



EMPLOYMENT TRIBUNALS

Claimant

N Eldebeisy

v

Respondent

Brownlow Enterprises Ltd T/A
Ventry Residential Care

Heard at: Watford by CVP
Before: Employment Judge Anderson

On: 12 June 2023

Appearances

For the Claimant: In Person (assisted by B Sinjab, interpreter)

For the Respondent: D Heneghan (administration support officer for the respondent)

RESERVED JUDGMENT

1. The claimant's claim for payment in lieu of notice is upheld. The claimant is entitled to one week of notice pay and the respondent must pay the claimant the sum of £320.85 less any deductions for tax and national insurance, within 28 days of the date that this judgment is sent to the parties.
2. The claimant's claim of unlawful deduction from wages of the sums of £48.40 and £25.00 is upheld. The respondent must pay the claimant the sum of £73.40 within 28 days of the date that this judgment is sent to the parties.
3. The claimant's claim of unlawful deduction from wages by way of a failure to pay statutory sick pay for the period 30 November 2021 until 7 February 2022 is dismissed.
4. The claimant's claim of breach of contract in relation to the provision of pension information and the making of payments to a pension provider is dismissed.
5. The claimant's claim that the respondent failed to provide written particulars of employment is upheld and the respondent is ordered to pay the claimant the sum of £641.70 (being two weeks gross pay) within 28 days of the date that this judgment is sent to the parties.

REASONS

Background

1. The claimant was employed by the respondent, a care home operator, as a care assistant from 8 February 2021 to 20 December 2021 when her employment was terminated. The claimant was absent on sick leave from 19 October 2021 up to and including the date of her dismissal on 21 December 2021.
2. The claimant filed a claim on 18 December 2021 claiming unfair dismissal, discrimination on the grounds of marriage, failure to make a redundancy payment and failure to make holiday payments. Some of these claims were struck out on jurisdictional grounds or withdrawn by the claimant. The claimant sought to amend her claim on 25 August 2022. The respondent made no comment. Some of the amendments were allowed by EJ Lewis on 13 February 2023. The claim to be decided today was clarified in the order of EJ Mason dated 26 April 2023 following a case management hearing on that date, as being one of unauthorised deductions from wages and breach of contract. A list of issues was agreed at that hearing and is set out below.
3. One of the issues was whether the respondent had failed to provide the claimant with payment in lieu of notice. At the hearing before EJ Mason the Respondent conceded that it had failed to do so and that it was now willing to pay one week's notice in the sum of £320.85. The claimant said that she was entitled to more than one week's notice, and so while that offer from the respondent remained open, the payment was not made in advance of this hearing.

The Hearing

4. The parties filed a joint bundle of 184 pages which included witness statements from the claimant and from Mr Heneghan. Both the claimant and Mr Heneghan gave evidence on oath at the hearing. The claimant speaks Arabic as a first language and was assisted throughout the hearing by an Arabic interpreter, Ms Sinjab. At the outset the claimant raised that Mr Heneghan had referred in his witness statement to a DBS certificate. She said that she had only received the statement on Friday (9 June 2023) and thought that the DBS certificate should form part of the disclosure. Mr Heneghan supplied a copy of a document summarising the outcome of a DBS check to the tribunal and the claimant during the reading adjournment. The relevance of the certificate was that in his witness statement, contrary to the position put forward by the respondent previously, he states that a deduction from the claimant's wages made in February 2021 was in respect of a DBS check. Previously the respondent has said, and the claimant understood it to be the case, that the deduction was a charge for supplying uniform to the claimant.
5. Mr Heneghan said that the respondent had received signed fit notes for the period 29 November 2021 until 7 February 2022 on 17 May 2023 and that

the respondent would now pay statutory sick pay for the period 29 November 2021 until dismissal on 21 December 2021. I asked the claimant whether this resolved that head of claim. She said it did not as she should be paid until February 2022.

