



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Kelly Taylor

**Respondent:** Anglian Care Limited

**Heard at:** East London Hearing Centre      **On:** 8 June 2017

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

**Representation**

**Claimant:** In person

**Respondent:** Mr M Stephens (counsel)

## RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. The Claimant's complaint of unfair dismissal fails and is dismissed.
2. The Claimant's complaint of unauthorised deduction from wages succeeds.
3. The Respondent is ordered to pay the Claimant £432.96 (£272.96 in unpaid wages and £160 in respect of Tribunal fees).

## REASONS

### INTRODUCTION

1. The Claimant worked for the Respondent as a carer from 19 June 2014 until she resigned on 9 January 2017. By an ET1 presented on 6 February 2017 she claims unfair constructive dismissal and unauthorised deduction from wages.

2. The basis of the Claimant's complaints is not entirely clear from the ET1 and she was somewhat confused during the hearing about the reason for her resignation and the alleged unauthorised deductions. It appeared to me that the issues to be determined were:

Unfair dismissal

- 2.1 Was an act or omission (or series of acts or omissions) by the Respondent a cause of the Claimant's resignation? The Claimant says she resigned in response to deductions from her pay and/or being removed from the rota.
- 2.2 If so, did the act(s) or omissions(s) by the Respondent amount to a fundamental breach of contract?
- 2.3 There is no issue about delay or affirmation of the contract.
- 2.4 If the Claimant was constructively dismissed:
  - 2.4.1 Has the Respondent established a potentially fair reason for dismissal?
  - 2.4.2 Did the Respondent act reasonably within the meaning of s.98(4) of the Employment Rights Act 1996 ("ERA")?

Unauthorised deductions from wages

- 2.5 Did the Respondent make unauthorised deductions from the Claimant's wages? The Claimant complains about a deduction of £272.96 for mobile phone data usage from her wages in November 2016. The Respondent accepts that the deduction was made but says that it was authorised. In her ET1 the Claimant also complained of various deductions in her final payslip, including a deduction of £300 for an NVQ course, but these sums have now been repaid.
3. I heard evidence from the Claimant and, on behalf of the Respondent, from Des Cross, Brenda Green, Liza Bolden and Tara Hawkes.

**FACTS**

4. The Respondent provides domiciliary care services to people who need assistance to live independently in their own homes. The Claimant commenced employment with the Respondent as a carer on 19 June 2014. She was employed on a "zero hours" contract, in that she was not guaranteed any hours of work, but would be offered work if it became available. The Claimant's evidence was that she worked "basically the same hours" each week, but she accepted that she was required to be flexible. It is not in dispute that this was her only job. Her payslips for her last three months' employment show that she was working between 144 and 192 hours a month (excluding holiday). She used her own car to travel to clients' homes and was paid mileage in addition to her salary.

5. The "Principal Statement of Terms of Employment" signed by both parties states under the heading "Hours of Work":

You will not have any normal hours of work and are not guaranteed any hours of work. You will be offered work if it becomes available. You will be given at least 1 weeks notice of available work.

Given the nature of the Company's business you are required to be as flexible as possible in order to accommodate the needs of the Company's customer. Whilst a regular working pattern may develop in terms of hours and customers, this in no way constitutes a contractual right and may be changed by the Company at short notice.

...

6. Under the heading "Deductions from Wages", the document states:

The Company reserves the right to require you to repay to the Company, either by deduction from salary or any other method acceptable to the Company:

- Any amounts of remuneration, expenses or any other payments (statutory, discretionary etc.) which are overpaid to you, whether by mistake or through any misrepresentation or otherwise, including holiday granted in advance of it being accrued, and:
- Any other sums owed to the Company by you, including, but not limited to, outstanding loans, uniforms, training, Company equipment, advances expenses or excess holiday taken.

7. All carers employed by the Respondent are issued with a mobile phone for work purposes only, for which a charge is made by way of a monthly deduction from salary. The evidence of Mr Cross, Managing Director of the Respondent company, was that this was a small charge to cover damage to the handsets. The Claimant raised some complaint about this during the hearing, but it does not form part of her claim so it is unnecessary to give any more detail about it.

