EMPLOYMENT TRIBUNALS

Claimant: **Mr Stefan Wawrzyniak**

Respondents: **R1) Pertemps Recruitment Partnership Ltd**
R2) Unipart Group Limited

Record of an Open Preliminary Hearing at the Employment Tribunal

Heard at: **Nottingham** **On: 28 June 2022**
Reserved to: 5 July 2022 (in chambers)

Before: **Employment Judge Blackwell (sitting alone)**

Representation

Claimant: **In person**

Respondent: **R1) Mr Irani-Nayer, Counsel**

R2) Mr Ian Lovejoy, Solicitor

RESERVED JUDGMENT

1. The Claimant's application to amend so as to include an allegation of a breach of Regulation 13 of the Agency Workers Regulations 2010 (2010 Regulations) is refused.

2. All of Mr Wawryzniak's claims of breaches of Regulation 5 of the 2010 Regulations are struck out as having no reasonable prospect of success save for the claim of an alleged entitlement to take and be paid for 5 days compassionate leave.

3. The claims against the first Respondent of breaches of Regulation 17(1) and 17(2) of the 2010 Regulations are struck out as having no reasonable prospect of success.

4. I decline to strike out or make any order for a deposit in relation to the claim against the second Respondent pursuant to Regulation 17(2) of the 2010 Regulations.

RESERVED REASONS

1. I heard evidence from the Claimant and Mr R Hind, an HR Business Manager employed by R2. There was an agreed bundle of documents references are to page numbers in that bundle. Mr Wawzryniak also gave evidence.

Introduction and History

2. On 11 February 2022 there was a Case Management Discussion held by telephone before Employment Judge Clark. At pages 37 to 40 EJ Clark sets out in his paragraphs 1 to 14 both the nature of the claims advanced by the Claimant in his claim form presented on 16 September 2021 and the application to amend granted by EJ Clark as follows: -

> *1) "By a claim presented on 16 September 2021, following early conciliation between 25 and 31 August 2021, the claimant brings claims alleging breaches of regulation 5 of the Agency Worker Regulations 2010 ("the regulations"). There is also an application before me to amend the claim to include recent events which I deal with below.*
>
> *2) The claimant is employed by the respondent to provide labour to hirers. One such hirer is the Unipart Group which currently manages the NHS Supply Chain warehouse at Alfreton. The claimant was employed by the respondent for the initial purpose of being assigned to Unipart at this site.*
>
> *3) It seems that management contract was previously operated by DHL (and possibly other entities at other times). That appears potentially relevant to the issues in this case as it provides a basis as to why this respondent says some of Unipart's direct employees at this site may have different terms and conditions to that which Unipart would now offer to new direct recruits. It is said some employees have been inherited following a TUPE transfer.*
>
> ***The Existing Case***
>
> *4) There are a number of aspects of the existing case that are agreed. It is not in dispute that: -*
>
> *a) the claimant is an agency worker within the meaning of regulation 3 of the regulations.*

b) The respondent is a temporary work agency (TWA) for the purposes of regulation 4 of the regulations.

c) Unipart Group is the hirer.

d) The claimant has been engaged with the same hirer throughout all relevant times.

e) The claimant's engagement started under a contract between him and the respondent signed on 1 April 2020 and the qualifying period under the regulations commenced on 3 April 2020.

f) On that basis, his 12-week qualifying period ended on 25 June 2020, at which point he acquired the rights conveyed by regulation 5 of the regulations.

5) In respect of each of the aspects of his terms and conditions challenged, the issue in this claim is essentially one of comparison with the hirer's same basic working and employment conditions. If, as at 3 April 2020 (and subject to any subsequent variation), the claimant would have been entitled to more beneficial terms as a direct employee than he was in fact entitled to under his agency employment, there will be a breach of regulation 5. The terms he challenges are: -

a) His basic rate of pay
b) His holiday entitlement
c) An alleged entitlement to take and be paid (5 days) compassionate leave
d) An alleged entitlement to additional/longer paid breaks during the working day.

