EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122596/2018

Held in Glasgow on 9, 10 and 11 December 2019

Employment Judge L Doherty

Members **Mr K McKenna**
Mr I Ashraf

Mr JS Jhammat	**Claimant** **In Person**
Newcross Healthcare Solutions Ltd	**Respondent** **Represented by:** **Mr Meechan -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgement of the Employment Tribunal is that the claimant was not victimised contrary to Section 27 of the Equality Act 2013; that the claimant was not subjected to a detriment contrary to section 45A of the Employment Rights Act 1996; and the claims are dismissed.

REASONS

1. The claimant presented a claim on 8 November 2018 of victimisation contrary to section 27 of the Equality Act 2013, and of detriment, under section 45 A of the Employment Rights Act 1996 on the grounds that he had brought proceedings in the Employment Tribunal against the respondents claiming holiday pay, which is a right conferred on him by the Working Time Regulations.

2. A final hearing was fixed over three days. It was agreed that this hearing would determine the merits only of the claim and in the event the claim succeeded a remedy hearing would be fixed.

3. The claimant represented himself at the hearing, and the respondents were represented by Mr Meechan, solicitor.

4. The parties had agreed a list of issues which is produced at pages 37 and 38 of the agreed Joint Bundle.

5. The first issue for the tribunal is to determine if the claimant did a protected act within the meaning of section 27 (2) of the Equality Act (the EQA). The claimant's position is that he did, and protection is afforded by virtue of the provisions of section 77 of the EQA. The respondents do not accept this

6. In the event the tribunal is satisfied the claimant did do a protected act under section 27 of the EQA, the issue is whether he was subjected to detrimental treatment on the grounds that he did this act.

7. It is accepted by the respondents that the claimant brought a holiday pay claim. It is accepted therefore in terms of section 45 A (1) (e) of the Employment Rights Act 1996 (the ERA) that the claimant brought proceedings against his employer to enforce a right conferred on him by Working Time Regulations, and that he therefore qualifies for the protection provided for in section 45 A (1) of the ERA.

8. The detriment alleged by the claimant under section 27 of the EQA and section 45 of the ERA, is that there was a reduction in the work offered to him by respondents in the period from May to September 2018.

9. The respondents do not accept that the claimant was subjected to any detriment, and in any event their position is that if he was, this was not by reason of him having done a protected act under section 45 of the ERA.

10. For the respondent's evidence was given by Miss Caroline Armstrong. Ms Armstrong no longer works with respondents but had been the branch manager for the respondents Glasgow branch during the relevant time.

Evidence was also given by Ms Baker, HR manager, and Ms Mhairi Blyth regional manager.

11. The claimant gave evidence on his own behalf.

12. The parties produced an agreed bundle of documents.

Findings in fact

13. From evidence before it the tribunal made the following findings in fact.

14. The respondents are engaged in the provision of healthcare staff to a number of organisations and bodies across the UK. The respondents operate throughout the UK and have branches in Glasgow and Hamilton. The respondents have around 7,500 employees, with around 250 employees at the Glasgow Branch.

15. The claimant commenced working with the respondents as a Support Worker on 9 January 2018. The claimant's contract of employment (page 91/105) provides for a guaranteed minimum number of hours per annum. It provides at clause 4, that his basic hours of work are 337 hours per annum.

16. In terms of clause 4.1 of the contract the claimant agreed that he would make himself available to work for the Employer for at least this number of hours per annum. The respondents undertook to provide assignments with particular clients with a minimum of 357 hours of work per annum in accordance with the claimant's availability (clause 4.2 of the contract). Clause 4.3 provided additional working hours may be available, but this was not guaranteed.

17. The respondents inform their staff about shifts available to them through a computer App. The App is a vehicle which offers shifts suitable to the individual employee, dependent on their experience, skill sets, qualifications, training, and employment history with the respondents. An employee will not be offered shifts on this App with an organisation which he/she has not worked for previously. Shifts are offered to staff exclusively on the App for a period of ten minutes. If there is no take-up, then the branch office contact staff directly

to fill the shifts. The App also allows employees to draw down payment for shifts worked, and to book training courses.

18. The claimant is not a SSSC registered or PVC checked; he could not work in Care Homes, other than as an individual support worker; he could not work with children; and at the point when he was recruited, he did not have the medication training which the respondent required. He would not be offered work via the App for a client who he had not worked for before. These were all factors which limited the work which the respondents had available for the claimant.

