address). There was also some confusion over whether and what documents the claimant had received by e-mail. It transpired that there was an error in the claimant's e-mail address to which documents were being sent by the respondent.
20. With regard to what had initially been lodged, Mr Bathgate confirmed that every pay slip for the whole of the period of the claimant's employment had been lodged. Mr Laczynski advised that these were (up to page 80) blank in the box for itemisation of hours, and I had noticed that and asked Mr Bathgate about it, because they did not appear to comply with the requirements of section 8 of the Employment Rights Act.
21. Although Mr Bathgate advised that the claimant had not sent him any documents to be included in the bundle (which could be explained by the claimant's lack of understanding about case management orders relating to documents sent to him in English), I noted that the claimant had sent a

number of payslips to the Tribunal which did have the relevant information included in them.

22. Mr Bathgate said that it appeared that the payroll software did not include the itemisation on print offs after the termination of employment, but he accepted  
5 that the information on the payslips was potentially relevant to the claimant's overtime claim.

23. I decided that it was imperative that all payslips which included all the relevant itemisation should be lodged. I made arrangements for the payslips which I had on the Tribunal file to be scanned and sent to parties, but  
10 unfortunately due to a misunderstanding these were sent to Mr Bathgate but not to the claimant. However, and in any event, the claimant advised that he had found additional payslips, which he agreed to forward to Mr Bathgate. Mr Bathgate understood that it was possible to get the correct payslips from his client and to lodge these as additional documents with the suffix B on the  
15 corresponding page number.

24. Unfortunately this all meant that the hearing of evidence could not commence on the first day. All parties agreed to commence the hearing at 9.30 on the second day, by which time I was satisfied that all relevant documents had been forwarded to the claimant. I heard evidence from the claimant, and then  
20 from Mr N Scott, managing director for the respondent.

25. During the course of the second day, as a result of evidence given by the claimant, Mr Bathgate lodged a number of additional productions, numbered 117 to 121. I was referred to these and to the productions discussed above, which are referenced by page number in this judgment.

## 25 **Findings in fact**

26. On the basis of the evidence heard and the documents lodged, the Tribunal finds the following facts admitted or proved:

27. The claimant commenced employment with the respondent on 29 March 2017. He was supplied as a contract worker to Greenvale AP Limited

(‘Greenvale’) in connection with a contract between the respondent and Greenvale.

- 5 28. He was excluded from the site at Greenvale in early November 2018 on the grounds of alleged misconduct and he was dismissed by the respondent for gross misconduct on 31 January 2019.
29. The claimant understood that he was taken on to work night shifts, Monday to Friday, 6 pm to 2 am, that is 40 hours per week.
- 10 30. However, as an agency worker, the claimant’s hours fluctuated each week, depending on the needs of Greenvale. For example in his first week at work, he worked 14 hours. The claimant was initially paid £7.20 per hour (page 28B).
- 15 31. After 12 weeks working under a contract for services on the Greenvale contract, the claimant was issued with a “Pay Between Assignments Contract of Employment” (Pages 1-7). This was signed by the claimant on 29 June 2017.
32. This was stated to be with a view to avoiding the consequences of the Agency Workers Regulations in regard to the terms and conditions of agency workers in comparison with permanent staff working at Greenvale.
33. The relevant clauses of that contract are as follows:
- 20 “These terms and conditions constitute a contract of employment and are provided to the employee in accordance with the terms of the ERA 1996.....This document contains the terms and conditions of employment which govern your service with the company. The employee is also referred to any assignment schedule which may be in place from time to time”.
- 25 1.2 “Minimum pay” means the higher of (a) 50% of the basic pay paid to the employee during the relevant pay reference period or (b) the amount the employee would have been entitled to under the National Minimum Wage Regulations 1999 for actual hours worked during the relevant pay reference period; “Pay reference period means a month, or in the case of an employee

who is paid wages by reference to a shorter period than a month, that period”.

5 2.3 The employee will be assigned by the company from time to time to provide services to the company’s hirers. During each assignment the employee agrees to work under the supervision and direction of the hirer at whose premises they are assigned...

10 4.1 The hours of work will vary for each assignment. The employee will be notified of the hours of work that apply to each assignment in an assignment schedule, which will be provided to the employee by the company upon commencement of an assignment or as soon as practicable thereafter.

15 4.2 The minimum number of hours the employee will be offered per week by the company during any assignment will be one. The maximum number of hours the employee will be expected to work per week during any assignment will be 48 hours per week....

## 5 Remuneration

20 5.1 During periods when the employee is carrying out assignments for clients of the company the employee will be paid remuneration calculated at a minimum hourly rate of [£6.70] which is the minimum rate of remuneration that the company reasonably expects to achieve for the type of work the employee is doing. The employee will be notified in the relevant schedule of the specific rate applicable for each assignment (including any variations thereto).