6) There is no dispute that a), b) and d) are relevant terms governed by regulation 6. It will be an issue for the final hearing to determine whether compassionate leave is a relevant term within scope of the regulations (over and above consideration of any comparative differences).

7) Whether these terms are the same as a comparable direct employee or less beneficial for agency workers will be determined by the appropriate comparison with the hirer's terms and conditions and applicable rates that would have been available to a direct employee starting on 3 April 2020 and engaged in the same or broadly similar work. That may be demonstrated by reference to established pay and conditions or, where there is a contemporaneous comparable permanent employee, either may point to that person in the evidence as an appropriate comparator.

8) In that regard, it may be significant to note that the claimant relies, in part at least, on "permanent colleagues who working there over 10 years and do exactly the same job". Two things arise from this. One is that there may be legitimate differences arising from the length of service. The other is that the respondent says some staff have terms and conditions preserved following an earlier TUPE transfer. It seems unlikely that that such individuals will provide an appropriate or material comparison but I leave that issue to the final hearing. The comparison generally has to be with the terms and conditions that would have been offered by the hirer if the claimant had been directly employed by them when he was taken on. Mr Wawrzyniak developed his argument today. He will also argue at a future hearing that the 2010 regulations should take

precedence over the 2006 TUPE regulations and that even if a direct employee's terms derive from a previous employment inherited under TUPE, he should still receive the same terms.

Time Limits

9) So far as the pay and terms were continuing from day to day at the date the claim was presented, they are in time. However, in respect of the allegation concerning compassionate leave, the date of the effect of the difference is not pleaded. Mr Wawrzyniak could not recall the exact date but placed it broadly in the weeks following 12 May 2021. The earliest date in time appears to be 2 weeks later on 26 May 2021. Even if the infringement was found to be before that date, the time limit is then subject to a just and equitable power to extend. The parties should address this in their submissions.

Amendment Application

10) Yesterday, Mr Wawrzyniak has emailed the tribunal and respondent with an application to amend his claim to add a new claim based on very recent events. I dealt with that application today and granted permission. That was principally because the alleged facts are clear, the claimant has almost the entirety of three months still to present a fresh claim as of right, the new complaint arises out of the same "matter" as the existing for the purpose of Early Conciliation (albeit it is not a requirement for an amendment) and there is no compelling reason in the case management of the existing claim for it to cause hardship to the respondent. Dealing with it now progresses the claim efficiently for all concerned.

11) As result, the claim now includes the matters set out in his written application dated 10 February 2022 and attachments and as particularised here.

12) On Friday 4 February 2022, Mr Wawrzyniak was told he was being removed from his position at the NHS supply chain. This decision came soon after he had posted a damning on-line review of the NHS Supply Chain warehouse under the current management of Unipart Group (i.e. the hirer). He has attached the terms of the post to his application to amend. In it, he is particularly critical of safety, discrimination and the management culture. Much of his criticism is expressed in the context of the matters he has complained about in the existing claim. He explicitly references the Agency Worker Regulations 2010 and the Equality Act 2010.

13) Mr Wawrzyniak says he was told that because of this post he was not required any longer at his job (unless he removed it). In the contemporaneous correspondence attached to his amendment application, an employee of the respondent (Tanya Fahey) denied that ultimatum was made but does accept that he was asked to remove the post. She goes on to confirm he was not suspended and that the respondent can offer alternative work after his holiday.

14) He has sought to bring an additional claim in relation to this. He has expressly labelled it a claim of unfair dismissal but, in the context of his employment with this respondent for the purpose of agency assignment, there may be an issue as to whether that relationship has in fact terminated. The respondent says it has not terminated it, he has not resigned and, in any event, he did not have 2 years qualifying service as at the date of the alleged dismissal. I am satisfied there is no requirement to have 2 years qualifying service (see section 108(3)(r) of the Employment Rights Act 1996) and so,

despite my reservation that there may not have actually been a dismissal, it sems to me that the claim is a proper one to advance. However, it also appears to me that the factual allegations made are more accurately articulated in law as claims of detriment under regulation 17(2) of the Agency Worker Regulations 2010 and/or victimisation under section 27 of the Equality Act 2010."