19. The respondents recruit staff to fulfil the needs of a specific client. In the claimant's case he was recruited specifically to fulfilling a need for a support worker form Sense Scotland (Sense).

20. The claimant commenced employment on 9 January 2018 and was offered his first shift with Sense on 5 February. The claimant worked exclusively for Sense in the period from 5 February until 19th April.

21. When recruiting staff where the Right to Work may be relevant, it is the responsibility of the Branch Manager to carry out the appropriate checks, and to forward the relevant documentation to the respondents Central Recruitment team. This team was headed by an individual by the name of Kelly Gaffney. This team is accountable for ensuring that the Right to Work is in place for individual employees.

22. In the event the respondents do not comply with the relevant legislation in connection with the Right to Work, they can be subjected to significant penalties, including heavy fines.

23. When the claimant commenced working with the respondents, he had an ongoing application for leave to remain in the UK. He provided the respondents with a letter from September 2017 from the Home Office advising his right to remain had been refused but that he had the right to appeal that decision.

24. Ms Armstrong, as the Glasgow branch manager who recruited the claimant, requested an Employer Check (E C S) from the UK Visas and Immigration Department of the Home Office. The ECS check was issued on 6 December 2017 (page 90) and confirmed that the check was valid for six months and expired on 5 June 2018. It provided that the employer should carry out a follow-up Right to Work check on this person on or before that date. The E C S check provided under Work Restrictions the following; *Student; A maximum of 20 hours per week during term time. No self-employment.*

25. On 23 January 2018 the claimant provided the Miss Armstrong with a copy of his degree qualification from the University of the West of Scotland, dated 4 July 2017. After some discussion a decision was made in discussion with the Recruitment Team, that the claimant's having produced his degree qualification meant that there was no restriction on his hours of work.

26. The claimant worked regular shifts from 5th February with Sense.

27. Sense raised these issues about the claimant's placement with them on or before 16 April and claimant was spoken to by the health care coordinator at Glasgow, Daren, on 16 April about these.

28. On 18 April the respondents were contacted by Sense who advised that they no longer wanted the claimant to be allocated to them as they were concerned about the claimant's interaction, or lack of interaction, with the service users he was supporting. This was not a conduct issue, but it was the case that Sense did not consider the claimant to be the right fit for them.

29. The claimant worked one more shift with sense on 19 April, but thereafter, the respondents did not allocate the claimant to any Sense shifts on their request.

30. The claimant emailed the respondents on 30 April (page 116) stating:

'Since last two weeks I am not offered any shift by New Cross in spite of my availability, which means my enemies have stopped suddenly.

Please pay my holiday pay to date immediately on this Wednesday as I have pending payments which are all upset by the availability of work.'

31. This email was initially responded to by Darren, who advised that holiday pay was incorporated into the claimant's pay.

32. On 3 May, Miss Armstrong emailed the claimant to say that she had seen his email regarding the enquiry holiday pay. She confirmed that the information given to him by Daren. She also stated that as a discussed with Darren, there had been negative feedback raised by Sense, and this impacted upon the places the respondents could send the claimant.

33. The claimant replied to this email later on 3 May reiterating in his complaint about holiday pay and stating that he was not happy about the work he had been offered by the respondents for the last four weeks. He denied the negative feedback from his work with Sense, which had been given to him by Darren. The claimant stated there was no such issue, and the true facts were that he had asked for three days off to go to a funeral in Birmingham and was thereafter not given work.

34. Ms Armstrong forwarded the claimant's email to the then HR director and advised the claimant that a review meeting would be arranged to address all the issues at the same time.

35. Ms Armstrong spoke with the claimant at some point on 4 May, and thereafter made a file note of her conversation with him (produced page 123 of the bundle). In that conversation the claimant denied that he did not work well with Sense and claimed that it was as a result of him complaining that he had to push service users in a wheelchair to Glasgow Green and he had told Sense that they should provide transport for the staff as this was too far. Ms Armstrong advised the claimant that they were struggling to place him as Sense was predominantly the client he had been taken on for.

36. The claimant said that he was not getting work as he had raised a holiday pay complaint against the respondent. Ms Armstrong told the claimant that this was a completely separate issue.

37. Ms Armstrong emailed the claimant again on 4 May confirming she had heard back from her HR director and advising again that there was no non-payment

of holiday pay, and the claimant had been given an explanation as to how holiday pay would be paid at his induction.

