



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Dennis

**Respondent:** Oakleigh Residential Home

**Heard at:** Nottingham                      **On:** Friday 25 January 2019

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

**Representatives**

**Claimant:** In Person

**Respondent:** Ms N Owen of Counsel

## RESERVED JUDGMENT

1. The Claimant's claims fail and are dismissed.

## REASONS

### Introduction

1. By a claim form dated 24 April 2018 the Claimant brings claims of unlawful deduction of wages pursuant to Section 13 Employment Rights Act 1996 and a failure to provide a written statement of particulars pursuant to Section 38 Employment Act 2002 and Section 1 Employment Rights Act 1996.

2. The Claimant gave evidence on her own behalf and behalf of the Respondent I heard from Ms S Stimson, the Home Manager and Mrs F Mawji, A Director. I had an agreed bundle running to some 95 pages.

### Issues

3. The issues in the case are as follows:-

3.1 Was the Claimant an employee of the Respondent and if not what was her relationship to the Respondent?

3.2 It is not in dispute that no Section 1 statement was provided.

3.3 In relation to unlawful deductions the issue in the case is really whether the Respondent is liable to pay the Claimant notwithstanding that on any examination of the facts, she did no work after 24 May 2018.

## **Findings of Fact**

4. I make the following findings of fact. The Claimant started work for the Respondent on 26 May 2017. She had worked for the Respondent before as an employee between September 2015 and September 2016. She was employed as a Care Assistant. The key issue in this case is what the nature of the contractual relationship was between the parties as of 26 May 2017.

5. The last shift the Claimant worked was on 22 May 2018. She has been paid for all of the shifts she in fact worked for the Respondent.

6. On 24 May 2018 the Claimant was called into a meeting with Ms Stimson and Mrs Mawji. The notes of the meeting were at pages 55 and 56 of the bundle although their content is a matter of dispute.

7. The Claimant did not undertake any work for the Respondent after this meeting. On 30 May 2018 the Claimant wrote to Mrs Mawji. That document appears at page 63 of the bundle and states:

“I am writing to say that I believe I should have had a letter in writing regarding my suspension and all of the evidence against me ie camera footage and all reasons why”.

8. On 6 June 2018 Mrs Mawji responded to the above letter. Her letter is at page 65 of the bundle and states:

“This letter is to inform you that for the health and safety of the residents and the other staff members, we require you to complete your mandatory training. The training has been offered to you on numerous occasions which you failed to attend. Therefore the mandatory training must be completed at your own time and expense. Once this has been completed, please contact us we will review the staff rota.”

9. The Claimant responded to that letter on 19 June 2018. Dealing with the training point the Claimant says:

“With reference to my mandatory training... I will respond to this letter first. The training has been offered to me, to be done after a ten hour night shift. I am sure you will agree that this is not only inconsiderate but also somewhat unacceptable. I am more than happy to complete all training, but not after a ten hour shift. I should be allowed rest time.”

10. The Claimant does not dispute that she has not yet undertaken all of her mandatory training.

11. There were further exchanges of correspondence but they are not material to the matters I have to decide.

12. The Claimant submitted her claim along with a detailed statement with a chronology which confirms that after the meeting on 24 May 2018 she has not undertaken any further work for the Respondent.

## **Discussion**

13. I deal first with the status of the relationship between the Claimant and the Respondent.

14. At pages 88-94 of the bundle is the Claimant's previous employment contract. It is a fairly full statement of the main terms, it sets out the role, the number of hours employed for per week, what the shift pattern was, breaks, pay and all the other details one would expect to find in an employment contract including holidays, arrangements for sickness absence and so forth. There are also clauses dealing with disciplinary matters and I note in particular paragraphs 9 of the contract which states:

"Statutory training such as moving and handling, first aid, infection control etc must be attended to up-date your skills and knowledge or alternatively the training can be arranged by yourself and paid for by yourself. Any breach of this condition will render you liable to disciplinary action. This may result in dismissal."

15. And at paragraph 14 under the heading of gross misconduct it states:

"The Home reserves the right to suspend without pay whilst any investigation necessary takes place."

16. When the Claimant rejoined the Respondent she was not given a contract of employment and she never asked for one.

17. The Respondent says that it sent to the Claimant the letter which appears at page 37 of the bundle. This states:

"Thank you for applying to Oakleigh Residential Home. We are pleased to employ you as a bank staff member. We will contact you in due course, as shifts become available. We look forward to having you as part of the team once again."

18. Having heard oral evidence from all of the witnesses I found Ms Stimson and Mrs Mawji credible. Their evidence was consistent with the contemporaneous documents in the bundle, they answered all of the questions put to them, in Ms Stimson's case in quite lengthy cross examination and they were clear that the role offered to the Claimant was a member of bank staff. Nothing it seems to me turns on the offer to "employ her" the Claimant as a member of bank staff, that is a term often misused.

19. Whilst I did not find the Claimant wholly lacking in credibility, at material points in the case she either flatly denied what is on the face of the contemporaneous documentation or in one case accused the Respondent of fabricating evidence such as the notes of the meeting which I shall come on to and initially the letter at page 37 of the bundle. When the Claimant was pressed she seemed to me to concede that it would be perfectly possible for the Respondent to have sent out that letter and for her not to have received it. I find as a fact that the Respondent did send out the letter at page 37 of the bundle.

