EMPLOYMENT TRIBUNALS

Claimant: Mrs P Lewis

Respondent: Basingstoke Mencap Services

Heard at: Bristol (by video)

On: 23 December 2022

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: Ms K Lewis – Claimant's daughter
For the Respondent: Ms M Akbar – Legal representative Peninsula

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant has been employed as a support worker by the Respondent since September 2015.

2. On 22 September 2021, she was informed that due to COVID-19 the Respondent had insufficient work to justify her 37 hours a week and she was placed on short-time working, of 31.25 hours per week.

3. She objected to that decision, contending that the Respondent was not contractually entitled to reduce her hours and therefore brought a claim of unlawful deduction from wages.

4. There was no dispute about the reduction in hours, or the amount of salary lost as a consequence (£708) and therefore the only issues for me were, firstly, as whether or not the Respondent was contractually entitled to impose this change to the Claimant's terms and conditions of employment. Also, secondly, the Claimant contended that even if the short-time working was a contractual entitlement, she did not accept that the Respondent was '*unable to provide her with work'*. In respect of the alleged contractual entitlement the Respondent

relied on a paragraph in the employee handbook ('the Handbook') [37], which stated:

Lay Off and Short Time Working
If we are unable to provide you with work we may need to lay you off for a period of time or reduce your working week whilst we try to resolve the situation. If you are laid off work, you will receive either statutory guarantee pay or your normal basic wage, whichever is the lower, for up to five days (pro-rata) of lay off.
After this period, there will be no entitlement to payment for any days not worked. We will normally only invoke this right as a last resort and for as short a time as necessary. Your continuity of employment with us will be protected during such a situation.

<u>The Law</u>

5. Section 13 of the Employment Rights Act 1996 (ERA) states:

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, …..

(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.

6. **<u>Hussain v Surrey and Sussex Healthcare NHS Trust</u> [2011] EWHC 1670, QBD**, gave guidance on whether or not a document or part of it was 'apt' for incorporation into an employee's contract of employment. The Court observed that there was no single test, but indications that the agreement was to have contractual effect included:

   - the importance of the provision to the contractual working relationship: so, the more important the provision alleged to be incorporated was, the more likely it was that the parties intended it to be contractual;

   - the level of detail prescribed by the provision;

- the certainty of what the provision requires: if a provision is vague or discursive, it is less apt to have contractual status;

- the context of the provision: a provision included among other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among provisions that provide guidance or are otherwise not apt to be contractual; and

- whether the provision is workable: the parties are not to be taken to have intended to introduce into their contract terms which, if enforced, would not be workable or make business sense.

The Evidence and Submissions

7. I heard evidence from the Claimant. The Respondent had provided statements from two witnesses, but sought to rely on the documents and oral submissions.

8. The Claimant's evidence can be summarised as follows (as relevant to the issues above):

    a. Her witness statement did not address the issues, referring to matters outside the scope of the claim.

    b. She agreed that she had been provided with and signed a copy of her contract of employment [27].

    c. She also agreed that she had been provided with a staff handbook [31], having signed for receipt of a copy, in March 2016 [74], although she said that this was '*one of them'* (with the implication that there may have been more than one version of the document, saying elsewhere '*three or four*').

    d. She also agreed that she had signed for receipt of an '*employee handbook update form'*, in April 2017 [79].

    e. She agreed that the Respondent had written to her on 22 September 2021, informing her as to the requirement for short-time working, giving her five and a half weeks' notice of its implementation [80].

    f. She attended a meeting on the subject on 6 October [82] and said that she was told that the Respondent didn't have work for her, but she didn't believe that was the purpose of the meeting, considering that the Respondent was taking this step to force her out.

    g. She agreed that she was subsequently informed that while her 'base hours' would be reduced to 31.5, if, in fact, she was required, on occasion, to work over those hours, she would be paid at the hourly rate of £9.48 [84], which she did, on occasion.

h. She was pointed to her 'statement of principal terms of employment' [27] and agreed that it stated, at its outset that '*This document sets out your principal terms and conditions of employment as required by section 1 of the Employment Rights Act 1996. Together with the Staff Handbook (except where explicitly stated otherwise) it constitutes part of the contract of employment …'*. She agreed that she had no evidence to support any assertion of hers that the copy of the Handbook in the bundle was any different to any other version she may have been provided with.