25 5.2 When the employee is available for work....but is not on an assignment, and has not carried out any assignments in that week running Sunday to Monday of at least the minimum hours set out at 4.2....the employee will receive minimum pay for that week.

5.2.1 If the employee does not contact the company in accordance with clause 8.9, s/he will be deemed to be not available for work that day



and the company shall be under no obligation to pay the employee minimum pay in respect of that day.

8.9 When the employee is not on an assignment, s/he is obliged to remain contactable by telephone so that the company can offer him/her suitable work if it becomes available. When not on an assignment the employee must contact the company each day before 10 am to report his/her availability or unavailability for work that day....”

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34. The claimant would be issued with assignment schedules by e-mail. For example, the claimant was issued with an assignment schedule for the period from 5 January 2018 (pages 8-10). The covering letter stated, “Please find attached the latest assignment schedule for your work at Greenvale AP, if you do not agree to these terms it is important you contact me immediately” (page 8). An “assignment details form” was attached (page 9), which stated that the start date of the assignment was 5 January 2018, the likely duration or end date was 9 January 2018 or 2 weeks whichever is the earliest date; the “hours of work and normal working days” was stated to be 18:00 to 06:00 12 hour nights. Under the section “rate of remuneration and details of overtime rates (including when overtime is paid”, it stated “ Standard - £7.50 hourly from 05/01/2018 to 09/01/2018”.

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35. The terms however changed from 19 March 2018 at the behest of the client, Greenvale.

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36. These new terms were set out in an assignment schedule dated 19 March 2018 (page 11 and 12). This states hours or work and normal working days 18:00 – 02:00 Custom”; and under “rate of remuneration and details of overtime rates (including when overtime is paid)”, it states, “see appendix A – rate sheet and PPE information”. That appendix (page 14) included the following in a box headed “pay” “Under 25 £7.50 ph. Over 25 £7.50 until 31st March 2018 £7.83 from 1 April 2018 *Overtime paid after 48 hours averaged over 4 weeks at 1.25 of basic rate (reference period from 26<sup>th</sup> Feb and every 4 weeks thereafter)*”.

37. Although the examples lodged were not signed the claimant stated that he had received e-mails with assignment details regularly.
38. Although the claimant did not challenge his pay at any time while he was working for the respondent on the Greenvale contract, the claimant now believes that in the weeks that he worked more than 40 hours he should be paid overtime. He calculated that he should be paid £10 per hour, because this was around one third more than his basic rate.
39. Although the claimant believes that he was suspended for two weeks in or around October 2017 (he cannot recall the exact dates), the claimant in any event took holidays during these two weeks so was on paid annual leave.
40. For the week ending 6 October 2017 (page 54B), the claimant worked and was paid for 57 and a half hours. For the week ending 13 October 2017 (page 55B), the claimant worked 41 hours and was paid for 16 hours holiday. For the week ending 20 October 2017, the claimant was paid 19 hours of holiday (56B). For the week ending 27 October 2017, the claimant was paid for 24 hours of holiday (page 57B).
41. There were different rates of pay for different roles, either GV Factory STD for which latterly he was paid £7.83 and for GV Hygienist STD he was paid £8.38.
42. On a number of occasions the claimant worked more than 40 hours per week, as set out in the pay slips lodged (42B, 46B, 47B, 48B, 50B, 53B, 54B, 55B, 58B, 59B, 63B,65B, 72B, 74B and 75B).
43. The claimant was excluded from the Greenvale site in early November. The claimant was offered a weeks' work with another client of the respondent, Martin the Printers for the week ending 15 November 2018, but he declined to accept it. The claimant took holidays (26 hours) for the week ending 23 November 2018 (page 113).
44. The claimant went to Poland on holiday from 21 December to 3 January 2019.

45. In the weeks remaining between November, December and January before the termination of his employment on 31 January 2019, the claimant did not contact the respondent to indicate that he was available for work.

46. The claimant was paid for annual leave accrued but not taken following the  
5 termination of his employment on 22 March 2019 (page 116).

### **Respondent's Submissions**

47. Mr Bathgate submitted that the claim before the Tribunal is now categorised as a breach of contract claim in relation to the underpayment of wages in  
10 terms of the further and better particulars which the claimant lodged to specify his claim. It consists of three component parts, namely the underpayment of overtime; the alleged suspension in August 2017 and the underpayment of wages between 8 November 2018 and 21 January 2019 when the claimant alleges he was suspended.

15 48. He asked the Tribunal to accept the evidence of Mr Scott as credible and reliable, and to accept it where it conflicts with that of the claimant. He asked the Tribunal to accept as a matter of fact that the signature on page 7 of the pay between agreements contract is that of the claimant; and also to find that the signature on the documents at pages 117 – 212 are the claimants; and  
20 that his evidence that the signature on page 7 is not his is simply not credible when it is compared with the others.