8. The Principal Statement of Terms of Employment also refers to an Employee Handbook. It is not in dispute that the Claimant was issued with a copy of the handbook and that its contents form part of her contract of employment. Unfortunately the version of the handbook produced in the bundle was not the same as the one that had been issued to the Claimant. The Claimant handed up during the hearing the version she had received and the parties agreed that that was the relevant document. I have therefore considered only the version produced by the Claimant.

9. The handbook includes the following passages that are relevant to the issues in this case:

**3.6 DEDUCTIONS FOR LOSS BROUGHT ABOUT BY EMPLOYEE**

We reserve the right to require you to repay to the Company, either by deduction from salary or any other method acceptable to the Company:

- Any losses sustained in relation to the property or monies of the Company, client, customer, visitor or other employee of the Company, during the course of your employment caused through your carelessness, negligence, recklessness, or through breach of the Company's rules or any dishonesty on your part;

...

- Any other sums owed to the Company by you, including, but not limited to outstanding loans or advances, relocation expenses or excess holiday taken.

...

**10.4 [Examples of gross misconduct]**

...

**Inappropriate Use of Computers**

Deliberately accessing internet sites containing pornographic, offensive or obscene material.

...

**13.6 MOBILE PHONE AND COMPANY LAND LINE USAGE POLICY**

**Issue of Mobile Phones and Company Land Lines**

Company Mobile Phones and Company Land Lines (hereafter “company phones”) are issued entirely at the discretion of the management. They are intended primarily for business use, and are intended to provide a means of communication between the Company and the employee at any time, and for the conducting of other company business. It is therefore the responsibility of the employee to keep company phones in working order, switched on and batteries adequately charged at all times. Any breakdowns in company phones must be reported to a Director immediately on discovery of such a breakdown.

**Personal Use**

Personal use of company phones is not permitted, except as is reasonably necessary in an emergency.

...

The Company reserves the right to deduct the cost of any personal calls made using company phones from employees’ wages, if it, at its sole discretion, the Company considers personal use to be excessive.

Breach of this Mobile Phone Policy is considered by the Company to be misconduct, and may result in disciplinary action being taken against any employee who breaches it.

10. Although the later version of the handbook did not apply to the Claimant’s employment, it is worth noting that the handbook has now been amended to state “or data usage” after “personal calls” in the penultimate paragraph above.

11. During 2016 the Claimant had had various deductions from her earnings, some of which were repayments to the local authority or DWP via attachment of earnings orders. She had also received loans from the Respondent, including one to help her move into a property nearer work and one to help her buy a car. These sums were then reclaimed by the Respondent in subsequent months, together with an “administration charge”, usually of £10. Again, the Claimant complained about this at various points during the hearing, but it does not form part of her claim.

12. In late 2016 an issue arose concerning the charges for data usage on the Claimant’s work phone. The Respondent received a phone bill on or around 15 September 2016 showing data charges of £52.04 excluding VAT in respect of the phone issued to the Claimant. In October 2016 the Respondent deducted £61.08 from the Claimant’s wages for “excessive company mobile usage”. None of the Respondent’s witnesses could explain how that figure had been reached, but Mr Cross

speculated that it might have been adjusted for VAT and/or the monthly figure already charged to the Claimant for her mobile phone (£11.60). £52.04 plus 20% is £62.45 so that does not appear to be the correct explanation.

13. The Claimant's evidence, which I accept, was that she had received data usage warnings on her mobile phone around this time and informed the Respondent about this. She says she does not know how the charges were incurred because she was not using any data on that phone.

14. On or around 15 October 2016 the Respondent received a phone bill showing data charges of £244.09 excluding VAT in respect of the phone issued to the Claimant.

15. In November 2016, Stephen Mason, a manager for the Respondent, told the Claimant that her data usage was excessive and referred to her downloading music and videos. The Tribunal bundle contains a letter dated 20 November 2016 from Stephen Mason to the Claimant entitled "Warning for use of mobile data", which states that any further excessive use "will result again the cost of the excessive usage being deducted from your wages". The Claimant denies receiving this letter and Mr Mason did not give evidence to the Tribunal so I accept that she did not receive it. She acknowledged, however, that her conversation with Mr Mason reflected what was in the letter, including the warning about deduction from her wages. She was warned there would be another deduction from her November pay and she "begged him not to take the whole amount". It is not clear whether she was told what the whole amount would be. The Claimant accepted in her evidence that she did not dispute at the time that she was responsible for the data charges.