38. In the period after 19 April, as a result of Sense no longer accepting the claimant, the limitations on the placements he could carry out because of his registration and training, his experience, and the work available at the Glasgow branch, there was a reduction in the shifts which could be offered to him. The claimant did not work between 19 April and 7 June. After 7 June the claimant was offered work by the respondents with a different client. The claimant was shared with Hamilton Branch which resulted in more work being available to him. The claimant has worked shifts from June 2018, primarily, with Cornerstone PC, and Threshold Support Services (pages 111/112) from 7th June, and he continues to be offered shifts by the respondents and to be employed by them.

39. There were 18 occasions between 7 July and 30 September 2018 when the respondents contacted the claimant to offer shifts which he could not accept, or they contacted the claimant to offer shifts and received no answer to their telephone calls (page 332).

40. On 7th June 2018 the claimant presented a claim for holiday pay to the Employment Tribunal. This claim was brought purely as one of failure to pay holiday pay and was not based on or related to a protected characteristic under the Equality Act. The claimant's wife, who was also employed by the respondent also presented a claim at that time for non-payment of holiday pay, and her claim is included in ET1 presented by the claimant. The claimant represented his wife in the pursuit of this claim.

41. The respondents received the claimant's claim on 15 June, and it was forwarded by Ms Armstrong to Anne Baker, senior HR Business partner.

42. On the reviewing the claimant's personnel file for the purposes of defending the holiday pay claim it became apparent that the second ECS check was due, the first having expired on 5 June.

43. Ms Armstrong requested an ECS check which was issued on 2 July 2018 (page 142). That check expired on 28 December 2018, and contained in clause 4, under Work restrictions, the same provision as the earlier ECS check, which was; *Student; A maximum of 20 hours per week working during term time. No Self-Employment.*

44. The ECS check was accompanied by an email which stated that the respondents required evidence of the employee's term time and provided details of what would be considered acceptable in this connection (page 145).

45. When Ms Armstrong received this, she was confused as to the situation, as the claimant had provided a copy of his degree, and therefore she considers there were no term times. Ms Armstrong did not know what to do, and she emailed Ms Baker on 2 July asking how to proceed.

46. Mr Baker contacted Ms Armstrong replied the same day, asking her what she used to apply for the ECS check. She stated she had not seen the Visa, but only a letter from the Home Office which confirmed that the claimant had no Right to Remain, subject to appeal.

47. Ms Armstrong replied the same day, providing Miss Baker with copies of the documents which she had, which was a letter from the Home Office to say that the claimant's application to remain had been refused and that he had the right to appeal this, and a copy of the claimant's degree certificate which confirmed he was no longer studying.

48. Miss Baker responded asking if Ms Armstrong had seen the appeal documentation. Ms Armstrong responded almost immediately stating she did not know the reasons for the claimant's appeal, and he was longer studying as he completed his degree course in July 2017 and that she no further updates apart from check.

49. Ms Baker considered this was an unusual situation and was unsure of how to proceed. On third July a 'flag' was put on the respondent's app by Kelly Gaffney, of the Recruitment Team because of concerns about the claimant's status. This prevented the claimant booking shifts. The reason noted on the

respondent's system for the flag was that they required documents from the Home Office to support the appeal application made by the claimant.

50. On 3rd July Ms Armstrong forwarded Ms Baker all the documentation which the claimant had by then provided, which confirmed that he had an appeal on 6 August against the refusal of his right to remain in the UK.

51. On 4 July, around midday, the claimant emailed Ms Armstrong to advise that he attempted to withdraw flex pay through the App but could not do so because of the flag put on his account. He stated it was more than 24 hours since he had provided the appeal documentation, and he thought the respondents were discriminating against them.

52. The claimant's email was sent at 12.38, and at 12.56, Ms Armstrong emailed this information to Ms Gaffney, copying Ms Baker, and asking if they could make the claimant's account active. Ms Armstrong also phoned the recruitment team, and tried to speak to Ms Gaffney, leaving a message with her assistant, in order find out if she was content that the respondent has sufficient information to confirm the claimant's right to work. Ms Armstrong emailed the claimant at around 3.30pm on 4 July confirming she had done this.

53. On 4 July, Ms Gaffney emailed, Sue Hill, who is a senior employee of the respondents with experience of immigration matters, stating *'We have a really messy one here RTW wise and need your help'.* Miss Hill replied asking Ms Gaffney to telephone her the following day.

