



EMPLOYMENT TRIBUNALS

Claimant: Miss R Youd

Respondent: Elton Community Centre

HELD AT: Liverpool

ON: 14 November 2017
15 November 2017
(in Chambers)

BEFORE: Employment Judge Langridge

REPRESENTATION:

Claimant: In person

Respondent: Mr G Woodcock, HR Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The draft contract provided by the respondent to the claimant on 10 January 2017 complied in part with the requirements of section 1 Employment Rights Act 1996, in identifying her written particulars of employment.
2. The written particulars of employment applicable to the claimant at the date when she brought her claim are as set out in the schedule to this Judgment.
3. The claimant is entitled to be given written itemised pay statements since her employment began on 7 August 2015.

REASONS

The Issues & Law

1. In her application to the Tribunal the claimant included claims for unpaid holiday pay, a declaration as to her written particulars under section 1 Employment Rights Act 1996 ('the Act') and a declaration as to her right to itemised pay statements under section 8 of the Act. The claimant also sought payment of wages in accordance with the recommended living wage. The primary reason that these

claims arose was that the respondent had not previously recognised the claimant as a worker or as an employee so as to qualify for any of these rights.

2. In its response to the claim the respondent maintained that the claimant was neither a worker nor an employee, but at the outset of this hearing it sensibly made various concessions. It conceded that the claimant does have employee status within the meaning of section 230 of the Act, that she has the right to itemised pay statements, and that she has the right to holiday pay in accordance with the Working Time Regulations 1998. Before the hearing started the respondent agreed to pay in full the claimed amount of holiday pay amounting to £546.70 gross covering the entire period of the claimant's employment, thereby also conceding the point it had previously raised that part of that claim was out of time. It therefore did not become necessary for the Tribunal to make any determination on the holiday pay claim.

3. The respondent agreed that its intention had been to provide the claimant with written particulars in accordance with section 1 of the Act, and very helpfully its representative, Mr Woodcock, set out in detail in his written submissions what the respondent understood those particulars should say. He identified those terms which the respondent felt were agreed (the vast majority), leaving the following terms still in issue:

- (1) The rate of pay of £7.70 per hour.
- (2) The hours of work, expressed to be a "guaranteed" six hours per week plus agreed overtime.
- (3) The job title of "cleaner/assistant".

4. These issues were discussed in some detail before hearing evidence in the claim. The claimant conceded that she had no legal right to seek a living wage, that her hourly rate is the rate expressly agreed with the respondent, and that her hourly rate meets the threshold under the National Minimum Wage Act.

5. Section 11(2) of the Act provides that the Tribunal may:

- a. confirm the particulars of employment as provided already;
- b. amend those particulars; and/or
- c. substitute other particulars.

6. The relevant approach for the Tribunal is to identify from the evidence what express and/or implied terms were agreed by the parties, including by their conduct, to ensure that the statutory particulars accurately reflect those terms. The Tribunal does not have the power to invent new terms, but rather it may clarify the terms agreed, or the fact that no term was agreed. The task is to be carried out by reference to the evidence. The Tribunal took into account the guidance in Southern Cross Healthcare v Perkins 2011 IRLR 247, CA and Eagland v British Telecom plc 1992 IRLR 323, CA.

7. It was explained to the claimant on several occasions during the hearing that it is not the Tribunal's role to determine the terms she would like to negotiate with her

employer, but rather to decide what terms were actually agreed between them. This would be determined either by reference to terms agreed expressly (orally or in writing) or terms which the Tribunal determined were implied into the employment relationship following the usual legal tests, but particularly by reference to the conduct of the parties during the two years or so of the claimant's employment.

8. Some other matters raised by the claimant in her Schedule of Loss were abandoned before the hearing began, namely for wages not paid. This was partly because they formed no part of her application to the Tribunal, and in fact arose after it was presented. The claimant went further and said that she felt these payments were about getting a "fairer wage", which was something she had hoped would be "ironed out" when she got a contract from the respondent.

9. The discussion about the issues therefore resulted in the Tribunal's task being confined to declarations as to two issues: the written particulars to which the claimant was entitled under section 1 of the Act; and the right to pay statements under section 8 of the Act. The latter point was conceded by the respondent. On the question of written particulars, the substantive issues of fact were reduced to the question of the claimant's working hours, and the description of her job title and/or duties. This last point formed the main substance of the dispute. While the scope of the issues was narrowed, the amount of detail in the evidence about the job title and duties was such that it took a great deal of time to hear the evidence. The Tribunal was presented with a substantial number of documents by the claimant relating to her employment, the most relevant of which were a draft contract and job description issued in January 2017, minutes of various meetings of the respondent's committees, and emails showing what was said by the parties about certain issues of fact.