16. The Respondent deducted £272.78 from the Claimant's November 2016 wages for excessive company mobile usage. Again, none of the Respondent's witnesses was able to explain how that amount related to the figure in the phone bill. Further, the Claimant's evidence was that neither of the deductions were shown on the payslips that she was given. The Respondent produced at the start of the hearing the Claimant's payslips from October 2016 onwards. The October and November payslips show the deductions for mobile phone usage, but the Claimant said that she had never seen them in that format. A copy of the November payslip that the Claimant received was in the bundle and although it is poor quality, it is just possible to see that the deduction is not shown. I accept that that was the only version of the payslip for that month that the Claimant ever saw, and that she had not seen payslips itemising the deductions for mobile phone usage until the Tribunal hearing. Her evidence was that after she had resigned she took her payslips to a support worker who noticed that various sums had been deducted and this is what led her to raise the issue with the Respondent.

17. The Respondent now alleges that the Claimant was accessing pornographic websites on her work mobile phone and suggests that this was the cause of the data charges. This is a serious allegation and the evidence in support of it is very thin. The Respondent has produced a number of photographs which appear to show the internet history of a mobile phone. The sites visited would appear to include some pornographic sites, as well as dating sites, online gambling sites and various innocuous sites. There are no dates given and there is no evidence that this was the Claimant's mobile phone, let alone a proper explanation of any investigation that was carried out. Nor is there any evidence of how the data charges were incurred, such as a breakdown of data usage by apps. In the circumstances I do not accept that the Claimant was using her

work mobile phone to access pornographic material. However, given that she did not dispute responsibility for the data charges at the time and she has given no plausible alternative explanation for the data charges shown on the bills, I find that the Claimant used the phone's data for personal use and although she may not have been aware of the extent of the charges, she knew that she would have incurred data charges in excess of what the Respondent would consider reasonable.

18. On Saturday 7 January 2017 the Claimant started work at approximately 7am. On her way to her first call she realised that there was something wrong with her car, so when she arrived at around 7.10am she sent a text message to the "on call" phone (held by a manager, for carers to contact in an emergency) to say that her car was "playing up". The Claimant completed the rest of her shift.

19. The Claimant was rostered to work the following day, Sunday 8 January. It is agreed that sometime between finishing her shift on Saturday and starting on Sunday morning she spoke on the phone with Liza Bolden, the Respondent's Operations Co-ordinator. There was a dispute about whether this conversation took place on Saturday evening or Sunday morning, but nothing turns on that so it is unnecessary to make a finding about the timing of it. The content of the call, however, is important. Ms Bolden's evidence was that she called the Claimant because she was worried about the Claimant being able to cover her shifts on Sunday if her car was playing up. The Claimant told Ms Bolden that the car needed a new clutch and she was not sure what she was going to do. Ms Bolden told her to take the car to a garage as soon as possible and in the meantime arranged for another carer to collect the Claimant on Sunday morning to take her to her first call, where she was on "doubles" with another carer who would then drive for the rest of the shift. The Claimant said she would take the car to a garage on Monday (her day off) and let Ms Bolden know what was happening.

20. The Claimant disputed that she had ever said or suggested that her car was not roadworthy. I do not accept this and prefer Ms Bolden's account of the conversation. Ms Bolden's account was detailed and consistent with a note she made of the conversation shortly afterwards. Further, it is not in dispute that the Claimant agreed to being collected so that she would not need to use her car. I find that at the very least the Claimant gave the impression that her car would not be reliable until she took it to a garage, and that she said she would inform the Respondent once she had done so.

21. The Claimant was rostered to work the following week, but had a day off on Monday.

22. At 10.37am on the Monday Ms Bolden called the Claimant to find out what was happening with her car. Ms Bolden's evidence, which I accept, was that the Claimant was due to work on the Tuesday and it was not going to be possible to put her on "doubles", so it would be problematic if the Claimant did not have a working car. The Claimant did not answer the phone, but she called Ms Bolden back at around 11.30am. Ms Bolden asked what the situation was with the Claimant's car and the Claimant said she had not had time to sort anything out. Ms Bolden then informed the Claimant that she would have to remove her from the rota for the following day. The Claimant was upset and said she would get back to Ms Bolden.

