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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100220/2024

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**Final Hearing held in Edinburgh remotely by Cloud Video Platform on
2 April 2024**

Employment Judge A Kemp

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Mr Naeem Fakher

**Claimant
In person**

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Social Care Alba Ltd

**Respondent
Represented by:
Ms K Howard
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The respondent had not concluded a contract of employment with the
claimant and the Claim is dismissed.**

REASONS

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Introduction

1. This was a Final Hearing held remotely. The claim made is for breach of contract. The respondent disputes the claim and argues that it was not in breach of contract.

E.T. Z4 (WR)

2. This is a claim where there was no employment that commenced in fact between the parties. I did initially consider whether or not the Tribunal had jurisdiction having regard to the terms of Regulation 3 of the 1994 Order referred to below, which refers to there being jurisdiction where a claim
5 arises or is outstanding on termination of employment. That was so although the respondent did not raise any challenge to jurisdiction. It is a matter as to which the Tribunal requires to be satisfied. Here there was no termination of employment as the contract did not commence. But I am bound by the decision of the EAT in the case of **Sarker v South Tees
10 Acute Hospitals Trust [1997] IRLR 328** which held that a claim of breach of contract was within jurisdiction in such circumstances.

Evidence

3. The parties had each prepared their own documents that they wished to rely on in accordance with case management orders issued. Evidence
15 was heard from the claimant, and for the respondent from Ms Fatou Sanneh.
4. Before the hearing commenced as the claimant was a party litigant and not legally qualified or experienced I explained about the giving of evidence and the conduct of the hearing. I stated that documents relevant
20 to the issues should be spoken to in oral evidence, as otherwise they would not be considered simply because they were before me. I also explained about cross examination before the respondent's witness gave her evidence, and after evidence was heard about the making of submissions.
- 25 5. I asked a number of questions of the claimant to elicit facts under Rule 41, seeking to put parties on an equal footing under Rule 2.

Issues

6. The issues were identified at the start of the hearing, in a manner that it was hoped would be comprehensible to the claimant and are:
- 30 (i) Was there a contract of employment between the parties?
(ii) If so, was the respondent in breach of that contract (when it withdrew a conditional offer of employment to him)?

- (iii) If the answer to both of the foregoing issues is yes, what losses did suffer from that breach?

Facts

7. The following facts, material to the issues before the Tribunal, were found
5 to have been established:
8. The claimant is Mr Naeem Fakher.
9. The respondent is Social Care Alba Ltd.
10. The respondent advertised a post as Administrative Assistant, which the
10 claimant applied for. At that stage he was a care worker for another
company named Carrgomm.
11. The claimant was interviewed for the post by the respondent. The
respondent then wrote to the claimant with a conditional offer of
employment by letter dated 26 September 2023. The claimant accepted
15 the offer that day. The conditions included reference to checks, one of
which was that the respondent receive a satisfactory work reference.
12. The claimant's existing employer provided a written reference which was
received by the respondent on 27 September 2023. It noted, *inter alia*, that
the claimant's communication skills were average, that his written work
was below average, and that he had had 35 absences in the last year.
- 20 13. The claimant exchanged emails with Ms Margo Ng of the respondent who
works in Human Resources. He indicated that he was required to give four
weeks' notice, and their messages discussed a start date for him of
30 October 2023. The claimant believed that would be when he would
start work for the respondent, and gave formal notice of termination of
25 employment to his current employer (on a date not given in evidence).
14. As a part of the recruitment process the respondent requires applicants to
undertake eLearning modules on a variety of policies and procedures they
operate. The claimant did so between 29 September and 1 October 2023.
15. The reference was considered by Ms Fatou Sennah of the respondent,
30 one of its Care Managers. She was concerned at its terms, and wished to

meet the claimant to discuss it as she had not conducted the initial interview. She considered that communication skills both written and oral were a key aspect of the role advertised. She did so on 13 October 2023. Her concerns were in the context of the recruitment process following guidance from the Scottish Social Services Council and the Care Inspectorate as to best practice. Checking references were satisfactory was a part of that. Once all checks had been completed, if thought satisfactory the respondent's normal process was then to issue a formal written contract of employment including a start date. Ms Ng stated "It's great to have you on board on 30 October 2023!....."

16. At some point during the day on 13 October 2023 the claimant sent various documents to the respondent by email including those for bank details and similar required for a new starter [the email was not before the Tribunal].
17. At the meeting on 13 October 2023, which lasted about 25 minutes, Ms Sennah asked the claimant about his work experience, and whether he would be able to undertake the role. He said that he could do so, and outlined his earlier work history. He explained that he had suffered a herniated disc, and had had surgery about three years earlier. He said that he had nerve damage. He said that he considered that he could undertake the role although it involved sitting at a desk. She had access to his CV when meeting him.
18. Having discussed matters with him she was concerned at whether the reference she obtained was satisfactory, and noted a disparity between its terms and what the claimant had told her, and that the quality of the written work in the CV was consistent with the reference. She decided that it was not a satisfactory reference, and instructed that the offer of employment be withdrawn. That was attended to by automated email sent to the claimant at 17.59 hours on 13 October 2023.
19. After receiving that message the claimant exchanged further messages with the respondent seeking to understand the decision, asking for the copy contract and to have sight of the reference. He did not have sight of the reference until provided to him as a part of the arrangements for the

Final Hearing. The messages exchanged included ones on 16 October 2023.

