EMPLOYMENT TRIBUNALS

Claimant Ms C. Ramsay

Respondent Enfield Mencap

OPEN PRELIMINARY HEARING

Heard at: Watford by CVP **On**: 19 and 20 April 2023

Before: Employment Judge McNeill KC

Appearances

For the Claimant: Mr E. Stenson, counsel
For the Respondent: Mr L. Jegede, solicitor

REASONS for Judgment sent to the parties on 27 April 2023

1. This hearing was listed at an earlier preliminary hearing on 11 January 2023 to determine certain preliminary issues:

   (i) The claimant's employment status;
   (ii) Whether the claimant's second claim (3307112/2022) should be struck out because the claimant failed to comply with the ACAS early conciliation (EC) requirements because she did not go through the EC process for a second time, prior to presenting her second claim; and
   (iii) Whether both the claimant's claims should be struck out on the grounds that the claims had no reasonable prospect of success.

2. A preliminary issue relating to time limits was not pursued by the respondent. Mr Jegede realistically accepted in closing submissions that, given that the ACAS notification had been received on 2 March 2022, the ACAS certificate had been issued on 11 April 2022 and the second claim had been presented on 17 June 2022, if the claimant had met the requirements of the EC process in relation to her second claim (which he disputed), her claims for dismissal and detriment were brought in time. His

only caveat to this was that there was an allegation of detriment made dated September 2019 and the next allegations of detriment were in February 2022. The gap between those dates would make it very difficult for the claimant to contend for a continuing course of conduct between those dates. There was considerable force in that submission, but the definition of the preliminary issues had excluded from consideration at this hearing any issues of "conduct extending over a period" and I therefore did not draw any conclusions on this issue, although I suggested to the claimant's counsel that it was a matter he may want to consider with his client.

3. In the event that the respondent's application to strike out was unsuccessful, I would consider whether a deposit order should be made on grounds that the claims have little reasonable prospect of success.

4. If any of the claimant's claims survived, a list of issues for the full merits hearing should be finalised and case management orders made. There should also be consideration of judicial mediation.

5. The respondent had made an application in writing before the hearing for a postponement of this hearing. This was on the basis that the respondent's previous solicitors had recently come off the record. This application was not pursued by Mr Jegede. I appreciated that he had not been able to prepare for the hearing with the time he would have liked and was grateful for the careful and clear assistance both from him and Mr Stenson in the way this case was presented.

Evidence

6. I read witness statements and heard oral evidence from Mr Dennis on behalf of the respondent and from the claimant and Ms Maria Martin, who also worked for the respondent for a time and had brought her own claim against the respondent. I was mindful that it was no part of my remit to assess the merits of Ms Martin's claim. The respondent further provided a witness statement from Ms Christine Donaldson, the claimant's line manager at the relevant time. She did not attend the Tribunal to be cross-examined and I attached little weight to her evidence where it was in conflict with other evidence that I found to be reliable.

7. I was provided with two bundles of documents and was taken to a substantial number of documents in those bundles.

Facts

8. In May 2019, the claimant, who had by then worked in the care sector for over ten years, applied for the role of "Bank Support Worker" with the respondent. The respondent at the time employed full-time support workers, working 37 or 37.5 hours a week on contracts of employment. It also had a bank of support workers who worked part-time.

9. The respondent had a template contract for its bank support workers which was headed “Engagement as a Casual Relief Worker” and set out terms on which a “Relief Support Worker” was engaged. It included a clause on “Status” that provided that the respondent was not obliged to provide the worker with any work and the worker was not obliged to accept and perform such work as was offered to them. There was an issue between the parties as to whether the claimant ever received a copy of this document.

10. The application form on which the claimant applied for the bank support worker job was headed “application for employment” and at the end of the application form, reference was made to “any subsequent contract of employment”.

11. The claimant was interviewed for the role on 13 June 2019 by Ms Donaldson, Operations Manager of the respondent. The role was discussed in detail with the claimant, and she was told that it would include caring for residents at the day centre and in the community along with undertaking activities in the day centre.