6. Mr Heneghan said that some of the respondent's property had not been returned by the claimant, but it was no longer seeking return of that property (a matter raised at the last case management hearing) and sought no financial compensation in that respect.

The Issues

7. The following list of issues was agreed at the case management hearing on 26 April 2023.

- 1. Unauthorised deductions (s13 and 23 Employment Rights Act 1996 ("ERA"))**

- 5.1 Did the Respondent make the following deductions from the Claimant's wages:

- (i) less sick pay than she was entitled to be paid whilst off sick from 29 November 2021 to 7 February 2022?
 - (ii) £25.00 in respect of a one page letter as evidence of her current work status on 10 August 2021;
 - (iii) £48.40 in respect of a charge for uniform and other property not returned at the end of her employment?

- 5.2 If so, in each case, was that deduction:

- (i) required or authorised by a provision in the claimant's contract; or
 - (ii) previously agreed to and signified in writing by the Claimant?

- 5.3 If so, how much is to be paid to the Claimant? Should the amount awarded be uplifted to reflect any failure by the R to adhere to an ACAS code of practice?

- 6. Breach of Contract: (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623)**

- 6.1 Notice**

- (i) How much notice was the Claimant entitled to? The Claimant says she was entitled to "at least one week" (para 16 amended ET1). The Respondent says it was one week.
 - (ii) The Respondent accepts the Claimant was (in error) not paid for her notice period. How much is she entitled to by way of damages caused by the breach of contract?
 - a. The Respondent is prepared to make a payment of £320.85 owing (one week's gross salary); the Claimant does not accept this figure and says she should be paid more than this because she was on sick leave at the time;

- b. Should any damages be adjusted to reflect mitigation, and/or in accordance with the ACAS code of practice?

6.2 Pension contributions

- (i) What were the terms agreed between the parties with regard to pension contributions?
- (ii) Did the Respondent fail to make contributions into the NEST scheme?
- (iii) If so,
 - a. how much is the Claimant entitled to by way of damages?
 - b. should any damages be adjusted to reflect mitigation, and/or in accordance with the ACAS code of practice?

7. Failure to give a written statement of particulars of employment: (ss1 - 7B ERA)

7.1 Did the Respondent fail to give the Claimant written particulars of her employment no later than the first day of her employment? The Claimant says [w/s] that she was asked to sign a lot of documents when she started on 8 February 2021 including a contract of employment; she says she has not since been provided with a copy. The Respondent says [amended G of R] that she signed a contract on 17.2.21 and was provided with a copy on [R to confirm date].

7.2 If so, is it appropriate for the Tribunal to exercise its power to determine the particulars of employment between the parties (s12(1) and (2) ERA)?

7.3 If so, what are those particulars?

7.4 Remedy:

- (i) Was the Respondent in breach of its obligation to provide the Claimant with a written statement of particulars at the time these proceedings began?
- (ii) Has the Claimant succeeded in any claims within the list of jurisdictions in Sch 5 to EA 2002 (which includes breach of contract and unauthorised deductions)?
- (iii) If so, how much is it just and equitable to award the Claimant?

[The tribunal must make an award of 2 weeks' gross pay unless it would be unjust and inequitable to do so and may – if it just and equitable in all the circumstances - make an award of 4 weeks' pay (ss38(1) to 5(EA 2002). A weeks' pay is as defined in ss220 to 229 ERA 1996]

Submissions

- 8. For the respondent Mr Heneghan said that the evidence demonstrated that there were good communications between the respondent and the claimant throughout her employment. He noted the quick response to enquiries from the claimant about a letter of confirmation of employment and pensions information. He said that as a company, where the respondent had made an error, it had admitted it. He said the big issues was the constant suspicion

cast on the respondent by the claimant who seemed to see herself as being intentionally wronged.

9. The claimant said that she had received the bundle very late which was a disadvantage and was proof that the respondent never provided information until it was chased. She said it was very unfair that the information about the deduction which she had thought was for uniform, but is now told was for a DBS check, should come up so late. She said that she had not received a contract and the respondent knows this. The claimant said that Mr Heneghan was not present when she signed her contract of employment and his information was not first hand.

Findings of Fact

10. The claimant was employed by the respondent as a care worker from 8 February 2021 until her dismissal on 21 December 2021.
11. The claimant signed a Contract of Employment on 17 February 2021. The claimant's line manager Hamdi Mahmoud signed the contract on behalf of the employer on 26 February 2021.
12. It is the claimant's case that she never received a copy of the contract. She stated that she signed many documents on 17 February 2021 which included the contract, but she was not given a copy. She claimed that she had asked Hamdi Mahmoud for a copy on many occasions, but they had failed to provide one, saying that it was not ready. The claimant raised a grievance in November 2021, and it was raised in discussion with Mr Heneghan at that time that the claimant believed she had not received a copy of the contract. Mr Heneghan neither confirmed nor denied that she had received a copy but said that a copy would be provided to the claimant when she returned from sickness absence. She did not return from sickness absence before her dismissal, so Mr Heneghan did not supply a copy.
13. Mr Heneghan said in his witness statement and in oral evidence that it was usual practice for two copies of the employment contract to be signed and one given to the employee. He said that there was no evidence of an issue between the claimant and Hamdi Mahmoud, and no evidence that she asked them for a copy. He said the respondent would be incredulous at the suggestion that the claimant was not provided with a copy.
14. I accept that there is no evidence of the claimant repeatedly requesting a copy of the contract from Hamdi Mahmoud. She states that this is because her requests were face to face but there is evidence that she did email them on other matters, and I find it unlikely that if this was a matter of concern to the claimant, she would not have raised it in an email to them if she was repeatedly being denied the document. However, on balance, considering that the contract was not signed by Hamdi Mahmoud until nine days after it was signed by the claimant, and noting that the claimant clearly stated, as is recorded by the respondent in writing in November 2021 that she did not have a copy of it, I find that the claimant was not supplied with a copy of her

employment contract, or any written statement of her particulars of employment.

15. The employment contract includes a section entitled Deductions which includes the following clauses:

7.1 The employer is entitled to deduct from your salary or other payments due to you at any time any money which you owe to the Employer at any time howsoever arising...'

7.2 The Employer is entitled to deduct from your salary or other payments due to you the following sums:

...
(e) the applicable sum for a Disclosure and Barring Service check upon commencement of your employment...'

16. An amount of £48.40 was deducted from the claimant's first wage payment in February 2021. The claimant was told by Hamdi Mahmoud that this was for her uniform. I accept that she was told that by Hamdi Mahmoud. Mr Heneghan said on behalf of the respondent, for the first time in these proceedings, in his witness statement sent to the claimant on 9 June 2023, that it has now been established that the payment was for a DBS check, which is required by an employer for each new employee in the care home sector. The claimant did not agree that the document provided by the respondent showing a summary of a DBS check undertaken on 17 February 2021 was evidence that such a check had been carried out and that the £48.40 deduction was in respect of this check. On balance I accept the evidence of Mr Heneghan that the deduction made was in respect of a DBS check. In reaching this decision I note that there is a standard uniform deduction charge of £25.00 set out in the contract and therefore this payment is not likely to be attributable to a uniform deduction, and the document provided by Mr Heneghan indicates that a DBS check on the claimant was carried out in February 2021.

17. In or around June 2021 the claimant asked Hamdi Mahmoud for a letter verifying her employment with the respondent. She followed up the request with an email dated 8 July 2021 and notes in that email that *'I am happy to pay for any cost'*. The letter was provided on 10 July 2021. A payment of £25 was deducted from the claimant's next wages in August 2021. There was no evidence given orally or in the bundle that the claimant was advised before the deduction was made of the amount, or when it would be deducted.

18. The claimant was enrolled in a Nest stakeholder pension scheme after her probation. It is stated in the claimant's contract at paragraph 10.1 as follows:

You are eligible at the end of your probationary period to join the company Stakeholder Pension Scheme, details of which are available once requested from your manager.

19. Copies of the claimant's payslips exhibited in the bundle record that the respondent was making deductions from her pay in respect of pension

payments and a spreadsheet is supplied providing the amounts of employer and employee contributions from July 2021 until December 2021.

20. The claimant states in her witness statement that the respondent had not provided her with pension information and in oral evidence she said that she had contacted the pension provider who could find no record of payments from the respondent. This contact was by telephone and there was no documentary evidence in the bundle, from the pension provider, to confirm that no payments had been made by the respondent.

21. My findings on this issue are as follows:

21.1 The respondent had a duty to enrol the claimant in a stakeholder pension scheme. It did enrol the claimant in such a scheme. It contributed to the scheme and deducted an amount from the claimant's pay in contribution to the scheme, as evidenced by her payslips. I also note that in oral evidence the claimant agreed that the respondent had made all relevant pension payments on her behalf.

21.2 The respondent had a duty to supply information about the pension scheme if the claimant requested it. The claimant requested this information on 27 January 2022, and the respondent supplied it in the form of a link to the relevant website on 28 January 2022. It further explained that only the claimant had access to her pension account.

22. The claimant commenced a period of sickness absence on 19 October 2021 and was still on sick leave at the time of her dismissal on 21 December 2021. The claimant was paid statutory sick pay up to and including 29 November 2021. On 23 December 2021 the respondent noticed that the fit notes provided by the claimant were not signed. Mr Heneghan said this was an error on the respondent's part and no payment of statutory sick pay should have been authorised without a signed fit note. The respondent wrote to the claimant on 23 December stating that a claim for sick pay could not be processed where the fit note was unsigned by the GP. The claimant responded on 24 December 2021 that previous notes had not been signed and told the respondent to contact her doctor. On 5 January 2022 the respondent emailed the claimant stating that it was the claimant's responsibility to supply a signed fit note. The respondent relied on government advice, a copy of which is included in the bundle, that states that a health professional needs to sign a fit note, and that if a fit note does not include the issuer's name or signature it is not valid and could be rejected by an employer or the DWP.

23. I find that as the claimant did not provide a valid fit note for the period 30 November 2021 until 21 December 2021, the respondent was within its rights to refuse to process a request for sick pay. I agree with the respondent and find that the provision of a valid fit note was the responsibility of the claimant.

24. The claimant said that she had a fit note until 7 February 2022 and statutory sick pay was due until the fit note ended. She made that assertion but

provided no evidence to show why this might be the case. The respondent said that no pay was due after the claimant was dismissed. I find that the claimant had no right to be paid sick pay after her employment was terminated.

25. Under her contract and statutorily, the claimant was entitled to one week of notice on dismissal. The respondent did not pay the notice at the time of dismissal. The respondent has subsequently acknowledged the error and stated that it accepts that a payment of £320.85 is due to the claimant. The claimant accepted in oral evidence that she was entitled to one week of notice pay only.

Decision and Reasons

Notice Pay

26. The claimant is entitled to one week of notice pay under the terms of her contract and in accordance with s86 of the Employment Rights Act 1996 as follows:

S86 Rights of employer and employee to minimum notice.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,...

27. The parties have agreed that the figure for one week of pay, gross, is £320.85 and this amount must be paid to the claimant minus any deductions for tax or national insurance.

Unlawful Deduction from Wages

28. Employment Rights Act 1996

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.

29. Claims under s13 should be brought within three months of the date of any deduction, but time for filing a claim can be extended by the tribunal (s23

Employment Rights Act 1996). I note that the respondent made no objection to the claimant's application to amend her claim and the application was granted in respect of deductions from wages. Time was not an issue recorded in the list of issues compiled at a second preliminary hearing and the respondent did not raise any issues about time with me at the hearing despite being invited to do so. I have therefore not considered, of my own volition, any issues relating to the timeliness of the filing of the claim.

30. *Deduction from pay of £48.40 in February 2021* – I accept that the deduction was for a DBS check, and I accept that the contract made provision for such an amount to be deducted from the claimant's wages. However, I have found that the claimant was not supplied with a copy of the employment contract and therefore I find that the deduction was unauthorised. In reaching this conclusion I considered the evidence provided by the respondent that a deduction from wages for the purposes of paying for a DBS check will not reduce National Minimum Wage pay, however, I do not accept that this means that any deduction from wages for this purpose is required or authorised by a statutory provision for the purposes of s13 (1)(a), as the evidence provided then goes on to discuss the position where the employee makes a payment to the employer for the DBS check.
31. *Deductions from pay of £25.00 in August 2021* – the claimant agreed to pay a fee for the writing of the letter, however, no evidence was provided that the claimant was notified of the amount of the fee before it was deducted or notified that it was to be deducted in August 2021. Nor was there evidence that she had agreed to pay by way of a deduction. While she said she would pay for the letter, she did not authorise this deduction and I find that the deduction was unauthorised.
32. *Sick Pay* - The claimant failed to provide a valid fit note for the period 30 November 2021 until 21 December 2021. The respondent has provided evidence in the form of government guidance that an unsigned fit note can be refused by an employer. I find that it was not an unauthorised deduction by the respondent to decide not to pay sick pay for the period 30 November 2021 until 21 December 2021.
33. At the hearing the respondent confirmed that it would now authorise and pay sick pay for that period, a valid fit note having been presented on 17 May 2023. As I have found that it was lawful for the respondent not to make the payment, any agreement now to do so is a matter between the parties and not one for this judgment.
34. The claimant claims that she should have received sick pay until 7 February 2022 which is when she stopped being covered by a fit note. As I have found that the deduction from 30 November 2021 until 21 December 2021 was not unlawful, I do not need to go on to consider whether it was lawful from 21 December 21 to 7 February 2022, but for the avoidance of doubt I find that where the claimant was dismissed on 21 December 2021, no further wages were due to her after that date. The length of the fit note is irrelevant.

Failure to provide pension information or make pension payments.

35. This allegation is brought as a claim of Breach of Contract. The claimant accepted in the hearing that the respondent had made all relevant payments to the stakeholder pension, Nest. I have found that the respondent provided the claimant with the necessary information to establish that the payments had been made. I conclude that there was no breach of contract on the part of the respondent in making pension payments or providing information to the claimant.

Failure to provide a written statement of particulars.

36. *Employment Rights Act 1996*

S1 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.

37. I have found that the claimant was not provided with a statement of employment particulars and therefore the respondent is in breach of s1(1) Employment Rights Act 1996.

38. Neither party made submissions on the whether the tribunal should determine the particulars of employment and as there was a contract of employment in existence, and as the claimant is no longer employed by the respondent, I do not feel it is necessary to give any consideration to that matter.

39. Under s38 Employment Act 2002 where the claimant was without a copy of her employment contract at the outset of these proceedings and she has been successful in her claim of unlawful deductions from wages, the tribunal must make an award of two weeks gross pay unless it would be unjust and inequitable to do so. It can make an award of four weeks pay.

40. I award the claimant two weeks' pay as she had requested a copy of her employment contract in November 2021 and did not receive this by the time of her dismissal. I accept Mr Heneghan's evidence that he would have provided it in person had she returned to work, and I therefore do not find that it is just and equitable to award any more then two weeks pay. The parties have agreed, in relation to notice pay, that the figure for a week's gross pay is £320.85.

Employment Judge Anderson

Date: 26 June 2023

Sent to the parties on: 4 July 2023

For the Tribunal Office