10. The Tribunal heard evidence from five witnesses in total, being the claimant, her partner (and former Chairman of the respondent) Martin Dickinson, and three witnesses from the respondent. These included Mrs Maureen Wilson, a secretary responsible for a disputed set of minutes; Mr Nigel Goodliffe, a former Chairman of the respondent; and its current Chairman, Mr Colin Crispin. Of the five witnesses only Mr Dickinson had a formal written statement.

11. The respondent produced a very short bundle incorporating the draft contract it had given the claimant in January 2017, a separate contract which the claimant had provided to it a few days later, and some very helpful written submissions.

Findings of Fact

12. The respondent is a community centre, unincorporated and run by volunteer trustees. It hires out the centre to organisations for events and has three bar staff which it treats as casual workers. The claimant is the only other person working in the centre, excluding the volunteers.

13. In August 2015 the respondent advertised the vacancy of "cleaner/assistant" to work a minimum of five hours a week. The duties of the job entailed mainly cleaning duties but also extra duties to include monitoring the centre when dance festivals were held, opening and closing for hirers if community members were unavailable to do so, and overall being proactive and "able to attend to small issues"

or report them to the committee. This summary of the job description was set out in the job advertisement, and following a successful application the claimant began work on 7 August 2015.

14. No written particulars or contract of employment were issued to the claimant at the time and she worked without any problems through to the end of 2016. When the claimant attended work, generally for around six hours a week with occasional extra hours of agreed overtime, she did so primarily in order to carry out cleaning and ancillary duties, such as making a list of cleaning supplies which she needed a committee member to order, or checking that windows were securely shut. She did not deal directly with suppliers but simply made a note of cleaning materials that she needed the trustees to order. The claimant did not attend the centre on any occasions other than to carry out the cleaning and ancillary duties, for example she did not attend simply to check on maintenance or security issues.

15. From January 2017 the subject of the claimant's written terms of employment and her duties began to be discussed. At that time her partner, Martin Dickinson, was the Chairman of the trustees and was directly involved in those discussions. He understood that he had a conflict of interest in relation to the claimant's position at the centre, but nevertheless he did take various steps during 2017 to press the respondent to treat her as an employee, to issue her with contract terms and to recognise aspects of her role which the claimant said meant she was in effect a "cleaner/caretaker". This title mattered to the claimant for reasons of job progression, and she saw it as "a reward for missing out on two years of National Insurance" as well as it being "good for her CV". She felt her title of "cleaner/assistant" was "a bit nondescript". The claimant did nevertheless acknowledge in her evidence that the title of "caretaker" could be interchangeable with that of "assistant".

16. This became the focus of the disagreement between the parties and is the main issue which the Tribunal had to deal with at the hearing.

17. On 10 January 2017 the respondent provided a draft contract to the claimant which, although not agreed, did comply with most of the requirements of section 1 Employment Rights Act 1996. This was issued by Mr Goodliffe, who was then the Chairman of the trustees, until Mr Dickinson took over that role shortly afterwards.

18. At a committee meeting on 11 January 2017 the claimant presented her arguments to members, including Mr Dickinson, as to why her contract should be changed in certain ways. She did not wish to be described (as she was in the draft contract) as a "zero hours' worker", and the main point of contention was that she wanted the title of "cleaner/caretaker". To use Mr Dickinson's words, the claimant was "fighting her corner".

19. The minutes of that meeting did not identify the detail of what changes were agreed to be made to the contract, though the question of the job title was one of the proposed changes. There was no agreement on that occasion to change the job title, but rather a proposal to put that forward for consideration at a later meeting of the trustees.

20. The minutes of the 11 January meeting incorrectly referred to the claimant as “cleaner/caretaker” but this was an error on the respondent’s part, contributed to by the focus on this job title during the discussion.

21. Not only did the respondent not agree on 11 January 2017 to change the job title as the claimant wished, it did not do so at any later date and never agreed that the claimant should be treated or described as a “cleaner/caretaker”. As Mr Dickinson himself said in oral evidence, any such agreement was subject to being ratified or approved by the trustees after that meeting. That ratification never took place, for a number of reasons. Firstly, the respondent is a very small organisation run by a few trustees who volunteer their time. They were extremely busy with a number of issues including an approaching AGM. A further factor was that there were a number of problems between the trustees and some disagreements which led to changes in the committee membership. One of the consequences of these disagreements was that Mr Dickinson resigned as Chairman in late August 2017. By the time of his resignation Mr Dickinson was continuing to push the respondent to accept the changes the claimant wanted to negotiate in her contract.

22. Returning to the events of January 2017, the claimant produced a lengthy 17 page draft contract on 13 January 2017 which she adapted from a template designed to be used for executives or managers. Her document bore no relation to the draft produced by the respondent three days earlier. The claimant’s document was discussed at a meeting with the respondent on 30 January 2017. The claimant’s own draft contract set out a list of duties, divided into regular duties and occasional duties. The regular duties mainly comprised cleaning as well as “attending to small maintenance issues”, including changing light bulbs and fuses. Under “occasional” duties the claimant identified opening and closing the centre for hirers, monitoring the centre during functions and taking bookings for functions.

23. The claimant’s draft contract did not include any reference to the duties she now claims were indicative of her working as a caretaker, such as working at heights, carrying out PAT testing of appliances, managing the respondent’s Facebook page, or obtaining quotes for maintenance work at the centre.

24. No decision was taken at the meeting of 30 January 2017 because one of the trustees (Miss Jarvis) refused to vote on principle, taking the position that the respondent did not have any employees and therefore being unwilling to give the claimant employee status. Mr Dickinson himself was unable to vote because of his conflict of interest, leaving only one other trustee who could not take a decision on his own.

25. At no time was any decision taken after that to ratify or agree the claimant’s proposed contract terms, as acknowledged by Mr Dickinson in his evidence.

26. At some point, by July 2017, the claimant started to use a dedicated email address as the centre caretaker. This was set up by Mr Dickinson without the committee’s authorisation. Mr Dickinson was proactively promoting the claimant’s cause, contacting ACAS to obtain advice for the respondent and contacting an accountant to discuss the provision of payroll services. These steps led to disagreement among committee members although, importantly, not between them and the claimant herself. The respondent and the claimant continued to have a good

working relationship throughout, the respondent at no time had any problem with the performance of her duties as “cleaner/assistant”, and it intended to keep her in that role. In fact, the respondent saw her as “an asset for the centre” and said so in an email sent by Mr Crispin to the claimant on 13 July 2017.

27. Where the respondent did have a problem with the claimant was in the fact that she was taking steps to expand her role and to take on additional duties without having the respondent’s authorisation first. For example, the claimant took it upon herself to obtain quotes for some work to be done on the yard, on one occasion. This followed an informal discussion on 12 July 2017 between the claimant and Mr Crispin when they went into the yard and discussed its poor state. The claimant took this conversation to mean that Mr Crispin had “implied” that she should obtain quotes, but he did not do so. During that conversation the claimant was offering to do more work at the centre, for example by doing some painting, but these were only her suggestions about how to enhance her role and they were never agreed.

28. The other task which the claimant offered to do was to manage the respondent’s Facebook page. This was done on a voluntary basis and without any expectation or right to be paid. The claimant was hoping that taking on these Facebook duties would later become part of her job, once a written contract was issued. She did not expect to be paid for that work at the time it was carried out. The respondent was aware of the claimant doing this and was appreciative of it.

29. The claimant also believed, with some justification, that she might be able to add PAT testing duties to her role. This was because Mr Dickinson had arranged for her to be trained in PAT testing, following her own suggestion, in an effort to save costs for the centre. In reality, however, this work was never carried out by the claimant and never became part of her duties. It was the respondent’s preference to use a qualified electrician for tasks such as this, and also for changing light bulbs and fuses.

30. Another point of contention about the claimant’s duties related to the taking of bookings for use of the centre by groups holding events. The centre operates one diary which Mr Goodliffe looks after. In either December 2016 or January 2017 Mr Goodliffe showed the claimant how to carry out bookings but he did not feel that she had the experience or training to do it to a good enough standard. In reality, therefore, that work was not then given to the claimant although Mr Goodliffe was happy for future committee members to consider her for it. When dealing with messages on the respondent’s Facebook page, the claimant did not take bookings but simply referred people on to Mr Goodliffe.

31. While the claimant’s desire to enlarge her role was genuine, these various changes to her duties were never agreed by the respondent and for the most part not actually carried out by the claimant. It therefore never became part of the claimant’s role to act as a caretaker, to carry out PAT testing, to obtain quotes for work or to take bookings or manage the respondent’s Facebook page. Those duties which were not related to cleaning fell within the scope of “assistant” at the centre, in keeping with the job the claimant was recruited to do.

32. In emails dated 13 July 2017 the claimant was specifically told that she should not be using the title of “caretaker” as this was still under negotiation. She was also

told not to obtain quotes for work to the centre other than to complete the task that she had already started on her own initiative.

33. Due to ongoing changes amongst the committee members at the respondent, other pressures on the time of the trustees, and an inability to reach agreement, the claimant initiated her application to the Tribunal in September 2017.

