



EMPLOYMENT TRIBUNALS

Claimant

Mrs. V. Zenonos

Respondents

(1) Ms L. Nnando
(2) Haringey London Borough Council

v

Heard at: Watford

On: 29 May 2019

Before: Employment Judge Heal

Appearances

For the Claimant: in person
For the First Respondent: not present or represented
For the Second Respondent: Mr. E. Jankowski

JUDGMENT

1. The second respondent was the claimant's employer and is liable to pay to her the redundancy payment and compensation for breach of contract as set out below.
2. The claimant is entitled to a redundancy payment in the sum of **£5071.50** (figure agreed by the parties).
3. The second respondent was in breach of contract in that it failed to give the claimant a full 10 weeks' notice.
4. The second respondent shall pay to the claimant compensation for the failure to give 59 days' notice in the sum of **£3,124.64** (figure agreed by the parties).
5. The total due from the second respondent to the claimant is **£8,196.14**.

REASONS

1. Written reasons are provided at the request of the second respondent.

2. By a claim form presented on 29 July 2018 the claimant made complaints of a failure to pay a redundancy payment and breach of contract. The breach of contract arises out of a failure to give notice of dismissal.
3. The first respondent ('L') was not present at the tribunal and was not represented. There has been some correspondence between the tribunal and the first respondent's sister. However, the first respondent's sister has made it clear that she is unwell and is not the first respondent's representative.
4. The second respondent recognises that the first respondent does not have full capacity. It possesses a report on L which Mr Fazilat has seen briefly but this report has not been brought to the tribunal or disclosed in these proceedings.
5. The first respondent is 46 years old and has a diagnosis of learning disability. She requires 24-hour care. She has autism and is deaf/blind. She communicates by deaf/blind signing. She can read Braille and can read books to about the level of 'The Lion the Witch and the Wardrobe' but would not be able to understand legal proceedings. She does not even know that these proceedings are taking place. There has been no contact with the Court of Protection. There is no one available to act as litigation friend. At present the first respondent lives in a care home in Ramsgate. The second respondent contacted the care home on the day before this hearing and spoke to the manager, however the care home did not know about these proceedings. The care home did not have power of attorney over the claimant's financial affairs.
6. There have been two previous hearings in this matter, and both the claimant and the second respondent wanted today's hearing to go ahead.
7. In these very difficult circumstances I have decided that - despite the risk to the first respondent of continuing with proceedings which she is incapable of understanding, about which she knows nothing and where there is no one present, available and/or willing to represent her interests - weighing up the factors in the overriding objective, it is appropriate to continue with this hearing.
8. I have been provided with an agreed bundle produced by the second respondent and running to 66 pages. I was also given some loose documents by the claimant.
9. I have heard oral evidence from:

Ms Veron Zenonos, the claimant and
Mr. Farzad Fazilat, Head of Service, Brokerage and Quality Assurance.

10. No party had prepared witness statements. Therefore, I asked the claimant questions to assist her in giving her evidence in chief and Mr Jankowski took Mr Fazilat through his evidence in chief. Each witness was then cross-examined and re-examined in the usual way.

The issues

11. At the outset of this hearing, I identified the issues in discussion with the parties (chiefly Mr Jankowski as the only legal representative present.)
12. There is no dispute that the claimant is entitled to a redundancy payment or compensation for the breach of contract in failing to give her notice. The real question is who should pay it?
 - 12.1 If the claimant entered into an employment contract, did the first respondent herself actually enter into that contract as the other party?
 - 12.2 Did the first respondent have capacity to enter into that contract?
 - 12.3 If any person purported to enter into the employment contract on the first respondent's behalf, was that person acting properly as the claimant's agent?
 - 12.4 The claimant asserts that the second respondent was the employer notwithstanding what appears on the face of the documents. Therefore, was the employment contract a 'sham' in the sense described in *Autoclenz v Belcher* [2011] UKSC 41, [2011] IRLR 820?
 - 12.5 If so, have the parties by their conduct shown who has really agreed to be the employer?
 - 12.6 Whoever is the employer, how much is the claimant owed?

Facts

13. I have made findings of fact on the balance of probability.
14. In these findings of fact, I propose to refer to the first respondent as 'L'.

The formation of the contract.

15. The claimant is now a counsellor. However, in 2007 she was looking for part-time work. The claimant's mother-in-law was working with L as her support worker at that time.
16. The claimant's mother-in-law said to the claimant that she was leaving the job. The claimant said that she would like to take the job. Accordingly, the claimant's mother-in-law spoke to Ms Christine Ademou who was L's social worker.
17. As a result of that conversation, the claimant went with her mother-in-law to be interviewed by Ms Ademou at 'Station Road'. Ms Ademou worked for the second respondent. At the interview, there was discussion about the claimant's wages, including the hourly rate, and contract. The claimant's mother-in-law already had a contract of employment of her own. The claimant was not given a new contract, but she simply took over her mother-in-law's role. I have not

been provided with a copy of the claimant's mother-in-law's written contract of employment. The claimant did ask her mother-in-law for a copy of that contract but given the passage of time it is no longer available. The claimant therefore had no written contract of employment.

18. All of the funding for L's care was provided by the second respondent. The second respondent paid the money into a bank account in L's name and L's carers were paid out of that bank account.

Kim Hooper, payroll provider.

19. L was unable to handle the administration of employing her carers, and therefore Kim Hooper - who was held out as an 'independent payroll provider' carried out the administration of the employment relationship. Ms Ademou told the claimant that Ms Hooper was an independent payroll provider. Ms Hooper did the payroll from the time the claimant started her work with L. The claimant did not know how Ms Hooper came to be 'in the picture'; she did not know who found her to be the payroll provider. In fact, the second respondent introduces the payroll provider to the service user or his or her family.

20. I have not heard any evidence from Kim Hooper. I have not seen any of the documents or correspondence between Ms Hooper and the second respondent. The second respondent entirely disavows any contractual relationship with Ms Hooper and says that Ms Hooper drafted the payroll services agreement between herself and L, subject to the second respondent checking that the terms were '*broad enough and provided the right services.*'

21. In my bundle is a document headed Payroll Services and Managed Account Agreement. This is the agreement apparently between Ms Hooper and the claimant.

22. This document begins,

'Below is a summary of the main parts of the managed account service. At the end you will find the full terms and conditions. These are part of the agreement and have been approved by the London Borough of Haringey.'

23. The agreement says that Ms Hooper will prepare payslips for the carers and pay the carers using the funds provided by the London Borough of Haringey or any other funder identified by L. Ms Hooper would submit each payroll run to HMRC, pay HMRC every quarter any tax or national insurance that was due, prepare and submit the year-end returns to HMRC and prepare and distribute P60s.

24. When L became required to provide a pension scheme then Ms Hooper would administer that.

25. Ms Hooper also agreed to set up a bank account for L to receive the funding and then to pay the carers, HMRC, pension contributions, payroll fees, bank charges and employers' insurance.

26. The agreement states, *'the London Borough of Haringey will have access to this account to review the transactions.'*
27. Ms Hooper did not require L to submit timesheets, but she was to let Ms Hooper know if the carers' hours changed. Any changes to carers' hours should be notified by L or by someone else who she had nominated. The agreement says, *'This should not be done by the carer unless this has been agreed by the London Borough of Haringey.'*
28. Changes in carers' details such as changes in address also had to be notified to Ms Hooper.
29. Ms Hooper's fees would be taken from the bank account.
30. Page 2 of the agreement is signed by Ms Hooper and also by 'A Nnando', who I am told is L's brother. The signatures are dated 19 September 2016. Mr Fazilat told me and I accept that L's brother did not thereby become the claimant's employer.
31. I have not heard any evidence from Mr Nnando.
32. Payslips were provided to the claimant naming the L as employer. P60s also named L as the employer and correspondence from HMRC was addressed to L. I infer that L was named in these documents because Ms Hooper arranged for this to be done. Given what I have been told about L and her abilities L did not know that she was being named as the claimant's employer and would not have understood what it meant if she had known. Her identity was being put forward as the claimant's employer without her knowledge or consent and despite the fact that she was incapable of understanding what being an employer meant.
33. Schedule 2 to the payroll services agreement sets out *'terms and conditions.'*
34. It is an express term of the agreement that, *'that the money in the bank account will belong to you.'*
35. The agreement then says, *'if you want to withdraw money from the account it can only be done with the written permission of the funder.'*
36. There is further an express term:
'Under this agreement you will remain the employer of each Carer and are responsible for all the obligations of an employer towards each Carer. We will help you with those obligations but will not become the employer of any Carer as a result of entering into this agreement. You will compensate us fully for any loss or damage that we may suffer as a result of anyone claiming that we are the employer of a Carer.'
37. The terms end with the following:

'This agreement will start on the date given at the top of the first page and will continue until:

- *you stop receiving funds to employ carers*
- *you provide one months notice in writing*
- *we provide one months notice in writing.*

This agreement cannot be ended in any other way unless you and we both agree.

When this agreement ends we will pay back any money that is left in your account to the funder who provided it.

Ending this agreement will not affect any rights that we all you already have on the date that it ends, including the right to be compensated for losses that either you or we have suffered.'

