



EMPLOYMENT TRIBUNALS

Claimant: Miss L. Robinson

Respondent: White Pill Ltd

Heard at: Newcastle ET via CVP **On:** 14 November 2022

Before: Employment Judge G. King

Representation

Claimant: Mr. P. Robinson

Respondent: Mr. Z. Rafiq

JUDGMENT having been sent to the parties on 24 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By her claim form, which was received by the Tribunal on the 14 June 2021, the Claimant brings claims arrears of pay and failure to provide a written contract. She also seeks a determination of her particulars of employment.
2. The Claimant's is that she had a verbal contract with the Respondent to work a minimum of 30 hours per week. She also contents that she is entitled to be paid £11.00 per hour.
3. The Respondent acknowledges that the Claimant was never provided with a written contract. The Respondent states that there was a verbal, zero hours contract with the Claimant, and that the rate of pay is the national minimum wage.

The Issues

4. The issues for the Tribunal to decide are therefore:

- a. Was the Claimant's contract with the Respondent for a minimum of number of hours per week?
- b. If so, what was the minimum of number of hours?
- c. Was the Claimant's contract with the Respondent for her to be paid the national minimum wage or £11.00 per hour?
- d. If it was for £11.00 per hour, did the Respondent fail to pay the Claimant the correct wage in line with the contract?

The Facts

5. The Respondent is an extended hours pharmacy open seven days per week from early until late.
6. The Claimant started to work for the Respondent following her seeing an advert in a newspaper, advertising the position. The Claimant states that the position was advertised as full-time. The advert is not available to the Tribunal.
7. Her employment started on 30 June 2008. She initially worked 44 hours per week. This is supported by the payslip dated 5 August 2018.
8. At a later date, this was changed 30 hours stop the reasons for this are disputed. The Claimant says it was at her request, and the Respondent says it was due to business need. The Tribunal is of the opinion that one of these reasons should not prevent the other from also being the case. The Respondent gave evidence that staff can refuse hours offered and these would then be offered to other staff.
9. The Tribunal finds this is consistent with the Claimant asking to do fewer hours than the Respondent offered her. The Tribunal also notes that the Claimant worked approximately 25 hours a week in October 2019 and January 2020, which is consistent with hours being variable either by mutual agreement, business need, or both.
10. The Claimant was off sick for approximately three months in 2020, returning to work in May 2020. She returned on 18 hours per week, working Monday, Wednesday and Friday. The Claimant says this was part of a phased return. The Respondent says that this was due to business need. As above, the Tribunal does not consider that one excludes the other.
11. This arrangement lasted for three months, then the Claimant's hours were put back up to 30 hours per week. The Claimant continued to work 30 hours per week, working Monday to Friday, until June 2022. From June 2022, her hours were changed to 18 hours per week, working Wednesday, Thursday and Friday.
12. The Claimant has raised her concerns, via two formal grievances, seeking an increase in her hours (back to 30 hours per week) and an increased in her rate of pay. She has refused to sign to documents given to her by the Respondent during appraisal meetings with the Respondent in April 2022;

one to say she agrees she is on a zero hours contract, and the other to say she agrees that no one and the Respondent business is being paid £11.00 per hour.

13. Both parties have referred to Standard Operating Procedures (“SOPs”) which have been signed by the Claimant. Neither party has included these in their documents and the Tribunal and the Tribunal made it clear it will not consider the SOPs as these have not been submitted.

The Law

Terms of the contract

14. The Tribunal has the power, under s.11 of the Employment Rights Act (“ERA”), to determine contract terms. These terms are then as if given by the employer, pursuant to s.12 ERA:

S.11 ERA - References to Employment Tribunals.

- (1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an Employment Tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.
- (2) Where—
- (a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and]
 - (b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part, either the employer or the worker may require the question to be referred to and determined by an Employment Tribunal.
- (3) For the purposes of this section—
- (a) [omitted]
 - (b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.
- (4) An Employment Tribunal shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—
- (a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.

