Claim number 2401440/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Johnson**

Respondent: **L&M Sheridan Limited**

HELD AT: Manchester (by Cloud Video Platform) **ON:** 13 June 2022
BEFORE: Employment Judge Fearon

REPRESENTATION:

Claimant: Mr Andrew Johnson (husband)
Respondent: Ms Asch-D'Souza (representative – trainee solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for breach of the Working Time Regulations 1998 is dismissed following a withdrawal of that claim by the claimant.

2. The respondent did not breach the claimant's contract of employment. The claimant's claim for breach of contract is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a domiciliary care worker. She commenced employment with them on 6 January 2019. Her employment ceased on 6 November 2021 following her resignation. The claimant's claim as set out in the ET claim form dated 22 February 2022 is that:

1.1 throughout the whole of her employment with the respondent she was contracted to work 30 hours per week and the respondent was in breach of contract as they did not provide her with the 30 hours of work she was contractually entitled to and therefore she was not paid the amounts she was contractually entitled to;

1.2 she was not provided with working breaks between shifts on at least 20 occasions which was in breach of the Working Time Regulations 1998;

1.3 she claims for damage to her mental health.

2. The respondent disputes the claim on the basis that:

2.1 the claimant was not contracted to work 30 hours per week throughout the whole of her employment and that on average over the whole of her employment she worked more than 30 hours per week;

2.2 all changes to the claimant's hours were agreed with the claimant taking account of her childcare commitments. The respondent says that as the claimant was not willing to work the shifts they offered to her in accordance with her contract the respondent could not guarantee her 30 hours of work within the confines of the restricted availability the claimant provided to them;

2.3 the respondent denies the claim for breaches of the Working Time Regulations 1998;

2.4 the respondent denies the claim for damage to the claimant's mental health.

Preliminary matters

3. At the beginning of the hearing the Tribunal had to deal with several preliminary issues.

4. The respondent objected to the claimant referring in the claim to without prejudice discussions and correspondence with ACAS as the respondent had not waived that privilege. During discussions, the claimant accepted that privilege was not waived and the without prejudice ACAS discussions/correspondence should not be referred to in the claim.

5. The respondent objected to the claim for holiday pay which was not included in the ET claim form and raised only in the undated schedule of loss included in the agreed bundle for the hearing. The claimant confirmed she did not wish to make an application to amend her claim to include the claim for holiday pay and confirmed that the claim for holiday pay in her undated schedule of loss was withdrawn.

6. In the ET claim form the claimant claimed for damage to her mental health. The respondent contended that injury to feelings or damage to mental health is not a remedy the Claimant can seek in a wages claim and the claimant in any event had no evidence in support of such a claim. In the preliminary discussions, including that there was no freestanding claim for damage to mental health, the claimant confirmed that no claim was being pursued for injury to feelings or damage to her mental health and this aspect of the claim was withdrawn.

7. In relation to the claims for breaches of the Working Time Regulations 1998, the claimant confirmed that she claimed in respect of 24 instances of her not being provided with 11 hour breaks between her shifts during the period from 18 April 2020 to 4 July 2021. The respondent contended the claimant should have brought this claim within 3 months of 4 July 2021 and had failed to do so: ACAS was notified on 4 December 2021 and the claim was presented on 22 February 2022. The Respondent contended that the claimant was out of time in presenting her claim, that it was reasonably practicable for the claimant to bring her claim in time and that accordingly the Tribunal lacks any jurisdiction to hear those claims.

8. The claimant gave evidence that she joined her union in June 2021 and she had obtained advices from her union and ACAS prior to 28 September 2021. She gave no explanation as to why it was not reasonably practicable to bring her claim for breaches of the Working Time Regulations 1998 within the relevant time limits other than she was trying to reach agreement with her employers on her working pattern.

9. After giving evidence and following the respondent's oral submissions, the claimant accepted that the claim for breaches of the Working Time Regulations had not been brought within the relevant time limits nor was there a good reason not to bring it within a reasonable period thereafter and she withdrew the claim for breaches of the Working Time Regulations 1998.

The Issues for the Tribunal to decide

10. It was agreed by the parties that the issues were:

    10.1 What contractual terms were agreed and when in relation to the claimant's working hours?

    10.2 Did the respondent provide the claimant with the 30 hours of work per week which she contends she was contractually entitled to?

    10.3 Between what dates does the claimant allege she was not provided with 30 hours per week of work in breach of her contract of employment?

    10.4 What losses are claimed and what damages is the claimant entitled to?

Evidence

11. I considered the agreed bundle of evidence provided by the parties comprising 238 pages as well as the statement of the claimant and the statement of Miss Samantha Sheridan on behalf of the respondent. I heard evidence from Miss Sheridan and from the claimant.

Findings of Fact

12. The claimant applied for a job with the respondent in October 2018 and on her application form she indicated her preferred working hours of 19 hours per week.

The claimant commenced employment with the respondent as a care worker on 6 January 2019. The contracted hours agreed at the commencement of her employment and set out at section 5 of the claimant's contract of employment were 75 hours per lunar month; this worked out at an average of 18.75 hours per week. In evidence the claimant accepted these were the contractual hours she agreed with the respondent.

13. Ms Samantha Sheridan, Operations Manager of the respondent, confirmed to the claimant in emails on 7 January 2019, that the claimant would be paid every 4 weeks for a total of 75 hours, the cut-off for that month was 13 January with payday on 18 January and then payday would be every 4 weeks after that.

14. Miss Sheridan explained to the claimant at the commencement of her employment her hours were built up because before all checks, including CRB checks were completed, the claimant had to work with a supervisor and less hours were available on that basis.

15. The claimant says she was paid for an average of 68 hours per month from the start of her employment until July 2019. Miss Sheridan disputed the claimant's calculations on average hours on the basis that they had been rounded down which was incorrect and did not include training time, travel time nor any sickness absences or holidays. The information provided to the claimant in response to her request for hours worked did not include this information as those aspects were worked out on the payroll system. The respondent's records confirm the claimant worked her contracted 75 hours until September 2020, then 100 hours every 4 weeks on average from September 2020 until the end of June 2021 following the claimant's flexible working request.

16. In July 2019, the respondent changed its terms and conditions of employment by agreement and new contracts were sent to the 54 employees whom the changes applied to. The contract sent out to those 54 employees stated that the contractual hours were an average of 30 hours per week. The apprentice who sent out the contracts on a block basis to the 54 employees, realised that a mistake had been made. As soon as that mistake was discovered the respondent notified the 54 affected parties that the 30 hours was a typographical error and on 24 July 2019 sent out an amended contract confirming the correct contracted hours. There was

a factual dispute about whether it was subsequently explained to the claimant that this was an error and I will return to that in my conclusions.

17. In March 2020 the claimant asked to work increased hours to assist her financially as her husband had been furloughed. The respondent agreed to this to assist the claimant financially in the circumstances of the pandemic. The respondent did not know how long the pandemic situation would last and therefore did not formally agree to permanently change the claimant's contracted hours; the claimant's contracted hours remained 75 hours over a four week period, an average of 18.75 hours per week. There was no contractual variation because in reaching this informal arrangement the parties had no intention to create legal relations.

18. Between March 2020 and September 2020 when her husband returned to work, the claimant was paid an average of 22.5 hours per week. These hours are in excess of the claimant's contractual hours throughout that period of 18.75 per week.

19. The claimant had a meeting with Michelle Sheridan on 9 September 2020. The meeting notes confirm this was an informal chat to discuss the claimant's request to change her hours straight away as her children were back at school, her husband was returning to work and she would need to work around her husband's rota because of childcare issues. She said she needed a minimum of 25 hours per week currently due to her husband having been furloughed. It was agreed that the claimant would provide her availability based on her husband's working hours and both the claimant and respondent would try to be flexible and work together around this.

20. The meeting minutes record that the claimant said she was really enjoying doing extra hours as opposed to the set hours she started on. In the meeting on 9 September 2020, the claimant agreed to a minimum of 25 hours on average over a four week period as this was more than the 18.75 hours she was currently contractually entitled to.

21. The claimant's hours were increased to a minimum of 25 hours per week averaged over 4 weeks on a temporary basis because at that stage things were uncertain and changing week to week due to the pandemic. Again, there was no contractual variation because in reaching this informal arrangement the parties had no intention to create legal relations.

22. In February 2021, the claimant had an appraisal. She did not ask about her contracted hours at the appraisal. When asked when she specifically raised the issue of working 30 hours per week, her evidence was that if she asked for more hours, she never received them until the pandemic. The pandemic of course started in March 2020 well before that appraisal taking place. I find that the claimant did not make a specific request to the respondent in February 2021 about working 30 hours per week.

23. By letter dated 10 June 2021 the respondent invited the claimant to a meeting on 15 June 2021 to discuss her varying working pattern, possible changes to her working pattern and whether that would be on a permanent or temporary basis.

24. A meeting took place on 15 June 2021 to discuss the claimant's hours as it had been noted from the rota that the claimant required specific days off in the week and that was making it difficult for the respondent to provide the claimant with her contractual hours. The respondent wanted to discuss the position and try and reach a formal agreement which would work for both them and for the claimant, including accommodating the claimant's needs due to her husband's working rota.

25. The claimant did not raise in that meeting on 15 June 2021, that she was not already being allocated 30 hours per week, because she just wanted to reach an agreement on her hours and going forward to have 30 hours per week. The claimant wanted two days off per week and to work around her husband's shifts for childcare reasons. The respondent agreed to consider what had been discussed about the claimant's working pattern to see what could be accommodated for her going forward. The claimant also told the respondent in that meeting that in around September/October 2021 her husband would be going back to the office; she agreed with the respondent that her hours could be reviewed at that time if the claimant needed to change them at that later date.

26. Sam Sheridan sent an e-mail dated 17 June 2021 to the claimant to confirm what had been discussed in their meeting on 15 June 2021. The claimant relies upon that e-mail as evidence that as of that date she was already on agreed contractual hours of 30 hours per week. The email confirms that going forward the claimant would work 30 hours per week on average with flexibility to take account of the claimant's husband's rota. The email confirms this arrangement would be confirmed "in a formal letter so it will form part of your contract and we will confirm a start date of when this will be starting from." I find that prior to 17 June 2021 there was no agreed contractual term for the claimant to work on average 30 hours per week over a 4 week period and as at that date her contractual hours remained on average 18.75 per week, over a 4 week period.

27. On 21 June 2021 Ms Sheridan wrote to the claimant to confirm the decision reached on the claimant's request for flexible working and further to the meeting on 15 June 2021. Ms Sheridan confirmed in that letter that the following terms were a permanent variation to the claimant's contract and would be effective as from Monday 28 June 2021:

"We will now wait until your husband has his rota from his employer, it has been agreed you will send this rota to us and we will allot available hours based on this, at that time. As agreed, we will be able to offer you 30 hours a week depending on your husband's rota. You will work weekend off and weekend on in a 2 week period and in the week you work weekends we will pick the days off to suit the business' needs."

28. On 28 June 2021 11:58 the claimant emailed the respondent saying it was her understanding they'd fit shifts around her husband's working pattern and she would work 4 weeks of earlies but differing shifts when he was working 7-3. She said once this was confirmed she would send copies of her husband's rota and asked how far in advance the rota was needed. 2 minutes later Sam Sheridan replied to the claimant saying "Yes that's fine with the availability. If you could provide as much notice as possible that would be great."

29. When asked in cross examination if it was agreed that the email reply was confirmation of agreement to the shift pattern in the claimant's e-mail, Miss Sheridan's evidence was that there was no agreement to that permanent earlies shift pattern and the respondent was looking to work around the claimant's husband's rota and then trying to reach agreement on this in the subsequent emails with the claimant. The emails of 5 and 7 July 2021 discussed whether the claimant's shifts were to start at 4pm or 3pm when her husband was working 7-3pm and the respondent agreed to 4pm starts when they could and if not school hours as previously mentioned. Sam Sheridan's email to the claimant dated 14 September 2021 confirmed that her email of 28 June 2021 was confirmation that the claimant should send her husband's rotas and the availability sounded fine but was not agreement to the claimant working a full block of early shifts regardless of whether the claimant's husband was working or not.

30. The claimant then continued to work for the respondent on the basis of the changes to her hours and on the flexible basis agreed to accommodate the claimant's husband's working rota for childcare reasons.

31. On 9 September 2021 the claimant emailed the respondent saying in the week commencing 18 October 2021 her husband was working 7-3 so that week she would need to work school hours or from 4pm. She did not provide her husband's full rota at that time.

32. On 10 September 2021 Sam Sheridan emailed the claimant asking for the full month of her husband's rota as was agreed in June 2021 when her contract was varied and the claimant then provided the rota.

