



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Kemp

Respondent: Norwich & Central Norfolk Mental Health Resources
t/a Norwich and Central Norfolk Mind

HEARD AT: NORWICH ET **ON:** 3rd & 4th July 2017

BEFORE: Employment Judge Cassel

REPRESENTATION

For the Claimant: Mr S Kemp, Husband of the Claimant.

For the Respondent: Mr D Chapman, Solicitor.

JUDGMENT having been sent to the parties on 14th July 2017, and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

1. In the claim form submitted on the 30th September 2016 the Claimant, Mrs M Kemp, makes a number of claims against her employer who are hereafter referred to as Norwich and Central Norfolk Mind.
2. In the response form which was submitted the claims are resisted.
3. There was a Preliminary Hearing and Case Management Discussion on the 9th December 2016 before Employment Judge Morron. The discussion shows that at that stage the Claimant was still employed and it was explained to her at paragraph 3 of the discussion document that the Tribunal has no jurisdiction to hear a claim for wrongful dismissal, breach of contract, while her employment was still subsisting. At paragraph 4 there is mention made of a holiday pay claim and as such Employment Judge

Morrison concluded she did not have a holiday pay claim. In paragraph 6 he referred to arrears of wages which he referred to as 'this claim too is problematical'. In any event orders were made and the claim was listed before the Tribunal for two days ending today the 4th July 2017.

4. At the commencement of the proceedings the Tribunal sought clarification of the issues. It was disclosed that the Claimant was no longer an employee of the Respondent, had not submitted a fresh claim and that the claim before the Tribunal is for money alleged to be owed by the Respondent to the Claimant, and the Claimant stated that this was for arrears of pay. Mr Chapman submitted that really this was nothing more than a breach of contract claim and it was doomed in his words to fail as the Employment Tribunal has no jurisdiction to hear such a complaint.
5. The Tribunal heard evidence from Mrs Michele Kemp, the Claimant, Mr Stephen Kemp, her husband, Mrs Emma Cliffe then Omnia Administrator for the Respondent now Governance Lead, Mrs Clare Bradbury, Head of HR for the Respondent. The Tribunal was also given a bundle of documents comprising 179 pages, a document entitled 'List of Issues' which was prepared by the Respondent's Representative and a skeleton argument which was produced by the Claimant.
6. The Tribunal makes the following findings of fact based on the balance of probabilities having considered the oral evidence and the documents to which the Tribunal's attention was drawn.
 - 6.1 The Respondent is a provider of services described by Mrs Bradbury as employing approximately 120 people, staff spread over the various different services that are offered with approximately 20 staff providing support and care to live-in accommodation, service referred to as "Omnia", approximately 20 staff providing support and care to external support services "Outreach", approximately 60 staff working in the wellbeing service which provides services to people with mild to moderate mental health problems in partnership with the Norfolk and Suffolk Mental Health Foundation Trust, and approximately 20 staff providing internal administration and office support referred to as the Head Office Team.
 - 6.2 The Claimant attended an interview following an application for work with the Respondent and on the 27th July 2015 exhibited at page 39 an offer letter was sent to her. The offer letter is headed "Omnia Support Worker (Bank)" and at paragraph 1 is the following comment:-

"I am delighted to offer you employment as an Omnia Bank Support Worker with Norwich and Central Norfolk Mind."
 - 6.3 The Claimant started work on the 17th August 2015 and terms and conditions of employment were issued on or around the 20th August 2015, these are produced at page 41 onwards. Within that document is the following:-

Job Title: Omnia Support Worker, Contract Type: Permanent
At paragraph 6 of that document is the following under hours of work:-

“You will form part of a bank of staff who are not guaranteed to be offered any work nor are you obliged to accept any offers of work.”

- 6.4 There was a starter form issued as well which is exhibited at page 48, dated 16th September 2015 in which the job title is given as “bank support worker”. Both of those two documents are signed by the Claimant.
- 6.5 At the time of her interview the Claimant was still working at a local hospital, and although she likely believed she would be working similar hours there is no evidence that such a promise was made, nor that the contract was in any way varied to guarantee such hours of work.
- 6.6 The Claimant performed her tasks well and the Tribunal finds that the work she undertook was based on a two week rota, and an example of that is exhibited at page 149 and she was offered work to cover periods not covered by other staff for example to cover holidays, sickness and indeed needs of the organisation.
- 6.7 All went well until a complaint was lodged alleging that the Claimant acted inappropriately or unlawfully. The complaint was made to Sarah Brown who didn't give evidence but evidence was given by both Clare Bradbury and the Claimant that the allegations were brought to her attention on the 11th April 2016. The Tribunal is in no doubt that the Claimant was deeply offended and extremely upset by the accusations and left work. However the Tribunal finds that there was nothing inappropriate or improper about the manner in which that meeting was held.
- 6.8 The Respondent initiated internal disciplinary procedures and broadly followed their own procedure. At page 61 is a letter from Clare Bradbury of the 12th April 2016, in it the allegations are given in broad terms, the fact that an investigation is to be undertaken and that a manager was appointed/provided for in that letter.
- 6.9 Also within that letter is the following:-

“Your husband has stated in our telephone call that you will not be attending any meetings but I urge you to attend so that you can input fully and in person to the investigation.”