(5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) also applies for the purposes of subsection (4)(a).]

S.12 ERA Determination of references.

(1) Where, on a reference under section 11(1), an Employment Tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the Tribunal.

(2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an Employment Tribunal may—

(a) confirm the particulars as included or referred to in the statement given by the employer,

(b) amend those particulars, or

(c) substitute other particulars for them, as the Tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the worker in accordance with the decision of the Tribunal.

(3) Where on a reference under section 11 an Employment Tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9, the Tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the Tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the Tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

Arrears of pay

15. An employee has the right not to suffer unauthorised deductions from pay, pursuant to s.13 ERA.

S.13 ERA — Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised— (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
- (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
- (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
- (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
- (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Failure to provide written particulars of employment

16. The relevant law is s.1 of the ERA and s.38 of the Employment Act 2002 (“EA”):

S.1 ERA - Statement of initial employment particulars.

- (1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.
- (2) Subject to sections 2(2) to (4)—
 - (a) the particulars required by subsections (3) and (4) must be included in a single document; and
 - (b) the statement must be given not later than the beginning of the employment.
- (3) The statement shall contain particulars of—
 - (a) the names of the employer and worker,
 - (b) the date when the employment began, and
 - (c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
- (4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—
 - (a) the scale or rate of remuneration or the method of calculating remuneration,
 - (b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals), (c) any terms and conditions relating to hours of work including any terms and conditions relating to—
 - (i) normal working hours,
 - (ii) the days of the week the worker is required to work, and
 - (iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,
 - (d) any terms and conditions relating to any of the following—
 - (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated), (ii) incapacity for work due to sickness or injury, including any provision for sick pay, (iia) any other paid leave, and
 - (iii) pensions and pension schemes,
 - (da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,
 - (e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

- (f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,
 - (g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
 - (ga) any probationary period, including any conditions and its duration,
 - (h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,
 - (j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,
 - (k) where the worker is required to work outside the United Kingdom for a period of more than one month—
 - (i) the period for which he is to work outside the United Kingdom,
 - (ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,
 - (iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and
 - (iv) any terms and conditions relating to his return to the United Kingdom,
 - (l) any training entitlement provided by the employer, (m) any part of that training entitlement which the employer requires the worker to complete, and
 - (n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of. (5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—
 - (a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
 - (b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.
- (6) In this section "probationary period" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—
 - (a) commences at the beginning of the employment, and (b) is intended to enable the employer to assess the worker's suitability for the employment.

S.38 EA - Failure to give statement of employment particulars etc.

- (1) This section applies to proceedings before an Employment Tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.
- (2) If in the case of proceedings to which this section applies— (a) the Employment Tribunal finds in favour of the worker, but makes no award to him 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 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change)the Tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
- (3) 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.
- (4) In subsections (2) and (3)—
 - (a) references to the minimum amount are to an amount equal to two weeks' pay, and
 - (b) references to the higher amount are to an amount equal to four weeks' pay.
- (5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
- (6) The amount of a week's pay of [a worker]⁹ shall— (a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and
 - (b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay). (6A) The provisions referred to in subsection (6) shall apply for the purposes of that subsection—
 - (a) as if a reference to an employee were a reference to a worker; and
 - (b) as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.

Deliberation

17. The Claimant has requested a written contract. The Tribunal cannot order the Respondent to produce one, but the Tribunal may award the Claimant two or four weeks' pay if, at the time of submitting her claim to the Tribunal, the Respondent had failed to provide the Claimant with a written contract, pursuant to s.38 of the EA. This is subject to the Claimant succeeding on another head of claim. There is no stand-alone right to make a claim for not being provided with a written contract of employment.
18. The Tribunal has the power, under s.11 ERA, to determine contract terms. These terms are then as if given by the employer, pursuant to s.12 ERA.
19. The Claimant also made a claim for pension contributions. This was not claimed initially in her ET1, nor was it on her calculation of loss. This was a new claim that was mentioned for the first time at the hearing. The Respondent has not had any chance to respond to this claim, and the Claimant has not been given permission to amend her claim. The Tribunal will therefore not consider this claim.
20. The Claimant says she wants her qualification to be recognised. This is not a claim the Employment Tribunal can hear. The Employment Tribunal has no power to set rates of pay dependent on qualifications. The Employment Tribunal can only look at what was contractually agreed between the parties.
21. The Claimant contends that she is contractually obliged to be paid £11.00 per hour. The Tribunal has seen no evidence in support of this. The Claimant has referred in her witness statement to being told that other staff are on this rate, but she does not say when or with whom these conversations were had. There are no statement and no evidence to support this. No witnesses have attended the Tribunal to support this claim. Even if other staff are on £11.00 per hour, this would not necessarily alter the Claimant's contract with the Respondent. The Tribunal notes that the Claimant has been employed by the Respondent since 2008, and has only recently queried the fact she is on the national minimum wage.
22. It may be that the Claimant has misunderstood the functions of the Employment Tribunal. The Employment Tribunal cannot be used as a forum for salary review. As stated above, the Employment Tribunal can only look at what was contractually agreed between the parties. There is no evidence to contradict that this contract is for the Claimant to be paid the national minimum wage, which she has been paid since 2008. It is inconceivable that the parties reached an agreement for £11.00 per hour in 2008 and the Claimant has then waited 14 years to challenge this. The Tribunal makes a finding that it is a term of the contract that the Claimant's rate of pay is the national minimum wage.
23. The Claimant's other claim is that her contract is for a set minimum of 30 hours. The Tribunal has considered the contract history in light of the findings of fact above.

24. The Tribunal needs to determine what was agreed the parties in relation to the contract. The Tribunal's powers here are limited. If the parties have agreed something, but it is vague and indeterminate, the case of *Everett v JW Sparrow Contracts Ltd* (ET Case No. 15374/79) states that the Employment Tribunal can only specify an equally indeterminate term.
25. The statutory definition of a zero hours contract inserted into the ERA by the 2015 Act focuses on the lack of certainty of any work being offered by the employer. S.27A(1) ERA defines a zero-hours contract as a contract under which the worker's obligation to do work or perform services is conditional on the employer making work or services available, and under which "there is no certainty that any such work or services will be made available to the worker". The statutory definition is therefore neutral as to whether the worker should be under any obligation to work — the worker's obligation must be conditional on work being offered but that is not to say that the worker must always be obliged to do the work if offered.
26. The Claimant has accepted that her hours and days of work have varied in the past. From the evidence the Tribunal has heard, the agreement reached between the parties in 2008 was not one that meets the definition of a zero hours contract as defined at s.27A of the ERA; that is to say the agreement to do work for the Respondent was not an agreement to do so conditionally on the Respondent making work available to the Claimant, and there is no certainty that any such work will be made available to the Claimant. The Claimant was expected to do set hours and set days, but these hours and days could be variable. The Respondent agreed to provide work and the Claimant agreed to do it.
27. All the Tribunal is able to conclude, however, is that there was this agreement and no other. The Tribunal can make no determination on what hours were agreed; only that the Claimant agreed to work for the Respondent on agreed dates. The Tribunal therefore cannot conclude that the Claimant is entitled to a minimum of 30 hours per week. As such, the Tribunal does not find that there has been any deduction from wages.
28. As the Claimant has not succeeded on any other head of claim, the Tribunal cannot make any award in respect of the Respondent's failure to provide a written contract.

Employment Judge King

Date: 9 December 2022

REASONS SENT TO THE PARTIES ON

Case No: 2501199/2022

12 December 2022

Miss K Featherstone

FOR THE TRIBUNAL OFFICE