20. The Respondent employs a number of care workers at the home but inevitably they have gaps in rotas and historically they fill this by engaging a small number, 3 or 4 what they call bank workers. These are individuals essentially engaged on zero hours terms so that they are available to be offered shifts although they can refuse. Mrs Mawji was clear that employees cannot turn down shifts whereas bank workers can.

21. Whether they do is irrelevant. Ms Stimson's evidence was that they have long term bank workers who undertake regular shifts but the test is not whether shifts are turned down but whether the worker can turn down the shifts and I find as a fact that in this case bank workers as the Respondent understands it can turn down shifts.

22. So although the Claimant will have been undertaking the same work as an employee I find that her relationship with the Respondent was not one of employment. There was to put it in the jargon, no mutuality of obligation. The engagement letter such as it is, is clear that the Claimant will be contacted "as shifts become available".

23. However, even if I am wrong, I would find that the Claimant was an employee, in my judgment she was employed on a zero hours contract and thus did not have to be given any shifts. In that context the precise nature or label given to the relationship is not as significant as the term which I find proved that the Claimant was not guaranteed any work.

24. On 24 May 2018 the individual managing the shift at one which the Claimant was working, Karl Lyon, raised a number of allegations about the Claimant's conduct or performance.

25. Ms Stimson's evidence was that when she received that correspondence she undertook an investigation and noted during that investigation that the Claimant had not attended a number of training courses put on for the employees including a number of mandatory courses. Of significant importance to this Respondent is the movement and handling course because they are of course regularly dealing with the movement and handling of residence. The Respondent is CQC registered and it must ensure that staff update their mandatory training in order to preserve their registration. It is of critical importance to the Respondent.

26. It was in that context that a meeting took place on 24 May between the Claimant, Ms Stimson and Mrs Mawji. The notes of that appear at pages 55 and 56 and although the Claimant alleged that the last paragraph of the notes had been fabricated I find that she has not shown any evidence to suggest that is the case. The notes of the meeting are wholly consistent with all of the evidence I heard and read in this case. The thrust of the meeting was that in part the issues raised by Mr Lyon were raised but the outcome of the meeting which is set out on the second page of the notes was that the Claimant would not receive any further shifts unless and until she completed her mandatory training.

27. As I have indicated in the findings of fact, the next letter of 13 May 2018, asks for information about her "suspension". In my judgment it was quite clear that the Claimant was not being suspended and that term was not used. It may be that when the Claimant was told at the meeting on 24 May that she would not be given any further shifts unless and until she completed her training she considered that she had been suspended and perhaps using the term suspension in a none technical sense she was being, but it was not a disciplinary suspension, she was not prevented from working because of the matters that Mr Lyon had raised. She was prevented from working because the Respondent felt it was at risk given that the Claimant had not undertaken her mandatory training, a matter she does not dispute.

28. As I said at the hearing, it seems to me that at this point the Claimant and the Respondent were running along parallel lines. The Claimant wanted what she perceived as Mr Lyon's allegations to be investigated because she thought she had been suspended because of those allegations. The Respondent was not carrying out an investigation because it was waiting for the Claimant to undertake the mandatory training so that they could get her back to work. This was at best unfortunate. Even during the hearing the Claimant refused what was plain on the face of the documentation and indeed on the face of the letter responding to her 30 May letter which I have referred to above. I say again on 6 June Mrs Mawji made it clear that once the Claimant had completed her statutory training the Respondent would "review the staff rota" which I took to mean and which Mrs Mawji confirmed meant that the Claimant could come back to work. Ms Stimson said in terms that the Claimant would be offered work and she would then be supervised and mentored so that she could as it were get back on track. The Claimant simply refused and continues to refuse to accept this even though it was stated in the hearing.

29. I find that the Claimant was a bank worker. She was not employed but even if she was she was employed on a zero hours basis. This means that the Respondent had the right to not give the Claimant any shifts. It must follow therefore that there can be no unlawful deductions given that the Claimant had no expectation of work and that her claim must fail.

30. Given that I have found that the Claimant was a bank worker she was not entitled to a Section 1 statement. However, even if she was, given that her claim has failed she would not be entitled to any remedy arising out of that failure.

31. In short therefore the Claimant has received all of the pay she was entitled to, all of that which was properly payable under her contract with the Respondent. She has not undertaken work and she is not entitled to receive any pay therefore.

32. For the sake of completeness I should deal with the point that even if I am wrong and even if the Claimant was an employee on a zero hours contract she still received the amount that was properly payable under that contract. I also accept Ms Owen's argument that following the case of **Luke v Stoke-on-Trent City Council** [2007] IRLR 777, the Claimant had effectively refused a lawful instruction to undertake mandatory training and therefore she falls into the category of "no work, no pay" as set out in the judgment in the **Luke** case. The issue raised by the Claimant that the Respondent has not advised her of any mandatory training since 24 May, the Respondent made it clear that the Claimant was well aware of what training she had to undertake, and even if she was not aware of it before the meeting on 24 May, which I do not accept, and even if she was not aware of it on 24 May, which I also do not accept, she was aware of it when she received the letter from Mrs Mawji on 6 June 2018 and Mrs Mawji made it clear that the training had to be done in her own time and at her expense. There is nothing in the arrangement between the parties which suggests that the Respondent will always pay and provide the training although they do in fact do that. The Respondent's position is having offered her a number of training courses which she declined (and I accept their evidence on this point) it was open for them to require her complete the training in her own time. A proposition with which I agree.

33. It follows from all of this that the Claimant's claims fail and are dismissed.

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Employment Judge Brewer

Date: 22 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE