Case No: 1303175/2021
&1304627/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms. Desrine Thomas**

Respondent: **Crowne Home Care Limited**

Heard at: **Birmingham** **On:** **23 December 2022 & 31 January 2023**

Before: **Employment Judge J. Jones**

Representation
Claimant: Mr Daley, Lay Representative
Respondent: Mr Mahmood, Solicitor

JUDGMENT having been sent to the parties on 8 March 2023 (after an administrative delay) and written reasons having been requested by the claimant on 6 February 2023 (and subsequently) in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant issued two claims in the Employment Tribunal, the first of which was issued on 16 July 2021, after a period of ACAS early conciliation between 19 April and 27 May 2021. This was a claim for holiday pay and arrears of pay (1303175/2021 – "the first claim").

2. The Claimant issued a second claim on 26 October 2021 following a second period of early conciliation between 30 September 2021 and 1 October 2021 (1304627/2021 – "the second claim"). In the second claim, the Claimant alleged disability discrimination and claimed again for holiday pay and arrears of pay.

3. Both claims came before Employment Judge Wedderspoon at a preliminary hearing in private on the 13 December 2021 when directions were given for a Hearing on the question of jurisdiction i.e. the time points that arose in the case. This took place before Employment Judge Gaskell on the 30 September 2022. Employment Judge Gaskell decided that the

disability discrimination claims were out of time but allowed the holiday pay and arrears of pay claims to proceed. He set out the issues to be determined at this Hearing (pages 92-93 of the joint bundle of documents). These remaining claims can be summarised as follows.

The claims

4. The Claimant was a support worker working for the Respondent until she commenced a period of sick leave at the end of June 2020. She claimed that she was fit to return to work in September 2020 but was not provided by the Respondent with any shifts and that, as a consequence, she suffered an unlawful deduction from her wages. The Claimant alleged that this deduction was continuing at the time she submitted her claims because she had been provided with no shifts by the Respondent since the end of her sickness absence, in breach of her contract of employment which, she said, provided for a guaranteed 30 hours of work per week.

5. The Claimant also alleged that she had accrued holiday pay during her sickness absence and on a continuing basis, which remained unpaid.

6. The Respondent asserted that the Claimant was a worker who was engaged on variable hours under a zero hours contract with no contractual guarantee of work. Further, the Respondent claimed that the Claimant was not in fact available for work after her sick leave ended due to the conditions she placed on the work she was able to do, and that this was the reason why she was not given any further shifts. The Respondent argued that the Claimant's engagement had in fact terminated on the 30 March 2021.

The evidence

7. The Tribunal received in evidence a joint file or bundle of documents running to 228 pages. References in these Reasons to page numbers are references to the pages of that bundle, unless otherwise stated.

8. The Claimant produced a written statement and was cross-examined. Adjustments were made for her by way of provision of a special chair in the Tribunal room, and the taking of breaks as required.

9. The Respondent called Mr Harry Singh a Director of the Respondent company to give evidence based on a written statement also and he was cross-examined by Mr Daley.

10. Both representatives made closing submissions and Mr Mahmood for the Respondents submitted a written skeleton argument.

The Facts

11. Based on the evidence, the Tribunal made the following findings of fact.

12. The Claimant commenced work for the Respondent as a support worker on 18 December 2016. The Respondent is engaged in the business of

domiciliary care. As a support worker, the Claimant provided care for clients in their own homes or in specialist accommodation.

13. The Tribunal found that the Claimant was issued by the Respondent with no less than 3 separate documents purporting to set out the terms of her engagement.[1] The first of these was in the bundle commencing at page 102, and was called a "Member Handbook." This document set out the policies of the Respondent in a number of respects relating to the way in which work was to be done, and also set out certain provisions more commonly found in contracts of employment/terms of engagement. An example of this was at page 106, which set out the arrangements for annual leave (paragraph 6). This paragraph stated that, under the Working Time Regulations 1998, all "Members" were entitled to paid annual leave of a minimum of 4 weeks pro-rata in any leave year. It added that leave was accrued for every hour worked.

14. Another example of a term or condition in the Member Handbook was section 8 on "availability" (page 107). This explained that individual Members were to provide their availability to work to their local office at least 4 weeks in advance and they would then be allocated shifts. The Handbook explained that, if an individual did not wish to be added for availability [sic], they were to notify their line manager. The Claimant signed a document on the 24 August 2016 to say that she had received a copy of this Handbook.

15. The second of the 3 documents that the Claimant received was described as a "contract of employment" (page 120) and was dated 18 December 2016. The Respondent signed it and the Claimant signed the document also to signify her agreement (signatures appearing at page 126). This was a statement said to be in compliance with section 1 of the Employment Rights Act 1996 and described the Claimant as an "employee" of the Respondent, included her title as a support worker and stated that she was directly responsible to the Respondent's registered manager. In relation to hours of work, paragraph 5 of the contract (page 122) stated that the Claimant's normal hours of work were to be determined by the rota, that her average hours of work were zero, that the hours of work that were offered to her might fluctuate on a weekly basis and that there was no guarantee of regular work. At paragraph 6 of the contract (page 123) it provided that the Claimant would receive 28 days' holiday during each holiday year.

16. Thirdly, the Claimant received a document entitled "Terms of Engagement with Care Staff" (page 127). Once again, the Claimant signed this document (on 19 December 2016) to say she had received it. The Respondents also signed this document.

17. In stark contrast to the contract of employment, at paragraph 2.2, this document stated that for the avoidance of doubt the terms and conditions did not give rise to a contract of employment between the Respondent and the Member. It referred in paragraph 3 (page 127) to the Respondent endeavouring to obtain suitable assignments for a Member with service

[1] This term is used neutrally and does not denote any finding on employment status

users, but that Members were not obliged to accept an assignment offered by the Respondent that fell outside his or her given availability for work.

18. The question of leave was dealt with at paragraph 6 of that agreement (page 129) and stated at paragraph 6.2 under the Working Time Regulations 1998, the Member is entitled to 4 weeks' pro-rata paid leave per year.

19. The Claimant set about working for the Respondent without further clarification of her status or terms of engagement/employment. The number of hours that she worked each month varied. The variability of hours was demonstrated by the Claimant's pay slips that were provided in the bundle from page 159 onwards. These showed, by way of example, that in some months the Claimant worked 78 hours (July 2017) and in others 142 hours (January 2018) (page 161). The Claimant was paid the national minimum wage for the hours that she worked.

20. It was clear from the evidence that the Claimant on occasion raised concerns with the Respondent about the shifts that she was being allocated to work for various reasons. She was repeatedly told in response to such queries that under the terms of her agreement with the Respondent, she was not entitled to any particular shifts or any particular hours, and that she had a zero hours contract.

21. On 11 January 2017, in response to a request for information to evidence her financial circumstances to a third party, the Claimant received a letter from the Respondent's HR Department (page 133). This read "to whom it may concern, I can confirm that we are currently offering Desrine Thomas support work for up to 30 hours per week". The letter went on to explain what the financial implications to her were of that arrangement.

22. In March 2020, the UK first Covid 19 national lockdown began. This did not have an immediate impact on the Claimant's work pattern initially. Some members of the Respondent's staff were furloughed, but not the Claimant. The Claimant had an accident at work on or about 1 April 2020 and thereafter suffered an increase in symptoms of pain and discomfort in her back. On 8 April 2020, she had a meeting with Ms. Rena Patel from HR and Ms. Sharan Kaur, where she explained that she was unable to use the hoist and therefore unable to meet the needs and outcomes of service users within the home. The Claimant continued work, however, notwithstanding the problems with her back, but on varied duties.

23. On or about 6 May 2020 the Claimant wrote to her manager requesting a change to her working arrangements (page 137). The Claimant essentially asked to no longer work on Saturdays but to be granted a shift on a Friday if possible. She also asked why she had ceased receiving her assignments on a Wednesday. The Claimant had asked to work on Fridays instead of Saturdays on previous occasions but had been told that Fridays were full and there were no spare vacancies for shifts at that time.

24. The Respondents were unable to accommodate the Claimant's request for different shifts and this was discussed at a meeting with her on 19 June

2020, of which there were notes in the bundle (pages 138-139. The notes state "you are reminded that your contract of employment clearly states that you are on a zero hours contract with no guarantee of shifts". The Claimant was also reminded that she was welcome to seek additional hours of work outside the establishment if they were unable to offer her the work she wanted on particular days and at the times she had requested.

25. By 28 June 2020, the Claimant's back pain was such that she was unable to continue at work and she commenced a period of sick leave. The last shift that the Claimant worked for the Respondent was on 28 June 2020. The Tribunal accepted the Claimant's evidence that she actually took annual leave first for the first 2 weeks of July 2020 and it was thereafter that she began to submit sickness absence notes for "lower back pain" - from 13 July 2020 onwards (page 142f). The Claimant was in receipt of statutory sick pay during August, September and October 2020, submitting a final sick note indicating that she was fit to return to work with effect from 21 September 2020.

26. The Claimant attended a return to work meeting on 26 October 2020. There was a dispute between the parties as to the date of this meeting. On the balance of probabilities the Tribunal concluded that the meeting was most likely to have occurred on this date as there were minutes in the bundle (page 146) bearing this date and there was no documentary evidence to support the suggestion that an earlier meeting had taken place. At this meeting, which was attended by the Claimant, together with Ms. Patel (HR) and Mr Singh of the Respondent, the Claimant advised that she was not able to work with clients that used wheelchairs because of her back pain. She also asked to undertake shifts between 8am and 3pm Monday to Friday only and would only be available for an occasional weekend shift. Mr Singh and Ms Patel explained that this would seriously limit their capacity to offer the Claimant work and she was asked to reconsider her requirements to see if a revised approach could open up more work availability.

27. On or about 5 November 2020, the Claimant realised that she was no longer receiving sick pay. This prompted her to make contact with the Respondent by letter (page 147). In the letter, the Claimant said that "she had emphasized that she was fit for work and that every indication seemed to suggest that she would resume her usual work, however, she had not been offered any more shifts". She asked for an update.

28. There was then a telephone call between Mr Singh and the Claimant on 17 November 2020. Once again this was the subject of contemporaneous or near-contemporaneous notes taken by the Respondent (Mr Singh) and entered on the HR system which the Respondent used. Mr Singh noted that the Claimant had expressed a wish to return to work, but only on Monday, Wednesday, Friday and a Saturday, and could work between 8am and 3pm. The Claimant also told Mr Singh that she wanted to return to work with her previous client. Mr Singh explained that this individual was now a wheelchair user which limited the amount of work that the Claimant could do. Mr Singh explained that there was work available with

other clients immediately, but the Claimant was not keen to pursue other options at this time.

29. The Claimant returned to her GP on 10 December 2020 with an exacerbation of back pain. This was indicated by a report from her GP to the Royal Orthopedic Hospital dated 31 December 2020 (page 151).

30. There was no contact between the Claimant and the Respondent following her phone call with Mr Singh on 17 November 2020, until the Respondent wrote a letter to the Claimant dated 1 March 2021. The Tribunal accepted that this letter had been written at the instigation of the Respondent's accountant who was processing payroll and noticed that the Claimant had not been paid for some time. The letter stated that Mr Singh was writing to the Claimant because she had not done a shift with the Respondent since 28 June 2020. In the second paragraph, the letter read, "we've not been contacted since this time to be advised of your availability to carry out any shifts or your intention to return to work". The letter concluded with a request that the Claimant contact the Respondent within 14 days, otherwise it would be assumed that the Claimant did not intend to return to work and her contract would terminate.

31. The Tribunal accepted the Claimant's evidence that she did not see this letter, despite the fact that the Respondent posted it by first class post, evidence which the Tribunal also accepted. Nevertheless, because the Claimant did not follow up or respond to the correspondence, by 14 March 2021, the Respondent's accountant generated a P45 form (page 174) which was then posted out to the Claimant showing her leaving date as 30 March 2021. The Tribunal concluded that, on the balance of probabilities, the Claimant received the P45 and realised that her contract with the Respondent had been terminated. At page 46 in the bundle and paragraph 17 of the Claimant's second claim form, the Claimant stated that she had managed to make contact with the Respondent on 30 March 2021 and had spoken to HR who confirmed that no work was available for her at that time. The Tribunal considered it likely that this call was prompted by the receipt of the P45. The Claimant went on to say in her second claim form that "it was at this point that [I] proceeded to access ACAS, so as not to cause further delay in securing redress to [my] employment matter". The Tribunal also noted that, in her claim form, the Claimant explained that she had experienced an exacerbation in her health symptoms after November 2020 up to March 2021. The Claimant contacted ACAS on the 19 April 2021 to commence early conciliation.

The Law

32. The Tribunal had 2 claims to determine. First, a claim for unlawful deduction from wages under section 13 Employment Rights Act 1996 ("the Act"). This states:

13 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) ….

33. A non-payment of wages contractually due to a worker is thus classed as a deduction and can be claimed in the Employment Tribunal pursuant to this section.

34. A worker is defined in the Act in section 230(3) as follows:

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(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

35. In relation to the claim to holiday pay, the Tribunal took account of The Working Time Regulations 1998 ("the Regulations"). Regulation 13 of the Regulations contains the right of all workers to 4 weeks' paid holiday each leave year. A leave year is either that which is provided for in a contract, or other relevant agreement, or the year beginning with the anniversary of the worker's commencement of employment. Regulation 13A entitles a

worker to an additional amount of leave of 1.6 weeks, making the total entitlement of annual leave 5.6 weeks, or a maximum of 28 days.

36. Regulation 14 provides that, where a worker's employment is terminated during the course of their leave year, and on the date on which the termination takes effect the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, the employer must make a payment in lieu of leave to the worker.

37. The calculation of such accrued annual leave is dealt with in Regulation 16 of the Regulations. It states that "a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 at the rate of a week's pay in respect of each week of leave".

38. The definition of " a week's pay" to be applied is that set out in sections 221-224 of the Act. The recent amendment to those provisions states that where there are no normal working hours, then a reference period should be used of the previous 52 weeks. Section 224(3) states as follows:

> "In arriving at the average weekly remuneration, no account should be taken of a week in which no remuneration is payable by the employer to the employee and remuneration in earlier weeks should be brought in so as to bring up to [52] the number of weeks of which account is taken".

39. The reference period is the period to be used to provide an average of the worker's weekly pay, which is then used to calculate her entitlement to accrued holiday on termination of employment.

Conclusions

40. Applying the law to the facts found, the Tribunal reached these conclusions.

Wages

41. Starting with the Claimant's wages claim, the first question the Tribunal asked was, "was the contract terminated?" The Tribunal concluded on the balance of probabilities that the Claimant's contract had been terminated with effect from the 30 March 2021. As indicated, the Claimant received her P45 prompting her to make contact with the Respondent when she was told by the HR department that there were no further shifts to be allocated to her. She then commenced ACAS Early Conciliation and it seems very likely to the Tribunal in those circumstances that the Claimant was well aware that her contract with the Respondent was at an end and that was why she brought proceedings in the Employment Tribunal.

42. What then was the Claimant entitled to be paid, if anything, for the period between the 21 September 2020 when she was declared to be fit for work, and 30 March 2021? It was not at all helpful to either party to this contract that such an array of contradictory documentation had been issued to the Claimant professing to include the terms of her engagement or employment with the Respondent at its outset. However, what was

consistent throughout the different documents that had been issued to the Claimant was that she did not have any guaranteed or set hours of work under her contract – in other words, that she was working on a flexible hours or "zero hours" basis. There was no evidence that this term of the contract was varied, in writing or otherwise, prior to the date of termination. On the contrary, the Respondent reminded the Claimant of this term orally on more than one occasion.

43. The Claimant advanced her case on the basis that it was a term of her contract that she would be provided with a guaranteed minimum of 30 hours' work each week. The sole basis upon which the Claimant asked the Tribunal to find that, contrary to the written terms of the contract, this term should be found expressly or impliedly, was the single mention of "30 hours" in the financial reference provided for the Claimant by the Respondent on 11 January 2017 (page 133). This was not on its face a contractual document, and the Tribunal heard no evidence to suggest that either party to the Claimant's contract with the Respondent intended this letter to form part of its terms or to have any contractual force. Further, the letter, being a reference, recorded merely the fact that the Respondent was "currently offering" the Claimant support work for "up to 30 hours per week". There was no mention of the Claimant being guaranteed such hours or even that, on being offered those hours, she was obliged to work them. The letter was, in the Tribunal's view, not a proper basis for finding that the Claimant's contract contained a clause stating that the Respondent guaranteed to provide her with 30 hours' work per week as a support worker, as she contended.

44. The Tribunal also took account of the fact that the Claimant had worked for the Respondent over a lengthy period of time and yet it was clear from her pay slips that the hours she worked during that period were very variable. It would have been clear to the Claimant that, although at certain times she fell into a relatively stable pattern of shifts, these were not guaranteed as she was advised of this by the Respondent.

45. Accordingly, the Claimant did not prove to the Tribunal that it was a term of her contract with the Respondent that she would be given work or paid for a set number of hours each week – whether 30 hours, or otherwise.

46. Even if the Tribunal was wrong about that, the Claimant agreed that her entitlement to pay related to the hours that she actually worked for the Respondent. It was common ground that the Claimant did not do any work between the 21 September 2020 and 30 March 2021 when her contract was terminated, and therefore it could not be said that "the total amount of wages paid on any occasion by the Respondent to the Claimant was less than the total amount of the wages properly payable" as required by section 13(3) of the Act, in order to found a claim for unlawful deduction from wages. It therefore followed that the claim to unlawful deduction from wages failed and was dismissed.

47. It was not necessary for the Tribunal to determine whether or not the Claimant was an employee in order to decide this claim. She was a worker, which the Respondent did not dispute, and that sufficed.

Holiday pay

48. The Claimant was entitled, as a worker, to the benefit of protection under the Regulations and the Respondent acknowledged this. The Claimant was entitled under the Regulations to 5.6 weeks' paid holiday. The way in which holiday pay is calculated in relation to a zero hours contract is set out in the Regulations.

49. As at the date of termination of the Claimant's employment on the 30 March 2021, she had not taken any annual leave that leave year. The Claimant had therefore accrued her annual leave and was entitled, in accordance with Regulation 14, to be paid her accrued holiday on termination of one week.

50. How should that accrued annual leave be calculated in accordance with the Regulations? In order to answer this question, it was necessary to first ask "did the Claimant have normal hours of work?" In the Tribunal's judgment, the clear answer to this question was no, based on the terms of her contractual arrangement with the Respondent and the way in which it was carried out in practice, which meant that her hours of work were variable.

51. In accordance with Regulation 16 and section 224 of the Act, where there are no normal hours of work, it is necessary to establish a reference period of 52 weeks to provide the worker's average weekly pay. Was the Claimant paid during each of the 52 weeks prior to the termination of her employment? No, not all of them. Therefore, in accordance with section 224(3) it was necessary to establish the Claimant's average weekly pay over a longer period comprising 52 weeks of paid work with the Respondent. It was most likely that the reference period would comprise the 52 weeks prior to 28 June 2020, although it would be necessary to exclude any weeks during that period when the claimant did not work, provided that the reference period did not go back further than 104 weeks prior to the termination of the claimant's employment.

52. The Tribunal did not have access to this historical pay data for the Claimant at the time of reaching its decision. A case management order was therefore made requiring the Respondent to put forward to the Claimant a proposed calculation of the Claimant's accrued holiday as at the date of termination of employment based on the Tribunal's findings and decision, supported by relevant documentary evidence showing the Claimant's pay over the relevant reference period. The Claimant was ordered to respond to this calculation with her comments. If, by these means, an agreement could not be reached between the parties as to the amount of holiday pay that is due and owing to the Claimant in accordance with Regulation 14, then the Tribunal ordered that there would be a Remedy Hearing to determine it, although it hoped that this would not prove necessary.

Employment Judge J Jones
15 May 202