



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Ross

Respondent: Dr Miriam Noorani

Heard at: LONDON SOUTH

On: Thursday, 9 March 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: Mrs J Box, Claimant's Aunt
Mr M Ross, Observer

Respondent: Dr Miriam Noorani

JUDGMENT having been sent to the parties on 3 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. The hearing took place on Thursday, 9 March 2017. The Claimant was represented by Mrs J Box, her aunt and the Respondent was in person. Also present were Mr Ross and Dr Noorani (husband of the Respondent).

2. The Tribunal heard evidence from the Claimant and Respondent. The Respondent is a medical practitioner as is her husband. The Respondent indicated that she had no understanding of holiday pay, to the extent that she considered the Claimant to be on probation and not entitled during that period. It appears the Respondent did not accept the Claimant was entitled to notice during what was considered to be probation.
3. The Tribunal made findings of fact as follows.
4. The Claimant was employed by the Respondent through an agency, Puddle Duck Nurseries. The agency provided to the Respondent on 22 August 2017 paperwork regarding the Claimant who had been accepted at interview. There was a suggestion that the Claimant was on a period of probation but this was not part of a written offer to the Claimant or an agreed contract. The projected start date in the agency invoice was 5 September 2016. The Claimant's evidence was that the job was full time for £450 net per week. She said she was told by the agency that was regardless of the hours worked. The days might vary in length but would be some full and some half to make up the week's work with all days in school holidays full time and overtime at £10 to cover additional hours.
5. The engagement was for a nanny as far as the Claimant understood. The Respondent argued that the job was for a Nanny with housekeeping but that does not appear to have any support in the documentation. It is not in dispute that the Claimant assisted the Respondent in the course of a house move, including unpacking boxes. This appears to have led to a criticism of the Claimant when the Respondent discovered the Claimant has located the webcam in the playroom. The Claimant explained that she had not moved the camera but installed it there in the course of unpacking.
6. The Claimant was supplied with only one payslip, in October. She gave evidence that she had never agreed for overtime hours to be "banked."
7. The Agency supplied a pro forma contract when the engagement was entered but this was passed on by the Respondent to the Claimant in blank. The Claimant found that she did hours in excess of the basic agreed and was told when she asked for payment this would be banked against future time off. She expressly rejected this arrangement in an e-mail.
8. The Claimant raised concerns about her terms with the agency 7 October 2016. She received a copy of the mail sent on 22 August 2016 to the Respondent. She said to the agency in response: "So I should be on at least £450 a week plus extra in the school holidays?" She received the reply: "Yes that's right. That is what we were led to believe." The Claimant also complained about late payment of her salary to the

Respondent by e-mail.

9. The Agency supplied a pro forma contract when the engagement was entered but this was passed on by the Respondent to the Claimant in blank. The Claimant found that she did hours in excess of the basic agreed. She was told when she asked for payment that this would be banked against future time off. She expressly rejected this arrangement in an e-mail.
10. The actions put forward by the Respondent to justify summary dismissal for gross misconduct include the Claimant bringing her husband into the new house and showing him around, the fact that the Claimant took the child to a friend without permission, tampering with the camera for the webcam, pronouncing the child's name wrongly and upsetting him, the child being wet at night, failure to undertake housework, disappearing during working hours, and shouting at the child in front of the Respondent's mother in law.
11. Having heard both parties and assessed the evidence I did not find the Respondent established on the balance of probabilities that the Claimant committed gross misconduct. All of the allegations put forward were refuted by the Claimant who on good grounds made it clear that the Respondent had deliberately delayed setting out clearly the terms of the appointment and sought to exploit vagueness to the detriment of the Claimant, particularly by asserting a different basis for payment and for the tasks to be undertaken to that which had been agreed, delaying payment and seeking to impose tasks, such as house removal work clearly outside the terms of engagement. Caring for the Respondent's elderly and unwell father in law is a striking example of a task assigned to the Claimant outside the work of a nanny on any view. I did not accept the evidence of the Respondent in relation to the allegations of gross misconduct. It appears to have been created to fulfil a need to justify summary termination, which had not occurred to the Respondent at the time of dismissal. I found the Respondent was unaware of the obligation to pay holiday pay and that the Respondent believed that the probationary period meant that there was no obligation to pay notice.
12. The relationship between the parties deteriorated on or about 14 to 20 October 2016. The Claimant was informed by the agency on 9 November 2016 that the Respondent did not want the Claimant to return. It was not said there had been gross misconduct, or that the Claimant had behaved inappropriately. She was given no insight into the reason for termination. That clearly raises a question as to the factual basis for this action. The allegations relied on have only come to light in response to this claim.

