EMPLOYMENT TRIBUNALS

Claimant: Mr C Bunghez

Respondent: Work Experience Ltd

Heard at: **Bristol** **On:** **21 January 2021**

Before: **Employment Judge Livesey**

Representation:
Claimant: Mr Duffy, counsel
Respondent: Miss Zakrzewska, legal consultant

REASONS

JUDGMENT having been sent to the parties on 28 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. **The claim**

1.1 By a Claim Form dated 19 June 2020, the Claimant brought complaints of unlawful deductions from wages and/or breach of contract.

1.2 Within the Respondent's Response of 4 August 2020, it brought an employer's counterclaim.

2. **The evidence**

2.2 The Claimant gave evidence in support of his claim and Mrs Puscas, an HR Manager, gave evidence in support of the Respondent's response and counterclaim.

2.3 A bundle of documents was produced, R1.

3. **The facts**

3.1 The following factual findings were reached on the balance of probabilities. Page references cited within these Reasons are to pages within the hearing bundle R1 unless otherwise indicated and have been quoted in square brackets.

3.2 The Claimant was employed as a Field Care Supervisor from 14 November 2019. The Respondent is a provider of home care services.

3.3 The Claimant's contract provided that he worked for 40 hours/wk over 5 days between Monday and Sunday between 7.00 am and 10.00 pm [34]. The contract specifically referred to 40 hours being the Claimant's '*normal hours of work*'. It also stated as follows;

> "*Every attempt will be made to ensure your continuing employment in the event that we are faced with a shortage of work or is unable to provide you with work for any other reason* [sic]. *This could include temporarily placing you on short time working or laying you off from work; in these circumstances you will be paid for those hours worked, in accordance with the statutory guarantee pay provisions.*"

3.4 The Claimant was paid at different rates for different hours worked; £11/hr for normal care work, £1 less for blocks of work rostered for more than 3 hours and £8.72/hr for administrative work [31].

3.5 The contract also referred to the Employee Handbook which the Claimant confirmed, by signing, that he had read. There were provisions within the Handbook which were relevant and were unchallenged in evidence by him. The Handbook itself was not produced into evidence, nor was it sought to be by either party.

3.6 Employees, like the Claimant, indicated their desired availability to the Respondent. The Respondent's Response suggested that the Claimant's indication constituted some form of contractual breach (paragraph 6.2.10 [24]), whereas, when Mrs Puscas gave evidence, she indicated that it was merely given as a guide to the rota planners, with the contractual requirements remaining as 7.00 am to 10.00 pm working.

3.7 The Claimant's guide availability was as follows; he did not want to work before 10.00 am, nor on any Wednesdays and he wanted every other weekend off [72]. It appeared that the Respondent was largely able to accommodate his wishes.

3.8 The Claimant's claim concerned two periods of work;
   (i) the week of the 20th to 26 January 2020;
   (ii) the week of the 24th to 28 February 2020.

3.9 In respect of (i), the Claimant was only given 19 hours of work in that week, a shortfall of 21 hours on the 40 hours which he claimed under his contract. Mrs Puscas explained the loss of hours on the basis of his desired availability (see paragraph 11 of her witness statement), but said that it was made up to him the following week; the Claimant undertook 96 hours of work over that two-week period. That was not challenged by him.

3.10 The Claimant gave two weeks' notice on 14 February, a Friday. He was then on annual leave between 17 and 23 February.

3.11 In respect of period (ii), the Claimant was not allocated any work and received no pay at all between 24 and 27 February. On 27 February, he was allocated work to start at 8:30 am the following day which he claimed that he

could not have done at such short notice. That was his account in his witness statement (paragraph 7) but, in an email of 27 February, he gave different reasons [37]; a failure to provide PPE, the loss of the App on his phone, the loss of his unform and badge and his poor health. During his oral evidence, he stressed the importance of the last of those issues and said that, on 28 February, he had in fact attended hospital.

3.12 The Respondent's case in respect of period (ii) was that the Claimant had called in sick on 14 February, having resigned. He took leave between to 21 February and made no further contact with the office until he visited on the 27th. He was then allocated work at 5:00 pm which he refused [36-7]. The Respondent further said that, after a period of sickness absence, the Sickness Policy within the Employee Handbook placed the onus on the Claimant to contact the Respondent to arrange a return to work meeting. As stated above, that Policy was not challenged by the Claimant in cross examination.

3.13 As to the Respondent's counterclaim, it was based upon the cost of damage allegedly caused by the Claimant to one of its vehicles and the cost of training courses.

3.14 In respect of the vehicle, the Respondent alleged that the Claimant had damaged a company car (paragraph 6.2.1 of its Response). The scratches were seen in a number of photographs [40-1] and it had obtained quotes for the repairs, the lowest of which was £360 [43]. The Respondent alleged that the Claimant's liability for such damage was covered by the Employee Handbook.

3.15 Having heard the Claimant's evidence on this issue as well, the following conclusions were reached;

- 3.15.1 The vehicle was in fact sold by the Claimant to the Respondent in early February 2020;
- 3.15.2 It was then delivered to the Respondent's Bournemouth office;
- 3.15.3 The Claimant did not drive it again;
- 3.15.4 The Claimant denied that he had scratched it or delivered it scratched. He was very clear on that evidence;
- 3.15.5 The Respondent called no direct evidence otherwise. Mrs Puscas was only able to say that she had been *told* that it had been delivered scratched;
- 3.15.6 Further, there was no evidence that, even if it was scratched, it was scratched by the Claimant during his work;
- 3.15.7 Overall, the Claimant's account on this issue was more likely to have been true.

3.16 In relation to the issue of training, Claimant had attended three training courses at a cost of £35 each (£105 in total). Deductions were entitled to have been made for his attendance under the Contract when read with the Employee Handbook [34]. However, the Claimant asserted that the Respondent had made those deductions, as reflected in the documentation [66-8]. Miss Zakrzewska withdrew that element of the counterclaim.

4 Conclusions

4.1 The first issue to address was the nature of the contract between the parties.

4.2 The contract did not appear to expressly stipulate a minimum of 40 hours work per week, nor did it provide for a set salary but, during her evidence, Mrs Puscas clearly and expressly conceded that it required the Respondent to provide a minimum of 40 hours per week.

4.3 The concern, however, was the effect of the clause which was set out in detail above. Did it serve dilute the contract as a whole so as to render it equivalent to one of zero hours? The key to the answer to that question lay in the use of the words "*continuing employment*". The paragraph was an assurance that, if work became quiet, employees might have been laid off or subjected to short time working rather than be dismissed. It was not, however, an ability on the part of the Respondent to provide less than the contracted hours specified otherwise.

4.4 The next question was whether the contract had ever been varied. In the circumstances described above, it had not. The Respondent's suggestion in its Response that the Claimant's availability was altered such that the contract was varied was not what Mrs Puscas said at all in her evidence. The Claimant's availability and the contractual requirements that he was under were two separate things. Although the Respondent tried to roster an employee around his or her availability, which was no doubt desirable for both parties, if it could not, the contractual hours had to be complied with and/or could have been enforced.

4.5 In relation to the periods of claim, therefore, the following conclusions followed;

(i) 20 to 26 January 2020;
The Claimant was not given 40 hours of work. He was entitled to that amount, as Mrs Puscas accepted. The contract did not specify a minimum of 80 hours over 2 weeks. The Respondent was not entitled to bring hours into account from other periods. His loss was 21 hours x £11, being £231. The Claimant's evidence, that he was promised that the 40 hours minimum would have been in relation to care work (as opposed to administrative work) was not disputed by Mrs Puscas;

(ii) 24 to 28 February 2020;
The Respondent asserted that the Claimant was absent without leave from 22 to 28 February and therefore no pay was due (paragraph 6.2.26 of the Response). The Claimant was off sick on 14 February, then took annual leave to 21 February, but thereafter made no contact with the Respondent until he attended the business on the 27th. Under the Respondent's Sick Pay Policy, the onus was on him to contact the Respondent to indicate that he was ready, willing and able to return to work after a period of sickness. He never did so. There was no return to work meeting until Mrs Puscas spoke to him on 27 February. He made no contact other than to indicate that he was returning his uniform and badge. If he had wanted to work and been fit to do so, one might have expected him to have contacted the Respondent.

When he was offered work following day, he refused it, both by email that day [37] and by telephone on the day that he was supposed to have worked. His claim for that period therefore failed.

4.6 The employer's counterclaim failed. The element in relation to training was withdrawn and the Respondent was not able to demonstrate that the Claimant had damaged the car during the course of his employment resulting in that additional loss.

Employment Judge Livesey
Date: 8 February 2021

Reasons sent to parties: 10 February 2021

FOR THE TRIBUNAL OFFICE