EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss M Sharry	AND	16 Plus Care Support Solutions Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON (by Video CVP+) **ON** 25 November 2020

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: **Mr Ricardo Sharry (Claimant's son)**
For the Respondent: **Mr Thomas Fuller (Consultant)**

RESERVED JUDGMENT

The judgment of the tribunal is that the Claimant fails in her claim for monetary claims for breach of contract and the claim is dismissed.

REASONS

The Hearing

1. By claim form received on the 13 November 2019 the Claimant claims for breach of contract and holiday pay. What the Claimant seeks is set out in response to question 9.2 of the claim form. That is one month's annual leave (28 days) and three months full pay as damages for breach of contract (a copy of this is at page 6 of the agreed bundle). In the Claimant's schedule of loss produced for this hearing this was extended to 8 months of loss as damages, in addition to the holiday pay (page 23 of the agreed bundle).

2. At the outset of the hearing it was confirmed with the Claimant's representative that the Claimant brings monetary claims for breach of

contract only, being for breach of a promise to pay her holiday pay for her holiday to Jamaica of one month from the 18 August 2019 to 18 September 2019 and for loss of earnings flowing from a breach of contract. The Respondent denies these claims.

3. It was confirmed by the Claimant's representative that the Claimant is not making a claim for holiday under the Working Time Regulations 1998 nor for statutory notice pay under the Employment Rights Act 1996.

4. The Respondent believes it owes the Claimant £6.04 for accrued but untaken holiday pursuant to the Working Time regulations 1998 (as referred to in paragraph 27 of the Respondent's witness evidence). However, this is not something the Claimant seeks.

5. This claim had been listed for a 2-hour final hearing (10am to Noon), however the extent of evidence, the complexity of the issues and the submissions that the parties wanted to make meant the hearing continued until just after 3pm. It was therefore considered necessary to reserve judgment.

6. For reference at the hearing I was presented with an agreed bundle running to 61 pages, a witness statement on behalf of the Claimant and a witness statement by Ms Edith Simon, a Manager, on behalf of the Respondent.

7. The Respondent's representative had also submitted a written skeleton argument that referred to three case authorities (and provided copies of those):

    a. Malloch v Aberdeen Corporation [1971] 2 All ER 1278
    b. Rawlinson v Brightsight Group Ltd [2018] IRLR 180
    c. Beveridge v KLM UK Ltd [2000]

<u>The Background to the Claim</u>

8. The Claimant says in her claim form that she was employed from the 29 July 2019 to the 14 August 2019 as a Support Worker. The Respondent says in its Response that the Claimant was employed from the 31 July 2019 to the 31 July 2019 as a Youth Support Worker.

9. The start date, and in particular the end date, of the Claimant's employment with the Respondent are significant issues of dispute in this claim.

10. The Claimant says in her claim form that she was employed to work 45 hours a week and was to be paid £1,890 a month before tax.

11. The Respondent says in its Response that the Claimant was on variable hours at £10 an hour.

12. As a breach of contract claim, what the terms of employment are between the Claimant and the Respondent, are the key issues of dispute in this claim.

The Facts

13. I heard evidence from the Claimant and from Ms Simon for the Respondent.

14. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

15. The Respondent is described at paragraph 3 of the statement of Ms Simon as …. "… a semi-independent living service which cares for vulnerable young people between the ages of 16 and 25 who are leaving either residential or fostering care into a semi-independent service. The service is designed to enhance the skill sets of the individuals in order to help them lead as independent a life as possible.".

16. It is not in dispute that the Claimant has a … "wealth of experience working with children and young people" (paragraph 2 of her statement), applied for a role with the Respondent and attended an interview with Ms Simon on the 4 July 2019 (paragraphs 4 and 5 of the Claimant's statement and paragraph 11 of Ms Simon's).

17. Although there was not copy of the job advert in the evidence bundle it appeared to be common ground between the witnesses that the job advert posted on Indeed was for a role in Bristol, and not Gloucester.

18. What is in dispute between the parties is what terms of employment were agreed between the Claimant and the Respondent at, and following, the interview on the 4 July 2019.

19. Unfortunately, the contemporaneous documentation presented for reference at this hearing, surrounding what job was advertised, what application was made and what was then offered and accepted, is not extensive or complete. There is no formal offer letter or terms of employment for example. This means the witness evidence of the Claimant and Ms Simon, as well as the surrounding contemporaneous documentation, require careful consideration to establish what contractual terms were agreed and existed between the parties, what of those were breached (if any) and what loss flowed from that breach (if there was a

breach and if there was any loss). Please note any typographical errors in the quoted text within the extracts provided in this Judgment, have not been corrected.

20. In her witness statement the Claimant says the following about the terms she says were agreed with the Respondent:

> "6. Following a successful interview, I discussed with Edith my holiday arrangements. I explained that I had a pre-planned holiday to Jamaica in August and that it would be very helpful to start as soon as possible.
>
> 7. Edith wanted to know if I wanted to do a few shifts in Gloucester to accumulate some funds before I went on holiday so I would be paid in August and September. Edith did raise some concern that I would use all my holiday entitlement if I went on annual leave for a month. I explained that I would not need another holiday until next April and that I would be happy to work over the Christmas period. Before I became unwell, I would travel to Jamaica twice a year.
>
> 8. We also discussed my rate of pay due to my experience we agreed to a higher rate of pay. Edith said she would consult with her business partner but stressed not to tell the other staff that I would be paid a higher rate.
>
> 9. During our conversation Edith kept talking about parliament another house in Gloucester she felt it would be good if I could work there. I explained that I do not have access to a car and would not be able to fix it until my return from holiday……
>
> 11. At no point during our conversation did Edith say my employment was dependent on a mortgage, my understand was that following satisfactory references I would start working in Bristol at Cherry Banks. Edith would come back to me about rate of pay, explore shift availability. Honour my holiday pay and look to bring me on board as soon as possible."

21. What Ms Simon says is:

> "12. I interviewed the Claimant on 4th July 2019, and after the interview I emailed the Claimant on 4th July 2019 and offered her the role of a Support Worker [36]. My email said that she would be paid £10.00 per hour during the week and £10.50 per hour during the weekends.

13. Admittedly my email was limited on the details of all of her terms and conditions of employment, but for all intents and purpose it was nothing more than to offer the Claimant a role which paid her certain amounts on certain days that she was available to work. The job description for this position confirmed that the nature of the role could be on a full time, part time, temporary, contract or even volunteer basis [31C].

14. The Claimant accepted this offer on 8th July 2019 by way of an email [37], and it was agreed that she would start work on 31st July 2019."

22. As noted at page 36 of the bundle, which is an email dated 8 July 2019 from the Respondent to the Claimant, it was confirmed the Claimant was being offered £10 an hour for week days and £10.50 an hour for weekends.

23. The Claimant in cross examination did not accept that her email at page 37 was her accepting the role, but she said it was her acknowledging the confirmation of the hourly rate. It was her case she accepted the offer of employment on the 4 July 2019.

24. Although there appears to be a dispute over when the offer of employment was accepted, there does not appear to be a dispute over the hourly rate.

25. There did initially appear to be a dispute over the date the Claimant worked her induction. The Claimant says the 30 July 2019 at paragraph 13 of her statement and the Respondent says the 31 July 2019 at paragraph 14 of the statement of Ms Simon. However, in oral evidence with reference to a copy of a text message at page 52 dated 31 July 2019, the Claimant confirmed that this was the date of her induction.

26. Within the evidence bundle there are then copies of a number of text messages between the Claimant and the Respondent after the induction exploring shift options. As the Claimant describes in her statement at paragraph 15 … "On the 1st of August I received a text with the shift pattern that covered dates and times for working in Gloucester. I contacted Edith by text informing her I was unable to take any shifts asking for her suggestions.".

27. Then at paragraph 16 … "On 4th of August I received a text from Julia asking if I was able to work in Gloucester. I responded to Julia informing her my availability was for Bristol. She said she would discuss with Edith and come back to me.".

28. Then at paragraph 17 … "On the 7th August I was contacted by Julia again where I was firm about the fact that I had applied for a role in Bristol she

informed me Edith would be in touch. I contacted Edith via text that same morning stating that I was confident she was dealing with the issue.”.

29. A copy of this text message to which the Claimant refers can be seen at page 60, dated 7 August 2019 and timed at 8:38am… “Good morning Edith I know you are a busy lady I have heard from Julie I know it’s in hand with you. But please have me in mind with some shifts before I go away many thanks, I know you are supportive towards your staff and I look forward to starting with the company.”.

30. Then at paragraph 18 of the Claimant’s statement … “I then received a text in the evening from Julia stating she was aware I’d spoke to Edith and whether I was available to some night shifts in Gloucester.”.

31. What follows this within the evidence bundle is a copy of a text message from the Claimant to the Respondent on the 12 August 2019 timed at 11:26am (page 60), which reads “Good morning please can I be added to the Rota in Bristol for September I will be back in the country on 20th September. I did not manage to take shifts as when I worked it out financially, I would not gain due to the travelling. Please can you also clarify if I’ve been taken on with the company”.

32. This contemporaneous documentary evidence clearly confirms that no shifts were agreed and there is great flexibility between the Claimant and the Respondent whether the Claimant is offered any and then whether she accepts any.

33. There has been no evidence presented to this Tribunal that proves it was agreed (as the Claimant asserts) that 45 hours a week is the fixed and agreed amount that the Claimant was expecting to work from the 1 August 2019. As at the 7 August 2019 the Claimant looks “forward to starting with the company” and as at the 12 August 2019 the Claimant is not of the view she has been taken on by the Respondent.

34. It is then shortly after this that the potential termination of the employment relationship happens and the reason for it is communicated to the Claimant, which then leads to this current dispute between the parties.

35. Considering then the dispute between the parties over when the Claimant’s employment relationship terminated. The Respondent had stated it was the 31 July 2019 in the Response form and initially this seemed to be confirmed by the written statement of Ms Simon, as at paragraph 19 …. “I spoke with the Claimant on the day of her induction and explained that her employment would be coming to an end because the new service was not going ahead.”. However, this paragraph was corrected when Ms Simon’s evidence was sworn in to say that the conversation was around the 14 or 15 August 2019

and not at the Induction. The letter confirming the withdrawal of the job offer was sent by email to the Claimant on the 15 August 2019 (page 38).

36. The Claimant's representative initially in submissions agreed that the date of termination was the 15 August 2019 (and the claim form does say the 14 August 2019, which is the date of the Respondent's letter it says confirmed the ending of the employment relationship). However, on reflection he sought to amend this to submit it was 23 September 2019 based on the email sent to the Claimant on that date (at page 47 of the bundle).

37. So, considering the relevant documents in more detail. I have been referred to page 38 within the bundle which is a copy of an email dated 15 August 2019, which attaches the "job offer withdrawal" letter dated 14 August 2019, which is at page 39 and reads …

    "Further to your recent interest in the position of Support Worker and subsequent conditional offer of employment. As you are aware, I advised that we would be purchasing another house in Bristol area, but this is not materialised.

    It is with regret therefore that I have to confirm that the Company has decided to withdraw the conditional offer of employment.

    I understand that this must be a disappointment for you but would like to wish you success in your job search.".

38. This is replied to by the Claimant on the 16 August 2019 by email timed at 14:32 which is at page 40 …

    "Good morning Edith

    Further to our conversation this afternoon where I informed you that I had taken legal advice.

    I am still employed with yourselves, and there were no conditions of contract. Also I attended an induction into the company systems.

    Wages were negotiating due to me having a wealth of experience.

    You did not have a shift in Bristol and I agreed to do shifts in Gloucester as you were aware I was going on holiday and you have done the Rota for August already for Bristol

    At the interview you also stated that you would pay me for my holiday…

39. This email clearly notes the uncertainty of the terms that applied to the Claimant at that time. She says … “Wages were negotiating…” and … “You did not have a shift in Bristol and I agreed to do shifts in Gloucester”. The Claimant does not say, for example, you agreed I would work for you in Bristol for 45 hours a week, which is what the Claimant now asserts was agreed.

40. It continues….

    “… I believe the way forward will be for you to pay me for the month of August 2019. Which will be for two days on plus and four days off which amounts to 96 hours +4 sleeps four for the month the total of £1,240…”

41. I have noted (and it was accepted by the Claimant’s representative in submissions) that this part of the email (at page 40) does not support an entitlement to a 45-hour working week from 1 August 2019 as the Claimant asserts.

42. In reply the Respondent sends an email on the 21 August 2019 (page 42) … “Apologies for the delay in getting back to you. Once gain we are truly sorry that we have had to withdraw the job offer. You have highlighted that you work during the month of August 2019 which is not the case. However we will pay for the five hours you completed an induction on 31 July at Cherry Banks.”.

43. In reply the Claimant sends an email on the 21 August 2019 (page 43) … “I write in connection with your email, but I need to clarify my status of me employment, as I signed up for this position there were no preconditions above and beyond the normal checks and balances around employment. I had a discussion with you where you accepted that there was no conditions and I see this as a breach of contract. I also clarify that I did not say in worked the month of August 2019 I was suggesting that the way forward is that you pay me for the month of August due to the financial impact this is having on me.”.

44. This confirms the Claimant did not expect to receive 45 hours a week as that is not why she asserts she should be paid for August which she says is … “due to the financial impact this is having on me…”, nor does she say that she should be paid for her month of holiday (18 August 2019 to 18 September 2019).

45. In reply the Respondent sends an email on the 23 August 2019 (page 43) …

    “Thank you for your email of 21st August.

I would like to reiterate that the reason for the withdrawal of employment was due to business not being able to progress with its planned home at Cherry Banks. This is regrettable in the job offer was made in good faith and it was due to unexpected circumstances but I had to withdraw job offer as there are no vacancies within Cherry Banks.

Whilst I understand and accept your concerns and frustration, I cannot see that there has been a breach of contract that you believe. I have already stated that you would be paid for the five hours induction that you have worked and this has been paid on 23rd August 2019 with regards to your request for payment for hours not worked in August, I will not be making any such payment to you. Both employment statutory notice periods and the contract that the company has states that no notice is due/payable to an employee where they have worked for under a month. Therefore, as you have not worked for the Company, other than an induction day, no notice is payable."

46. In reply the Claimant sends an email on the 27 August 2019 (page 44) … "Further to our conversation this morning also emails I have given you the opportunity to pay me for the month of August due to all the inconvenience caused to me by your organisation and the financial position you have left me in. If you had choose to pay me for this month nothing more would be said or done. But you now leave me no option but to take you to court for breach of contract".

47. The Claimant suggests she is still employed in her email to the Respondent dated 17 September 2019, which she sends to the Respondent after her return from holiday (page 45) …

"I want to set out my position.

I am employed. There were no conditioned to my employment above and beyond the normal checks and balances.

I agreed in principal to working at another location at the time, the rota for august was already done and the shifts you had were in gloucester, but my place of work was in Bristol.

The offer of employment was not subjected to a mortgage or a placement going ahead.

I completed my induction but the normal conventions didn't follow, I was not given my contract on the first day, I did not receive the employee handbook or clarity in terms of my place of work.

I find it difficult to accept that you have rescinded the offer with an arbitrary term that wasn't a condition of my employment which you conceded when I discussed this with you on the phone and via email".

48. This email supports that the terms the Claimant asserts do not appear to have been finalised as the Claimant acknowledges she did not receive "… clarity in terms of my workplace".

49. In reply the Respondent sends an email on the 23 September 2019 (page 47) …

    "The to your email of 17th September 2019 at 10:27, I have sought legal advice in order to be able to properly respond to you.

    On review, I have to agree with you that the job offer was not conditional and therefore the manner by which the contract should have been terminated should have been with alternative wording in a letter. This therefore means that your employment has instead been terminated.

    The reason for the termination remains the same, namely that the work you are employed to undertake has sadly not materialised. This therefore constitutes a redundancy. Based on your short amount of service you are sadly neither entitled to notice or redundancy pay.

    Whilst I appreciate the letter is incorrect, I have asked as to whether a legal remedy to the manner of the dismissal would be applicable, and I have been informed that no such remedy exists. There is no contractual or statutory procedure that was required to be followed in order to terminate your employment, and there are no contractual or statutory payments you are due other than payment for the hours worked and holiday pay accrued on the hours you have completed."

50. What follows this is then the initiation of contact with ACAS and then these Tribunal proceedings. The Respondent confirms that in its view the Claimant is owed £6.04 for accrued but untaken holiday under the Working Time Regulations (as confirmed in paragraph 27 of Ms Simon).

51. Considering then the question of the termination of the employment relationship and when that was.

52. The letter dated 14 August 2019 says, "It is with regret therefore that I have to confirm that the Company has decided to withdraw the conditional offer of employment.". This appears to be unequivocal in what it says, the job is withdrawn. It is also said following the Claimant querying with the Respondent on the 12th of August 2019… "Please can you also clarify if I've been taken on with the company".

53. It does seem therefore that the employment relationship terminated on the 15 August 2019 when the Claimant received the letter dated 14 August 2019. However, for completeness I have gone on to assess how the contents of the letter dated 14 August 2019 appears to have been understood by the Claimant. I have done this by considering carefully her documented responses to it.

54. The Claimant's immediate response to the termination letter is on the 16 August 2019 and reads … "I am still employed with yourselves, and there were no conditions of contract. Also I attended an induction into the company systems..." and "… I believe the way forward will be for you to pay me for the month of August 2019. Which will be for two days on plus and four days off which amounts to 96 hours +4 sleeps four for the month the total of £1,240…".

55. Then on the 21 August the Claimant writes … "I write in connection with your email, but I need to clarify my status of me employment, as I signed up for this position there were no preconditions above and beyond the normal checks and balances around employment. I had a discussion with you where you accepted that there was no conditions and I see this as a breach of contract. I also clarify that I did not say in worked the month of August 2019 I was suggesting that the way forward is that you pay me for the month of August due to the financial impact this is having on me.".

56. This notes at that point the Claimant considered there to be a breach of contract.

57. Then on the 27 August 2019 the Claimant writes … "Further to our conversation this morning also emails I have given you the opportunity to pay me for the month of August due to all the inconvenience caused to me by your organisation and the financial position you have left me in. If you had choose to pay me for this month nothing more would be said or done. But you now leave me no option but to take you to court for breach of contract".

58. This email also acknowledges the Claimant believes there has been a breach of contract, which suggests she must accept the contract has ended, as she is not seeking to have work given to her and is not suggesting she would attend work.

59. Then on the 17 September the Claimant states "I am employed. There were no conditioned to my employment above and beyond the normal checks and balances…", however she then concludes with … "I find it difficult to accept that you have rescinded the offer with an arbitrary term that wasn't

a condition of my employment which you conceded when I discussed this with you on the phone and via email.”.

60. Although the Claimant says she finds it difficult to accept the position, there is nothing to suggest it is not understood. The Claimant does not act as if she is still employed by the Respondent, for example by saying she will attend work.

61. For these reasons it does appear clear that the relationship was terminated on the 15 August 2019 when the email was received by the Claimant. It also appears that this was understood by the Claimant.

62. It was accepted in evidence that there were no terms agreed as to a contractual notice period for the termination of this employment. The Claimant confirmed in response to cross examination that notice was not discussed.

63. For completeness then to consider the Claimant’s length of service. The Claimant only worked for the Respondent when she undertook her induction on the 31 July 2020. It is only after that there is an effort between the parties to try and sort out shifts, however none were agreed.

64. If this was taken as the start date, or even the 29 July 2019 as the Claimant refers to in her claim form, although this is not supported by any evidence, then the total service would be less than a month.

65. Focusing then on whether there was an agreement by the Respondent to pay the Claimant for her month of holiday. This was not accepted by Ms Simon in cross examination. Ms Simon was categoric that she would not have agreed on the 4 July 2019 to pay for a holiday that the Claimant had already planned to go on before she commenced any employment with the Respondent and before references and all other checks had been completed. Those reference checks were not completed until after the 30 July 2019, as is confirmed by the exchanges of text messages which are copied at pages 56 and 57 of the bundle.

66. It is for the Claimant to prove on the balance of probability that the term she seeks to rely upon as to holiday pay was agreed, certain and formed part of her contractual terms. I do not find that she has discharged this burden. There are no emails or suggested discussions after the interview on the 4 July 2019 and before the termination of employment about this holiday pay term. The Claimant relies solely on what she says was agreed during her conversation with Ms Simon on the 4 July 2019 which is sets out at paragraphs 7 and 11 of her witness statement. The extent of her evidence to support the existence of such a term is limited to what she says in her witness statement at paragraph 11 “…my understand was that following

satisfactory references I would start working in Bristol at Cherry Banks. Edith would come back to me about rate of pay, explore shift availability. Honour my holiday pay and look to bring me on board as soon as possible.”.

67. The Respondent did come back to the Claimant about the rate of pay (as detailed above).

68. Nothing further though is communicated about the holiday pay before the termination of the employment relationship.

The Law

69. Having established the above facts, I now apply the law.

70. The Claimant’s claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

71. As the Claimant seeks to rely upon terms of the employment contract with the Respondent, it is for her to prove on the balance of probability, that there were such terms, that they were breached and resulted in loss. This is specific to the two heads of remedy she seeks:

    a. A month’s holiday pay; and

    b. Damages caused by the ending of her employment relationship.

72. I have noted the following from the written submissions made by the Respondent’s representative as to the case authorities relevant to the issues I have to determine:

    “In Malloch v Aberdeen Corporation [1971] 2 All ER 1278, the House of Lords stated (at 1282) that, “At common law, a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously is he chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant’s only remedy is in breach of contract.””

    “In Rawlinson v Brightsight Group Ltd [2018] IRLR 180, the Employment Appeal Tribunal (at paragraph 34) made a similar remark with regards to the implied term of trust and confidence, in that that there was no common law obligation upon an employer to exercise a contractual right to dismiss fairly or in good faith.”

73. For completeness I have also considered section 86 of the Employment Rights Act 1996, and in particular section 86(1) noting statutory notice is

available for a person "…. who has been continuously employed for one month or more…".

The Decision

74. I have found that the Claimant was offered a role with the Respondent to be paid at £10 an hour for week days and £10.50 an hour for weekends.

75. Although the ultimate job role was to be based in Bristol there was an understanding that the Claimant would be offered shifts at the Respondent's Gloucester premises before she went on her holiday to Jamaica, as the Claimant says in her statement "Edith wanted to know if I wanted to do a few shifts in Gloucester to accumulate some funds before I went on holiday so I would be paid in August and September." (at paragraph 7 of her statement).

76. This also appears to be recognised by the contents of the various texts between the Claimant and the Respondent, which discuss what shifts are available and where and what the Claimant could do. Also, as the Claimant herself states in her email to the Respondent on the 16 August 2019 timed at 14:32 (page 40) … "You did not have a shift in Bristol and I agreed to do shifts in Gloucester as you were aware I was going on holiday and you have done the Rota for August already for Bristol…".

77. The contemporaneous documentary evidence clearly confirms that after the Claimant's induction (31 July 2019) no shifts were agreed and there is great flexibility between the Claimant and the Respondent whether she is offered any shifts and then whether she accepts any. No evidence has been presented to this Tribunal to support that, as the Claimant asserts, it was agreed with the Respondent that from the 1 August 2019, the Respondent had agreed that the Claimant was entitled to 45 hours of work a week.

78. It is of significance that the Claimant herself says in her correspondence with the Respondent, as at the 7 August 2019 that she looks "forward to starting with the company" and as at the 12 August 2019 she questions whether she has actually been taken on by the Respondent …" Please can you also clarify if I've been taken on with the company". This clearly shows at that time the Claimant was not certain what had been agreed. This position is also supported by the contents of the contemporaneous correspondence that passes between the parties following the asserted termination of the employment relationship.

79. The only logical way any sense can be made of this contemporaneous documentation is that the Claimant must have understood at that time that the full-time role she says she was promised was not expected to start until her return from her holiday to Jamaica. Therefore, what existed between

the parties at that time appears to be a flexible arrangement where the only thing actually agreed is that the Claimant will be paid at £10 an hour for weekdays and £10.50 an hour for weekends.

80. As to the termination of the employment relationship I have found as fact that this was on the 15 August 2019.

81. The letter dated 14 August 2019 says, “It is with regret therefore that I have to confirm that the Company has decided to withdraw the conditional offer of employment.”. This appears to be unequivocal in what it says, the job is withdrawn. This is also stated after the Claimant querying with the Respondent on the 12th of August 2019 … “Please can you also clarify if I’ve been taken on with the company”.

82. As detailed in my findings of fact, following review of the Claimant’s documented responses to the Respondent’s letter dated 14 August 2019, the Claimant appears to have understood that the relationship had terminated.

83. The email from the Claimant on the 21 August notes “… I had a discussion with you where you accepted that there was no conditions and I see this as a breach of contract….”.