54. Ms Armstrong followed up her enquiries with Ms Gaffney and Ms Baker the following morning, asking if there was a decision on removing the flag. Ms Gaffney emailed Ms Armstrong later that morning indicating that she would be happy to take the flag off and set another one to go live on the date of the appeal hearing, if Ms Baker was content with this.

55. Ms Gaffney having spoken with Sue Hill, a decision was taken to remove the flag on 5 July, and this was done, allowing the claimant to be offered work and use the other functions of the App. The claimant had been prevented

from drawing down pay and attending a medication training course while the flag was on.

56. Ms Blyth, the regional manager had also been emailing HR trying to have the flag removed. She emailed on 5th July (page 164) asking that it was dealt with as soon as possible, as the branch had been contacting HR without success. She advised that the claimant was pursuing the respondents in the Employment Tribunal and would like to have this the RTW matter resolved promptly.

57. Ms Armstrong emailed the claimant on 5 July confirming the flag had been lifted from his account. As at that stage there were no restrictions on the claimant's account.

58. Ms Baker considered that the situation in terms of the claimant's right to work, was complex, and was beyond her knowledge, or the respondent's internal resources. Ms Baker considered there was confusion where section 3C the Immigration Act applies, from advice contained in a document by the name of An Employer's Guide to Right to Work Checks (page 283 of the bundle-the Guidance), another document, The Home Office Guide to Right to Works Checks (the Gulde283).

59. The Guidance states at page 17 (276) that *'A person who has section 3C leave remains subject to the conditions attached to the extant leave unless the conditions of the leave are varied by the Secretary of State. For example, a person subject to conditions allowing employment may continue to work as before. Any restrictions on the type of employment allowed or the number of hours they can work will still apply'.*

60. That Guide (page 298) provided that it was illegal to employ someone aged 16 or over subject to immigration control who is not allowed to undertake the work in question. The Guide provides that where a student has permission to study under Tier 4 of the Points-based System, the conditions allow them to work when they are 'following a course of study'. It goes on to provide that their entitlement to work full-time during vacations and during the period permission that is granted before the course begins and after the course ends

only applies if they are following, or have completed, the required course of study.

61. Ms Baker decided to take external legal advice, and she contacted Ashworth solicitors explain the situation, and seeking their advice.

62. Ashworth responded in an email dated 11 July (page 177), and the effect of their advice was that the respondents should apply the 20-hour restriction during term time specified in the claimant's July ECS check.

63. The claimant's wife, who also worked for the respondents, was also affected by Visa issues.

64. Ms Armstrong checked the number of hours the claimant had been working, which indicated that he be working more than 20 hours. The respondent decided, following the advice of Ashford's solicitors, to apply a 20-hour restriction during term time, and this restriction was uploaded onto the respondent system by Kelly Gaffney on 20 July.

65. On 21 August the claimant attempted to book a 24-hour shift, but found he was unable to do so, because of the 20-hour restriction. He emailed Ms Armstrong on 21 August (page 183) complaining about this. This was the first occasion on which the claimant had attempted to work more than 20 hours.

66. The claimant did not provide the respondents with details of his term time. He considered that as he completed his degree, he did not have term time.

67. Ms Armstrong obtained details of term times on behalf of the claimant and emailed him on 22 August (page 182) confirming that as his Visa was under appeal the respondents had been advised that the terms of his visa were as granted i.e. a student visa with restriction of 20 hours, and additional hours could be worked outside term times. Ms Armstrong confirmed that she had obtained term times on the claimant's behalf, and that at the moment he was on holiday, starting back on 3 September. She confirmed that she had lifted the 20-hour restriction until 3 September. Ms Armstrong advised the claimant that if he felt this was incorrect, he should provide documentation to support

this. The claimant responded restating his position that the respondents were incorrect, and that all restrictions should be lifted.

68. On 22 August, in response to the claimant's email of 21 August, the respondent carried out further enquiries. Sue Hill contacted a member of staff whom she knew in the Home Office (David Perrin) querying what they should do in circumstances where a student had finished his course, and proved this, but was going through a new Visa application, or even an appeal. She queried whether the respondents should in any way have to limit his hours to 20 hours per week during the normal term times of his old institution, or whether because he finished the course, they could no longer monitor or control this

69. There was further email correspondence back and forth between Ms Armstrong, and the claimant in which the claimant continued to maintain the position that no restrictions should apply as he had obtained his degree certificate.