Conclusion

13. I reached the following conclusions in relation to the claims made.

Unlawful Deduction of Wages

14. This is a claim under section 13 of the Employment Rights Act 1996. The Respondent has informed me, and this accords with the Claimant's records, that the Claimant was paid during her employment the sum of £4,263.43 net of tax. That was the sum stated in the claim form.
15. I have found in the face of conflicting evidence regarding the terms of the Claimant's employment that she was not employed, as the Respondent suggests, on some averaging basis of 45 hours a week but that her engagement was for a straight forward full time engagement estimated at 45 hours a week paid at the net rate of £450 with overtime to be paid in addition at £10 net per hour.
16. Accordingly, I found in respect of the period of the Claimant's employment, which I calculate as 9 weeks and 2 days, that she should have received, for her basic hours at the unusual agreed figure of £450 net of tax, the sum of £4,230. Accordingly, she is in credit to the sum of £63.43. The Claimant claimed that she worked 18 hours of overtime at £10 an hour. I noted that the Claimant accepted the Respondent's timesheet in the course of the hearing and that appears, from my reading of it, to record that the Claimant worked a total of 9.5 hours overtime which at £10 per hour equates to £95. So taking into account the £33.43 credit the balance due to the Claimant under this heading is £61.57.

Breach of Contract in Relation to Notice Pay

17. There were no contractual terms in relation to notice, no statement of particulars ever having been given to the Claimant in this case, an acknowledged deficiency on the part of the Respondent. Accordingly, the statutory minimum notice by Section 86 of the Employment Rights Act 1996 after one month's employment is one week.
18. The Respondent has sought to defend the case on the basis that the Claimant committed an act or acts of gross misconduct entitling her to summarily terminate the Claimant's engagement. I did not find on the balance of probabilities that the Respondent proved that there have been gross misconduct in this case. The Claimant says quite candidly that she had no knowledge or expectation that anything had happened that would lead to summary termination of her employment. There appears to have been, as is not unsurprising in cases where a close personal relationship with relative strangers is involved, some personality differences and conflicts. These arose on 14 and 20 October. The

Respondent waited until 9 November to terminate the Claimant's employment. This was done not by any direct contact with the Claimant but by notification to the agency. There is no information from the agency as to what they say they communicated to the Claimant. The Claimant says that all she was informed was that she was not to return to the Respondent's home. Accordingly, I do not accept that the Respondent is relieved of the obligation to pay notice pay to the Claimant and the Claimant is therefore entitled to the sum of £450 net.

Holiday Pay

19. Turning to the claim for holiday pay, this is a claim for accrued holiday remuneration due on termination of employment pursuant to Regulation 14 of the Working Time Regulations 1998. The Claimant has by my calculations worked 65 days of the year of 365 days. I apply that proportion to the 5.6 weeks of holiday given under the working time regulations and the weekly rate of £450 that equates to slightly short of 1 week's holiday, namely £448.76.

Section 38 of the Employment Act 2002

20. In 9 weeks of employment the Claimant did not receive the required statutory statement of initial particulars of employment pursuant to Part 1 of the Employment Rights Act 1996. Under the provisions of Section 38 of the Employment Act 2002 I am required, since the Claimant has succeeded, to make an award of the minimum amount or the higher amount that is two or four weeks pay in a case where the Claimant is successful and the Respondent is at the time the claim is presented in default of her obligations in relation to a statement of terms of employment under section 1 of the Employment Rights Act 1996. Although the period of default is relatively short since the employment here only lasted 9 weeks, many of the difficulties that have arisen in the course of this case and which have required time and concentration to resolve would not have been problematic had the employer complied with the obligation at the outset. One aspect in considering the amount of the award is the rationale for failure to produce the document. The employer was aware of the obligation but appears to have declined to provide a contract or a statement of particulars to the Claimant on the basis that from an early stage the employer considered that it was unlikely that the employment would continue. That appears to have been a decision taken not because of the conduct of the Claimant but for other reasons, possibly because other family members would be able to undertake the child care. Another salient feature is that the Claimant clearly accepted engagement as a nanny whereas the tasks which the employer anticipated she would fulfil, and required her to undertake, were those of a nanny, housekeeper, removal assistant and carer. That was clearly an unsatisfactory basis for any employment to start. More significantly the conflict in relation to the basis of payment, and indeed

the date in each month when the Claimant was to be paid, which were not clearly set out in writing anywhere became the subject of dispute and bitterness between the parties.

21. For these reasons I consider that the higher award is appropriate in this case and that is therefore 4 weeks at £450 a total of £1,800.
22. I also make an award pursuant to Rule 75 (1) (b) to the Claimant who has been successful in all aspects of this case in respect of the fees incurred. The sum is £390 and the total is therefore £3,150.33.

Regional Employment Judge Hildebrand

Date 16 May 2017