



EMPLOYMENT TRIBUNALS

Claimant

Mr Brandon Sullivan

v

Respondent

Care UK Community Partnerships
Limited

Heard at: Cambridge

On: 3 March 2021

Before: Employment Judge Dobbie

Appearances

For the Claimant: In person

For the Respondent: Mr J Boyd, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The claim for holiday pay is dismissed upon withdrawal.
2. The claim for arrears of pay is dismissed.

REASONS

Introduction

1. By a claim form presented on 18 June 2020, the Claimant raised three claims:
 - 1.1 Holiday pay;
 - 1.2 Arrears of pay; and
 - 1.3 Other payments.
2. In discussion with the parties at the outset of the Hearing, it was agreed that there is no outstanding liability for holiday pay and that claim was withdrawn. I dismissed it upon withdrawal.

3. As to the other payments claimed, the Claimant confirmed that was for pay (salaried pay) for contractual hours of 31.37 hours a week for the period from 8 October 2019 to the Appeal outcome, which was dated 26 May 2020, which the Claimant says was a period in which his contract of employment persisted. The Claimant stated that the appeal outcome, in conjunction with his P45, indicated the end of his employment with the Respondent to him. Therefore, the “arrears of pay” and the “other payments” ticked on the claim form are in fact the same payments, being this salaried pay.
4. At the outset of the Hearing, Counsel proposed a list of issues which I broadly adopted. That is as follows:
 - (1) Was the Claimant’s employment contract terminated?
 - (2) If so, by whom, how and on what date?
 - (3) If the employment contract was terminated – with effect from 27 September 2019, or some other date - what was the Claimant’s status after that date? In particular, was he engaged under the terms of a Bank contract, an employment contract or some other contract?
 - (4) If he was so engaged on another contract – with effect from 27 September 2019 or some other date – did that contractual relationship come to an end?
 - (5) If so, when, how and by whom?
 - (6) If the claim is brought as a breach of contract, did the Claimant submit that claim within three months of the termination of his employment (whenever that was, if indeed it has been terminated)?
 - (7) If not, was it reasonably practicable for him to have done so and if not, did he present it within a reasonable period thereafter?
 - (8) If the Claimant brings his claim pursuant to s.13 of the Employment Rights Act 1996 (“ERA”), did he submit the claim within three months of the underpayment / non-payment, or within 3 months of the last in a series of similar underpayments / non-payments?
 - (9) If not, was it reasonably practicable for him to have done so, and if not, did he bring the claim within a reasonable period thereafter?

Findings of Fact

5. The Claimant commenced employment on 7 February 2018 as a Care Assistant with the Respondent at Mills Meadow. On 31 December 2018, he reduced his hours to 31.37 a week and this was effected by way of a written variation to his employment contract.

6. In anticipation of commencing an MSc in Psychology in October 2019, the Claimant requested to be “transferred” to a Bank contract in August 2019. This was to allow him the flexibility he needed to work whilst undertaking his studies. He was informed by Rebecca Calver that do so he would need to resign from his employment contract and request a “transfer”.
7. The Claimant understood that moving to Bank work meant there was no obligation to accept any particular amount of work and no right to be offered a particular amount of work, or to accept or be offered work, at any particular times or dates. This is in effect a worker contract (in Law) not an employment contract. The witnesses would not have appreciated the legal niceties of the difference, and most workers do not. However, the Claimant did understand at the time he made the request to “transfer” what the change in relationship would entail and the flexibility was desired by him because it suited his changed circumstances.
8. On 29 August 2019, so as to achieve the change from employee to Bank worker, the Claimant wrote to the Respondent in an email headed ‘Resignation / Bank Staff’, as follows:

“Have decided that the most meaningful way forward at this time professionally is to resign my current contract position (effective today’s date 29 August 2019) at Mills Meadow and transfer to Bank staff”.

The email went on to query when his current contract would be brought to one end and what holiday he might be paid, amongst other matters.
9. On 30 August 2019, Mrs Calver sought clarification that the Claimant would be “*transferring to bank from 26 September 2019*”. The Claimant replied:

“...the date I resigned was 29 August 2019, not 28 August 2019 as stated in your email. By way of clarification, I am giving notice as per my contract which based on 4 weeks would mean I would be transferring to Bank on 27 September 2019.”
10. In September 2019, the Claimant booked shifts on the Bank system for 28 September 2019 and 1, 4, 7 and 9 October 2019. He attended work on 28 September 2019, 1 and 4 October 2019 fulfilling his Bank duties on those dates.
11. On 5 October 2019, the Claimant informed Mrs Calver by email that he had booked shifts up to 18 November 2019 on the system and asking why after that date his old contract hours appeared on the system.
12. Also, on 5 October 2019, the Claimant was informed by Mrs Calver that she had delayed “*processing you from contract to Bank*” to ensure he received a reward voucher related to an outstanding CQC inspection.

13. On 8 October 2019, the Claimant raised concerns about the delay in changing his status on the system and other matters.
14. On 9 October 2019, the Claimant sent an email to Mrs Calver stating that once he had received his contract, he will let her know if he was continuing his employment with Care UK. He clarified in his oral evidence that by *"continuing his employment"* he meant working for Care UK at all (in any capacity) because by that time he was frustrated and was reconsidering whether he wanted to work for the Respondent ever again. He did not attend his pre-booked Bank shift that day.
15. The Claimant received the Bank contract later that day, on 9 October 2019. He raised various queries and concerns about the contract in an email sent at 20:29 hrs that day to Mrs Calver, Sally Shadbolt and Anne Gregory. He stated he wanted clarity on the matters,

"before I make any decisions"

One such matter was,

"what is my employment status during the period from 28.09.19 to date?"

16. Part of his confusion arose from the fact that the Claimant was receiving automatically generated correspondence and paperwork as though he were a new joiner. He was also concerned that the contract was backdated to 28 September 2019 rather than starting that day (9 October 2019) or later.
17. In various correspondence up to this date, the Claimant referred to his resignation without seeking to withdraw it.
18. On 17 October 2019, the Claimant raised a grievance about his changing status and other matters. He stated:

"I have been without a contract since 28/09/19... without a contract and not having visibility of the terms and conditions of my engagement, I felt it prudent not to continue working until such time as I could have sight of the document evaluate it and or have clarification of my employment status from 28/09/19 going forward..."

19. The Claimant attended a Grievance Hearing on 1 November 2019 Chaired by Sally Shadbolt. At that meeting, Ms Shadbolt stated:

"...your request letter was not a resignation to terminate employment with Care UK, it was a request to alter your employment contract. This means you were still employed on a permanent contract, until your Bank contract came into effect. It only comes to one end once your Bank contract is set up and signed."

20. On 19 November 2019, Ms Shadbolt delivered her formal outcome which reached the same conclusion on the issue of the Claimant's status and assured him that the finding that he was still a permanent employee would not open him up to a disciplinary process for non-attendance of his contracted hours up to that date.
21. The Claimant did not start attending work at any time during this process, nor enquire about whether he should do so. As stated above, his last day of work was his Bank shift on 7 October 2019.
22. The Claimant appealed the decision on 21 November 2019, stating (amongst other things) that the minutes of the grievance meeting were inaccurate and that the outcome letter contains errors. He provided comments embedded within a version of the outcome letter as part of his Appeal.
23. On 12 May 2019, the Claimant sent an email and letter to Leah Queripel stating that it was a precursor to legal action. The letter itself states that,

"...in line with the advice I have been given, I am hereby raising a formal grievance as a precursor to potential legal action"

The grievance was that the Claimant had not been rostered since October 2019 onwards and this he said was in breach of his contract of employment (his permanent contract).

24. There was no Appeal Hearing and Mr Steyn delivered his outcome on 22 May 2020. In that outcome letter, he stated that the Claimant's employment had terminated on 27 September 2019 and he had worked as a Bank worker thereafter but because he had not signed the written Bank contract, he had in effect chosen to terminate his "employment". Mr Steyn also stated:

"If however you wish to remain on the Bank... please can you let me know and we will arrange for this to be resent again and for another Bank agreement to be issued or for your P45 to be sent to you."

Reasons

25. The individuals involved in the above scenario did not appreciate the legal niceties of the distinction between the terminology 'employee' and 'worker' in Law. However, I was able to ascertain from the Claimant and the Respondent's witnesses that they did correctly understand the effect of the Claimant ceasing to work under his contract of employment and commencing work as a Bank worker, as stated above.
26. Phrases such as 'transferring' from an employment contract to a Bank contract are misleading because the word 'transfer' suggests that there would be no end to the existing contract, merely a change to another one. In legal terms, a resignation from his contract of employment would bring

that relationship to an end and then he would start a fresh relationship with the Respondent as a worker (a different capacity in Law).

27. The Claimant did understand this (as stated above) and his resignation, tendered on 29 August 2019 was clear and unequivocal notice of termination of his contract of employment. He was not misled or induced to give such notice. It was not given in the “heat of the moment” and at no time did he seek to withdraw it.
28. I therefore find that the resignation email sent by the Claimant on 29 August 2019 was an effective resignation. Indeed, in his evidence, the Claimant stated that it was not until the grievance meeting when Sally Shadbolt suggested his resignation may not have taken effect that he considered his employment to have continued after the resignation email.
29. A party cannot unilaterally decide to rescind notice that has been validly given (Riordan v War Office [1961] 1 WLR 210). In any event, the Claimant did not ever seek to withdraw it, instead he sought to rely on Sally Shadbolt’s own mistaken account of his status to argue that his contract of employment subsisted and that he ought to be paid for his salaried hours (even though he had not worked them).
30. The next question then is what terms governed the relationship from 28 September 2019 onwards? The formal contract terms of a Bank worker had not been seen by the Claimant until 9 October 2019 and were never formally agreed or signed by him. Indeed, on the day he received the terms, he ceased attending his pre-booked shifts, and did not attend any shift thereafter, indicating did not agree to be bound by the terms of the written Bank contract.
31. In these circumstances, the Claimant cannot be said to have agreed those terms. However, I find that there was sufficient agreement of essential terms that there was a contract (under which the Claimant rendered services as a worker) from 28 September 2019 onwards. Those terms included that the Claimant would select shifts on the Respondent’s app and attend those he had booked. He would be paid for those at the rate of pay of a Bank worker. The fact that he worked under these terms on 28 September 2019 and 1, 4 and 7 October 2019 evidences an agreement between the parties of this nature on these bare minimum essential terms. There was a meeting of the minds and intention to create legal relations such as to form such a contract.
32. I note that from 09 October 2019, the Claimant was not disciplined for his failure to attend work that day, or for not attending work thereafter (either for the Bank shifts he had booked up to 17 November 2019 or his old contract hours). He did not ask for shifts and did not attend work at all after 7 October 2019. Therefore, I find that the Claimant and the Respondent both understood that by early October 2019 that he was no longer an employee and there was no obligation on the Respondent to provide work, nor any obligation on the Claimant to accept work.

33. I must note that the Claimant's refusal to attend work on 9 October 2019 and thereafter was due to the confusion created by the Respondent's own miscommunication and catalogue of administrative and technology errors, which it has no good explanation for.
34. The fact that the Respondent (through Sally Shadbolt) later mischaracterised the legal relationship between the Claimant and Respondent was another failing which understandably caused great confusion and frustration for the Claimant, which he ought never have to have suffered. However, it does not change the reality of the matter in Law, which is that his resignation was effective to terminate his contract of employment by 27 September 2019 and had done so, after which time he rendered services as a worker.
35. It is most regrettable that the Claimant had to face so much uncertainty and confusion, especially at a time when he was commencing a period of study. I am most surprised at the multiple and compound errors that the Respondent made. I am also disappointed at how the Claimant's appeal was so heavily delayed. The way in which the Respondent handled the Claimant's termination of employment and commencement of Bank duties was unsatisfactory.
36. The Respondent can only blame itself for the fact that the Claimant became confused and aggrieved. I urge the Respondent to improve its systems and put in management training to ensure that these failings do not occur again.
37. However, given my finding that the Claimant was no longer an employee after 27 September 2019 and that he instead had a contract as a worker, with no obligation to accept work or a right to be offered work, his claim must fail. This is because, after 27 September 2019, he was only entitled to be paid for shifts booked and worked and he did not do any work after 7 October 2019. Therefore, he is not entitled to any back pay and I dismiss the claim accordingly.

9 March 2021

Employment Judge O Dobbie

Sent to the parties on: ...

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For the Tribunal Office