70. In order to make further enquiries about this, Miss Baker contacted Ashford's again, by telephone on 23 August. They send an email on 23 August (188) confirming their advice that the restrictions in the student visa which the claimant had should apply to his hours of work. Ashford's stated that employees could argue that because he /she was no longer student, the restrictions should not apply, but that unfortunately this was an area in which the Home Office guidance was slightly conflicting. They advised that upon querying this with the Home Office they were advised that restrictions <u>should</u> apply and therefore they considered the following this course was the least risky option for the respondents.

71. In an email of 24 August (page 190) the claimant suggested that the respondent take legal advice and pay for the losses which he suffered by putting on these restrictions. In this email the claimant also complained that the respondent's only motive was to harass and victimise him because he is raised issues of non-payment of holiday pay.

72. On 2 September, David Perrin of the Home Office emailed Sue Hill to advise that he had been told by his colleagues on the enforcement team that in the

circumstances described an employee would be allowed to work full-time until a decision was made on his new application.

73. Sue Hill emailed Ms Baker on 3 September, advising that she had had what she described as 'a good response' from David Perrin and that there was no need to restrict hours while the claimant's application was in progress.

74. Ms Baker was on holiday when this email was sent, and she returned on 14 September. Immediately upon her return from holiday she actioned that this email and all restrictions were lifted as of that date.

75. The respondents treated the claimant's email of 24 August as a grievance, and it was passed to Ms Armstrong, to deal with. Ms Armstrong wrote to the claimant on 17 September explaining the history of events and reasons for the restrictions on his account (page 205/206). Ms Armstrong confirmed that all restrictions had been lifted.

76. Ms Armstrong did not uphold the grievance, as she did not find that there was any discrimination or harassment of the claimant. The claimant was advised of his right to appeal Ms Armstrong's conclusion, and he did so on 22nd of September.

77. The appeal was dealt with by Ms Blyth, who met with the claimant on 9 October. Minutes of the meeting are produced at pages 222 to 223 of the bundle. The claimant's grievance expanded to include a grievance about Ms Armstrong. Ms Blyth did not uphold the claimant's grievance and wrote to him on 12 October setting out reasons as to why it was not upheld (page 228/229). Those where that as of 18 April, the respondent's client has contacted the Glasgow branch and indicated they would prefer the claimant not return to their Service, as it did not think he was suitable for them. Ms Blyth noted the claimant had not worked for a number of weeks until 7 June but found this was a direct result of having no suitable work for the claimant at that time. She explained to the claimant that as he was a registered support worker for adults only and was not at that time trained to administer medication, and this seriously limited the work available to him. She confirmed that the claim to the Employment Tribunal of 15 June had no bearing on the fact that he was not

offered work. Ms Blyth explained the reasons for the restrictions on the claimant's account due to advice and guidance both from the Home Office, and a legal adviser, and the uniqueness of the claimant's case. She did not uphold the claimant's grievance.

78. The claimant's wife, who is also employed by the respondents, was offered shifts which were not offered to the claimant, due to the fact that she had different skills and qualifications.

79. The claimant and his wife's holiday pay claims where considered at a hearing in the Employment Tribunal on 2 November 2018 and were dismissed.

Note on Evidence

80. The tribunal formed the impression that all of the respondent's witnesses were entirely credible and reliable. The evidence which Ms Armstrong, Ms Baker, and Ms Blyth gave was to a significant degree supported by contemporaneous documents in the form of emails, file notes, and correspondence.

81. Ms Baker had no difficulty in accepting that it was the review of the claimant's personnel file for the purposes of preparing the respondent's defence to the holiday pay claim which alerted her to the fact that an ECS check was due. That is insufficient to allow the tribunal to draw the inference that the ECS check was done, and restrictions placed on the claimant's account, because the claimant had brought a holiday pay claim. In reaching this conclusion the Tribunal take into account that is a matter of fact the ECS check was due, and the respondents were under an obligation to obtain this.

82. The Tribunal takes into account the not inconsiderable steps which the respondent took to try to understand the position in terms of the claimant's ability to work under the Visa which the Home Office had advised was in place. That included testing the matter internally, taking external legal advice on two occasions, and asking the advice of a contact in the Home Office.

83. In addition to that, on each occasion when the respondent received advice to the effect that a restriction could be lifted, they implemented this. None of

these actions on the part of the respondents support the conclusion that they were motivated in restricting the claimant's hours of work because he had presented a complaint to the Employment Tribunal about failure to pay holiday pay.

