



EMPLOYMENT TRIBUNALS

Claimant: Miss J Holmes

Respondent: Mr T George t/a Optimaplus Nursing and Care Services

Heard at: West Midlands **On:** 17th May 2021

Before: Employment Judge Steward (sitting alone) by CVP

Representation

Claimant: In person

Respondent: In Person

JUDGMENT

1. The Respondent was in breach of contract and is ordered to pay the Claimant the sum of £499.50.
2. The Claim for other payments at £6031.68 is dismissed.

REASONS

Claims and Issues

1. The claimant has claimed breach of contract in relation to notice pay and other payments as per her ET1.
2. Both the claimant and respondent were requested pursuant to the case management order of the 4th of January 2021 to provide full written statements containing all evidence they and witnesses intended to rely on at this hearing. They had to provide all relevant documents in chronological order. The statements had to have numbered paragraphs be cross reference to the documents and contain only evidence relevant to the issues in the case. They had to provide copies of the written statements and documents to each other on or before the 1st of March 2021.
3. The Claimant has provided an ET1 and a statement with various exhibits dated the 6.5.2021. The Respondent has provided an ET3 but has not provided the

Claimant or the Tribunal with any statements. The Respondent emailed the Tribunal on the 11th May 2021 asking to 'take the case for management review' and setting out some issues they have with the claim.

4. There is no agreed bundle of documents and little compliance with the order of the 4.1.21. Both the Claimant and Respondent have attended the hearing today and both agree that even though there is non compliance with the order of the 4.1.21 the case should proceed today. I have taken the view that both the claimant and the respondent have had ample time to comply with the order of the 4.1.21. I take the view that the matter should proceed today when considering the evidence and the nature of the claim and also the overriding interest to deal with matters justly and proportionately. The parties had no further documents that they wish to show me.
5. I heard oral evidence from both the Claimant and the Respondent.

Fact Findings

6. The Respondent Togy George trades as Optimaplus Nursing and Care Services. The Claimant was employed as a Business Development Manager. She was offered the role on the 17th July 2020 but due to the Coronavirus pandemic could only start in the role on Monday the 5th October 2020. As a Business Development Manager her role was to place nursing staff within the NHS. There was a contract of employment provided to the Tribunal which was unsigned. It suggested the Claimant would be paid a gross yearly salary of £40,000. No notice needed to be given by either party within the first 4 weeks of the commencement of the employment.
7. As result of changes to compliance and new supplier rules in August 2020 agencies had to tender to be on the supplier framework for the NHS. The agreements/contracts after a successful tendering process lasted for 2 years.
8. The Respondent did not engage in that tendering process and therefore as at the 5th October 2020 were not on any supplier framework for the NHS. Optimaplus would therefore be treated as a non framework agency and would not be able to supply nurses to the NHS.
9. The Claimant said that she spent the 5th and 6th October 2020 trying to see if there was a way around this problem and contacted other people she knew within the industry to see if they could assist. The Claimant said that it was impossible to place Optimaplus nurses within the NHS and therefore she could not carry out her role or the terms of the contract. The Respondent completely agreed with the Claimant on these matters. There was no dispute that the Claimant could not carry out her role given the changes to the framework and the tendering process.
10. On the 7th October the Claimant came into work early to speak to the Respondent with regard to the difficulty she had encountered. It is clear from the Claimants written statement and the oral evidence I heard that both parties agreed there was unfortunately no role for the Claimant. The Claimant and the Respondent both confirmed in their oral evidence that they agreed to terminate

the contract on the morning of the 7th October 2020. The Claimant in her evidence used the phrase 'a parting of the ways'. The Respondent agreed. Later the same morning at 9.56am the Respondent sent to the Claimant a text message which read

'Sorry Jo it didn't work out' to which the Claimant responded **'I am too'**

11. There is no doubt based on the written evidence and agreed oral evidence that both the Claimant and the Respondent agreed to voluntarily bring the contract to an end.

12. Thereafter the Claimant says that the Respondent agreed to pay her up to the 20.10.20 a total of 12 days. The Claimant provided a copy of the contract of employment. In her oral evidence she brought to the attention of the Tribunal the fact that she scribbled onto the top of the first page of the contract 'paid til 20th October'. The Claimant states she wrote this on the contract during the meeting with the Respondent on the morning of the 7.10.20.

13. On the 29.10.20 the Claimant emailed the Respondent asking him to confirm that she would be paid up to the 20.10.20. The Respondent replied on the same day as follows

"Morning Joanne. Your wage is processing for 12 working days as per the agreement which is the 20.10.20"

14. The Respondent said in his oral evidence that at the meeting on the 7.10.20 that he said that he would pay the Claimant some money. His actual wording was **'we will pay you something'**. The Respondent disputed that he intended or agreed to pay 12 days. He stated that he was happy to pay the three days worked by the Claimant. He stated that he was mistaken when he sent the email of the 29.10.20 and didn't mean to say 12 days. It was a typing error and that English is not his first language. The Respondent made it clear he was happy to pay for the 3 days worked though technically he didn't have to.

15. I have no hesitation in accepting the Claimants evidence on this disputed point. The Claimant has set out clearly what occurred in her witness statement. She has also attached an email exchange which makes it clear that the Respondent agreed to pay her for 12 days work up to the 20.10.20. The Respondent conceded that he sent the email on the 29.10.20. I do not find he made a mistake. The Respondent is a successful businessman who was able to explain to the Tribunal how his business operated. I find that post the mutual termination of the contract on the 7.10.20 there was an agreement that the Claimant would be paid for 12 days work.

16. As the Claimant was due to receive £40,000 per year as a gross salary I accept the Claimants figure that she should have been paid the sum of £1818.18 (12 x £151.51) gross. She actually received £1318.68 gross which is a shortfall of £499.50.

17. In the ET1 the Claimant also claimed for loss of earnings until she started her new employment but as a much lesser salary. In the Claimants statement dated the 6.5.21 at paragraph 15 the Claimant explains that she was also claiming the sum of £6031.68. The Claimant started work for 16 weeks at a

new employer on the 21.10.20. This role paid £20,397 pro rata. The Claimant wished to claim the shortfall against the amount she would have been paid by the Respondent.

The Law

17. Employment tribunals in England and Wales were given the power to deal with breach of contract claims by the Employment Tribunal's Extension of Jurisdiction Order 1994.

18. Article 3 states that proceedings may be brought before an industrial tribunal in respect of the claim of an employee for the recovery of damages or any other sum if

(a) the claim is one to which section 131(2) of the 1978 act applies and which of course in England and Wales would under the law for the time being in force have jurisdiction to hear and determine

(b) the claim is not one to which article 5 applies and

(c) the claim arises or is outstanding on the termination of the employee's employment

Conclusions

19. The Claimant worked for the Respondent from the 5.10.20 until the 7.10.20.

20. The Claimant and the Respondent both agreed to mutually terminate the contract on the morning of the 7.10.20 as it was impossible for the Claimant to fulfil her role under the contract. The contract was the document produced to the Tribunal and though unsigned both the Claimant and the Respondent agreed that they were bound by the contents of it.

21. After the contract was terminated the Respondent agreed and the Claimant accepted that she would be paid for 12 days up to the 20.10.20. Though this was not a condition of the original contract it was clearly an agreement between the Claimant and the Respondent which applying Article 3(c) of the Employment Tribunal's Extension of Jurisdiction Order 1994 was a claim arising and outstanding at the termination of the employee's employment.

22. I conclude therefore that the Claimant should be paid damages in the sum of £499.50 to represent the period of 12 days that was agreed between the Claimant and the Respondent on the 7.10.20.

23. The Claimant cannot claim the additional £6031.68 as set out in her witness statement. There was no term in the contract which made provision for payment of a sum as claimed by the Claimant. Therefore this element of the claim is dismissed.

Signed by: Employment Judge Steward

Signed on: 18.5.21