23. Very soon after this phone call, at 11.43am, the Claimant sent a text message to the "on call" phone in the following terms:

“Gotta wait in for Rosie Hun then I’ll b down with me notice I can’t deal with it anymore I’m lower then rock bottom right now n crap I’ve heard goin around over weekends completely tipped me over I’m done x”

24. The Claimant initially disputed that she had sent any text message in these terms. During the hearing I permitted the Respondent to produce a screenshot from the actual “on call” mobile phone and show it to the Claimant. It contained a text message from “Kelly Taylor” on 9 January at 11.43 in exactly the terms set out above. When presented with this the Claimant accepted she must have sent it, but claimed to have no recollection of doing so.

25. The Claimant’s account of the whole exchange with Ms Bolden that morning differed from the facts set out above. She claimed that Ms Bolden told her during the conversation at 11.30am that Mr Cross had decided to remove the Claimant from the rota until further notice and that this prompted the Claimant to send a text message in the following terms: “u have given me no choice but to hand in my notice as I need to work to live”. The Respondent’s evidence was that it had no record of any such message being received. The Claimant did not produce any evidence of it. In view of this and the Claimant’s denial that she sent a message which was clearly sent, I reject the Claimant’s account and find that the only text message she sent was in the terms set out at paragraph 23 above. I accept the Respondent’s evidence that Mr Cross treated the Claimant’s text message to the “on call” phone as notice of her resignation and it was only after this that he removed the Claimant from all future rotas.

26. I find that the Claimant’s text message was intended to convey her resignation. Indeed in her own witness statement the Claimant said that during a subsequent conversation with Mr Cross she said “I text Liza to hand in my resignation I felt I had no choice”. Furthermore, viewed objectively, it conveyed that intention.

27. As to the reasons for the Claimant’s resignation, it was not clear from the evidence, not least because the Claimant denied any recollection of sending the text message, what the Claimant was referring to when she said “crap I’ve heard goin around over weekends completely tipped me over”. There was some evidence, however, of the Claimant having difficult relationships with some of her colleagues. She accepted that she had fallen out with at least one, Tara Hawkes, and there was evidence of a text message exchange between the Claimant and another carer, Debra Craske, on or around 12 January 2017, in which the Claimant referred to events of the previous weekend, saying “it seemed my name was bein dragged up kept thinking what I done now”.

28. I accept that the immediate cause of the Claimant’s text message on 9 January was her conversation with Ms Bolden in which Ms Bolden told her that she would be removed from the rota the following day, but I also find that a further significant cause was a breakdown in her relationships with colleagues. As for the deductions from the Claimant’s wages, I accept that she had been struggling financially, partly because of the attachment of earnings orders and the fact that she was repaying loans to the Respondent. That may have been a factor in her decision to resign, but the deductions relating to data usage and the NVQ course did not affect her decision-making. The deduction for the NVQ course was made from her January 2017 wages, after she had resigned. Although she knew that there had been deductions in respect of data usage, she did not know what the amounts were until after she resigned and she made no

complaint about them at the time.

29. Mr Cross and Ms Bolden both gave evidence that they believed the Claimant had wanted to leave the Respondent and get another job anyway and they believed she had taken steps towards finding alternative employment before resigning. The Claimant denied this and there was no evidence of her having contacted any other employer until 10 January when she responded to a Facebook advertisement from another care company. She secured employment with them sometime in late January. I accept that the Claimant had not taken any steps towards finding another job until after her resignation.

30. There was some evidence of further communication between the Claimant and various managers at the Respondent, including Mr Cross, from 10 January onwards, but since her employment had already come to an end on 9 January it is unnecessary to make any factual findings about this.

## THE LAW

31. Sections 13 of the ERA provides, so far as relevant:

### **13 Right not to suffer unauthorised deductions**

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

32. Section 95(1)(c) of the ERA provides:

### **95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—

...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.



Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

33. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

- 33.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- 33.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.
- 33.3 The employee must leave in response to the breach.
- 33.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 and subsequent cases)

34. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

## CONCLUSIONS

35. By agreement, the parties submitted written submissions after the hearing because the evidence did not conclude until after 5.30pm. Submissions were received by both parties. The Claimant attached to her submissions some further evidence, despite my having explained to her at the end of the hearing that written submissions should be based solely on the evidence I had heard. I have not taken the additional evidence into account.