12. There was no discussion at the interview of whether work would be guaranteed, and the claimant was not told that she could accept or reject any shifts offered to her. The claimant made it clear she could only work part-time because of her childcare responsibilities. Mr Dennis happened to come into the room while the claimant was being interviewed but he was not the person conducting the interview. He had met the claimant in a professional context before, but he did not know her. He made some comment about a full-time contract in passing, but this did not constitute any sort of job offer.

13. During the interview, there was discussion between Ms Donaldson and the claimant as to when the claimant could work. The claimant indicated that she could work part-time hours over three days but could work additional hours if she had sufficient notice to arrange childcare. This did not constitute agreement that the respondent would provide the claimant with at least three days work each week or that the claimant was committing to working three days every week (holidays aside). The working hours were not guaranteed.

14. There was no discussion at the interview about the claimant’s employment status. The claimant only considered the question of her employment status after her contract was terminated.

15. Following the interview, it was confirmed by Ms Donaldson that the claimant was being offered a part-time job. A reference was sought for the claimant on a template form headed “Employment Reference Form”.

16. The claimant started working for the respondent on 5 August 2019. She attended an induction, where she was provided with an induction pack containing policy documents such as the disciplinary and grievance

policies. She was introduced to the management team and filled in a "New Starter Checklist" that the respondent gives to all its staff.

17. I was not persuaded that the claimant asked for a written contract on several occasions after and was assured that one would be provided, and that Mr Dennis would follow this up. If this had been a matter of concern to the claimant at the time, it is likely that there would be some written record of these requests.

18. Mr Dennis was facing a very difficult personal situation during at least part of the period when the claimant worked for the respondent, which led to some disruption of normal practices. Normally, a bank support worker would be given a contract and asked to sign it. In the claimant's case this was not done. The respondent has not adduced any evidence that the template contract included in the bundle for the tribunal, with the claimant's name on it, was ever given to the claimant to sign either at the commencement of her employment or at any time thereafter. This document was provided to the claimant after she made a data subject access request. The word document containing the metadata that would show when this document was produced has never been provided to the claimant, although requested. Mr Dennis made it clear that, if there was such a document, it should be on the respondent's system.

19. As a bank support worker, when she was working, the claimant carried out the same day-to-day role as a full-time support worker. In addition to that work, full-time support workers also took on the role of key workers and had to write reports and an annual review. Bank support workers were not given time out for this type of activity. This was because they did not work full-time hours.

20. Timesheets, some sample text messages, and the claimant's own evidence indicate that she would be asked about her availability to work each week. Initially this was done by verbal requests for availability from Mr Bethel Ihenacho and later this was done by WhatsApp messages. Rotas would be prepared on the basis of the information provided. In practice, although the claimant worked consistently for the respondent (at least when there was work available from May 2021) the claimant's hours varied week to week and month to month and she did not invariably work on the same days each week. When cross-examined, she confirmed that she had control over the hours she worked, although she could not unilaterally determine the days and hours on which she would work.

21. Once availability had been agreed and shifts allocated, the claimant was obliged to attend for her shifts. She was concerned that if she refused shifts, they would be taken away from her.

22. The claimant was paid via the PAYE system. Tax and NI were deducted at source. She accrued and took holidays in the same way as full-time support workers, and she contributed to a workplace pension.

23. During the first three months of lockdown (April/May/June 2020), the respondent did not apply for any payments under the government job retention (furlough) scheme, contrary to what the claimant alleged. It continued to pay its full-time staff throughout the period of the pandemic. Bank staff were treated differently. A payment was made to them for three months based on their average hours as a goodwill gesture. The respondent could not afford to pay them after that. On that basis, the claimant was paid for 80 hours a month for three months, with work being found for her during that period from time to time. From July 2020 to June 2021, the claimant did not work for the respondent and was not paid.

24. From July 2021, the day-to-day management of the claimant was undertaken by Ms Donaldson. She would arrange for instructions to be given on the tasks to be completed by the team, either via a staff notice board or activity sheets which detailed which service users the claimant would be caring for and what specific activities were to be undertaken with those service users. On some days, the claimant would be instructed to drive one of the respondent's vehicles to transport service users from their homes to the day centre and vice versa. In terms of day-to-day work, the claimant undertook the same work as full-time support workers and all other support worker staff working for the respondent.

25. On 9 February 2022, the claimant received a letter terminating her contract with the respondent. She was not initially paid the holiday pay that was due to her, and she consulted ACAS. Notification, as stated above, was on 2 March 2022; an EC certificate was issued on 11 April 2022; and the first claim, which was only a claim for holiday pay, was presented on 11 May 2022. The second claim, which included claims for unfair dismissal and detriment related to alleged protected disclosures (whistleblowing) and health and safety was presented on 17 June 2022.

Law in relation to employment status

26. Section 230 of the ERA provides that: *"an "employee" means an individual who has entered into or …worked under a contract of employment".*

27. Having made my finding that there was no written contract between the parties in this case, I must first look objectively at the factual matrix and determine what the arrangement between the parties was and whether the arrangement is properly characterised as a contract of employment. This may include looking at what happened in practice.

28. In order for there to be a contract of employment, the first requirement is that there must be mutuality of obligation. There must be an obligation on the employer to provide work to the employee and an obligation on the employee to accept work when it is offered. If there is, it becomes necessary, in considering whether there was a contract of employment, to look at a range of relevant factors, which will frequently

include the degree of control exercised by the employer over the work done by the individual.

29. Where an individual engaged on a bank or similar basis is engaged to carry out a particular shift or assignment, there is little doubt that during the course of that shift or assignment there will be mutuality of obligation. Questions may then arise in relation to whether there was an "umbrella" contract between assignments and whether there were breaks in continuity of service but neither of those matters has been argued in the current case.

30. The claimant here relied on the case of **Wilson v Circular Distributors Ltd** [2006] IRLR 38 as comparable to the current case. Mr Wilson was a relief area manager who, pursuant to a written contract, had no regular or guaranteed hours of work and was told that there would be occasions when no work was available and he would not be paid for those periods. There were other provisions of his written contract consistent with a contract of employment. Crucially, the Employment Appeal Tribunal (EAT) held that on a proper construction of the contract, when work was available it had to be offered and when it was offered the claimant had to undertake that work. In that case, there was a written contract. It was distinguishable from the current case.

Analysis and conclusions on employment status

31. At the time that she was offered work by the respondent, the claimant understood that she would be working part-time for the respondent and that the respondent would provide her with shifts on the basis of about three days a week. The respondent expected to be able to provide the claimant with work at that sort of level.

32. The job was, however, described as a "bank support worker" job. The word "bank" is not decisive as to whether there was a contract of employment between the parties but, giving the word its ordinary meaning, being part of a "bank" implies being part of a pool of workers whom an employer can call on when there is a requirement to work. Those workers are entitled to undertake other work unless there is contractual provision to the contrary and may refuse work if offered, even though this may have the consequence in practice that they are not offered further work. The reference to employment and a contract of employment on template documents preceding the start of the arrangement between the claimant and the respondent was just one factor in considering whether there was in fact a contract of employment.

33. Although the job done by the claimant when she was working was very similar to that done by full-time support workers, who were employees, she had control over when she worked in the sense that she could refuse work if she was unavailable. Although in practice, the claimant was regularly offered work, there was, I find, no obligation on the

respondent to offer her work. There was no such express term and there was no basis (nor was any contended for) for implying such a term.

34. I take into account in reaching this conclusion that during the period of the pandemic, the claimant was not offered any work at all for a period of about a year. This was in contrast to full-time support workers who continued to work for the respondent and to be paid throughout the pandemic period. The claimant did not over that period object to not being provided with work. For the first three months of the pandemic, she was paid what I accepted was essentially a goodwill payment that was not related to hours actually worked during that period.

35. If the claimant had refused to work for the respondent at any time, the respondent could not require her to work. She did not have an enforceable obligation to work, even though the reality was that if she continued to refuse shifts she may not be offered further work. When she was offered and accepted shifts, there were of course contractual obligations on both parties during the course of each of those shifts.

36. In all the circumstances, I find the claimant was not an employee within the meaning of section 230(1) of the ERA because the arrangement lacked the essential mutuality of obligation. I note that there is no dispute that the claimant is a worker within the meaning of section 230(3).

37. As she was not an employee, her claim for unfair dismissal must be dismissed.

Second issue

38. The issue here is whether the claimant failed to comply with the ACAS EC requirements in section 18A of the Employment Tribunals Act 1996 (ETA) in relation to her second claim.

39. The respondent submits that the second claim is wholly different from the first claim and a second and separate notification to ACAS should have been made. He relies on the decision of the EAT, Kerr J, in **Akhigbe v St Edwards Home Ltd and others** UKEAT/0110/18/JOJ, in particular at paragraphs 49, 50 and 51, where Kerr J says that there may be a need for a second certificate where there is no connection between two claims.

40. On this issue, I accepted Mr Stenson's submission that the leading authority is **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73 and that the observations of Kerr J relied on by Mr Jegede are obiter dicta, the decisive issue in that case being one of abuse of process.

41. In **Compass group v Morgan,** Simler P at para. 20 states that provided there are matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of

section 18A(1) of the ETA. The second claim in that case related to matters that post-dated the bringing of the first claim.

42. The question is whether the proceedings instituted related to any "matter" in respect of which the claimant had provided the requisite information to ACAS. In the current case, the matter referred to ACAS arose out of the termination of her contract. There was sufficient connection between that matter and the matters subsequently claimed in her second claim that no second notification was required.

Strike out

43. The relevant surviving claims (following my decision on employment status) are the detriment and the holiday pay claims. It is not contended that the holiday pay claim has no or little reasonable prospect of success. The claimant acknowledged that she had received some holiday pay (approximately £400). The issue is whether that was the full amount that she was entitled to.

44. The detriment claim is primarily a whistleblowing claim. In considering striking out whistleblowing detriment claims, I take into account **North Glamorgan NHS Trust v Ezias – [2007] ICR 1126.** Only exceptionally should such a claim be struck out when facts are in dispute.

45. Mr Jegede submits that two of the PIDs relied on are not public interest matters. He may be correct but I do not consider that the position is without doubt. When considering a strike-out, before the evidence has been heard, I should take the claimant's claim at its highest. There are at least reasonable arguments that matters relating to the employment of care workers and whether they can take breaks are in the public interest.

46. Mr Jegede further submitted that the matters alleged by the claimant could not be relied on as detriments because they involved legitimate questions and instructions given by the claimant's manager.

47. This again is a matter that should be determined on the evidence. Whether a question asked, an instruction given or something else said amounts to detriment may depend on the manner in which something is said. This can only be determined after hearing evidence.

48. I do not consider that the claimant's remaining claims have no reasonable prospect of success. I also am unable to say on the evidence made available to me that they have little prospect of success. I therefore do not strike out the claims or make a deposit order.

49. At the conclusion of the hearing, the claimant made an application for costs on the basis of the respondent's unreasonable conduct. The respondent contended that this hearing had been required because the respondent was pursuing an application for a strike-out which had no reasonable prospect of success. The claimant correctly pointed to a

number of procedural failings by the respondent, in particular relating to directions for taking certain steps in the proceedings.

50. I refused the application. Costs awards in the Tribunal are the exception and not the rule. I did not consider that there was unreasonable conduct by the respondent. The respondent's solicitors had come off the record close to the hearing. I did not know the reason for that and should not speculate. Mr Jegede properly and in accordance with the overriding objective did not apply to postpone and made a sensible concession in relation to time limits. The claimant's contentions in relation to the issue of employment status, an issue which had occupied most of the Tribunal's time, had failed.

51. In all the circumstances, even if I had considered that there was unreasonable conduct by the respondent, I would not have exercised my discretion to award costs.

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Employment Judge McNeill KC

Date: 28 May 2023

Sent to the parties on: 5 June 2023

GDJ
For the Tribunal