3. In relation to the amendment dealt with in paragraphs 10 to 14 above I have seen Mr Wawrzyniak's letter to amend at page 54 and further correspondence at pages 55 and 56. Having heard Mr Wawrzyniak's further explanation of his position he regards his removal from the Alfreton Depot in February 2022 as "a dismissal". Mr Wawryzniak has two complaints of inequity, the first is that he was paid at a different rate and has different conditions to those employees which Mr Hind describes as "Agenda for Change". The second complaint is that R2 has failed to close the pay gap between the various classes of TUPE employees. Whilst I have sympathy for Mr Wawryzniak's position this Tribunal can only assist if the law permits it to do so.

4. I am satisfied that having heard Mr Wawryzniak at length that the amendments to the original claim he brings firstly against R1:-

   4.1 A claim of unfair dismissal pursuant to Regulation 17(1) of the 2010 Regulations.

   4.2 An allegation pursuant to Regulation 17(2) that he has been subjected to a detriment namely, being permanently removed from the Alfreton site.

5. Against R2 a claim pursuant to Regulation 17(2) the detriment being the instruction to R1 to remove Mr Wawryzniak from the Alfreton site on a permanent basis.

6. On the 28 April R2 was added though incorrectly named. The correct entity is Unipart Group Limited.

7. On 30 May R1 Solicitors made an application to strike out or in the alternative for the payment of a deposit see pages 62 to 63.

8. On 8 June at pages 52 and 53 EJ Ahmed listed this hearing to determine the following issues:-

   "1. To determine whether the complaints of a breach of the Agency Worker Regulations 2010 and unfair dismissal should be struck out if it is

considered that they have no reasonable prospect of success within the meaning of Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013;

2. Alternatively, to determine whether the Claimant should pay a financial deposit as a condition of continuing with any or all of the complaints (or any allegations or arguments in respect of them) if it is considered that they have little reasonable prospect of success, and if so to decide the amount of the deposit."

9. At the beginning of today's hearing, I invited Mr Wawryzniak to re-read Employment Judge Clark's Case Summary and the witness statement of Mr Hind. I explained to Mr Wawryzniak that he would need to challenge those factual statements contained in Mr Hind's evidence with which he did not agree. I also informed him that I proposed to ask him once he had re-read those two documents with whom he was comparing himself and in particular whether he was only comparing himself with the Agenda for Change employees. At that point but not on oath, Mr Wawryzniak said he was comparing himself with employees other than the Agenda for Change employees.

Application to Amend

10. Also, at that point Mr Wawryzniak produced a copy of a letter from him to Unipart of 25 November 2021 which was added as pages 94 and 95 of the agreed bundle. I explained to him that the letter could be treated as an application to amend his claim so as to include an allegation of a breach of Regulation 13 of the 2010 regulations or it could be simply added for reference both during this hearing and the final hearing. Mr Wawryzniak made it clear that he wished to make an application to amend based upon the letter of 25 November. We therefore dealt with that application on the basis of the well-known Selkent rules.