### Unauthorised deduction from wages

36. It is not in dispute that the deduction for data usage was made from the Claimant's wages in November 2016. The only issue is whether it was an “unauthorised deduction” within the meaning of section 13 ERA. In its written submissions the Respondent relies primarily on the provisions in the handbook, a copy of which had been given to the Claimant. I accept that the handbook was contractual and that its terms are “relevant provisions” for the purposes of section 13(2).

37. The Respondent argues that paragraph 3.6 of the handbook authorised deductions in respect of “any losses sustained in relation to the property or monies of the Company...caused through...breach of the Company's rules” and that accessing internet sites containing pornographic material amounted to breach of the Company's

rules because it is listed as an example of gross misconduct in the handbook.

38. I note that the Respondent did not rely in its ET3 on the provisions in the handbook, but referred to the provision in the Principal Statement of Terms of Employment relating to deductions for sums overpaid or owing to the Company. It also referred to further alleged express terms of the Claimant's contract, one stating "You must not use the Company's office equipment for private purposes" and another stating "You must not use Company telephones for receiving or making calls unrelated to Company business unless for emergency purposes". No evidence of such terms was presented to the Tribunal and the Respondent did not rely on any such terms in the hearing or in its written submissions.

39. I further note that the Respondent did not refer to the Mobile Phone and Company Land Line Usage Policy in the handbook in its ET3 and nor does it rely on that policy in its written submissions.

40. In any event, even assuming that all of the contractual provisions to which reference has been made are properly pleaded on behalf of the Respondent, I do not accept that any of them authorised the deduction for data usage. I have rejected the Respondent's contention that the Claimant was accessing internet sites containing pornographic material, so that cannot be relied upon as a "breach of the Company's rules". Further, although the mobile phone policy in the handbook contains a general prohibition on personal use, it limits the right to make deductions to costs relating to personal calls where the use is considered to be excessive. Data usage is different in nature and I do not accept that the mobile phone policy, either by itself or in conjunction with the Principal Statement of Terms of Employment or paragraph 3.6 of the handbook, authorises deductions for any costs relating to personal data usage.

41. Further, the Respondent has not shown that the amount deducted related to data charges. It was not the amount shown on the bill and no explanation has been provided for how it was calculated.

42. The Respondent appears to argue an alternative case in its written submissions, again not pleaded in its ET3, that there was a variation in the contract permitting deductions for excessive data usage and that the Respondent notified the Claimant of the existence and effect of the term in writing by itemising a similar deduction in the previous month's payslip. This is a dubious argument to say the least, but it is unnecessary to address it because I have found that the version of the payslips given to the Claimant at the time did not specify the deduction for data usage.

43. The complaint of unauthorised deduction from wages therefore succeeds and the Respondent must pay the Claimant £272.78.

#### Unfair dismissal

44. I have accepted to some extent that the Claimant resigned in response to her removal from the rota, but I have also found that by the time of her resignation she had only been told that she was being removed from the rota for the following day. I must therefore consider whether the Respondent's actions in that respect amounted to a fundamental breach of the contract.

45. The Claimant has not identified any express term of the contract which she alleges the Respondent breached, so I have assumed that she relies on the implied term of trust and confidence.

46. I do not accept the Respondent's argument that because the Claimant was on a zero hours contract her removal from a rota could never amount to a breach of the implied term. Removal from a rota to which an employee has already been allocated for no good reason could, in principle, amount to breach of the implied term. In the circumstances of this case, however, I find that it did not. The Claimant had said, or at least given the impression, that she did not have a reliable means of transport in order to carry out her shifts. She had also said she would keep the Respondent informed about her car. By 11.30am on Monday 9 January, knowing that she was due to be working the following day, she had not done anything further towards resolving the problem with her car. In the circumstances it was not unreasonable for Ms Bolden to inform the Claimant that she would therefore have to be taken off the rota for the following day. Her conduct could not be described as calculated or likely to destroy the relationship of trust and confidence between employer and employee.

47. The other reasons for the Claimant's resignation are not alleged to amount to fundamental breaches of the contract and there would be no basis for any such argument. The Claimant was not therefore constructively dismissed and her complaint of unfair dismissal fails.

#### Costs order

48. The Claimant paid a claim fee of £250 and was granted full remission of the hearing fee. Because the Claimant has been successful only in respect of her complaint of unauthorised deduction from wages, I consider that the Respondent should only be required to pay the amount the Claimant would have had to pay if she had brought that claim alone, which is £160.

Employment Judge Ferguson

20 July 2017