EMPLOYMENT TRIBUNALS

First claimant Paul Ezikwa
Second claimant Ashraf Pandor
Third claimant Charlotte Ezikwa

Respondent G (anonymised due to an anonymisation order)

Heard at: Cambridge **On:** 31 October 2022 and 1 November 2022

Before: Employment Judge Freshwater

Appearances
For the First claimant: in person
For the Second claimant: did not appear
For the Third claimant: in person
For the Respondent: Mr McFarlane (professional representative)

RESERVED JUDGMENT

1. The first claimant's claim for unfair dismissal against the respondent is not well founded and is dismissed.

2. The third claimant's claim for unfair dismissal against the respondent is not well founded and is dismissed.

3. The second claimant's claim is dismissed on withdrawal.

4. The first claimant's claim for notice pay succeeds. The amount awarded is £75.66. This is calculated at 3 weeks x £25.22.

5. The third claimant's claim for compensation for notice pay succeeds. The amount awarded is £80.31. This is calculated at 3 weeks x £26.77.

ORDER

1. An order is made under Rule 50 of the Employment Tribunal Rules of Procedure. The order is the anonymisation of the respondent. The identity of the respondent should not be disclosed to the public. This includes the listing of this hearing and any documents forming part of the public record or entered on the Register. This judgment has been anonymised for that purpose.

RESERVED REASONS

<u>The claim and issues</u>

1. The claimants were employed as carers by (and for) the respondent. They were dismissed with effect from 20 September 2020. The reason for their dismissal was said to be redundancy.

2. The claimants claimed that they had been unfairly dismissed by the respondent because there was no fair reason for them to have been made redundant. They did not accept that a redundancy situation existed. They also claimed that they should have received more notice pay because they had expected to be kept on furlough for longer or that they should have received more redundancy pay. They said that if they had been kept on furlough for longer, then they would have been entitled to more holiday pay.

3. The respondent denied that the claimants had been unfairly dismissed. It was submitted that the redundancy was fair because the respondent's circumstances had changed so that the claimants' position had become redundant. In the alternative it was argued that there was some other substantial reason for the redundancy, and that if they should not have been made redundant that they could have been fairly dismissed in due course. The respondent's case was the claimants had been paid the correct amount of holiday pay. It was accepted that the respondents had not received the correct amount of redundancy pay because they had been paid 80% of their weekly

salary (due to being furloughed). If it was found that they had been unfairly dismissed, then the redundancy payment should offset any notice pay.

Procedure, documents and evidence heard

4. The case was heard in person. An agreed bundle of evidence was filed electronically (410 pages long in the PDF version). In addition, I read witness statements from Herbie Pool and Megan Orange on behalf of the respondent. The claimants submitted a joint witness statement, which I accepted as evidence even though it was not in the correct format. Mr Ezikwa provided an additional witness statement of his own. The claimants filed schedules of loss.

5. At the start of the hearing, I was told that the second claimant had already withdrawn his claim. As such, I proceeded with the case on the basis that the first claimant was Mr Ezikwa and the third claimant was Miss Ezikwa. For clarity, I have recorded that the second claimant's claim is dismissed on withdrawal. It was agreed with the parties that the issues for consideration were liability and remedy.

6. I heard from the following witnesses on behalf of the Respondent: Herbie Pool and Megan Orange. The first and third claimants each gave evidence on their own behalf. I heard submissions from the first and third claimant, as well as on behalf of the respondent.

7. I agreed to allow the late submission of evidence from the third claimant. This was a screenshot of a text message conversation. During the hearing, Mr McFarlane submitted a timeline of the Coronavirus job retention scheme 2020. This was emailed to the tribunal and to the claimants.

8. The evidence and submissions took place over 2 days, and judgment was reserved.

9. During the hearing, it became clear to me that personal information about the respondent's health and his care plan was an important part of the evidence in this case. I raised this issue with the parties. The claimants did not object to information about the health of the respondent being protected. The respondent submitted that a restricted reporting order made Rule 50(3)(b) of the Employment Tribunal Procedure Rules 2013 would be sufficient in this case to protect the respondent's health information. This would have prevented any reporting of the respondent's health or care plan. After the hearing, I reviewed the position and concluded that a restricted reporting order could only be made under Rule 50(3)(d) which could only apply to certain cases within the meaning of section 11 and 12 of the Employment Tribunals Act 2010. This was not such a case.

10. After the hearing, I considered the submissions I had heard from the claimants and the respondents. I decided that it was necessary in the interests of justice to make a different order under Rule 50(3)(b) of the Employment Tribunal Procedure Rules 2013. This order is to prevent the disclosure of the identity of the respondent to the public, including this judgment which will form part of the public record.

11. In deciding whether it was necessary in the interests of justice to make such an order, I took into account the right to respect for private life (article 8 of the European Convention on Human Rights [ECHR]) and balanced this with the importance of open justice (which is paramount) and the right to a fair and public hearing (article 6 of the ECHR) and the right to freedom of expression (article 10 of the ECHR). In summary, I found that an order under Rule 50(3)(b) was the most proportionate measure available to me to protect the details of the respondent's health and care plan which are an important part of his right to respect for his private life. This was preferable to redacting parts of my judgment and reasons, which would have meant the case could not be understood in context.

12. Neither the claimants nor the respondent's representative had the opportunity to make submissions to me about an alternative order under Rule 50(3)(b). Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under Rule 50(3)(b) is made, *may apply to the Tribunal in writing for the order to be revoked or discharged,* either on the basis of written representations or, if requested, at a hearing.

Findings of fact

13. The claimants were employed by the respondent as personal assistants. This is because the respondent required personal care following an accident that caused him to become wheelchair bound. It was not in dispute that he requires continuous care and support with everyday tasks from being helped to get up in the morning and getting dressed, to having food prepared for him.

14. The first claimant commenced his employment on 11 September 2017. The third claimant commenced her employment on 27 September 2017.

15. The claimants were recruited through an agency called AskJules Limited. AskJules Limited is a company that assists young disabled adults to manage their personal (health) budgets. The services that it provides include: recruitment, accounts, budget management and payroll. Mr Pool is employed by AskJules Ltd and is responsible for Human Resources. Miss Orange is also employed by AskJules Ltd. She is the respondent's support manager.

16. The respondent employed the claimants when he was a student at the University of Birmingham, where he lived during term time. Both claimants earned £10 and worked for 12-hour shifts. During university holidays, the claimants were live-in carers for up to 10 days at a time.

17. Following his graduation from university in June 2019, the respondent moved back to his hometown which was approximately 80 miles away from Birmingham. The claimants were still employed by the respondent, who paid for their increased travel expenses. The claimants worked as live-in carers, earning £10 an hour (£240 a day).

18. Towards the end of 2019, the respondent said that his needs had changed and a new business case was prepared on 14 November 2019 setting out the new care needs of the respondent. In essence, the respondent proposed a change to the terms and conditions of the claimants' employment. It was said that the respondent would require live-in personal assistants or carers working one

week on and one week off with two personal assistants on duty at any time (one covering the day shifts and one covering the night shifts).

19. On 25 February 2020, a meeting was held between the claimants and Mr Pool. The new arrangements were discussed. It was agreed that Miss Orange would create a new rota from the 1 March 2020. She was to schedule blocks of 3-day live-in shifts. The rate of pay was to remain the same (£10.00 per hour for 24 hours shifts). After 3 months, the shifts would increase to blocks of 5-day live-in shifts, and ultimately to full-time 7 days live-in shifts at a daily rate of pay to be agreed. During this meeting, the claimants said that they would be prepared to continue with the temporary 3 live-in days, but would not be able to work for the respondent the 5- and 7-day shifts started.

20. On 1 March 2020, the respondent ceased paying travel expenses for the claimants. It was agreed that the claimants (and the other personal assistant) would work at least a 3-day live-in period each before returning for another shift. This would keep the travel expenses down for the personal assistants.

21. On 29 March 2020, the claimants were furloughed due to the Covid-19 pandemic. The respondent had a live-in carer because he was a very high-risk person and changes of personnel needed to be kept to a minimum. The respondent found this to work well, as he had found hand-overs between carers difficult to cope with around his work and travel.

22. On 27 April 2020, a meeting took place by telephone between the claimants, Mr Pool and Miss Orange. A letter was sent setting out the detail of that meeting. It said that the respondent's care plan was for live-in carers who would work two weeks on and two weeks off. The rate of pay would be less than that of a carer paid at an hourly rate. The claimants were warned that they were at risk of redundancy.

23. On 4 May 2020, another meeting took place between the claimants and the respondent's representatives. The letter (dated 6 May 2020) that summarised the meeting said that the respondent had agreed to furlough the claimants "until further government notice" and then "make redundancy". However, the letter also said that it was not formal notice of redundancy and that a final decision

had not yet been reached. The letter said that a third consultation meeting would take place.

24. On 26 May 2020, a third consultation meeting took place between the claimants and the respondent's representatives. The claimants were told that the new carers would be employed on a live-in basis, working for 2-weeks on and 2-weeks off. The rate of pay would be £120. This was the normal rate of pay for a live-in carer. The claimants did not accept these terms as their pay would half over the course of a week.

25. On 16 July 2020, the claimants received an email from the respondent's representatives stating that the furlough arrangements would come to an end and redundancies made at the end of July 2020. The first claimant responded to say that this was not what had been previously agreed and furlough was continued. The claimants had understood that they would be furloughed until such time as the government ended the furlough scheme. I accept that they genuinely believed this to be the case. However, I find that this was not the intention of the respondent or his representatives and that, in essence, there was a misunderstanding between the parties on this point.

26. The claimants were furloughed again from 27 July 2020 until 30 September 2020. This was notified to them by an email from Mr Pool on 27 July 20202, following a conversation that Miss Orange had with the respondent.

27. The claimants were dismissed with effect from 30 September 2020. This was the effective date of termination of their contract of employment. They received redundancy payments as follows. The first claimant received £1,513.14. The third claimant received £1,070.84.

28. The first claimant was paid £408.85 a week during furlough. This was 80% of his usual wage (namely £511.06). He received notice pay, which the respondent accepted he was contractually entitled to, based on his furlough pay.

29. The third claimant was paid £428.34 a week during furlough. This was 80% of her usual wage (namely £535.43). She received notice pay, which the respondent accepted she was contractually entitled to, based on her furlough pay.

30. Both claimants were paid holiday pay. The holiday year of all the claimants began on 1 January and ended on 31 December. They were all entitled to 5.6 week's holiday per year, their holiday pay being based upon their average earnings over the previous 12 weeks. The first claimant received 212.5 hours of holiday pay on 9 October 2020 and a remaining 10.5 hours on 30 October 2020. He received a total of 223 hours holiday pay. The third claimant received 59.25 hours of holiday pay on 9 October 2020 and a remaining 112.50 hours on 30 October 2020. She received a total of 171.75 hours holiday pay.

31. The respondent's care needs changed again after the change in care plan that led to the dismissal of the claimants. This is because his health deteriorated. A new pattern of care was put in place.

The Law

32. Section 98(1) of the Employment Rights Act 1996 states that "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

    (a) the reason (or, if more than one, the principal reason) for the dismissal, and

    (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

33. Section 98(2)(c) of the Employment Rights Act 1986 says that "A reason falls within this subsection if it...is that the employee was redundant"

34. Section 139(1)(b) of the Employment Rights Act 1986 says that "for the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to... the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) 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."

35. The case *Safeway Stores plc v Burrell 1997 ICR 523, EAT* sets out the test that a tribunal must apply when considering whether an employee was made redundant for the purposes of section 139(1)(b) of the ETA 1996:

(i) was the employee dismissed?
(ii) 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?
(iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

36. Section 98(4) of the Employment Rights Act 1986 states that "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)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

(b)shall be determined in accordance with equity and the substantial merits of the case."

37. In *Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT*, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. Those factors are:
(i) whether the selection criteria were objectively chosen and fairly applied;
(ii) whether employees were warned and consulted about the redundancy;
(iii) whether, if there was a union, the union's view was sought, and
(iv) whether any alternative work was available.

Conclusions

38. The business need of the respondent changed in that he wanted live-in personal assistants or carers who would take on additional work (in respect of bowel management). This was considered necessary to meet the changing personal needs of the respondent, now that he was no longer a university student, as well as to save overall care costs. However, this does not mean that the work itself had diminished. The respondent still required the same type of work to be carried out in respect of his care needs. Indeed, broadly speaking, the type of work (caring for the respondent) had increased because there was a need for the respondent's new carers to deal with bowel management. Rather, it was the way in which his care needs would be met that was expected to change.

39. I am, however, satisfied that there was a redundancy situation in this case. This is because it was expected that the type of work in question would be done by less employees (a reduction from 4 personal assistants to 2 personal assistants or carers). The claimants were dismissed and the cause of this was mainly that the respondent needed 2 live-in carers working for long periods, not 4 people changing shifts more frequently. The fact that, ultimately, his care needs changed again and that this working pattern turned out to be unsuitable is not relevant. This is because, at the time of the consultation and redundancies, the respondent settled on what he believed to be a suitable plan.

40. Having found there was a genuine redundancy situation in this case, I considered whether the dismissal was fair or unfair. The respondent is an individual who employed the claimants as his personal carers (rather than a large company). There was not a large team of careers. He was reliant on 4 individuals. He was entitled to decide that he needed to change his care plan, and worked with his representatives to try and ensure that the claimants were consulted and treated fairly. The claimants were warned and consulted about potential redundancy. The respondent did listen to the claimants' views, and kept them on furlough for longer than he wanted. This provided a benefit to the third claimant, who received greater redundancy notice than she would otherwise have been entitled to. The respondent did not have access to large financial resources. He had to work within the budget available to him as an individual. There was no alternative work suitable for the claimants that could be provided by the respondent. The claimants did not want to work as live-in carers on a 2 week on and 2 week off basis, at the live-in carer rate. The respondent struggled with frequent changes of carers, and that was the reason he wanted 2 carers to work in two-week blocks.

41. In reaching my decision, I found that both the claimants were told they would be made redundant on 16 July 2020, although they were not told when this would take effect. On 27 July 2020 they were told that their employment would end on 30 September 2020. The fact they were retained on furlough until the end of September does not change this. Indeed, this happened because the respondent was trying to treat them fairly in that he recognised it was a difficult time to be out of work during the Covid-19 pandemic.

42. I do not find that the respondent was bound to keep the claimants on furlough until the scheme finally came to an end. Nobody knew when this would be. The important issue is whether or not the claimants were dismissed fairly and whether there was genuinely a redundancy situation. If there was, the respondent was entitled to dismiss the claimants rather than furlough them indefinitely. Of course, any such dismissal would have to made in accordance with the law.

43. I find that the claimants were not unfairly dismissed by the respondent, and that part of their claim is dismissed.

44. However, the claimants should have received notice payment reflecting their full pay rather than the 80% furlough rate of pay. The respondent's representative accepted that each claimant should have had three weeks' pay at 100% of their normal weekly wage. The amount of money that the claimants are owed is as follows:

    (a) the first claimant: £75.66. This is calculated at 3 weeks x £25.22.

    (b) the third claimant: £80.31. This is calculated at 3 weeks x £26.77.

45. The claimants were paid the correct amount of holiday pay by the respondent. That part of their claim is dismissed.

Employment Judge Freshwater

Date: 25 January 2023

Sent to the parties on: 26 January 2023

For the Tribunal Office