There were further messages to both Sarah Davies whose call was answered by Mr Kemp, and a further call by Emma Cliffe. The substance was slightly different but in terms that she should not be contacting the Claimant.

- 6.10 There was no response to the letter of the 12th April 2016 and a further letter was sent to her on the 21st April 2016. Within that letter was the following:-

“Additionally I recall when I spoke to your husband that he stated

that you would not be coming back to work for Norwich Mind and I would therefore like to know whether it is your wish as well as not responding to the allegations to also not return to work at all."

There is also a reference to a telephone call made by Jason Edwards when he apparently spoke to Clare Bradbury in terms that Mr Kemp had said that the Claimant was unavailable.

- 6.11 A response was written on the 22nd April 2016 signed by Mrs Kemp. She identified this letter and said that she had drafted it. The Tribunal finds that that was an unhelpful response and referred to seeking legal advice, advice from ACAS and contacting the Police. More importantly there was no response to the question about any intention to return to work.
- 6.12 The Tribunal finds that on reasonable grounds the Respondent concluded that the Claimant was not willing or ready to return to work.
- 6.13 There was an investigation into the complaint which proceeded without any further input from the Claimant, and a conclusion was reached that was referred to in a letter again from Clare Bradbury exhibited at pages 75 and 76. A report is referred to which has not been brought to the Tribunal's attention but the following conclusion was reached:-

"Because some of the facts are unclear and because I do not believe anyone has suffered any discrimination as a result of your words I've decided not to take the matter any further. This means that the matter will not proceed to a disciplinary hearing. However, as you see the investigation has concluded that your words do demonstrate a lack of awareness and I would like to meet with you to discuss this."

- 6.14 There was a meeting on the 28th June and meeting notes were exhibited at page 79, and there was a letter produced at pages 81-82 from Clare Bradbury. Within the letter at page 81 in the final paragraph is the following comment:-

"To address some of the other points you made in our meeting, you called the client hereafter referred to as 'S' there is words, the worst of which being a vicious bitch."

The Tribunal finds that that letter was sent to the Claimant, and indeed a response was made to that letter of the 4th July 2016. However, there was no response to the allegation of the use of those words which the Claimant denied in Tribunal as having uttered. However, the Tribunal heard evidence from Clare Bradbury and had regard to the documentary evidence and find that these words were said by the Claimant.

- 6.15 The relationship deteriorated still further. In the letter of the 4th July 2016 there is reference to lies and malicious allegations, blaming her husband for failings and so on.

6.16 In any event the Claimant never again worked for the Respondent and subsequently resigned.

6.17 The end of the relationship occurred on a date following the submission of the claim form.

6.18 The relevant law in regards to breach of contract under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 at Regulation 3 is the following:-

“Proceedings may be brought before an Employment Tribunal in respect of the claim of an employee for the recovery of damages or any other sum (other than a claim for damages or for a sum due in respect of personal injury) if:-

- a) the claim is one to which Section 131(2) 1978 Act applies in which a court in England and Wales at the time of the law being in force have jurisdiction to hear and determined; or*
- b) the claim is not one to which Article 5 applies; or*
- c) the claim arises or is outstanding on the termination of the employees employment.”*

6.19 Under Section 13 of the Employment Rights Act 1996, under protection of wages is the following:-

- (1) An employer shall not make a deduction from wages if 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 workers contract.
 - (b) The worker has previously signified in writing his agreement or consent for making the deduction.

6.20 In addition Mr Chapman has brought to the attention of the Tribunal the following case, *A Basai v Connex Bus (UK) Ltd [2005] WL7980792*.

Conclusions

7. The Tribunal finds that the contractual arrangements between the Respondent and the Claimant were clearly set out in various documents including the offer letter, the terms and conditions of employment, and the starter form. The contract has all the hallmarks of a zero hours contract. There is no obligation on the Respondent to provide work to the Claimant, and no obligation on the Claimant to undertake it. There has been no evidence to show that this contractual arrangement has been varied either in express terms or otherwise.

8. The evidence points firmly in any event that following the complaint made in April 2016 that the Claimant was neither willing nor ready to work.
9. The Respondent initiated disciplinary investigations and was entitled to do so, and indeed as a service provider to vulnerable people it would have been remarkable if they had not done so.
10. The Respondent conducted the enquiry in a reasonable manner and there was nothing about the Respondent's conduct that points to a breach of contract.
11. Throughout the period of investigation and indeed generally there is no obligation on the Respondent to provide work and in not doing so they did not breach any term of the contract.
12. The Tribunal has found that on the 28th June the words used by the Claimant led to a genuine and reasonable concern as to the future employment of the Claimant in any event.
13. The Tribunal has considered *Basson*, although the facts are different the issues are similar and this claim cannot therefore be a claim under Section 13 of the Employment Rights Act 1996.
14. The terms of the Extension of Jurisdiction Order are clear. This was not a claim that was outstanding on the termination of employment, certainly not in the Claimant's claim that was presented to the Tribunal, and the Tribunal has no jurisdiction to hear the complaint of breach of contract.
15. The Tribunal makes the final comment that even if it did have jurisdiction the claim of breach of contract would fail and be dismissed.

Employment Judge Cassel, Norwich.

Date: 27th July 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS