EMPLOYMENT TRIBUNALS

Claimant: Ms A Strowger

Respondents: Chartwell Care Services (1)
Chartwell Trust Care (2)

Heard at: Leicester

On: 12, 13 and 14 November 2018

Before: Employment Judge Brewer
Members: Mrs B Tidd
Mr A Wood

Representation
Claimant: In person
Respondents: Mr B Gardiner of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claim for victimisation under section 27 Equality Act 2010 fails and is dismissed.

2. The claim for breach of contract fails and is dismissed.

3. The claim for unlawful deduction in relation to holiday pay succeeds. The Respondent is order to pay the sum of £750, subject to deductions for taxation in respect of 6 days accrued untaken holiday.

REASONS

Introduction

1. The claims issued by the Claimant initially included a claim for unfair dismissal but she lacks continuous service sufficient to bring that claim and it was dismissed at an early stage in the proceedings.

2. The remaining claims were for victimisation, breach of contract in relation to a purported increase in her pay which was subsequently withdrawn, unpaid notice pay and unpaid accrued untaken holiday pay.

3. The Claimant represented herself and the Respondent was represented by Counsel. Although there was an agreed bundle, the Claimant brought in a number of documents, which we accepted into evidence. During the course of the evidence, further documents were produced, all of which were accepted in evidence. We had witness statements from the Claimant and, on behalf of the Respondent, from Mr G Lane (Finance Director), Ms A Medjber (Executive Assistant to the Chief Executive) and Mr S Mattu (Chief Executive).

4. We have taken account of all the evidence in reaching our judgment, along with the helpful submissions of both parties, for which we are grateful. The judgment was unanimous.

Issues

5. In relation to the victimisation claim, the issues are as follows:

    5.1 Did the Claimant carry out a protected act at the meeting she had with the Respondent on 25 May 2017?

    5.2 Did the Claimant carry out a protected act at the disciplinary hearing on 23 June 2017?

    5.3 If so, did the Respondent submit the Claimant to detriments because she had carried out a protected act.

    5.4 The Claimant says the protected acts are as follows:

        (a) The decision to suspend the Claimant taken on 25 May 2017 and,

        (b) the decision to delay the outcome of the disciplinary hearing held on 23 June 2017.

    5.5 If the victimisation claim was made out, the Claimant would be entitled to compensation for injury to feelings and for any financial loss.

6. In relation to the claim of breach of contract, the issues are as follows:

    6.1 What rate of remuneration was the Claimant entitled to receive from 1 May 2017 onwards?

    6.2 What notice period was the Claimant entitle to?

    6.3 What was the effective date of termination?

    6.4 Was the Respondent entitled to dismiss the Claimant summarily on the grounds that the Claimant was in fundamental breach of contract?

    6.5 Did the Respondent dismiss the Claimant for gross misconduct?

7. In relation to the claim for holiday pay, we note that the parties did not disagree that some holiday pay was owed and the only issue before us was the particular number of outstanding unpaid days holiday.

The law

8. The victimisation claim is brought under section 27 Equality Act 2010. This requires that the Claimant has done a 'protected act' or that the Respondent believes that the Claimant has done or may do a protected act and as a result subjects the Claimant to a detriment. The protected acts are set out in section 27(2)(a) to (d). These are:

> *"(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

9. In relation to breach of contract, the Claimant must prove that the Respondent breached her contract, that is to say either an express or an implied term of the contract.

Findings of fact

10. The Claimant was offered the position of Group HR Manager of the Respondent, which she accepted on 1 February 2017. The Claimant says she never received a copy of the Respondent's handbook. The terms therefore upon which she says she was employed are set out on pages 50 and 51 of the bundle.

11. The Claimant was initially employed on the salary of £32,500 per annum. She was given a number of terms in relation to a bonus, hours of work and holidays. Importantly for the purposes of this claim, the following is included in the offer letter:

> *"After the successful completion of your probationary period, the notice period will be 3 months. At the end of this probationary period your salary will increase to £35,000 per annum provided you achieve the following objectives. …*"

12. There then followed five objectives, the first of which is "*Implementation of a professional recruitment process within the Company*".

13. The Claimant commenced employment with the Respondent on 1 February 2017. Shortly thereafter, the Respondent employed David Beattie and the Claimant was, amongst others, notified of this on 17

February 2017 by email (page 52 of the bundle).

14. Mr Beattie was given a number of tasks to achieve and the Claimant was given a copy of that list of tasks. This appears at pages 54ab and 54 ac of the bundle. Item 3 of that is a recruitment plan and the Respondent stated as follows:

> "*We currently have a major recruitment crisis in some of our adult services and children's services. Agency is approaching 30% of staffing in one of our adult homes and staff shortages in one of children's services is preventing us accepting referrals. We urgently need a focussed recruitment plan to fill these vacancies. In addition, we need to access skill levels in some of our services and address any caps by recruiting more senior staff.*"

15. We find as a fact that the key task for the Claimant was implementing a recruitment process for the reasons set out above and given to Mr Beattie. We find that it was also one of Mr Beattie's key tasks to ensure that the recruitment plan was put in place.

16. By the end of March/beginning of April 2017, the Claimant had drafted a recruitment process which she had sent to Mr Beattie for his approval and it required some tweaking. She advised the Chief Executive (Mr Mattu) of this by email on 4 April 2017. This followed an email from Mr Mattu on the previous day asking Mr Beattie for an update on "*where we are with the recruitment*" because, as he put it, "*We spent most of the profits in February with agency and have a lot of maintenance issues outstanding*". This emphasises the importance of a recruitment pipeline for employees for the organisation, rather than the constant use of agency staff given that wage costs are the Respondent's biggest single cost.

17. On 11 April 2017, a senior manager (Amanda Chapman) resigned. For reasons which do not need to trouble us, the Respondent and Ms Chapman entered into a settlement agreement, the Respondent having agreed to make a certain level of payment to Ms Chapman for the agreement. We find as a fact that the Respondent determined only to pay the amount set out in the agreement and no further payment. We find as a fact that that was made clear to the Claimant by Mr Lane, and even if it was not, we cannot find anywhere that the Claimant had authority to unilaterally increase the amount of payment to be made to Ms Chapman.

18 Nevertheless, that is what the Claimant did. This arose because as initially drafted, the employment of Ms Chapman was due to end at a point in April, certainly by no later than the end of April. Because the agreement took longer to finalise, it stated that Ms Chapman's employment ended on 12 May 2017 and Ms Chapman therefore asked to be paid to that date, which meant that she would be entitled to 2 further weeks' pay. The Claimant agreed and instructed payroll to make this payment. She did not have authority to do so.

19. As part of the implementation of the recruitment process, senior managers in the Respondent, including Mr Beattie, Mr Lane and the Chief Executive,

were expecting to receive from the Claimant a weekly tracker spreadsheet. The purpose of that was to show a pipeline of applicants for employment and their progress through the appointment process. That process essentially involved the following key stages – application, verification of right to work, interview and appointment and DBS checks as well as references.

20. On 26 April 2017, the Claimant presented Mr Lane with a contract amendment form (page 72 of the bundle). She had completed the form which increased her salary to £35,000. Where the form asks for the reason for change, the Claimant wrote *"12 week review – increase as per employment offer letter*". Mr Lane signed the form, which is dated 26 April 2017 and the new pay was to come into effect on 1 May 2017.

21. On 27 April 2017, Mr Lane wrote to the Claimant and Mr Beattie. In his email he says:

> *"Sokhi and I are becoming increasingly concerned over lack of any tangible progress on recruitment. Looking at the care hours for Milligan in April, we are running at 300 hours a week below the funded level and about 200 hours a week down on March … which brings me to my biggest beef. There is a total absence of any MI on the recruitment process, which means all we get is finger pointing and little progress.*"

22. Mr Lane attached a recruitment tracker which a former HR manager had used and he says in no uncertain terms that he requires that to be reinstated. He also makes it clear that "*recruitment should be the number one priority*". The reference to "*Sokhi*" is to the Chief Executive, Mr Mattu and the reference to *"MI*" is to management information.

23. It would appear that matters had not improved by the end of April. On Friday 20 April 2017 at a senior management meeting, it was stated that recruitment remains the biggest risk for the Respondent and the notes state expressly that "*discussed at the owner of recruitment agrees that AS will be this*". The reference to 'AS' is to the Claimant.

24. Mr Lane continued to have concerns about recruitment and the lack of a pipeline or at least information on that. He emailed senior managers again on 2 May 2017 (pages 81 and 82 of the bundle) complaining that the management team was not working effectively and in particular that no single person is driving the recruitment process. He states "*We have achieved very little in the first 4 months of 2017 and this needs to change*".

25. Contrary to what was decided by the senior management team in their meeting, Mr Lane says that Mr Beattie will be the owner of recruitment with everybody else supporting and reinforcing the messages. He required weekly recruitment data which he and his Chief Executive could review and offered everyone the opportunity to discuss the issues with him should they wish.

26. It would seem that the recruitment issues remained problematic. On 13 May 2017 (pages 92 and 93 of the bundle), Mr Beattie wrote to the Claimant. The email is highly critical of her and it points out that in mid April the Claimant said that she was tracking applications and that she would bring updated information to a managers meeting on Thursday 27 April.

27. However, Mr Beattie pointed out that at that meeting the Claimant had said that the recruitment tracker spreadsheet was in fact not up to date and that she would have it updated and sent to Mr Beattie. She failed to do that. Mr Beattie pointed out that by 8 May, he still had not received the recruitment tracker from the Claimant and he had also not received a vacancy tracker, which had been discussed at the senior managers meeting on 28 April.

28. He also noted that on reviewing paperwork in the Claimant's office when she was not at work, it was difficult to understand her filing system for applicants, there appeared to be missing DBC checks, paperwork was not properly filed and the HR update sheets for the majority of applicants was not up to date. Mr Beattie makes it clear that going forward, the Claimant's number one priority would be recruitment.

29. Following Mr Beattie's email, Mr Lane wrote to the Claimant on 15 May 2017 (page 94 of the bundle) in which he states he was very disappointed to note the content of Mr Beattie's email and he states:

> "*Whilst you have done some good work since you joined us, it appears form David's feedback that the number one priority of recruitment has not been your number one priority. In addition, there is a strong suggestion from David that you have avoided giving straight answers and providing information essential to the recruitment process. This is very disappointing. Given the contents of David's email I have reluctantly come to the conclusion that I need to suspend the salary increase I signed off before I went on holiday. I will reinstate it as soon as I am sure that you are really managing the recruitment process and you have re-established the trust in you of David, Sokhi and me which has been damaged by the revelations."*

30. In short, Mr Lane was stating that given the information he now had, in fact the Claimant had not passed her probation and that the pay rise consequent on her achieving the five objectives set out in her offer letter could not be made.

31. We note that on 15 May 2017, the Claimant responded to Mr Lane's email and also commented on the email from Mr Beattie. She does not say that recruitment was up to date, she does not say that she provided the documents which Mr Beattie had been asking for and in fact says:

> "*On return from the bank holiday on 2 May, I spent the first 3 days entirely focussed on recruitment, re-writing the ads, posting on to the 6 chosen websites and responding to emails, booking*

interviews and setting up and maintaining the pipeline tracker".

32. This appears to be an acceptance that by at least the first week in May, there was no recruitment tracker in place. That is surprising given that on appointment recruitment was the number one priority and that that had been reiterated on a number of occasions since the Claimant started with the Respondent.

33. Mr Lane responded to the Claimant's email on 16 May 2017 and in essence reiterates that there was a lack of management information about recruitment and whilst accepting that the Claimant was not solely responsible for recruitment, she was responsible for creating and implementing a process and for producing management information. It appeared to Mr Lane that neither of those things had been done.

34. On 25 May 2017, Mr Beattie met with the Claimant. The Respondent says that that meeting was "*off the record*" and in submissions Mr Gardiner argued that the meeting was "*without prejudice*". Initially it was alleged that the meeting was a *"protected conversation*" but it was not because the Claimant is not claiming unfair dismissal. We find that at the time of this meeting, there was no 'dispute' and that the meeting was not without prejudice. At the meeting, in essence Mr Beattie told the Claimant that her position was untenable and he offered to allow her resign and receive one month's pay in lieu of notice. The Claimant says that she would have left for 3 months' pay in lieu of notice but given that she was being offered one month, she rejected the proposal. At that meeting, the Claimant said words to the effect that Mr Beattie was not going to force her out of the business the same way that he had forced out Ms Chapman.

35. On 25 May 2018, the Claimant was suspended. She was told that there had been allegations which amount to gross misconduct and there would be an investigation. She was told that she should remain available for work during normal working hours and that suspension was on full pay.

36. Subsequent to that, a disciplinary investigation was carried out by Ms T Branson, Operations Manager.

37. On 9 June 2017, the Claimant was invited to a disciplinary hearing to take place on 15 June 2017 to consider the gross misconduct allegations. She was sent a full copy of the investigation pack and the disciplinary procedure.

38. On 20 June 2017, the Claimant raised a grievance and in that she recites what happened at the meeting with Mr Beattie on 25 May 2017. We note that in her recitation of what took place, she makes no suggestion that she raised any allegation or concern or gave any information about any breach of the Equality Act 2010.

39. Mr Lane responded to the grievance on 21 June 2017 (pages 124 and 125 of the bundle). The disciplinary hearing took place on 23 June 2017. No decision was taken at the conclusion of that hearing. Mr Beattie had said that the meeting was adjourned to take into consideration everything

which the Claimant had said and he stated "*If an additional investigation is needed, I will make sure it happens and I will be in contact next week*".

40. On 3 July 2017, the Claimant resigned from the Respondent's employment giving 3 months' notice.

41. In response to the letter of resignation, Mr Lane wrote to the Claimant on 14 July 2017 acknowledging receipt and accepting the resignation. He says that during the 3 months' notice period, the Claimant would be placed on gardening leave and said:

> "*During this period of gardening leave you will receive your normal salary but you will continue to be bound by your contract with the Company. For the avoidance of doubt, that means that you are not free to work for any other organisation until the expiry of your notice period on 3 October*".

42. We note that this repeats what was said in the letter of suspension of 25 May 2017 when Mr Beattie said:

> "*You are required to … ensure you do not perform work for any other employer, or undertake self-employment, during your normal working hours*".

43. In fact, the Claimant did work elsewhere during her notice period. On 7 July 2017, the Claimant received just short of £500 net payment from VENN Group Ltd. That was payment for her attendance at an assessment centre and for work. The Claimant's bank statement for the relevant period shows that she received similar sums every week until Friday 25 August 2017. The Claimant accepts that she was working in various HR roles for two employers during that period.

44. On 27 July 2017, Mr Lane wrote to the Claimant the letter which appears at page 145 of the bundle. In that letter, Mr Lane says that the Respondent had information that the Claimant commenced employment with VENN Group on 26 June 2017. He reminded the Claimant that she was suspended on full pay and one of the obligations was for her to not work elsewhere during her notice period. Mr Lane goes on to say:

> "*As you have broken your contract of employment with Chartwell and breached the terms of your gardening leave, we have suspended payments of your July salary and any further salary payments due during your notice period. If you believe that the information we have received is incorrect we will review our decision to suspend your salary payments but only if you can provide a written confirmation from HMRC for July, August and September that no RTI returns have been submitted, for you, by any other organisation during that period.*"

45. He goes on to say that if the Claimant does not satisfy the Company as set out "*we … will record that you ceased employment with us on 25 June 2017 having terminated your contract of employment with us*".