Conclusions

34. When the claimant abandoned her claim for a living wage, she explained to the Tribunal that she had asked for this as “an insurance” in the context of the other issues she was also pursuing, something which she thought was “fair”. This was a theme which recurred during her evidence, making plain that in a number of respects the claimant was hoping to persuade the respondent, if not the Tribunal, to allow her to improve her contract terms by enhancing the role. To her credit, the claimant did not try to link this to any improvement in pay, other than to suggest that she might be paid for additional time spent managing the Facebook page.

35. Whilst the claimant’s enthusiasm to do more for the respondent is commendable, she is not in a position to make unilateral changes to her contract or duties. It is important that any such changes are agreed, especially in the respondent’s circumstances where resources are very limited and it has, until now, taken the view that approximately 6 hours a week of cleaning and ancillary duties as an assistant are sufficient to meet its needs.

36. Although there were repeated attempts by the claimant and Mr Dickinson to improve her position, it is clear that no such agreement was ever reached with the respondent. A document was produced on 10 January 2017 to the claimant in the form of a draft contract, which went a long way to complying with the requirements under section 1 Employment Rights Act 1996 to provide written information about terms of employment. It did not comply with the requirement to provide this information within two months after the employment began. The written particulars provided were incomplete in relation to information about how disciplinary or grievance issues would be handled, and contained a few other inaccuracies. For example, the date when the employment began was not correctly stated and there were other relatively small differences between that and the evidence produced by the respondent at this hearing in relation to the interval of payment and the hours of work, as well as the position on Bank Holidays.

37. Following production of this document to the claimant on 10 January 2017, all the other communications between the parties amounted to the claimant attempting to negotiate different terms, which were never agreed. In reality the terms applicable to the claimant’s employment at the time when she issued her claim are as set out in the attached schedule, and in accordance with paragraph 6 of the respondent’s written submissions, which Mr Crispin agreed in his evidence was an accurate reflection of the correct position.

38. Accordingly, the Tribunal makes a declaration under section 12 Employment Rights Act 1996 that the terms in the attached schedule are the applicable terms for the purposes of section 1 of the Act, and that the claimant is entitled under section 8

to be provided with a written itemised pay statement from the point when her employment began.

Employment Judge Langridge

Date 20 December 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
4 January 2018

FOR THE TRIBUNAL OFFICE

SCHEDULE

The following are the terms of employment applicable to the claimant as at 8 September 2017:

- a. The name of the employer: Elton Community Centre.
- b. The name of the employee: Rosemary Antonia Youd.
- c. The date when employment began: 7 August 2015.
- d. The date when continuous employment began: 7 August 2015.
- e. The claimant's rate of pay: £7.70 per hour.
- f. The interval of payment: Every two weeks with a timesheet of hours worked made on alternate Fridays for the previous two working weeks (a working week being Tuesday to Monday) with payment made the following Tuesday.
- g. Hours of work: Guaranteed hours of six per working week at such times as are necessary due to the use of the centre on a week by week basis, with additional working hours to be agreed by the committee of the respondent and the claimant on a week by week basis.
- h. Provisions relating to annual leave: 5.6 weeks per year, with a week's pay to be calculated according to the average number of hours worked by the claimant over the previous 12 weeks. Holiday requests should be submitted to a member of the respondent's committee notified to the claimant from time to time. The dates of holiday will be mutually agreed by both parties.
- i. Provisions relating to incapacity for work including sick pay: The claimant shall notify a member of the committee as notified to the claimant from time to time by telephone between 8.00am and 10.00am on each day of absence from work. The claimant shall provide a statement of fitness to work from the claimant's doctor where her absence lasts for more than seven calendar days. The claimant will be entitled to payment of statutory sick pay subject to her being eligible at the relevant time. The claimant's normal working days for the purposes of statutory sick pay shall be Tuesday to Monday inclusive.
- j. Provisions relating to pensions: The respondent does not currently offer a pension scheme with this employment. The respondent will, when required by law, operate a workplace pension scheme in accordance with the Pensions Act 2008 and notify the claimant of her rights and entitlement in respect of the scheme at the time in writing.
- k. The length of notice the claimant is required to give the respondent to terminate employment: At least one week.
- l. The length of notice the respondent is required to give the claimant to terminate this employment: One week for each complete year of service up to a maximum of 12 weeks' notice after 12 years' service.

- m. Job title: Cleaner/Assistant
- n. Fixed term provisions of employment: None.
- o. Place of Work: Elton Community Centre, School Lane, Elton, Chester, CH2 4PU.
- p. Collective agreements relevant to this employment: None.
- q. There are currently no specific disciplinary rules applicable to the claimant.
- r. Any formal disciplinary decisions taken by the respondent in relation to this employment would be made by a member of the committee in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
- s. The claimant would be entitled to appeal any disciplinary decision to any member of the committee who did not make the original disciplinary decision.
- t. The claimant would be entitled to apply to any member of the committee for the purpose of seeking redress of any grievance relating to this employment.