84. The Tribunal also considered the evidence of Ms Armstrong, which was supported by Ms Baker and Ms Blyth, to the effect that Sense has contacted the respondents on 18 April to advise they longer wished the claimant to work with them. The tribunal found the evidence of these witnesses on this point entirely credible. Their evidence was supported by contemporaneous file notes from Darren and Ms Armstrong, and emails to the claimant confirming the position at that time. Their evidence that Sense had raised issues about the client and did not want him to return to work where was further supported by the claimant's own email of 3 May, which suggested that the difficulties were not about his performance at work, but about the fact he took time off to go to a funeral. This suggested that the claimant was aware of difficulties even if he did not accept that they were down to his performance.

85. The claimant stated in his submissions that the respondents did not lead any evidence to support the contention that Sense no longer wanted him to work with them. That submission however completely ignores that the respondent's witnesses gave oral evidence, which the tribunal accepted on this matter.

86. The tribunal did not form the impression that the claimant in any way set out to mislead, however it did form the impression that he lacked insight, and that his view of matters was significantly influenced by his perception that he had been badly treated because he had raised a holiday pay claim. That lack of insight was evident from the fact that he refused to accept that there could legitimately be confusion as a result of the Home Office 'Guidance' and 'Guide' and that the respondents were legitimately entitled to take and follow legal advice or advise from the Home Office on this issue.

87. Furthermore, the fact that the claimant complained about the reduction in the work which he was offered in his email of 30 April, at the same time as he first advised that he had an issue about how he was paid holiday pay, very

significantly undermined his evidence that the respondents restricted his working hours because he raised issues about holiday pay.

Submissions

Respondent's submissions

88. Mr Meechan helpfully produced written submissions. He submitted that the respondent's witnesses were credible, and where there was a conflict, their evidence should be preferred to that of the claimant.

89. Mr Meechan made submissions as to the facts which he urged the tribunal to find, which included that there was no causal link between the claimants presenting a holiday pay claim, and any restriction on his hours of work. He took the Tribunal to the two sets of Home Office Guidance, and section 3 C of the Immigration Act. He submitted it was not surprising that the respondents found this advice to be conflicting.

90. Mr Meechan then took the tribunal to section 27 and 77 of the Equality Act, and submitted that the claimant had lodged a holiday pay claim, which was not section 77(3) pay disclosure, and therefore the claimant was unable to gain the protection of section 27.

91. Mr Meechan submitted that the claimant had not established sufficient facts to shift the burden of proof in relation to the protected act. It was not enough for the claimant simply to show that he had been treated badly in order to satisfy the tribunal that he had suffered unfavourable treatment. The claimant had not done a protected act, and the burden of proof did not shift, and victimisation claim should be dismissed. The claimant in any event was not subjected to a detriment

92. In relation to the claim under section 45A and 48(1ZA) of the ERA Mr Meechan again took the tribunal to the relevant sections. It is accepted by the respondents that the presentation of the claimant to the Employment Tribunal falls within section 45A(1)(e).

93. Mr Meehan submitted however that the claimant had not been subjected to a detriment. There was no contractual obligation on the respondents to give the claimant a particular number of hours on a weekly or monthly basis. The contract only provided for an annual minimum number of hours.

94. In any event, there was very clear evidence as to why the respondents acted as they did, and Mr Meechan addressed the tribunal on this. There was no causal link between the protected act, and the claimed detriment. While the holiday pay claimant may have caused the respondent to review the claimant's personnel file it was not the motivation for them requesting the ECS check or imposing the restrictions which they did. That was driven by their concern to remain inside the law, and the advice which they have been given.

95. Mr Meechan referred to the case of *Arriva London South Ltd v Nicolaou 2012 ICR 510* in support of the proposition that the principles derived from discrimination law similarly guide claims brought under section 45Aof the ERA.

96. Mr Meechan also submitted there was a clear explanation from the witness evidence about why the claimant hours of work dropped after 18 April, which was entirely unconnected to his holiday pay claim.

Claimant's submissions

97. The claimant submitted that he had provided the respondents with his acknowledgement letter from the Home Office regarding his pending application for the right to remain and work in the UK and he referred to the original ECS check which the respondents obtained. That notification provided he was allowed to work with a restriction of 20 hours per week during term time. The claimant submitted as he had finished his studies, he did not have any term time. He completed his degree on 4 July 2017, and he showed this to the respondents, proving to them he had finished her studies. He submitted he also showed them the Home Office Guidelines in this regard which states that he is allowed to work without any restriction as the restriction was only during term time and did not apply to those who had completed studies. The claimant submitted that after satisfying themselves regarding his

right to work the respondents gave him a contract of employment working full-time without any 20 hours restrictions.

98. The claimant submitted that on 30 April he emailed the Glasgow office and asked for holiday pay. The respondent declined this claim, so he, along with other member of staff raised the issue of holiday pay.

99. The claimant then contacted ACAS, and thereafter brought a claim in the Employment Tribunal on 7 July 2018. He represented himself, and the other employee.

100. The claimants submitted after he raised the issue of holiday pay on 30 April, he was not offered work despite of his availability. He submitted in the month of June 2018 he was offered just six shifts despite his availability. On 2 July he was told by Ms Armstrong that his account was deactivated because he did not have the right to work, which prevented him from withdrawing flexi pay from the respondent. He submitted that this was a wilful act, and that he was left with no money.

101. The claimant submitted the second ECS check which the respondent obtained stated that he had the right to work. Because of the restrictions the respondents imposed, claimant was unable to book shifts or attend medication training.

102. The claimant submitted that after continuous emails, on 5 July the respondent removed restriction, but he was still not offered work. He was offered only three shifts the month of July and no information was given to him by the respondent as to why there were restrictions on his working. He said when he enquired at Glasgow, they said there was no available shifts and did not tell him about restriction.

103. The claimant submitted that on 21 August he tried to book shift for 24 hours, and then discovered the 20-hour restriction. As most shifts were for 24 hours, he was not able to do shifts because of the restrictions imposed by the respondent's which they should not have imposed. The claimant referred to the Home Office guidelines in this connection. The claimant raised a

grievance on 21 August, but no action was taken. He sent a reminder on 4 September, and finally on 17 September he received an email from Ms Armstrong who informed him that the restrictions of 20 hours had been moved. The claimant submitted that the respondents received verification from the Home Office that he had the right to work full-time on 2 September, but restrictions continued until 17 September.

104. The claimant submitted that his working conditions were intentionally restricted from the 1 May 2018 until 17 September 2018 with a motive to victimise him because he raised a holiday pay claim. He was also representing another employee. The claimant submitted because of the restrictions he was delayed in getting training for administration of medication which further impact on the prospect of him getting shifts and the restrictions have impacted on his earnings which had affected his family.

Consideration

Section 27 Claim

105. The Tribunal firstly considered the claim under section 27 of the Equality Act.

106. Section 27 provides;

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act."*

107. The claimant submits that he is entitled to the protection of section 27 under the terms of section 77 of the Equality Act.

108. Section 77 provides;

> *…….*
>
> *(3) A disclosure is a relevant to disclosure if it is made for the purpose of enabling the person who makes it, or the person to whom it is made,*

to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic

(4) The following are to be treated as protected acts for the purpose of the relevant victimisation provision-

(a) seeking a disclosure that would be a relevant paid disclosure;

(b) making or seeking to make a relevant paid disclosure;

(c) receiving information disclosed in a relevant paid disclosure.

(5) The relevant victimisation provision is, in relation to a description of work specified in the first column of the table, section 27 so far as it applies for the purposes of the provision mentioned in the second column.

109. The table makes provision for Employment -Sections 39(3) or (4).

110. The claimant's complaint is of a failure to pay holiday pay. There is nothing in the body of the ET1 to suggest that the claimant was seeking a disclosure of pay in order to find out to what extent there was a connection between pay and having or not having a protected characteristic. The claimant did not produce any documentary evidence or give oral evidence about having made a request for a disclosure of this nature, and there was no evidence at all from which the Tribunal could conclude that the claimant had made a relevant pay disclosure as defined by section 77 (3) of the EQA.

111. The effect of this conclusion is that the claimant has not done a protected act under section 27, and this claim is dismissed.

Section 45 of the ERA Claim

112. The tribunal then considered the claim under Section 45 A of the ERA.

113. Section 45A of the ERA provides;

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker –

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998.

(b) refused (or proposed to refuse) to forego a right conferred on him by those Regulations,

……..

(e) brought proceedings against the employer to enforce a right conferred on him by those Regulations or

114. There is no dispute in this case that the claimant's presentation of a complaint to the Employment Tribunal seeking to recover holiday pay amounts to him bringing proceedings against his employer to enforce a right conferred by the Working Time Regulations, and therefore the claimant qualifies for the protection afforded by section 45A.

115. The question therefore for the Tribunal is whether the claimant had been subjected to any detriment on the ground that he had done that protected act.

116. The Tribunal obtained guidance as to the approach it should take to the issue of causation in the case of *Arriva* referred to by Mr Meechan, and in particular the judgement of Judge Peter Clark. That was to the effect that the relevant question is the *reason why* the employer acted as he did, and the reason why question must not be confused with the 'but for' test.

117. The Tribunal had no hesitation in concluding that the reason why the respondents did not offer the claimant shifts after 19 April was because he had been recruited to work with Sense, and on 18 April Sense had told the respondent's they did not wish the claimant to be placed with them. As indicated above in the Note on Evidence Ms Armstrong and Ms Blyth's evidence on this point was supported by contemporaries file notes. The claimant submitted that the respondent's position could not be accepted because he had worked on 19 April, but the evidence was that Since had

asked for him not to be placed with them as of 18 April. Both the respondent's witnesses were candid in their evidence in that they accepted they could not say for certain why the claimant worked in the 19 April, but they both made an assumption that he was booked for a shift on that date and Sense was prepared to allow the claimant to work a final shift which had been booked. This, it appeared to the Tribunal was entirely plausible, as the claimant worked no shifts after the 19th, and therefore the nothing significant turned on the fact that he worked on the 19th, and the respondent's evidence was as of 18 April, Sense that indicated no longer wished the claimant to be placed with them.

118. Furthermore, the tribunal had no hesitation in accepting the evidence of Ms Armstrong, and Ms Blyth as to the factors which affected work available to members of staff, and that the claimant's restrictions in terms of his registration and medication training meant that there was very little work available for him after 19 April when he worked his last shift for Sense. Thereafter the tribunal accepted Ms Armstrong and Ms Blyth's evidence that the claimant was shared with the Hamilton branch, and that the work which was offered to him increased. This is borne out by the claimant's work patterns which were produced in the bundle.

119. The claimant submitted that the shifts were available to his wife, but not to him, in support of the position that the reason why he was not offered work was because he had lodged a holiday pay claim. He submitted that albeit his wife had lodged a holiday pay claim too, he was victimised in this way because he was a representative acting for her.

120. The tribunal did not accept this was the reason why the claimant's wife had shifts available to her when he did not, but rather preferred the explanation offered by the respondents, which was of the claimant's wife had different training and skill sets, and therefore for this reason the work available to her which was not available to the claimant.

121. Furthermore, the Tribunal had no hesitation in concluding that the reason why the respondents put a block on the claimant's account, preventing him working, attending training or drawing an advance of pay, from 3 to 5 July,

and thereafter, put a block on his account preventing him working more than 20 hours during term time, removing this in August, and then removing all restrictions in September, was because of their concerns about falling foul of relevant immigration legislation, their genuine confusion as to what the position was in light of two sets of Home Office Guidance and section 3 C of the Immigration act, and the legal advice, and advice from the Home Office, which they had obtained. The reasons why the tribunal accepted the evidence of the respondent's witnesses on these matters is set out above the Note on Evidence.

122. The Tribunal considered the claimant's submission to the effect that if he had not raised a holiday pay claim then restrictions would not have been applied to his account, and that the ECS check was only requested after the respondents looked at his personnel file and preparing the defence to the holiday pay claim.

123. Ms Baker had no difficulty in accepting that it was the review of the claimant's personnel file for the purposes of preparing the respondent's defence to the holiday pay claim which alerted her to the fact that an ECS check was due. That is insufficient to allow the tribunal to draw the inference that the ECS check was done, and restrictions placed on the claimant's account, because the claimant had brought a holiday pay claim. In reaching this conclusion the Tribunal take into account that is a matter of fact the ECS check was due, and the respondents were under an obligation to obtain this. The tribunal did not conclude that it was the presentation of the holiday pay claim which motivated the respondents to request the ECS check.

124. The Tribunal was therefore not satisfied that the reason why the claimant experienced a reduction in hours such as it was, between May and September was on the ground that he had raised a holiday pay claim, and therefore the claim under section 48 (1ZA) of the ERA is dismissed.

Employment Judge:	L Doherty
Date of Judgement:	19 December 2019
Entered in Register,	
Copied to Parties:	20 December 2019