46. The Claimant did not respond to Mr Lane.

Discussion

Victimisation

47. In effect, in her evidence the Claimant conceded that she had not made any protected act under section 27 Equality Act 2010. She did not allege sex discrimination or give evidence or even make a suggestion that there was sex discrimination. On the Claimant's own evidence, the most she did was to say to Mr Beattie that she was not going to be pushed out the way Ms Chapman, and other females, had been. Given that, it is not necessary for us to make findings about detriments. There simply would not be the causation necessary to found a claim for victimisation.

Breach of contract

48. The question arises whether the Claimant had in fact successfully completed her probation period and in any event whether a pay rise was awarded. The letter which appears at pages 48 and 49 of the bundle could have been better drafted. The relevant part states:

> "*After the successful completion of your probationary period, the notice period will be 3 months. At the end of this probationary period your salary will increase to £38,500 per annum provided you achieve the following objectives …*"

49. It seems to us that the proper reading of this is that after the Claimant had successfully completed her probation period, her notice period will increase from one month to three months. The reference in the next sentence to "*this probationary period*" must be a reference to the *"successful completion of your probationary period"* in the previous sentence. There is no other reading of that which would make sense. However, the difficulty for the Claimant in this case is that even if she was to argue that merely being employed for the first 3 months is 'successful completion', the fact is that she was not entitled to the pay increase unless she achieved the 5 objectives clearly set out in the offer letter and which she accepted. The first of those is "*implementation of a professional recruitment process within the Company*". On any reading of the evidence, the Claimant drafted a recruitment procedure but first that was not implemented or not properly implemented and second, it did not provide management with the management information it was seeking or at least it did not do so in good time and in the way that was required.

50. We have considered whether the Claimant could rely on Mr Lane's promise to give her the pay rise as evidenced by the contract amendment form at page 72 of the bundle. We accept the submission by Mr Gardiner that even if that was a promise, it was not one which the Claimant gave consideration for and was not therefore legally binding. Mr Lane was operating under the mistaken belief that the Claimant had done what she was charged with doing, implementing a recruitment process but it

became apparent to him rather quickly that that was far from the case and he very quickly withdrew the uplift.

51. Whilst it would have been preferable for him to have taken soundings from Mr Beattie before he agreed the pay rise, the reality is that since no actual increased pay was ever paid to the Claimant, she cannot in our view rely on any form of estoppel and cannot, for the reasons set out above, rely on an enforceable contract. In short, in withdrawing the pay rise, Mr Lane was not acting in breach of contract. The Claimant's contractual right to the pay increase never crystallised because she never achieved the objectives set out in her offer letter/contract.

52. The second element of the breach of contract claim relates to notice pay. We were invited to determine the effective date of termination in this case. However, in the circumstances that would appear to be wholly unnecessary. Either the Claimant's employment terminated at the end of the notice period, which we have already found is 3 months, or the Respondent terminated the Claimant's employment summarily on or around 28 July 2017. Importantly, the Claimant accepted that when she undertook work for VENN Group during her employment, that was a fundamental breach of contract either for which she was or could have been dismissed summarily. In her evidence, the Claimant said that she believed her employment ended at the end of July and when she read Mr Lane's letter at page 145 of the bundle, she thought herself "*that's it, I am no longer employed*". If we were obliged to determine the effective date of termination, given all of the evidence, we would find it was 28 July 2017.

53. However, as we have said, in the end that is an issue that does not trouble us. The question is does the Respondent owe the Claimant pay or damages for failing to pay any pay for the months of July, August or September?