33. On 13 September 2021 the claimant emailed Sam Sheridan about her shifts and queried how many hours she had been offered in the week commencing 23 August 2021. Sam Sheridan replied in her email dated 14 September 2021 that over the 4 week period from 23 August 2021 to 19 September 2021 the claimant worked an average of 28.25 hours per week including the 6 days holiday there had been confusion about; she also confirmed that due to the confusion about the claimant's holiday days no holiday entitlement would be taken off her and the claimant would get paid leave for the hours she lost that week due to the respondent's error on the holiday days. The claimant was 1.75 days short of her contractual 30 hours per

week over that 4 week period which was due to her refusal to work a late shift on her husband's day off, the refusal being contrary to the agreement reached with the respondent and which took effect on 28 June 2021.

34. The claimant maintained that there had been agreement for her to work permanent earlies and indicated she was going to raise a formal grievance. The respondent on 24 September 2021 wrote to the claimant inviting her to a meeting to discuss that grievance. The claimant replied that she had not yet raised a grievance and confirmed she would be off work with work related stress and she self certified her absence. As she was off sick, her shifts were re-allocated. The claimant did not raise issue about that until 28 September 2021 when she wrote asking for payment for shifts not having been allotted during her absence.

35. The claimant remained off sick and on 1 October 2021 submitted a GP fit note for the period of her absence up to 15 October 2021.

36. On 6 October 2021 the claimant resigned from her employment with the respondent. The claimant remained off sick until her employment ceased on 6 November 2021 at the end of her notice period.

Discussion and conclusions

37. I find that the claimant was contracted to work an average of 18.75 hours a week from the commencement of her employment until July 2019 on the basis of her original contract. I find that over that period she worked her contracted hours.

38. I find that there was an agreed change to her terms and conditions in July 2019 but that her average hours of 18.75 per week did not change at that time.

39. Ms Sheridan at paragraph 7 of her statement gives evidence that the claimant's contract was amended by mutual agreement on 23 July 2019, with the claimant's contracted work hours remaining fixed at 18.75 per week, her shifts remaining unchanged and the hourly rate being agreed at £9.00. She says the error of 30

hours in the contract was discussed with the claimant and then the amended contract sent out to her. In evidence the claimant denied having that conversation and then accepted she may not have remembered it rather than it not having taken place at all.

40. The claimant was asked in cross examination if she had ever had discussions with the respondent in July 2019 about working 30 hours per week and her evidence was that she just expected to get the hours stated on the contract. When asked if her shifts changed after July 2019 and whether there was a change in her shift pattern her evidence was that her shifts changed when she asked for more hours and was given overtime. She gave no evidence as to the specific date when she discussed and agreed with the respondent an increase in her hours to an average of 30 hours per week.

41. I accept the respondent's evidence that that the error relating to working hours in the contract sent out to 54 employees by the apprentice in July 2019 was explained to the claimant. I find that there was no variation of the contractual term in relation to the claimant's hours in July 2019. I find that the claimant continued to work on the basis of her existing contractual hours of 18.75 hours per week.

42. I find that in September 2020, it was agreed the claimant's hours were increased on an informal and temporary basis to an average of 25 hours per week (averaged over a four week period), shifts being allocated depending on the claimant's husband's rota. From September 2020 the claimant was working in excess of her contracted 75 hours per 4 week period.

43. I find there was no agreement reached between the claimant and respondent in June 2021 for 4 weeks of permanent earlies and 1 week of permanent lates irrespective of the claimant's husband's day off. The letter dated 21 June 2021 sets out the agreement reached which was to take effect from 28 June 2021 including that the claimant's hours would be increased to 30 hours per week on average over a 4 week period, depending upon the claimant's availability taking account of her husband's rota which was to be provided to the respondent as soon as the claimant was able; the hours/shifts offered would take account of the respondent's business needs as well as the claimant's availability.

44. I find that the claimant worked her contracted hours from the commencement of her employment until September 2020 and then worked in excess of her contracted hours from September 2020 until the end of June 2021. There was no contractual entitlement to an average of 30 hours per week prior to 28 June 2021.

45. The only shortfall of hours below an average of 30 per week over a 4 week period occurred in August/September 2021 when there was a 1.75 hours shortfall. That shortfall was due to the claimant's refusal to work hours offered and her failure to abide by the agreement reached with the respondent in June 2021 and was not due to the respondent failing to offer the claimant hours in accordance with the agreed contractual terms.

46. I accordingly find that the respondent provided the claimant with the hours she was contractually entitled to and did not breach the claimant's contract of employment. The claimant's claim is not well founded and is dismissed.

Employment Judge Fearon

Date 16 August 2022

JUDGMENT SENT TO THE PARTIES ON

18 August 2022

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