



EMPLOYMENT TRIBUNALS

Claimants: Kausar Sadiq and 20 others

Respondents: (1) Sivanta Care Ltd (in voluntary liquidation);
(2) Mr Jayman Patel

Heard at: East London Hearing Centre (by telephone)

On: 11 November 2020

Before: Employment Judge S Knight

Representation

Claimant: First Claimant in attendance; represented by Gillian Finch

1st Respondent: Not in attendance; unrepresented

2nd Respondent: In attendance; unrepresented

JUDGMENT

1. The claims against the Second Respondent are struck out.
2. The First Respondent was in breach of contract by dismissing the Claimants without notice.
3. The First Respondent failed to pay the Claimants redundancy pay.
4. The First Respondent made unauthorised deductions from the Claimants' wages
5. The First Respondent failed to provide each Claimant with written particulars of employment.

REASONS

Introduction

The parties

1. The Claimants were all care home workers employed by the First Respondent. The First Respondent was a care home operator, incorporated on 29 February 2016. The Second Respondent is one of the two directors of the First Respondent, and its majority shareholder. The First Respondent is in Creditors Voluntary Liquidation; winding up commenced on 6 April 2020.

The claims

2. The Claimants in the ET1 all claim for unpaid notice pay (wrongful dismissal); unauthorised deductions from wages; and failure to provide written particulars of employment. They also stated in the ET1 that they claim for an “unpaid consultation period”.
3. As set out below, at the hearing I gave such leave as was necessary to amend the claim to allow the Claimants to claim for:
 - (1) Unpaid notice pay (wrongful dismissal);
 - (2) Redundancy pay;
 - (3) Unauthorised deductions from wages, composed of arrears of wages and holiday pay;
 - (4) Compensation for failure to provide written particulars of employment.
4. On 6 April 2020 ACAS was notified under the early conciliation procedure. On 14 April 2020 ACAS issued the certificate. On 21 May 2020 the ET1 was presented. No ET3 has been received by the Tribunal.

The issues

5. In advance of the hearing neither Respondent had constructively engaged with the Tribunal on any of the issues in the claim. Further, this was the first hearing in the claim, and as a result there had been limited case management by the Tribunal. The effect of this was that the issues in dispute required some limited clarification at the outset of the hearing.
6. At the start of the hearing I sent a draft list of issues to the parties in attendance. The parties agreed the list of issues. I then added a further issue, which now appears as the first issue, regarding the status of the Second Respondent. The parties in attendance agreed that this should be considered as the first issue in the case.

7. The agreed list of issues appears at Appendix 1 to these Reasons.
8. For the sake of clarity, I note that none of the Claimants has claimed for unfair dismissal.

Proceeding in absence

9. At 14:30 I began the hearing, which took place by telephone. The First Claimant and her representative Ms Finch were present. No representative of the First Respondent was present. The Second Respondent was in attendance.

Efforts to contact the First Respondent

10. Before the hearing commenced, the First Respondent, through the insolvency practitioner Miles Needham, had confirmed to the Tribunal's staff by telephone that they did not wish to participate in the hearing.

Conclusion on proceeding in absence

11. Rule 47 of the Employment Tribunal Procedure Rules provides:

"Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

12. Rule 47 of the Employment Tribunal Rules of Procedure provides:

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13. I had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47 and the non-attendance of a Respondent):

- (1) The rule confers a very wide discretion (¶ 14);
- (2) The rule does not impose on an Employment Tribunal a duty of its own motion to investigate the case before it, but the Employment Tribunal should consider the material already before it (¶ 15);

- (3) The Tribunal has a discretion to require the present party to give evidence, but no duty to do so (¶ 16);
- (4) Before making a decision the Tribunal shall have regard to the information required under the rule (¶ 16).
14. I also had regard to the Overriding Objective, as set out in rule 2 of the Employment Tribunal Rules of Procedure. I had regard to all factors contained within rule 2, but particularly “(d) *avoiding delay, so far as compatible with proper consideration of the issues*”.
15. The First Respondent was clearly informed that today’s hearing would be going ahead. I concluded that the First Respondent, through Mr Needham, had made a positive decision not to attend. No reasons had been provided to the Tribunal for that decision.
16. I determined that the claim could fairly be determined on the documents submitted by the parties, and the First Claimant’s oral evidence.
17. I therefore permitted the hearing to proceed in the absence of the First Respondent.

Procedure, documents, and evidence heard

Procedure

18. The hearing took place by telephone. All parties participating in the hearing were able to hear and be heard.
19. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

20. The Tribunal considered the following material which it had received from the parties:
 - (1) From the First Claimant, the ET1 and correspondence about the procedure.
 - (2) From the First Respondent, no material.
 - (3) From the Second Respondent, correspondence about the procedure.

Preliminary issue: the Second Respondent’s position

21. I queried why the Second Respondent had been added as a Respondent to the claim.
22. Ms Finch informed me that the Claimants had been advised, by the liquidator of the First Respondent, to add the Second Respondent, in order to ensure that the Second Respondent bore legal responsibility for any debts of the First

Respondent arising out of the proceedings.

23. The Second Respondent did not wish to be a party to the proceedings. He did not wish to make any submissions or act as a witness. He had been informed by the liquidators of the First Respondent that he was not to act on behalf of the First Respondent.
24. Through Ms Finch, the First Claimant agreed that the First Respondent was the employer of the Claimants: the Second Respondent was not the employer. There were no representations to the contrary from any other Claimant. The Claimants did not allege that there was any sham involved as to who the employer in fact was. The Claimants had not advanced a claim of discrimination.
25. I therefore found that the Tribunal did not have jurisdiction to hear any claim against the Second Respondent, and that he should not have been added as a respondent. I struck out the claim against the Second Respondent.
26. The Second Respondent then explained that he no longer wished to participate, and left the hearing.

Evidence

27. At the hearing I heard evidence under affirmation from the First Claimant. I took a full note of the evidence in my Record of Proceedings.
28. The First Claimant agreed to treat the narratives contained in Boxes 8.2, 9.2, and 15 of the ET1 as her witness statement. The First Claimant added to her witness statement as follows:
 - (1) She had worked out the claims on the ET1 using gross wages taken from a table of wages owed to each Claimant. The table is correct. She will send it to the Tribunal in due course. The table comes from a spreadsheet which would be sent to Sivanta Care Limited's HR provider, then they would send it back to the First Claimant with the pension contributions and the NICs listed. The spreadsheet in question has already been checked by the HR provider as it usually would be.
 - (2) The Claimants were told by the Second Respondent that they would be paid for their last month's work. The Second Respondent called a staff meeting on the 23rd and told the staff the business would close and said the wages would be paid. The day the wages were to be paid, Kevin Hogan (the Health & Safety manager) was there and the staff were told that the money would be paid that day. However, it never materialised. Wages were meant to be paid on the 5th of every month.
 - (3) Each member of staff was entitled to a different period of notice. The First Claimant knew what those periods were in her position as the Registered Care Home Manager. The Second Respondent had told her when she joined the First Respondent's staff that after her probation period her notice period (both in terms of what she had to give, and what the First

Respondent had to give) would be 3 months. He told her that each party would give 3 months' notice because it took 3 months to recruit a manager. (This applied only to registered care home managers because to be a care home manager a person has to go through CQC procedures: lower level managers, such as the Health and Safety manager, could be easily recruited). Her probation period ended September or October 2019.

- (4) When he closed down the business, the Second Respondent reassured her she would be paid her notice. She forfeited her holiday to close the home down, ensure it was GDPR compliant, and work out the care plans for transfer of the patients. The Second Respondent said he would make sure she would get her notice and would be paid for her extra time.
- (5) For staff who weren't managers, the notice period was 1 month, because they are paid monthly. The exceptions to this are staff in their probation period, who were entitled to a week's notice, and those who had a right to greater notice because of long service. The probation period lasts 3 months.
- (6) The First Claimant was told of the length of the notice periods by the Second Respondent. He had told her that previously they were giving 1 week's notice periods, but the business was suffering from people leaving with just 1 week's notice. Recruiting new staff at the care home was very difficult. In this context, she had been told by the Second Respondent that if people had claimed extra holiday before leaving they could claim it back.
- (7) The First Respondent did not pay anyone any notice pay or redundancy pay. Any redundancy pay that any Claimant received was paid by the government. Many Claimants did not receive the full amount they were owed, because the payments from the government have a limit. Kevin Hogan had some money deducted from the wages owed to him by the government for redundancy pay because he had been told by the Second Respondent to sell some equipment for the First Respondent, and he was holding that money for the First Respondent, which he declared to the government.
- (8) All Claimants were employees of the First Respondent, employed directly by them.
- (9) The last month's pay of all Claimants was unpaid: the last payment for anyone will have been 5 February 2020, covering the month of January 2020.
- (10) Some claimants were paid for accrued holiday pay through the government redundancy service.
- (11) She did not receive a contract of employment, only an offer letter. During her employment, she was responsible for recruitment of other staff. The Second Respondent then would sign off on the decisions. He would sign the offer letter, and was supposed to sign the contracts. Of those

Claimants she has spoken to about it, she is not aware of any having received a contract. She understands that no one received a written contract setting out the written particulars of their employment. Contracts – including insofar as they set out notice periods – were oral agreements.

- (12) Based on her records, and the oral terms of the contracts, the Claimants were entitled to the following notice periods:

1	Kausar Sadiq:	3 months
2	Mercedes Charity Torpey:	1 month
3	Chelsea Charleigh McGirr:	1 month
4	Jade Louise Cooper:	1 month
5	Julie Vecchiet:	1 month
6	Jemma Cooper:	1 month
7	Nichola Dew:	1 month
8	Sasha Dowden:	1 week
9	Oliver Edward Donald Potter:	1 month
10	Hannah Meredith:	1 month
11	Amy Sturch:	1 month
12	Emma Thorpe:	12 weeks
13	Kevin Danny Hogan:	1 month
14	Joy Townsend:	1 month
15	Sara Dowden:	1 week
16	Andrew Robinson:	1 month
17	Linda Marion May:	6 weeks
18	Jamaica Albellar:	1 month
19	Kelly Drake:	1 month
20	Hector De La Cruz:	1 month
21	Adrienne Barker:	1 month

Closing submissions

29. Ms Finch for the First Claimant did not make closing submissions. By this stage no other party was present.

Law

Effective date of termination (“EDT”)

30. S 97 Employment Rights Act 1996 (“**ERA 1996**”) defines the effective date of termination (“**EDT**”), as follows:

“(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect [...]”

Unauthorised deductions

31. Part 2, ss 13 to 27B ERA 1996 sets out the statutory basis for a claim of unauthorised deduction from wages. ERA 1996 s 13 provides in particular as follows:

“(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “*relevant provision*”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”

32. “Wages” is widely defined. According to ERA 1996 s 27(1), it includes “*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*”.

Findings of fact

Status of the Second Respondent

33. As I found at the outset of the hearing, and as the First Claimant and Second Respondent agreed, the Second Respondent was not the employer of the Claimants. The First Claimant’s evidence was that the First Respondent employed all of the Claimants. I find that the First Claimant’s evidence in this regard was correct.

EDT

34. The Claimants say that the EDT was 13 March 2020. I have heard no evidence to contradict this. The First Claimant’s evidence on this matter is clear, coherent, and credible. I accept this evidence. I find the EDT for all Claimants was 13 March 2020.

Failure to pay notice pay (wrongful dismissal / breach of contract)

35. The First Claimant’s evidence was clear and coherent in regard to the notice to which each Claimant was entitled. She gave clearly reasoned evidence. I find that she was in a position to know what each person’s notice period would be, as she was the manager employed by the First Respondent responsible for hiring staff and communicating with the HR professionals. During the course of her evidence listing the amount of notice to which each Claimant was entitled, she had originally stated that the Seventh Claimant, Ms Dew, was entitled to 5 weeks’ notice, based on length of service. However, she realised that she was in fact unsure of this. I allowed her time to consult her records and contact Ms Dew, which the First Claimant did. The First Claimant reported that her initial view was mistaken, and that Ms Dew had in fact only been employed since June 2017, so was entitled to a month’s notice. The approach of the First Claimant to this evidence struck me as being reflective, considered, and being borne out of a concern not to mislead the Tribunal, even to the smallest extent, and to the benefit of the Claimants. I find that the notice periods to which each Claimant was entitled were as set out by the First Claimant.
36. The First Claimant’s evidence was that the Claimants were dismissed abruptly, without appropriate notice. This evidence is uncontradicted. The First Claimant is in a position to know this information, as the First Respondent’s Registered Care Home Manager. I find that her evidence that the Claimants were dismissed abruptly is correct.

37. The First Claimant's uncontradicted evidence was that the First Respondent did not pay notice pay. I find that the First Respondent did not pay notice pay.

Failure to pay redundancy pay

38. The First Claimant's evidence was that the Claimants were dismissed without any redundancy pay. This evidence is bolstered by the First Claimant's account of the government having made redundancy payments. I note that the First Claimant could have avoided saying this in order to make the Claimants' position seem more stark, but she did not do so. This lends credibility to her account. There is no evidence of any redundancy payment having been made.
39. I find that the Claimants were not paid redundancy pay.

Arrears and holiday pay (unauthorised deductions from wages)

40. It has not been disputed that the Claimants were employees of the First Respondent. I therefore accept that they were.
41. It has not been disputed that the First Respondent failed to pay the Claimants' final paycheque. The First Claimant's evidence in this regard has been clear and consistent. I accept her evidence. I find that there was a deduction from wages in respect of each of the Claimants.
42. The First Respondent has not suggested that any deduction was an authorised or excepted deduction. I find that the deductions were not authorised.
43. The First Claimant's evidence was that the Claimants were not paid accrued holiday pay by the First Respondent, although some may have been paid by the government. I accept the First Claimant's evidence. I find that there was a failure to pay accrued holiday pay.

Failure to provide written particulars of employment

44. The First Claimant's evidence – in her ET1 adopted as her witness statement, and orally – was clear that, to her knowledge, no employee was provided by the Respondents with written particulars of employment. I find that the First Claimant told the Second Respondent of the failure to provide written particulars of employment to the First Respondent's staff, and that the First Respondent had an obligation to provide such written particulars.
45. I find that the First and Second Respondents had actual knowledge of their obligation to provide written particulars of employment, and decided not to do so. I find that this was a particularly serious, systematic, and calculated breach of the law.

Conclusions

Failure to pay notice pay (wrongful dismissal / breach of contract)

46. I accepted the First Claimant's uncontradicted evidence of the notice periods to

which each Claimant was entitled. I conclude that the Claimants were entitled to the following periods of notice:

1	Kausar Sadiq	3 months
2	Mercedes Charity Torpey	1 month
3	Chelsea Charleigh McGirr	1 month
4	Jade Louise Cooper	1 month
5	Julie Vecchiet	1 month
6	Jemma Cooper	1 month
7	Nichola Dew	1 month
8	Sasha Dowden	1 week
9	Oliver Edward Donald Potter	1 month
10	Hannah Meredith	1 month
11	Amy Sturch	1 month
12	Emma Thorpe	12 weeks
13	Kevin Danny Hogan	1 month
14	Joy Townsend	1 month
15	Sara Dowden	1 week
16	Andrew Robinson	1 month
17	Linda Marion May	6 weeks
18	Jamaica Albellar	1 month
19	Kelly Drake	1 month
20	Hector De La Cruz	1 month
21	Adrienne Barker	1 month

47. I found that the Claimants were dismissed abruptly. I conclude that each of the Claimants was dismissed either without notice or with less than the notice to which they were entitled. I conclude that the First Respondent did not pay the Claimants the notice pay to which they were entitled.

48. I therefore conclude that the First Respondent was in breach of contract by dismissing the Claimants with less than the notice to which they were entitled.

Failure to pay redundancy pay

49. I found that the First Respondent did not pay redundancy pay to the Claimants. I therefore conclude that the Claimants' claims of a failure to pay redundancy pay are well-founded.

Arrears and holiday pay (unauthorised deductions from wages)

50. I found that the First Respondent did not pay the Claimants their final paycheque or their accrued holiday pay. I therefore conclude that the Claimants' complaints that there were unauthorised deductions from their wages are well-founded.

Failure to provide written particulars of employment.

51. I found that the First Respondent did not provide the Claimants with the required written particulars of employment. I therefore conclude that the

Claimants' complaints that they did not receive written particulars of employment are well-founded.

Final conclusions

52. Remedies for each complaint will be determined at a remedies hearing.

**Employment Judge S Knight
Date: 16 November 2020**

APPENDIX 1: LIST OF ISSUES

Status of the Second Respondent

1. Was the Second Respondent the true employer of the Claimants?

Jurisdiction

2. When was the Effective Date of Termination (“EDT”)?

The Claimant says it was 13 March 2020

Wages of each Claimant

3. What was each Claimant’s gross wage:

(1) Per week?

(2) Per month?

Failure to pay notice pay (wrongful dismissal / breach of contract)

4. To how much notice was each Claimant entitled?

The Claimants say 3 months.

5. Was each Claimant dismissed without notice (or less notice than that to which each was entitled under the employment contract)?

The Claimants say “yes”.

6. Did the Respondent pay each Claimant notice pay?

The Claimants say “no”.

7. How much notice pay is owed to each Claimant?

Failure to pay redundancy pay

8. Was each Claimant entitled to redundancy pay?

The Claimants say “yes”.

9. If so, how many weeks’ redundancy pay should have been paid?

10. How much redundancy pay was paid to each Claimant?

The Claimants say £0.

11. How much redundancy pay is owed to each Claimant?

Arrears and holiday pay (unauthorised deductions from wages)

12. Was each Claimant a worker?

13. Is the claim in respect of wages (under section 27 of the Employment Rights Act 1996 (“**ERA 1996**”))?

14. Has the Respondent made a deduction from wages (under s 13(3) ERA 1996)?

15. Was any deduction of wages authorised (under ss 13(2) and 13(3) ERA 1996)?

16. Was any deduction an “excepted deduction” (under s 14 ERA 1996)?

17. If an unauthorised deduction from wages was made:

(1) How much arrears of pay is owed to each Claimant?

(2) How much holiday pay is owed to each Claimant?

(a) What was each Claimant’s leave year?

(b) How much holiday had each Claimant accrued in the leave year to the EDT?

(c) How much holiday had each Claimant taken in the leave year to the EDT?

(3) How much financial loss did each Claimant suffer, which is attributable to the non-payment of wages?

Written particulars of employment

18. Did each Claimant receive written particulars of employment setting out all of the matters in the Employment Rights Act 1996 ss 1(3) and 1(4).