



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Leigh

Respondent: Bright Eyes Day Care Nursery Ltd

Heard at: Birmingham (By CVP)

On: 20 January 2021

Before: Employment Judge Miller

Representation

Claimant: In person

Respondent: Mr S Mountford (Director)

RESERVED JUDGMENT

1. The claimant's claim of breach of contract for failure to pay notice pay succeeds.
2. The respondent is ordered to pay the claimant the sum of £710.18 gross (subject to any deductions for tax and national insurance).

REASONS

1. The claimant, Mrs Leigh, was employed by the respondent, Bright Eyes Day Care Nursery, as a Nursery Practitioner. She started work on 2 February 2016 and she handed in her notice on 13 March 2020. Her notice expired on 24 April 2020.
2. The claimant says that she was not paid her notice pay for the period up to 24 April 2020. The respondent says that that is because the claimant did not work during that period.
3. The claimant started early conciliation on 29 July 2020 and the early conciliation finished on 10 August 2020. The claimant presented her claim

to the tribunal on 15 August 2020. The claimant brought her claim against Mr Stephen Mountford.

The correct respondent

4. It was agreed that in fact the claimant's employer was Bright Eyes Day Care Nursery Ltd and the name of the respondent is amended, by agreement, to Bright Eyes Day Care Nursery Ltd.

The issues

5. The sole issue to be determined is whether the claimant is entitled to be paid for the period of her notice from 26 March 2020 until 24 April 2020.

The hearing

6. The hearing was conducted remotely by video using the Cloud Video Platform (CVP). The claimant attended and represented herself. The respondent was represented by Mr Stephen Mountford, the respondent's director, and Ms Samantha Clayton, the claimant's former manager, attended and gave evidence for the respondent.
7. Each party had provided a separate bundle of documents but neither party had provided a witness statement. I therefore heard oral evidencing chief from the claimant and Ms Clayton.

Findings of fact

8. I only make such findings as are necessary to decide the issue in this case. Where an allegation or assertion is disputed I have made findings on the balance of probabilities.
9. The claimant started working for the respondent on 22 February 2016. The respondent said that the claimant was initially contracted to work 7.5 hours per week and there is a letter in the respondent's bundle dated 15 February 2016 which states this. There is no other contractual documentation. The claimant said she started working initially on a casual basis as cover for employees' days of and sickness.
10. At some point, the claimant's hours of work increased. The claimant was unclear about when this happened but it was after her initial three month trial period. The respondent produced a summary of the hours they said the claimant worked from October 2019 in the form of emails from their payroll provider. They said that the claimant worked the following hours:
 - a. October 2019 – 87.25 hours
 - b. November 2019 – 76 hours
 - c. December 2019 – 67.5 hours
 - d. January 2020 – 78.75 hours
 - e. February 2020 – 77.75 hours
 - f. March 2020 – 95 Hours

11. There was no disagreement that the claimant worked regularly in excess of 7.5 hours per week. Shifts were allocated on a weekly basis and that claimant sometimes attended at short notice.
12. I find, therefore that the claimant had no fixed, or normal working hours. Her hours of work varied although she only worked from Monday to Friday.
13. The claimant did not agree with the hours of work recorded in respect of February and March 2020, although she did agree with the earlier figures.
14. The claimant said that in fact she worked an additional 16.75 hours in February 2020 and an additional 11.25 hours in March 2020. The claimant said that this was from working late to provide cover and working through her breaks. The claimant was unable to provide details for February – she said that she needed to refer to her diary. I did not give permission for the claimant to rely on this as she did not have it to hand, it was not before the Tribunal and the respondent had not had a chance to see it. I would not therefore have been just to allow the claimant to rely on this.
15. In respect of March, the claimant gave oral evidence that she worked additional hours as follows:
 - a. 2 March – 45 minutes
 - b. 6 March - 40 minutes
 - c. 10 March – 15 minutes because she did not take a break (although the claimant said she could have taken it)
 - d. 12 March – the claimant only took 30 minutes of her unpaid 45 minute break so 15 minutes
 - e. 17 march – 2 hours overtime
16. At most this represents an additional 3 hours and 55 Minutes.
17. The respondent said that the claimant was only entitled to be paid for agreed overtime, and overtime would either be paid or recompensed as time off in lieu. Ms Clayton said that everything the claimant had worked and been authorised for had been paid, including 45 minutes to do some shopping. The claimant said that *most* of the time the overtime she worked was agreed.
18. I find, on the balance of probabilities, that the hours recorded by the respondent's payroll provider in the emails referred to accurately reflect the authorised hours that the claimant worked. There was no evidence that the claimant had previously challenged the recorded hours from February and I prefer the written contemporaneous record to the claimant's recollections.
19. I note that the respondent asserts that the claimant was overpaid in March 2020. The claimant disputes that, there was no evidence as to how that alleged overpayment arose and there is no counterclaim from the respondent. I do not therefore need to make any finding about this.

20. The claimant says, and the respondent agrees, that the claimant handed in her notice on 13 March 2020. The claimant says that she originally intended to give 4 weeks' notice but was asked to stay on until 24 April 2020 by Ms Clayton, the claimant's line manager and, it transpired, her aunt. The reason, she says, that she was asked to stay on was to help out with a planned trip for the children to ensure there were adequate number of staff.
21. In their response, the respondent says that in fact the claimant handed in her notice but asked to be able to continue working. In any event, it is clear that whoever suggested it, it was agreed between the claimant and the respondent that the claimant's employment would end on 24 April 2020.
22. Shortly after the claimant gave in her notice, however, a nationwide "lockdown" was announced by the Prime Minister in response to the Covid-19 pandemic which had an impact on all businesses, including nurseries.
23. The claimant says that she had a conversation on 26 March 2020 with Ms Clayton to the effect that the nursery was now closed and there would be no more work. Ms Clayton says that she cannot recall the particular conversation as she has many conversations with staff on a daily basis. Ms Clayton says that in fact the nursery remained open for vulnerable children and the children of keyworkers.
24. There is an email dated 27 March 2020 from Ms Clayton to Kate Cooke of the respondent's payroll providers. That email sends the respondent's workers' hours form March and concludes "Kate we have also made the decision to close the nursery due to the low number of children in attendance and would like to apply for the government job retention scheme for staff members"
25. I was also referred to a text message from Ms Clayton to the claimant dated 10 July 2020 which said "when the government closed us down there was no work for any of us so none of us would have had any hours for April. We all probably would have been temporarily laid off it was furlough that saved us. So because there were no hours regardless of notice or not your final entitlement was the annual leave you accrued as you wasn't furloughed. I know you talked about lieu of notice which your right if Steve had told you, you didn't have to work and the nursery was open. He would still need to pay you but it wasn't Steve's choice it was the government and we were struggling financially"
26. Finally, in their response, the respondent says "Mrs Leigh was asked to work her notice but she refused stating it was due to the covid 19 situation, in which we understood her concerns, but the nursery was open for deep cleaning and paperwork it was not open to children at this point so Mrs Leigh could of come to work".
27. In my judgement, these documents support the claimant's recollection of the conversation she had with Ms Clayton and the respondent's response form makes it perfectly clear that the nursery was in fact closed to children. I have no doubt that it was an anxious and confusing time for the respondent

and it is wholly possible that Ms Clayton does not recall the conversation. However, these documents do reflect that the respondent at the time decided to close the nursery. It may be that things changed and, as Ms Clayton said, they did in the event open for certain children. However, on the balance of probabilities Ms Clayton did have a conversation with the claimant on 26 March 2020 to the effect that the nursery was closing and there was no work for her for the foreseeable future.

28. It was Mr Mountford's case that the claimant had been required to come in to work throughout her notice period to do paperwork and cleaning. Although that did seem to change slightly on the basis that Ms Clayton said the nursery was open for keyworker children it seems likely, as suggested above, that this was a later development.
29. There was, in fact, one conversation between the claimant and Ms Clayton about work after 26 March 2020. This was agreed. Ms Clayton said that she asked the claimant to go into the nursery to do planning and paperwork and there was a requirement to do a handover.
30. The claimant said that she did have paperwork to do but that she could do it at home and did so. This, she said, had been permitted previously. The respondent disputed this and said that it was necessary for the claimant to go into work to do some paperwork for confidentiality reasons, and that they had never received the handover paperwork.
31. Ms Clayton said in evidence that she did not ask the claimant to come in to do cleaning. She said that the claimant asked to do paperwork at home, but she said the nursery was open and she should come in but the claimant refused. It is not clear how that conversation ended but Ms Clayton said that she did not contact the claimant again about coming in to work but did send her a message to ask if all the paperwork was complete and the claimant said it was.
32. Ms Clayton said it was not her responsibility to chase the claimant to come into work.
33. In my view, there was a conversation in which the claimant was asked to come into work but it is apparent that this was only to do paperwork. On the balance of probabilities, the claimant considered at the end of that conversation that she was within her rights to stay at home and do her work. This may or may not have been correct but the respondent did not take any steps to correct that impression. They did not write to the claimant to instruct her to attend work or warn her that her pay would be docked if she did not attend. I therefore consider that the claimant did reasonably believe that she had not been instructed to attend work. I find that the claimant had been permitted to do some paperwork from home previously and the respondent took no steps to make it clear that she was not entitled to do so this time.
34. The respondent said that the claimant was paid up to the end of March 2020 and there is a pay slip for 95 hours pay in March. The claimant said,

and it was not contradicted, that she was due to work on “the Friday and the Monday” (26 March 2020 was a Wednesday) so I find that, on the balance of probabilities the claimant was paid for the days she worked in March up to and including 26 March 2020 but not thereafter. Mr Mountford has made it clear on a number of occasions in writing and in the hearing that the claimant would not be paid for days she did not work.

The law

35. Section 86 of the Employment Rights Act 1996 provides for the minimum notice that an employee or an employer is entitled to. If an employee has worked for one month or more, the employer is entitled to a minimum of one week’s notice. The parties may agree payment in lieu of notice and they may agree a longer period of notice.
36. Section 89 of the Employment Rights Act 1996 provides that where an employee does not have normal working hours, the employer must pay the employee one week’s pay for each week of the notice period during which the employee is ready and willing to do work of a reasonable nature. A week’s pay is calculated in accordance with section 224 of the Employment Rights Act 1996 which is the average of the 12 weeks’ pay ending with the last complete week before the date of termination of employment, disregarding any weeks when no payment was made.

Conclusions

37. The parties agreed a period of notice from 13 March to 24 April 2020. The claimant was entitled to be paid for that notice if she attended at work or if she was ready and willing to do work of a reasonable nature.
38. The claimant gave evidence that she was ready and willing to do work and she did do some work at home. However, I have found that she reasonably believed that she was not required to attend at the nursery to do work. There was one conversation but the respondent did not make it clear that the claimant would not be paid if she did not go to work at the nursery. The claimant was entitled to conclude that she was either not required to go in as the nursery was closed or she was permitted to work at home as far as necessary as she had been permitted previously.
39. Specifically, the claimant was not asked or required to go into work to do cleaning as the respondent asserted.
40. The claimant was paid up to and including 26 March 2020. She was entitled to be paid until 24 April 2020. This is a further 4 weeks and one day.
41. The claimant’s average weekly wage is the average of the 12 weeks ending on 20 March, the last full week that the claimant did any work. This is the average weekly pay from 30 December 2019 until 20 March 2020.
42. The weekly amounts of hours or pay are not available. In the same period but including the week ending 26 March 2020, the claimant worked a total

of 251.5 hours. This is a period of 12 weeks and one day. This equates to a weekly rate of 20.6 hours per week. The claimant was paid at the rate of £8.21 per hour. Therefore the claimant's average weekly wage was £169.13.

43. The period from 26 March 2020 to 24 April 2020 was four weeks and one day. The claimant is therefore entitled to a payment in lieu of her notice of £710.18.

Employment Judge Miller

29 January 2021