54. We find that they do not have such an obligation. The Claimant's evidence was that she was paid by VENN Group from around 28 June, when she attended an assessment centre, and thereafter for work which she undertook. The effect of that is that she was unavailable for work for the Respondent and the Respondent was not obliged therefore to pay the Claimant. That applies whether it is pay during a notice period or payment in lieu of the notice period. Indeed, on our reading of the case, the Claimant was paid twice for the period 28 to 30 June 2017. Her claim in this respect also fails and is dismissed.

55. Finally, in relation to holiday pay, it was agreed at the hearing that the Respondent owes the Claimant pay for 6 days' accrued untaken holiday in the gross sum of £750, which shall be paid to the Claimant net of taxation.

Costs

56. At the end of the hearing given our judgment, the Respondent made an application for costs.

57. We heard submissions from Mr Gardiner and from the Claimant. mr

Gardiner's submission was that the Claimant's claims had no reasonable prospect of success and/or the case had been brought or pursued unreasonably thus engaging both rule 76(1)(a) and (b) of the 2013 Rules of Procedure.

58. Mr Gardiner brought to our attention a letter sent to the Claimant by him on 12 March 2018 which states expressly that if the offer made in that letter is rejected, then the letter will be referred to at the tribunal in support of an application for costs. In that letter, he sets out in detail why the claims for victimisation and pay, other than holiday pay which has always been conceded, were bound to fail. His reasoning in the letter largely mirrors, albeit rather more briefly, the findings we have made as set out above. He made the point that we found that by the Claimant's own evidence she did not make a protected act and she said in terms that she had never alleged sex discrimination, for example. On that basis, there was no possibility that a claim for victimisation could get off the ground. We accept the points Mr Gardiner made about that.

59. In relation to the claim for payment after June 2017, given the Claimant's acceptance that she was working in fundamental breach of contract as we have found above, we entirely failed to understand the basis upon which she sought to claim payment for a period when she was in fact working and was being paid by VENN Group. Again, her claim was unreasonable and clearly had no reasonable prospect of success.

60. We take a slightly different view of the claim in relation to the question of whether the Claimant's pay was properly increased or not in April/May 2017. That was a rather more difficult claim and was based on what we now consider to be a misunderstanding of the contract on the part of the Claimant. However, that is not something for which we criticise her for. Nevertheless, given that the Respondent's costs in this matter are in excess of £20,000, the application for costs in the sum of £5,000 was, in context, reasonable.

61. We enquired of the Claimant's means. She is in stable employment and currently earns £45,000 per annum. She did not suggest that she could not afford to pay costs. She said in response to Mr Gardiner that she believed she was victimised as a result of the meeting on 25 May 2017. It is entirely unclear why she maintains that belief. We could understand if she was using the term 'victimised' in a non-technical sense, but we reiterated to her that she has told us that she has 25 years' experience as an HR professional, many at a senior level, and that she has been a representative in employment tribunals. We also note from an email which was disclosed by Mr Gardiner in support of his claim dated 22 March 2018 from the Claimant that she had taken legal advice, in which case it remains unclear why she continues to say she was victimised, at least within the meaning of the Equality Act 2010. She clearly was not because she clearly did no protected act. Whether she felt badly treated is neither here nor there in the context of this claim.

62. We are mindful that costs are the exception not the rule in our jurisdiction but we do have the power to award and in this case we consider that rule 76(1) was engaged. Given the Claimant was offered a settlement in the sum of £6,590 in March 2018, given that she was seeking a sum in the region of £17,000 to £25,000 and given that that was wholly unreasonable in the circumstances, along with what we have said above about the likelihood of success in the principal claims she was making, we accept, as we have said, that the rule is engaged and in this case it is reasonable for us to award costs and we do so in the sum of £5,000 in favour of the Respondent.

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Employment Judge Brewer
Date 11 January 2019

JUDGMENT SENT TO THE PARTIES ON
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FOR THE TRIBUNAL OFFICE