49. In those circumstances, he urged the Tribunal to treat the claimant's evidence in all material respects with caution.

50. The contract at pages 1-7 regulates the arrangement between the claimant  
25 and the respondent at all material times that are relevant to this Tribunal claim; and throughout the time between June 2017 and January 2019, the claimant worked to the provisions of this contract and was paid in accordance with this contract.

51. In other words there is no contract between the claimant and the respondent whereby he is entitled to be paid at the minimum wage for working over 40 hour per week over five days between Monday to Friday.
52. Further there is no provision in any contract which entitles the claimant to be paid at the rate of £10 per hour for overtime worked.
53. The evidence supports the respondent's position that any entitlement to overtime occurs when the employee works for more than 48 hour per week averaged over a four week period. That is then paid at time and a quarter as set out in the assignments which Mr Scott referred to in his evidence that the arrangements for overtime to be paid commenced at 19 March 2018.
54. On the assessment of wage slips averaged out over the reference period of four weeks the claimant did not work over 48 hours so that he has no claim for overtime.
55. Mr Bathgate submitted that even if he is wrong about that, then the quantification of any claim should not be based on £10 per hour, but based on a quarter of his hourly rate as set out in the assignments.
56. Turning to the issue of the underpayments in Autumn 2017 and at the end of the claimant's contract, the respondent's position is that at no time was the claimant suspended from work. The claimant has produced no letters or documents to support his assertion that he was suspended; and the wage slips for October 2017 support the fact that he was paid throughout. The respondent's position is that at all times between June 2017 and November 2018, the claimant was offered work.
57. In respect to the period beyond November 2018 to the termination of the claimant's employment, the claimant admitted that he had been offered work with Martin's the Printers and that had to commence on 15 November 2018. Following 23 November 2018, no contact was made by the claimant to the respondent as required in terms of clause 5.2.1 of the contract.

58. The claimant did not contact the respondent as required in terms of the contract, therefore he was not entitled to be paid in terms of the provisions set out relating to minimum pay on pages 1 and 2 of the contract.

59. If the Tribunal is not with him, then the claimant's evidence is that between 21  
5 December 2018 and 3 January 2018 he was on holiday in Poland which would straddle three pay weeks; and that he took holidays for another week in the period up to 23 November 2018.

60. At best the claimant's position is that he can argue under the contract that he  
10 ought to have been paid for five weeks between 8 November 2018 and 21 January 2019. The weekly rate of pay is not less than 50% of the highest payment of the particular assignments on 25 August. That particular week was the week ending 31 August 2018 when the gross amount paid was £453.83 which would provide a figure of £226.91 that being 50% of 5 weeks amounting to a total of £1,134.55.

15 61. However the respondent's position remains that the claimant was entitled to no further payment because the terms of the contract were complied with in their entirety; he was at no time suspended; and he was offered work throughout the period of his assignment with the respondent except for the period beyond 23 November when he failed to contact the respondent as  
20 required in terms of sections 5 and 8 of the contract. In the circumstances the Tribunal is invited to dismiss the claim.

### **Claimant's submissions**

62. The claimant made reference to the fact that he would have commented on  
25 the contract if it had been e-mailed or posted out to him. He said that his wife was able to confirm that there were documents in relation to the disciplinary action and periods of suspension.

63. He accepts that he was offered work in Edinburgh but he was not in a position to travel 40/50 miles to Edinburgh. He asked for more in Drysdale [more locally] but he was not offered it. He explained that the holiday in

Poland had been pre-planned six months before and he was not in a position to re-schedule it.

64. He submitted that he is only seeking to be paid the money which he is due, which he states is for two weeks while he was suspended, as well as for the overtime.

### **Tribunal deliberations**

#### **Observations on the evidence and the witnesses**

65. The Tribunal heard evidence only from the claimant and from Mr Scott, director with the respondent. Although I did not accept the claimant's evidence, this was largely because of very evident misunderstandings of the legal position. So his evidence in general was unreliable, so that this is not a comment on his credibility as such.
66. There was a rather odd passage of evidence relating to whether the documents lodged bore the signature of the claimant. He suggested that the signature on the agreement did not look like his signature, but he did say too he could not be 100% sure about that. I have found that the signature on the pay between assignments agreement bears to be his signature; and in any event that the relationship between the claimant and the respondent was regulated by the terms of that contract.
67. Consequently, wherever there was a conflict between the claimant's understanding, and Mr Scott's evidence, the evidence of the respondent was preferred.
68. With regard to the relevant law to be applied, this is a claim for breach of contract upon termination of employment and therefore to be determined on the basis of the contractual agreement between the claimant and the respondent.

### **Overtime claim**

69. Mr Laczynski submitted that he had not been paid overtime for hours that he had worked. He explained that he had been taken on to work 40 hours per week Monday to Friday, working night shifts. It is clear however that he was not engaged to work 40 hours per week because on many occasions he did not work as much as 40 hours per week. Rather as an agency worker, he worked variable lengths of shifts depending on the nature and scale of business at the time.

70. Although he did not raise the matter at the time, he came to the view that he ought to be paid for any week when he had worked for over 40 hours, and he pointed to all of the pay slips which had been lodged which showed that he had worked over 40 hours but only been paid at a basic rate. He calculated that he should be paid £10 per hour, but that was based on what he understood others working on other contracts were being paid in respect of overtime rates.

71. Whether a worker is entitled to overtime for hours worked and at what rate will depend on a worker's contract. In this case, it is clear from the terms of the assignment schedules (which the claimant accepts he got even if there were none lodged which he had signed) that the arrangement with regard to over time was that it would be paid after 48 hours averaged over four weeks and paid at time and a quarter. On that basis, for the period after 19 March 2018 when the provision came into force, the respondent submits, and I accept based on an analysis of the payslips lodged, that there was no four week period when the claimant averaged over 48 hours per week. Consequently based on the agreement made between the claimant and the respondent the claimant was not entitled to any overtime during the time he worked for the respondent.

### **Suspension in 2017**

72. The claimant also sought pay for weeks during which he claimed to have been suspended.

73. He referenced a period in October 2017 when he says that he was suspended. That may well be right, but as Mr Bathgate pointed out, the claimant did not lodge any documents or paperwork to confirm that. Even if his wife had such paperwork as he alleged, he had not lodged it. But in any event, by reference to the pay slips which were lodged for October 2017, there is no week when the claimant was not paid. For the week ending 13 October 2017, he is stated to have taken some holidays (but also worked 41 hours) and for the week ending 20 October 2017 he took 19 hours of holidays; and for the week ending 27 October 2017 he took 24 hours of holidays. He said that he had to take holidays while suspended because he needed the holiday pay, and that may well be the case. However this does not accord with not having been paid while suspended from work, even if he was entitled under the terms of his contract to be paid while suspended. Mr Lacszinka referenced others he knew who had been paid while suspended, and that may well be set out in the terms of their contract with their employer.

74. Thus I find that there were no sums due to the claimant in respect of any period in Autumn 2017.

### **Suspension at the end of 2018**

75. With regard to his claim for payment for a period while he was suspended prior to the termination of his employment, given that I have accepted the respondent's evidence and in particular I have accepted that the relations between the claimant and the respondent are governed by the terms of the "pay between assignments" contract, I find that the claimant is not entitled to payment for the period prior to the termination of his employment.

76. In particular, I note that the claimant was excluded from site early November 2019 (various dates between 2, 8 and 11 November were suggested) on the grounds of alleged misconduct. His alleged misconduct led to him being asked not to return by the end user client.

77. The respondent then conducted an investigation and disciplinary process which resulted in the claimant being dismissed for gross misconduct on 21 January 2019.



78. The claimant asserts that he was “suspended” during that period, but this is denied by the respondent.
79. The respondent’s position is that the claimant was offered work for the week ending 15 November 2019 with Martin The Printers. As I understand his evidence, this is not denied by the claimant, but his position is that given his location and family circumstances he could not travel to Edinburgh to take up work there.
80. The following week, as is clear from the payslips, the claimant took annual leave. The claimant also confirmed that he had been on holiday in Poland from 21 December 3 January. He was paid for the balance of his outstanding holiday following the termination of his employment.
81. The outstanding question relates to the remaining weeks, that is the last week in November, and the weeks during December and January before the termination of his employment.
82. The claimant claims that he was “suspended”. The respondent rejects this. While it may well be that an employee is entitled to be paid while “suspended” given the terms of their employment, there is no provision in this contract which relates to suspension.
83. Indeed the contract is titled “pay between assignments” and so clearly intends to regulate the situation when an employee was not on, or was not offered, an assignment. The contract provides that during such a time an employee will received minimum pay calculated on the basis of a stipulated formula. However, this must be read with paragraph 8.9 of the contract, which states that in order to benefit from the right to minimum pay, an employee is obliged to remain contactable by telephone so that the company can offer them suitable work if it becomes available. And in particular, an employee must contact the company each day before 10 am to report that they are available for work (or indeed unavailable). As I understood the claimant’s evidence, he did not do so. In such circumstances he is not entitled to the benefit of minimum pay, or indeed full pay which he seeks.

84. I find therefore that the claimant was not suspended from work following being excluded from the Greenvale contract. Nor was he entitled to any remuneration up to the date of the termination of his employment, given the terms of engagement between the claimant and the respondent. This claim is therefore dismissed.

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Employment Judge: Muriel Robison

Date of Judgment: 26 May 2021

Entered in register: 01 June 2021

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