11. In that regard it is for the Tribunal to carry out a balancing exercise of all the relevant factors having regards to the interest of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. The relevant factors would include: -

a) The Nature of the Amendment

So far Mr Wawryzniak advances his claims under both Rules 5 and 17 of the 2010 regulations. The nature of the letter of 25 November is that it is an allegation of a breach of Regulation 13 and is therefore an entirely new cause of action.

b) The Applicability of Time Limits

It is clear that time began to run by not later than 25 November 2021 and it is therefore clear that the claim is some four months out of time. Regulation 18 permits an extension of time if "in all the circumstances of the case it considers that it is just and equitable to do so".

c) The Timing and Manner of the Application

The application was made today some half an hour after the start of proceedings. Mr Wawryzniak provided no explanation for why it had not been done earlier. It seems that he has never sought advice and has conducted these proceedings entirely off his own bat. The facts set out in the letter of 25 November were obviously available to Mr Wawryzniak at that point. He made no reference to them either in his application to amend, see page 54, or in the discussions with Employment Judge Clark 11 February 2022.

d) The Balance of Hardship

Plainly if I refuse this application then Mr Wawryzniak will not be able to pursue the allegation. Liability if proven lies with the hirer ie R2 and they would be obliged to begin an investigation into the various applications and interviews set out in the letter of 25 November which would clearly not be a simple task.

12. Taking all these factors into account and the fact that prima facie based on the letter of 21 November that Mr Wawryzniak was actually given the opportunity to apply for posts, his complaint simply being that he was not appointed, then in my view the balance lies clearly against permitting the application to amend and I therefore refuse it.

Issues

13. These are set out at paragraphs 4 and 5 above and paragraph 5 of EJ Clark's summary.

The Relevant Law

14. **Regulations 5, 6, 17 of Agency Workers Regulations 2010**

*"**Rights of agency workers in relation to the basic working and employment conditions***

***5.**—(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—*

(a)other than by using the services of a temporary work agency; and

(b)at the time the qualifying period commenced.

(2) For the purposes of paragraph (1), the basic working and employment conditions are —

(a)where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;

(b)where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where—

(a)an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

(b)the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(a)both that employee and the agency worker are—

(i)working for and under the supervision and direction of the hirer, and

(ii)engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b)the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(5) An employee is not a comparable employee if that employee's employment has ceased.

(6) This regulation is subject to regulation 10.

"Relevant terms and conditions

***6.**— (1) In regulation 5(2) and (3) "relevant terms and conditions" means terms and conditions relating to—*

(a) pay;

(b) the duration of working time;

(c) night work;

(d) rest periods;

(e) rest breaks; and

(f) annual leave.

(2) For the purposes of paragraph (1)(a), "pay" means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other

emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

(3) Those payments or rewards are—

(a) any payment by way of occupational sick pay;

(b) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;

(c) any payment in respect of maternity, paternity or adoption leave;

(d) any payment referable to the worker's redundancy;

(e) any payment or reward made pursuant to a financial participation scheme;

(f) any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service;

*(g) any payment for time off under Part 6 of the 1996 Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992(**1**) (payment for time off for carrying out trade union duties etc);*

(h) a guarantee payment under section 28 of the 1996 Act;

(i) any payment by way of an advance under an agreement for a loan or by way of an advance of pay (but without prejudice to the application of section 13 of the 1996 Act to any deduction made from the worker's wages in respect of any such advance);

(j) any payment in respect of expenses incurred by the worker in carrying out the employment; and

(k) any payment to the worker otherwise than in that person's capacity as a worker.

(4) For the purposes of paragraphs (2) and (3) any monetary value attaching to any payment or benefit in kind furnished to a worker by the hirer shall not be treated as pay of the worker except any voucher or stamp which is—

(a) of fixed value expressed in monetary terms, and

(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

(5) In this regulation—

"financial participation scheme" means any scheme that offers workers of the hirer—

(a) a distribution of shares or options, or

(b) a share of profits in cash or in shares;

"night time", in relation to an individual, means—

(a) a period—

(i) the duration of which is not less than seven hours, and

(ii) which includes the period between midnight and 5 a.m.,

which is determined for the purposes of these Regulations by a working time agreement, or

(b) in default of such a determination, the period between 11 p.m. and 6 a.m.;

"night work" means work during night time;

"relevant training" means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training—

(a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and

(b) which is provided on a course run by that institution or person;

"rest period", in relation to an individual, means a period which is not working time, other than a rest break or leave to which that individual is entitled either under the Working Time Regulations 1998 or under the contract between that individual and the employer of that individual;

"working time", in relation to an individual means—

(a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual,

(b) any period during which that individual is receiving relevant training, and

(c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement; and

"working time agreement", in relation to an individual, means a workforce agreement within the meaning of regulation 2(1) of the Working Time Regulations 1998, which applies to the individual any provision of—

(a) a collective agreement which forms part of a contract between that individual and the employer of that individual, or

(b) any other agreement in writing which is legally enforceable as between the individual and the employer of that individual."

Unfair dismissal and the right not to be subjected to detriment

17.— *(1) An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).*

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

(a)that the agency worker—

(i)brought proceedings under these Regulations;

(ii)gave evidence or information in connection with such proceedings brought by any agency worker;

(iii)made a request under regulation 16 for a written statement;

(iv)otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;

(v)alleged that a temporary work agency or hirer has breached these Regulations;

(vi)refused (or proposed to refuse) to forgo a right conferred by these Regulations; or

(b)that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for subjection to any act or deliberate failure to act is that mentioned in paragraph (3)(a)(v), or paragraph 3(b) so far as it relates to paragraph (3)(a)(v), neither paragraph (1) nor paragraph (2) applies if the allegation made by the agency worker is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to a dismissal of an employee within the meaning of Part 10 of the 1996 Act."

15. **37 and 39 of the First Schedule of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013**

"Striking out

37.— *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

39.— *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise, the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

16. Further as Mr Irani-Nayer points out in his helpful Skeleton Argument a case should not be struck out as having no reasonable prospect of success if there is *"a crucial core of disputed facts"* that are *"not susceptible to determination otherwise than by hearing and evaluating the evidence"* that is Ezsias v North Glamorgan NHS Trust 2007 IRLR603.

The Regulation 5 Claims

17. In addition to the agreed facts set out at paragraph 4 of EJ Clark's summary I find the following additional facts. At all relevant times there were three classes of employee at the Alfreton warehouse: -

    a) Agenda for Change employees originally employed on NHS Terms and Conditions.

    b) DHL employees employed before the TUPE transfer as between DHL and R2 which occurred in 2019 I accept Mr Hind's evidence that not all of the DHL employees had the same terms.

    c) R2's employees.

18. I accept Mr Hind's evidence not challenged by Mr Wawryzniak that the only employees enjoying different terms and conditions to those enjoyed by Mr Wawryzniak were the Agenda for Change employees. Mr Wawryzniak also accepted that proposition in cross examination.

19. However, Mr Hind in his statement says in relation to compassionate leave the following; -
    "For the sake and completeness Unipart employees are allowed to take up to 5 days paid leave in case of the death of a close family member, the exact amount

dependent on individual circumstances including the closeness of the deceased relative to them. This is not an expressed contractual term but a general practice".

Conclusion

20. Thus, having regard to the wording of Regulation 5 the only employees with whom Mr Wawryzniak is entitled to compare himself are the Unipart employees in terms of pay, holiday entitlement and entitlement to additional longer paid breaks. The evidence is clearly that there was no difference. It therefore follows that in relation to rate of pay holiday entitlement and additional/longer paid breaks his claim has no reasonable prospect of success and must therefore be struck out.

21. As to the allegation in relation to compassionate leave it seems to me that it is arguable that, as Mr Irani-Nayer concedes that compassionate leave may fall within the definition of pay contained in Regulation 6. Both Respondents argue that a true interpretation of Rule 6(3) shows an intention not to include compassionate leave within the ambit of the Regulations. I am not entirely convinced by that argument and think it is best left for the final hearing.

Further Claims Against R1

Unfair Dismissal Pursuant to Regulations 17(1)

22. Mr Irani-Nayer submits that there never was a dismissal. Mr Wawryzniak made it clear that he applied for his P45 as a reaction to his being excluded from the Alfreton site where he had worked for the whole of his employment with R1. It is always for the Tribunal to determine what brought about an end to the contract of employment. I am not satisfied that Mr Wawryzniak has no reasonable prospect or little reasonable prospect of establishing that there was a dismissal. It may well be that he could establish the grounds for a constructive dismissal. That is particularly so since he alleges that no procedure was followed and that R1's employees would not listen to his side of the story.

23. However, it seems to me that there is very clear evidence that the reason or if more than one the principle reason for the dismissal was Mr Hind's email of 7 February 2022 at page 81 in which Mr Hind's said, *"Unipart do not want him to return to the assignment in Alfreton as he has failed to follow a procedure for Pertemps or Unipart to be able to investigate or look into any concerns that he may have wanted to discuss or raise and has instead made comments in a public domain that are potentially unfounded, derogatory, slanderous and bring Unipart's name in dispute. You told me on Friday that he would take the post down, but it is still there".* Mr Hind confirmed in evidence that that email was sent and that he expected R1 to remove Mr Wawryzniak from the Alfreton warehouse and not to return. In my view

that evidence renders the claim of unfair dismissal against R1 as having no reasonable prospect of success and therefore should be struck out.

Claim of Detriment Pursuant to Regulation 17(2)

24. For the same reasons as given above in paragraph 23 this claim also has no reasonable prospect of success and should be struck out.

Claim Against R2 Detriment Pursuant to Regulation 17(2)

25. The detriment here is the removal of Mr Wawryzniak from the Alfreton site such removal not being in dispute. It is also arguable that the letter of 25 November 2021 satisfies Regulation 17(3)(a)(v). Notwithstanding that I cannot see a Tribunal reaching any other conclusion on the facts that the reason for Mr Hind's instruction to have Mr Wawryzniak removed from the Alfreton site was his posting in social media of allegations of breaches of Health and Safety qualifications.

26. However, that posting also included the following allegation, "*Unequal pay. There are four different pay and entitlements to the employee who do the same job this was introduced gradually under difference blankets (Equality Act 2010 or AWR 2010 not applied). Some employees can have 15-minute break longer than others who do the same job if you was involved in accident you will quickly realise what it means blaming culture".*

27. Thus, that post which is set out at page 79 is clearly compliant with 17(3)(a)(v) and given Mr Hind's evidence at paragraph 17 *"I can confirm that the decision to ask Pertemps to remove Stefan was solely because of the material he placed on the internet about our site and had nothing to do with his complaints in 2021 about the term of his engagement."* It seems to me therefore that there is an arguable case against R2 under Regulation 17(2) which should proceed to a full hearing.

ORDERS

Made Pursuant to the Employment Tribunal Rules of Procedure

1. The final hearing will proceed as already listed **on Monday 31 October 2022, Tuesday 1 November and Wednesday 2 November 2022 before an Employment Judge sitting with members at The Tribunal Hearing Centre, Carrington Street, Nottingham, NG1 7FG.**

2. In so far as orders Case Management Orders have not so far been complied with the parties are to seek to agree a revised table. If such cannot be agreed, then an urgent application must be made for a further Case Management Discussion.

3. Thus, the issues that remain to be determined are: -

    a) Against both R1 and R2 that there was a breach of Regulation 5 of the 2010 Regulations in respect of an alleged entitlement to take and be paid for 5 days compassionate leave.

    b) Whether such claim has been brought within time having regard to Regulation 18 and if it has not whether in all the circumstances of the case it would be just and equitable to consider such complaint.

    c) Against R2 alone an allegation of a breach of Regulation 17(2) of the 2010 Regulations the detriment being the instruction to have Mr Wawryzniak removed from the Alfreton site.

Employment Judge Blackwell

Date: 3 August 2022

JUDGMENT SENT TO THE PARTIES ON

12 August 2022

FOR THE TRIBUNAL OFFICE

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