20. The claimant commenced Early Conciliation on 14 December 2023. The Early Conciliation Certificate was issued on 16 January 2024. The Claim Form was presented on 16 January 2024.

Submissions

21. The parties made brief submissions, with the claimant arguing that he had been truthful in what he said, he had been told that he could resign from his previous employer, and had done so trusting them.
22. Ms Howard made reference to a written submission she had prepared but in summary argued that the conditional offer of employment had not crystallised, and therefore that there had been no contract, no breach and there should be no remedy. She relied on the case of *Wishart*.

The law

23. A claim may be made under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 for a breach of contract where that arises or is outstanding on termination, as referred to above. Whether or not a contract was formed between the parties is dependent on whether agreement existed between the parties or not – *Morrison-Low v Paterson 1985 SC (HL) 49*. The issue is decided objectively, such that whether or not a party intended to enter into a contractual relationship is not relevant. An expression of future intention is not sufficient, nor is there a contract if it does not include the essential requirements of a contract, or if there is an agreement to agree unless that is sufficient, or can be remedied by an implied term – *Avintair Ltd v Ryder Airline Services Ltd 1994 SC 270*.
24. In *Wishart v National Association of Citizens Advice Bureaux Ltd [1990] IRLR 393*, an interim injunction was sought by the claimant who had been offered a post 'subject to receipt of satisfactory written references'. When these were taken up they disclosed absence for reason of illness on a number of occasions and the defendants withdrew the offer of employment after having discussed the position with the claimant. The

5 Court of Appeal held that there was no established employment relationship between the parties, and it was evident that the defendants did not have trust and confidence in the claimant with the result that the Judge had erred in treating the case as an exception to the normal rule whereby the Courts did not order specific performance of contracts of employment. Two members of the Court of Appeal expressed the view that in the context of the question of whether there is an enforceable contract of employment between the claimant and the defendant, it was highly unlikely that the claimant would succeed at trial in establishing that there was an objective test involving a notional reasonable prospective employer for determining whether a reference is satisfactory, and it was more likely that all that was required was that the defendants consider the references in good faith.

Discussion

15 25. I considered that the witnesses each sought to give what they considered to be honest evidence. There was not a large dispute on fact, but where there was I preferred the evidence of Ms Sennah. She was very clear in her oral evidence, and explained the process that the respondent follows in its recruitment, that written communication skills were important for the role advertised, as the person was the first point of contact including for service users, and that she had concerns over the terms of the reference describing the claimant's written work as below average. She also had his CV which has various errors or infelicities of expression within it. She also noted that his oral communication skills were rated as average in the reference, but was another key aspect of the role. Her view was that, having met him, the reference received was not satisfactory, and she withdrew the offer as a result. All of that evidence I considered reliable.

25 26. The claimant put to her in cross examination that her only concern was that he had had 35 days of absence, but she did not accept that, and was adamant that she had concerns over his communication skills particularly those in writing. I was satisfied that her evidence on that should be accepted. I was also satisfied that she genuinely believed that the claimant's reference was not satisfactory, and came to that view after having a meeting with him which gave him the opportunity to persuade her

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that it was. The act of her holding that meeting supports the view that she was genuinely of that opinion, in my assessment. She would not have done so in my view if she had not genuinely wished to find out if he was able, in her opinion, to undertake the role.

5 27. It follows from the findings I have made that I consider that the conditional offer was not completed, or the offer not crystallised as Ms Howard put it, such that there was no contract in law between the parties. The offer made was accepted, but had been made with conditions and one of them had not been satisfied. The acceptance was not therefore sufficient to
10 conclude a contract. The offer was withdrawn on that basis, as in my view the respondent was entitled to, the condition of a satisfactory reference not having been fulfilled..

15 28. The claimant thought that there was a concluded contract, because he had been told about a start date, but the letter to him of 26 September 2023 was I consider clear that it was conditional, using that word in the heading, and at no stage was he told that the conditions, referred to in the letter as checks, had been successfully completed. He accepted that he had been advised by Ms Ng something to the effect that he could resign from the existing employment, rather than instructed to do so, and it did
20 not appear to me that that was a basis to find that a contract of employment existed in law. The test is an objective one, not a subjective one.

25 29. I did not find assistance from the case of **Wishart**. The context of that was an application for an interim injunction in England. The law to be applied to a contractual issue such as the present is the law of Scotland, which I consider is as set out above.

30 30. The other aspect that the claimant sought to rely on was that he had spent time reviewing the respondent's policies by eLearning, as required, and should have been paid to do so. Ms Sennah explained that that was required of candidates at the recruitment stage, and was not paid. The claimant accepted that he had not been told by the respondent that it would be. His evidence was that he had been paid in other applications,

but that experience is not sufficient in law to create a binding legal obligation in my opinion, either under contract or otherwise.

31. I conclude accordingly that the claimant has not established that there was a concluded and binding contract with the respondent, albeit that he himself believed genuinely that there had been. The answer to the first issue is in the negative, and issues two and three do not therefore arise.

32. In the absence of there being any contract between the parties, or other basis for a legal obligation, I must dismiss the Claim.

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Employment Judge A Kemp

Employment Judge

4 April 2024

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Date of judgment

Date sent to parties

05/04/2024