9. Ms Akbar made the following submissions on behalf of the Respondent:

   a. She referred to s.13 ERA.

   b. The Claimant had been provided, in advance of the decision to place her on short-time working with a contractual term to that effect, as contained in the staff handbook and which forms part of her contract.

   c. There was no requirement to provide her with reasons for that decision, but, in any event, she was given ample notice, was consulted with and in fact, did, on occasion, work in excess of 31.5 hours.

   d. Her hours were returned to normal in February 2022.

   e. No change has been made to the terms and conditions of her employment.

10. Ms Lewis said on behalf of the Claimant that the handbook now contained in the bundle was not a true copy.

<u>Conclusions</u>

11. The Claimant's signed contract of employment specifically incorporates the Handbook (unless stated otherwise).

12. The Claimant accepted that while there may have been several editions of the Handbook that she had no evidence that the 'lay off and short-time working' paragraph was not contained in all of them. (Likewise, it is clear, Ms Lewis had no basis upon which to make the assertion in her submissions that the copy in the bundle '*was not a true copy'*. The Claimant had made no reference to it in her witness statement and nor had she challenged the validity of the document when included in the bundle or requested disclosure of other versions.)

13. Clearly, the 'lay off and short-time working' paragraph is part of her contract of employment, as it is expressly incorporated into it and therefore is contractually enforceable.

14. Even, however, were it not so expressly incorporated, it is clearly a part of the Handbook that would be 'apt for incorporation', being, applying <u>**Hussain**</u>, an important consideration, being detailed and certain and it is set out in the context of other clearly contractual provisions, such as to how she would be paid and

what deductions could be made to her salary. Finally, the provision was clearly, as it proved, a workable one.

15. It was agreed evidence that the Claimant did in fact, at least on some occasions, work more than the 31.5 reduced hours and was paid accordingly. She also returned to full-time working in February 2022.

16. The Claimant provided no evidence to challenge the Respondent's contention that:

    The Basingstoke Mencap Trustees Report and Unaudited Accounts (pg 137) highlight a drop in the charities (sic) *net current assets at the end of the 2022 financial year. This included a decrease in donations and overall income during that year. This reduction in client hours and work led to the Claimant being placed on Short Time Working, and this was communicated to the Claimant.* [Ms Joslin's statement para. 4]

    and as explained to her in the meeting of 6 October 2021 [82].

17. Accordingly, therefore, I had no reason to doubt the Respondent's evidence on this point. In any event, I don't consider that it for this Tribunal to delve into the financial arrangements of an employer, or to seek to challenge their management decisions, in the absence of any evidence (as in this case) of any malicious intent on their part.

<u>Conclusion</u>

18. I find therefore that the Respondent was contractually entitled to impose short-time working on the Claimant, thus reducing her hours of work and pay, accordingly and that therefore such deductions cannot be, applying s.13, unlawful.

19. The Claimant's claim of unlawful deductions from wages therefore fails and is dismissed.

<u>Costs Application</u>

20. Ms Akbar applied for the Respondent's costs of defending against this claim on the basis that it had been unreasonable for the Claimant to have pursued it and also that she had been given a costs' warning on 20 December 2022.

21. Ms Lewis submitted that her mother was on the National Minimum Wage and would be unable to pay any such order.

22. The factors I considered relevant were as follows:

    a. Clearly, the claim was without merit, although I take into account that the Claimant is a litigant-in-person and both she and her daughter were clearly confused by the issues, having raised a host of irrelevant matters in her witness statement, while failing to address those that were relevant.

b. I note that the Respondent gave the Claimant a costs warning, offering payment of the full amount sought, but the Claimant said that she was unable or unwilling to accept that offer because it was on the condition that she sign a compromise agreement requiring her to give an undertaking that she had no knowledge as to any prospective personal injury claim against the Respondent, when that might not either now be the case, or possibly in the future.

23. I decided, therefore, to refuse the Respondent's application because:

   a. While the claim failed, it was not, on the basis of the Claimant's lack of understanding of the issues, unreasonable behaviour of hers to pursue it.

   b. While she did refuse an obviously entirely reasonable offer, it was, firstly, made very late in the day (a couple of days before this Hearing), which had it been made earlier, may have influenced my view on the second point, the Claimant's possible misunderstanding of the personal injury undertaking. If given more time to seek advice, or for consideration of the offer, then *perhaps* its refusal may have been more difficult to see as reasonable, but that is not the situation before me.

Employment Judge O'Rourke
Date: 18 January 2023

Reasons sent to the parties: 31 January 2023

For the Tribunal Office