The claimant's employment

38. The claimant began to work as L's deaf/blind support worker on 3 September 2007. The claimant simply took over from what her mother-in-law was doing for L.
39. On 11 September 2007 the claimant contacted Kim Hooper and told her that she was the new support worker for L.
40. L's primary carer was initially her mother and, after her mother passed away, her sister.
41. L was unable to give the claimant instruction or direction in the course of her duties. L would be dressed when the claimant arrived at work and then the claimant would take L out on trips, and to places such as the library. The claimant would do craft activities with L, choosing materials which were tactile because L could not see.
42. The claimant gave L a choice of activities and L might choose activity for the day, but apart from that, L was not in control.
43. So far as it was necessary, day-to-day direction came from L's family. Initially, this was her mother and then after the death of her mother, from her brother and her sister.
44. There was an occasion after L's mother died when Ms Ademou wanted to persuade L to go to 'Sense' in Barnet. They tried to sign to L about it. L did not really understand the decision that she was being asked to make.
45. The claimant attended meetings with L's social workers.

46. The second respondent kept an eye on the financial situation and carried out annual audits to make sure that the money provided was being applied properly for L's benefit.
47. The claimant was paid her wages out of the fund placed in L's bank account. She was also paid holiday pay and the parties agree that she should have been paid sick pay although it appears that this was not paid to her. When there were difficulties with her wages, the claimant would deal with Ms Hooper, but Ms Hooper was unable to resolve the problem, then the claimant would turn to Mr Lewington of the second respondent's Direct Payments Team for assistance.
48. Although there was no contractual agreement or policy document providing for this, the second respondent 'encouraged' families of people like L to take out insurance against the risk of redundancy or other contingencies. The second respondent pointed families in the direction of 'FISH' in order to take out that insurance. L's family did take out such insurance but in the event of the redundancy which eventually took place it turned out that the insurance did not cover anything like the sum needed. The insurance was funded by the second respondent.

Termination of employment

49. Unfortunately, L's sister became seriously ill. She needed intensive treatment and became unable to care for L. Therefore, L was rehomed in a residential home in Ramsgate and the claimant together with L's other carer was made redundant.
50. By telephone call on 16 February 2018 L's sister telephoned the claimant and gave her 7 working days' notice. The claimant was paid for her seven days' notice period. The effective date of termination was 27 February 2018.
51. By letter dated 23 February 2018 L's sister wrote to the claimant telling her that her position was at risk of redundancy and saying that she had commenced a period of consultation with the claimant.
52. By further email dated 14 March 2018, L's sister wrote to the claimant again explaining the emergency situation in relation to her own health. Therefore, she said, that the claimant was being made redundant from 31 February 2018. Due to the nature of the emergency, there was nothing further to discuss and the claimant would be made redundant. L's sister told the claimant that 'FISH' would be handling the arrangements for the redundancy package in conjunction with Haringey social services and that process had already commenced.
53. L's sister thanked the claimant for all her years of patient, diligent work looking after L and wished her all the best for the future.
54. Accordingly, the claimant was employed from 3 September 2007 to 31 February 2018 which is 10 full years of employment. She was however entitled by virtue of section 86 of the Employment Rights 1996 to not less than one week's notice for each year of continuous employment were maximum of 12 weeks.

Therefore, she was dismissed in breach of contract in that she was entitled to 10 weeks' notice and was only given one week's notice. So, she is entitled to compensation for breach of contract. The claimant and second respondent agreed the figures owing as those set out in the judgment above.

55. The claimant and L's family have remained on good terms.

The claw back of funds

56. By letter dated 11 September 2018, Christine Jordan, Direct Payments Officer for the second respondent, wrote to L's sister saying,

'Please find attached a copy of the Direct Payment Account for [L], copy of the final payslip for Ms VN Zenonos.

The Insurance Company will need to know although the Balance in the [L] Direct Payment account (held by the Payroll Provider) is £33,189.89.

Between 1st March 2018 to 26 June 2018 an overpayment was made to the Direct Payment account of £17,241.91. 8.5 weeks is held as a core fund £8,843.91.

Please note that these Funds are due back to Haringey Council less Payroll Provider fees of £1,850 (subject to agreement).

The above would then leave a balance within the account £5,254 07 which is also due back to Haringey Council.

Yours sincerely,

*Christine Jordan
Direct Payments Officer'*

57. After the end of the employment contract and without any party having paid the notice and redundancy payments, the second respondent 'clawed back' the remaining funds from L's bank account. This happened by the second respondent giving an instruction to Kim Hooper to remove the funds from the account.

58. Mr Fazilat said in evidence that *'the claw back was incidental. It was part of the annual audit. It happened at the same time'*. He accepted that it was one of an employer's obligations to pay a redundancy payment if it was due and could not explain why the second respondent thought it appropriate to claw back funds which might have been used to make such a payment.

59. Mr Fazilat said that there was no deliberate scheme by the second respondent to avoid paying a redundancy payment to someone like the claimant. He said that it was not the purpose of the scheme to make sure that the Secretary of State paid the redundancy payment instead of the second respondent.

60. It has not been explained to me how there was an 'overpayment' as described in the letter of 11 September. There is also a suggestion in the correspondence that the sum of £5254.07 was an overpayment. I have not been shown the bank account details to see how this happened. Apart from the bare assertion in the letters I have no evidence at all about the 'overpayment'. Given the dates, it may be that the second respondent continued paying funds into the bank account after the termination of the employment contract, but this is only my own speculation.
61. In any event, even with the overpayment, once Kim Hooper's fees had been paid, there remained the core fund of £8,843.91 (plus possibly the £5,254.07) which together might have been used to discharge remaining legal obligations to the carers.

Concise statement of the law.

62. As a general rule, a person has capacity to authorise an agent where the act can be done by an agent and the principle would have capacity to make the contract or do the act himself.
63. Where one party to a contract asserts that an element of the contract is a 'sham' trying to alter the normal categorisation of the contract, then the question is what does the conduct of the parties show was the *true agreement* between the parties?

Analysis

64. This case is not the usual variety of sham contract argument. It is the first respondent, or rather her sister speaking on her behalf in the response form, who says that in reality the first respondent was not the employer. The claimant also says that the second respondent was in fact the employer.
65. I have been shown no written contract and I have found that there was no written contract.
66. On the basis of the claimant's evidence, the contract was in fact made between the claimant and the London Borough of Haringey, that is the second respondent. The key conversation took place at the interview at Station Road with Christine Ademou. It was as a direct result of that interview that the employment contract started. I find that the contract was in fact entered into at that interview. There is very little evidence about what was actually said at that interview but it is plain that the two real parties to the contract reached agreement then.
67. The second respondent then led L's family into a structure that made it appear that L was the employer, and indeed L's family appear to have accepted that this was the case and have acted accordingly as guided by the second respondent, at least until the problem with the redundancy and notice payments arose.

68. The second respondent provided the funding, that is the wages to be paid in return for the claimant's work.
69. Although Kim Hooper was involved as a payroll provider, the second respondent retained ultimate supervision over the claimant's wages and the proper use of the funding.
70. Although L's family provided daily supervision, ultimate supervision for L's well-being in the claimant's care lay with the second respondent through its social workers.
71. The fact that the second respondent was able to make and implement a decision to claw back the remaining funds in the bank account demonstrates that notwithstanding what appeared on the face of the payslips, P60s, correspondence with HMRC and the service agreement with Kim Hooper, real financial control in fact vested in the second respondent.
72. This contradicts the assertion in the service agreement that the money in the bank account belongs to the first respondent. It also contradicts the assertion in the service agreement that the first respondent was responsible for the legal obligations of an employer. If the money genuinely belonged to the first respondent and she was responsible for an employer's obligations, then as a matter of logic the remainder of the money would have remained in the bank account so that the employer's obligation of paying the redundancy payment could have been discharged from those funds.
73. In any event, the first respondent did not have capacity to enter into a contract of employment as employer. She was incapable of understanding what 'contract of employment' meant. L had no understanding of adult or serious affairs and did not even have the capacity to understand the social worker who wished her to attend Sense in Barnet. L had no control over the claimant in the sense that an employer would have control. L could not make decisions about payment, for example, or to discipline or to dismiss. Mr Fazilat told me in evidence that the second respondent accepted that the first respondent was not fully competent.
74. I am told that a report exists in the second respondent's hands which provides expert opinion relevant to the question of L's capacity, however this report has not been provided to me. Therefore, I have made my decision about L's capacity on the evidence before me, including what Mr Fazilat has told me.
75. To the extent that the various documents make L appear to be the employer, that is a sham: those documents do not reflect the true agreement between the parties.
76. I have considered whether a member of L's family, for example her brother, might have entered a contract of employment as her agent. However, if L were the principal then, without the capacity to enter a contract herself, she could not authorise an agent to do so. Not only could L not authorise a member of her family to be her agent, he would not have the least understanding of what you

meant or what was meant by the contract of employment. No party has suggested that any member of L's family was in fact the employer.

77. Therefore, I consider that the contract of employment was in fact made between the claimant and the second respondent. It is the second respondent who is liable for compensation for breach of contract and the claimant's redundancy payment.

Employment Judge Heal

Date:10.07.19.....

Sent to the parties on:12.07.19.....

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For the Tribunal Office