EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Mhindurwa**

Respondent: **Lovingangels Care Limited**

Heard at: Reading On: 4 June 2021

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the claimant: In Person

For the respondent: Mr P Collyer, employment consultant

JUDGMENT

(1) The claimant was unfairly dismissed.

(2) The respondent was in breach of its duty under section 1(1) of the Employment Rights Act 1996 and the claimant is entitled to an award pursuant to section 38 Employment Act 2002.

(3) The claimant's complaints about unpaid wages and holiday pay are dismissed.

(4) A remedy hearing a shall take place by CVP on the **20 August 2021**. The parties are to send to each other by **30 July 2021** any witness statements and copies of any documents that they wish to rely on at the remedy hearing.

REASONS

1. In a claim form presented on the 9 September 2020 the claimant made complaints of unfair dismissal, redundancy payment, unpaid wages and holiday pay. The respondent defended the claims.

2. The claimant provided a witness statement of ten pages dated 1 June 2021. The respondent relied on the witness statements of Ms Moreblessings Chakafa, Ms Shamiso Peperkeke and Mr Kyle Pacey. I was also provided with a bundle containing 350 pages of documents.

3. At the start of the proceedings I attempted to clarify the issues to be decided in the case with the claimant and the respondent. The claimant stated the following matters needed resolution; underpayment of wages from the

commencement of the claimant's employment in 2018 until April 2019 when the claimant contends that she was paid less that the minimum wage, and that in the calculation of the pay for the claimant's breaks she was paid short by 99p per hour. Whether the respondent provided the claimant with a copy of her contract of employment, if so when. Whether from June 2019 the claimant was paid the minimum wage. Whether the claimant was dismissed for redundancy or she was dismissed because she raised issues about the calculation of her pay. Whether (if the claimant was dismissed because of redundancy) it was fair to dismiss the claimant for redundancy. The claimant claims that she is owed £17,466.80, plus an award for failing to provide her with a statement of the main terms and conditions as required by section 1 and 4 of the Employment Rights Act 1996.

4. By an agreement made between the claimant and the respondent on the 23 March 2018, the claimant was employed as a care assistant. The agreed rate of pay was £8.10 an hour, this was increased to £9 per hour at weekends and £12.15 an hour on bank holidays. The contract also made reference to a sleep-in rate, providing that "*You may be required as part of your duties to sleep in, in which case you will be paid £50 per hour."* The contract also made reference to a live-in rate, providing that *"You will be paid £600 per week for single live-in and £700 for joint live-in."*

5. It was not clear, but it appeared to me that the parties agree that the reference to a sleep-in rate of £50 per hour was a typographical error, in any event no issue arises in this case in respect of that part of the contract that relates to the sleep-in rate.

6. The contract also made reference to an Employee Handbook containing a number of matters relevant to the claimant's contract including the disciplinary procedure, disciplinary appeal procedure and the grievance procedure. The claimant was not provided with a copy of the contract (signed on 23 March 2018) until it was provided under cover of a letter dated 15 May 2019. The claimant was never provided with a copy of the Employee Handbook and denied a copy when she requested it on grounds that to provide it to the claimant would breach GDPR data protection regulations.

7. The claimant met with the respondent to discuss her rate of pay on the 9 April 2019 and again on 21 May 2019. The claimant's position was that she had not been paid the national living wage. Following these meetings it was agreed that the claimant would be paid on the basis of a standard working day of 13 hours a day (according to the respondent) or 15 hours a day (according to the claimant). It was agreed that this would start from 10 June 2019. It was recognised that the claimant had not been paid the minimum wage for the period since the claimant's employment commenced employment working as a live-in carer for HR. There was no back dated payment made to the claimant at this time.

8. The minutes produced of the meeting of 21 May 2019 state that *"it had been established … that the [claimant's] working hours were 7am-10pm with a 2 hour unpaid break."* (p64)

9. In a letter dated 12 February 2020 the claimant raised a grievance. The grievance included a number of matters including that the claimant was entitled to have a written statement of particulars for her employment; that the claimant was entitled to 28 days holiday pay, that the respondent failed to provide her with details of pension autoenrollment and that the claimant had not been provided with her a copy of the Employee Handbook. The claimant also raised issues relating to a food allowance and payment for disturbed nights. It became clear that the claimant was also claiming for underpayment of wages from 23 March 2018 until 10 June 2019.

10. The respondent recognised that the claimant was entitled to be paid in respect of holiday pay and food allowance. This resulted in payments to the claimant being made on the 9 April 2020 of £2,233.44 (holiday pay) and £1,930 (food allowance).

11. The respondent calculated that the claimant was entitled to an additional payment of £2,210.28 for the underpaid wages in the period from 23 March 2018 to 10 June 2019.

12. From October 2018 the claimant was employed providing live-in care for HR. On 8 February 2020 HR was admitted into hospital and she subsequently left hospital to live in a care home. The claimant was no longer required to provide live-in care for HR.

13. On the 18 May 2020 the respondent wrote to the claimant stating that respondent was not able to offer the claimant live-in care work. The claimant was invited to attend a meeting with the respondent. The purpose of the meeting was to discuss the reasons why her employment may come to an end; whether the claimant believed that her employment could be continued and if so how, and what alternative work may be available. The claimant was told that see could be accompanied by an accredited trade union representative. The claimant was told that if her employment was terminated she would be entitled to a redundancy payment.

14. The claimant attended the meeting on the 12 June 2020. The meeting took place using zoom. At the meeting the claimant was informed that the respondent could only offer her domiciliary care work.

15. A further meeting with the claimant took place on the 6 July 2021.

16. The respondent wrote to the claimant on the 13 July 2020 and was informed that there was no alternative to redundancy and the claimant was given notice of dismissal on the grounds of redundancy.

17. The claimant was entitled to a redundancy payment of £1,614.

18. The claimant was paid a redundancy payment of £2485.56, holiday pay of £1,473.08 (gross), pay in lieu of notice £1,65.04 (gross) and £2,210.28 (gross) in respect of underpayment of wages for historic under payment.

19. The claimant appealed the decision to dismiss her. The claimant's appeal was dismissed by Mr Kyle Pacey. Mr Pacey also considered the claimant's grievance appeal and did not uphold that either. I have considered the evidence given by Mr Pacey because in the way that he described the actions he has taken in considering the claimant's appeal he explained that he relied on and accepted the information that was provided to him by Ms Peperkeke. He said the claimant's union representative was present was telling him what was correct and so he "*could lean on the impartiality of the union rep"*. He accepted that he made no enquires to ascertain for himself whether the claimant's contentions were correct or incorrect, he simply accepted what the respondent stated as correct. In my view, in reality it was not an appeal that was capable of remedying any prior error at all, it was merely a rubberstamp of what had gone before.

20. In her claim form at section 9.2 the claimant claims that she was underpaid wages of £21,822.84 in the period from 23 March 2018 until 9 June 2019. The claimant also makes a claim in respect of something she describes as *"Appeal of Redundancy Claim based on days available for work"* in the sum of £17,106.44 without any explanation of how it is calcualted.

21. The claimant's witness statement does not specify the amount that is being claimed by the claimant. The witness statement does not explain the calculations on the claim form at section 9.2. During the hearing I asked the claimant to specify the amount being claimed and she gave the figure of £17,466.80.

Unfair dismissal (Redundancy)

22. The claimant's claim for unfair dismissal appears to be based on the proposition that she should not have been dismissed, rather she should have been furloughed. In paragraph 11 of her witness statement the claimant sates

> It is true, as stated in item 13 of Moreblessings' statement that I requested to be furloughed in May 2020 in line with what I understood to be Government policy at the time, but this was summarily "shot down" for reasons which I still consider inadequate if not vengeful. This is a classic example of what happens when the bond of trust and respect between employer and

> employee is allowed for whatever reason to break down!

23. The claimant in her evidence did not appear to accept that there was a redundancy situation and relied on the fact that the respondent was advertising for positions during the relevant period.

> Regarding my redundancy, why has there been such a dismal failure on Loving Angels Care's part to give a clear and credible response to why I should not view my redundancy as targeted particularly in so far as no other staff member has been affected apart from me? To add insult to injury, they have continued to advertise for live-in-carers on their website!

The respondent, as I understand its position, accepts that they did continue to advertise for live-in carers even though they did not have any vacancies. I do not understand the reason for this, save that the explanation appeared to relate to a need to maintain a continuity of available staff if required.

24. The respondent's position is that the claimant asked to be furloughed, but it could not agree to furlough because there was no work for her. The reference to work is to live-in care work. The work that the respondent had was that of domiciliary care which the claimant was not able to do because the location of the work was mainly around Bracknell and claimant's home is in Birmingham.

25. The claimant's appeal against her redundancy was considered by Mr Pacey who rejected the appeal. In the course of his appeal it was clear that the reason that the claimant was dismissed was because the claimant was offered domiciliary care work but refused it and in the absence of any live-in care work the respondent dismissed the claimant.

26. The claimant says that she was unfairly dismissed because the real reason for her dismissal was not redundancy but because she had raised issues with the respondent about the underpayment of her wages. Further the claimant says that although HR was no longer requiring the claimant to provide her with live-in care the respondent must have had work available for her because it continued to advertise for live-in carers.

27. The respondent contends that the claimant was dismissed because of redundancy as the work the claimant was employed to do had diminished and the respondent could no longer provide sufficient work for her. The respondent says that it consulted with the claimant and considered whether there were suitable alternative roles prior to dismissal.

28. By section 98 Employment Rights Act 1996 (ERA), where an employee has been dismissed for redundancy, the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee, and shall be determined in accordance with equity and the substantial merits of the case.

29. By section 139 (1) (b), an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish. This requires consideration of the work that the employee actually did.

30. To determine whether someone had been dismissed for reason of redundancy three questions need to be asked was the employee dismissed? if so; had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? if so; was the dismissal of the employee caused wholly or mainly by the ceasing or diminishing?

31. At the third stage the tribunal is only concerned with causation – so if the redundancy situation arises but does not cause the dismissal, the employee is not dismissed by reason of redundancy. The question is, was there a diminution/cessation in the employer's requirements for employees to carry out work of a particular kind, or an expectation of such?

32. The claimant alleges that the real reason that she was dismissed was because she had raised issues about underpaid wages. I do not consider that this was the case. The respondent was open about its failings in respect of the payment of the claimant's wages and explained why this came about. The respondent also offered the claimant alternative work domiciliary care work, which was the only work that they had available that the claimant could do. Such an offer would not have been made if there was a desire to punish the claimant.

33. The claimant was employed as a carer and from October 2018 the claimant was employed providing live-in care for HR until 8 February 2020 when she was taken into hospital and then subsequently went to live in a care home so the claimant was no longer required to provide her with live-in care. The respondent was not able to provide the claimant with live-in care work and could only offer domiciliary care work which the claimant could not accept. I accept the respondent's explanation that there was no live-in care work to offer the claimant at the relevant time.

34. I have come to the conclusion that the respondent did not have any live-in work to offer the claimant. Although the claimant says that the respondent continued to advertise for live-in carers the explanation given was that there was no current vacancy to be filled by live-in carer at the time that the claimant was dismissed.

35. I am satisfied that the claimant was dismissed because of redundancy. The claimant was dismissed because the respondent's requirements for live-in workers had ceased or diminished and the claimant's dismissal was because

the claimant was not able to accept the only other work that was available (domiciliary care work).

36. Was the claimant's dismissal on the grounds of redundancy unfair?

37. The claimant says that the dismissal was unfair because the respondent had live-in care work available which she was not offered. I am not satisfied that the evidence before me does not permit a conclusion that the respondent had live-in care work available that the claimant could be offered. The effect of the Covid-19 Pandemic severely restricted the availability of live-in care work for the respondent.

38. The claimant also says that the respondent should have furloughed her. The claimant asked to be furloughed but the respondent did not do so. The respondent's position is explained by the evidence of Ms Moreblessings Chakafa: "*In May 2020 the Claimant asked to be furloughed, but we could not agree as there was no work for her. In an emailed letter dated 18 May 2020 I confirmed to the Claimant that we did not have any other suitable work and invited her to attend a telephone meeting to discuss. She was informed that a possible outcome could be her dismissal for redundancy (p. 84- 86).*"

39. The Coronavirus Jobs Retention Scheme ('the scheme') was announced by the Chancellor of Exchequer on 20 March 2020. The scheme was to provide support for employers to enable them to continue employment of employees by paying part of their employees' salaries rather than lay them off. The original version of the scheme was to run until the end of May, this was extended to 30 June, and on the 12 May 2020, the Chancellor extended the scheme to run for until the end of October 2020. The scheme running from 1 July 2020 introduced 'flexible furlough' to help employees back into work with employers contributing towards the cost of their furloughed employee's salaries to replace part of the contribution made by the Government.

40. Under the scheme for each month that an employee is furloughed the employer pays the employee, the lower of, either 80% of the employee's regular wage or £2,500. The employer could, but was not obliged, to pay the employee their full wage.

41. From 1 July 2020 the flexible furlough scheme allowed employees to be brought back to work, with their agreement, for any pattern of part-time working. The employee was to be paid their usual wages for hours worked while remaining eligible for the scheme for any of their normal hours not worked.

42. In the period up to the end of July 2020, employers who furlough workers were be able to claim a grant of up to £2,500 per month for the regular wage of each furloughed worker, plus the associated costs of Employer's National Insurance contributions and the minimum employer contributions under automatic enrolment.

43. From August 2020, furloughed workers were to continue to receive 80% of salary (up to the cap of £2,500 per month, or a proportion of that cap if on flexible furloughed) for furloughed time, but employers were to be required to pay a percentage towards the salaries of furloughed employees. In September 2020 the government contribution went down to 70% (up to £2,187.50 per month) and in October 60% (up to £1,875 per month). The employers being required to make up the balance.

44. Both the employer and the employee have to agree for the employee to be placed on furlough.

45. The whole purpose of the furlough scheme was to avoid lay off of employees because of the effect of the Coivd-19 pandemic by providing significant government support to employers. I am of the view that in July 2020 a reasonable employer would have given consideration to whether the claimant should be furloughed to avoid being dismissed on the grounds of redundancy. In this case the claimant's position was impacted by Covid-19. As Ms Chafaka explained: *"We didn't have any immediate work for the claimant then the amount of live-in work reduced significantly due to Covid-19. The only work we had was local domiciliary care which was not workable for the Claimant because of her Birmingham location."* This is the type of situation that the furlough scheme envisaged. Why it was not considered or not considered suitable in this case is not explained by the respondent.

46. The respondent stated that there were no live-in care clients being referred to the respondent because movement between clients requiring live-in care was restricted due to the Covid-19 pandemic. The respondent had no way of knowing when it was going to change. The respondent's position was simply that at the time it had no live-in care work so could not agree to furlough the claimant. The respondent does not appear to have considered whether the claimant should be furloughed for a period of time to see what if any change there was in the availability of live-in care work or other work that the claimant could take on.

47. The claimant's appeal hearing before Mr Pacey was a rubberstamp exercise and not a proper appeal. He gave no consideration to whether the claimant should be furloughed.

48. I am of the view that the failure to give consideration to the possibility of furlough and the failure to offer the claimant a proper appeal render the claimant's dismissal unfair.

49. Unpaid wages (including minimum wage): The claimant claims for an underpayment of wages from the commencement of the claimant's employment in 2018 until April 2019. In this period the claimant says that she was paid less than the minimum wage. The respondent's witnesses provided evidence that the claimant had alleged that she was underpaid wages and they considered this. Miss Chakafa calculated the amount owing to the claimant and this was paid. The claimant has failed in the evidence to demonstrate why the amount paid by the respondent is not correct. The claimant has failed to

establish that there was an outstanding underpayment of wages beyond the amount that was paid to her of £2,210.28. The claimant offers no alternative calculation or explanation.

50. The claimant contends that she has been under paid in the calculation of the pay for her breaks where she was paid short by 99p per hour. The claimant in respect of this part of her claim has again failed to calculate amount that is due or to demonstrate how the respondent's calculations are incorrect. The burden is on the claimant to show that she was under paid and she has not done so.

51. Failure to provide the claimant with a contract: The respondent provided the claimant with a copy of her contract of employment under cover of a letter dated 15 May 2019. The claimant also asked to be provided with a copy of the employee handbook. The claimant was not provided with a copy of the employee handbook during her employment and was only provided with a copy of the handbook in about March 2021, eight months after the end of the claimant's employment.

52. The contract of employment made reference to the employee handbook in respect of the disciplinary procedure and rules, disciplinary appeal procedure, and grievance procedure. In respect of each it stated that *"a more detailed explanation of the procedure is contained in the Employee Handbook."* When the claimant asked to be provided with a copy of the employee handbook the claimant was told that the *"because of the supposed restrictions imposed on them as an organisation by the provision of the general Data Provision Regulations (G.D.P.R.), this document could not be made available to"* her.

53. Section 1(1) of the ERA provides that "Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment." Section 3 (1) (a) of the ERA provides that "A statement under section 1 shall include a note- specifying any disciplinary rules applicable to the worker or referring the employee to the provisions of any document specifying such rules which is reasonably accessible to the worker."

54. Section 38 (3) Employment Act 2002 provides that: "If in the case of proceedings to which this section applies- (a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and (b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 … the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead." The minimum amount are to an amount equal to two weeks' pay, and the higher amount are to an amount equal to four weeks' pay.

55. The claimant's employment ended on the 31 July 2020, she commenced proceedings on 9 September 2020 and the claimant was provided with a copy of the Employee Handbook in about March 2021. During the claimant's employment she was not allowed access to the Employee Handbook by the respondent who kept it from her. The respondent throughout the claimant's

employment was therefore in breach of its duty to the claimant under section 1(1) ERA. It failed to provide an Employee Handbook in form accessible to the claimant.

Remedy hearing

56. The case is to be listed for a remedy hearing on the **20 August 2021**. The parties are to send to each other by **30 July 2021** and any witness statements on remedy and copies of any documents that they wish to rely on at the remedy hearing.

Employment Judge Gumbiti-Zimuto

Date: 25 June 2021

Sent to the parties on: 6 July 2021

S. Bhudia

For the Tribunals Office