84. Then on the 27 August 2019 the Claimant writes …. “Further to our conversation this morning also emails I have given you the opportunity to pay me for the month of August due to all the inconvenience caused to me by your organisation and the financial position you have left me in. If you had choose to pay me for this month nothing more would be said or done. But you now leave me no option but to take you to court for breach of contract”.

85. These emails acknowledge the Claimant believes there has been a breach of contract, which suggests she must accept the contract has ended, as she is not seeking to have work given to her and is not suggesting she would attend work.

86. Then on the 17 September the Claimant states “I am employed. There were no conditioned to my employment above and beyond the normal checks and balances.”, however she then concludes with … “I find it difficult to accept that you have rescinded the offer with an arbitrary term that wasn’t a condition of my employment which you conceded when I discussed this with you on the phone and via email.”.

87. Although the Claimant says she finds it difficult to accept there is nothing to suggest it is not understood. The Claimant does not act as if she is still employed by the Respondent, for example by saying she will attend work.

88. In his submissions the Claimant's representative acknowledged that the Claimant was not seeking loss of earnings after the date of termination. He acknowledged that would be a matter for an unfair dismissal complaint which is not being made here, as the Claimant does not have the required service to make such a claim.

89. Within his submissions the Claimant's representative confirmed that the Claimant was claiming for the promised month of holiday pay and he also submitted that it was for earnings of 45 hours a week of work the Claimant had agreed to do, he submitted, from the 1 August 2019 to the date of termination (which he asserted should be found to be the 23 September 2019).

90. The Claimant's representative submitted that the loss flows from a breach of the implied term of trust and confidence that arose from the Respondent using unfair recruitment practices, which was primarily that the Respondent had not proven a valid reason for the termination of the Claimant's employment. To support this the Claimant had focused on the truthfulness of the Respondent as to the mortgage offer and the relevant property affected by this in Bristol.

91. However, the truthfulness or otherwise of the reason for the termination of employment is not an area I need focus on in this claim for the following reasons:

92. I accept the submissions of the Respondent's representative on this point and in particular in light of both Malloch and Rawlinson (referred to above) the Respondent could terminate for whatever reason (or without reason).

93. I have not found that the Claimant has proven on the balance of probabilities that she was on a 45-hour a week contract from the 1 August 2019.

94. Further, the Claimant's argument is circular. The Claimant is in effect saying that her contract was breached because the Respondent did not have a valid reason to terminate it. However, it was terminated and the issue is therefore what loss flows from that, if it was terminated in breach of contract.

95. As already noted there were no terms agreed as to notice of termination. As the Claimant only worked for the Respondent from when she undertook her induction on the 31 July 2020, statutory notice does not apply, as the total service would be less than a month.

96. As to there being an agreement by the Respondent to pay the Claimant for her month of holiday. It is for the Claimant to prove on the balance of

probability that the term she seeks to rely upon as to holiday pay was agreed, certain and formed part of her contractual terms. I have not found that the Claimant has discharged this burden.

97. There are no emails or suggested discussions after the interview on the 4 July 2019 and before the termination of employment about this holiday pay term. The Claimant relies solely on what she says was agreed during her conversation with Ms Simon on the 4 July 2019 which is set out at paragraphs 7 and 11 of her witness statement. The extent of her evidence to support the existence of such a term is limited to what she says in her witness statement at paragraph 11 "…my understand was that following satisfactory references I would start working in Bristol at Cherry Banks. Edith would come back to me about rate of pay, explore shift availability. Honour my holiday pay and look to bring me on board as soon as possible.".

98. As to holiday pay the Claimant says … "Honour my holiday pay". This is not enough to find on the balance of probability that as at the 4 July 2019 there was a certain contractual term in place in the form the Claimant asserts. The Claimant would need to prove that there was a term agreed that required the Respondent to pay the Claimant a full month of pay, equivalent to 45 hours a week, for a holiday to Jamaica from mid-August 2019 to mid-September 2019, that the Claimant had planned before taking any employment with the Respondent. In my view the Claimant has not done this.

99. For these reasons it is the judgment of the tribunal that the Claimant fails in her claim for monetary claims for breach of contract and the claim is dismissed.

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Employment Judge Gray

Date 30 November 2020
JUDGMENT SENT TO THE PARTIES ON
10th December 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE