



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms I M de Araújo Ramos Fernandes  
**Respondent:** Eden Brook Home Care Limited  
**Heard:** East London Hearing Centre (remotely by CVP)  
**On:** 2 August 2023  
**Before:** Employment Judge S Shore

## Appearances

For the claimant: In Person  
For the respondent: Ms V Worcester, Managing Director

## RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The claimant's claim of unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 succeeds in part. The respondent shall pay the claimant £789.97 (gross without deduction of income tax or National Insurance).
2. The claimant's claim of breach of contract (failure to pay notice pay) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 fails.
3. The claimant's claim of breach of contract (failure to pay travelling expenses) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 fails.

# REASONS

## Introduction and History of Proceedings

1. The claimant was previously employed by the respondent, which is a company that provides home care services, but left its employment and re-joined after a period. For the purposes of this claim, she was employed by the respondent as a Care Assistant, from 20 February 2022 until 13 June 2022 (both dates were agreed by the parties in their respective ET1 and ET3). Early conciliation started on 6 July 2022 and ended on 16 August 2022. The claim form was presented on 28 September 2022.
2. The claim is about alleged underpayments. The claimant says she resigned and gave a month's notice in June 2022. However, on 13 June 2022, she had an exchange on WhatsApp that the respondent says was an express resignation with immediate effect. The claimant says that the message was not a resignation.
3. The claimant returned her staff uniform on 17 June 2022.
4. The claimant claims the balance of her notice period; underpayment of wages and underpayments of travelling expenses. I will return to the question of how much she claims in these reasons.
5. The respondent's case at the preliminary hearing was that the claimant resigned on 13 June 2022 without notice and has been paid everything owed to her. That position changed at the final hearing.
6. The claimant presented claims of:
  - 6.1. Unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996.
  - 6.2. Breach of contract (failure to pay notice pay) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 fails.
  - 6.3. Breach of contract (failure to pay travelling expenses) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
7. I case managed the claims on 1 March 2023, when the claimant represented herself and the respondent was represented, as today, by Ms Worcester, its Managing Director. I produced a case management order dated 1 March 2023 that ran to 14 pages and contained a lot of information for the parties to assist them prepare for the final hearing. I am disappointed that neither party appeared to have complied with the orders I made.

**Issues**

8. The List of Issues (questions that I had to find the answers to at this hearing) agreed by the parties at the preliminary hearing 1 March 2023 are as follows:

**1. *Unauthorised Deductions from Wages***

- 1.1 *Were the wages paid to the claimant on between 20 February 2022 and 13 June 2022 less than the wages she should have been paid?*
- 1.2 *Was any deduction required or authorised by statute?*
- 1.3 *Was any deduction required or authorised by a written term of the contract?*
- 1.4 *Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?*
- 1.5 *Did the claimant agree in writing to the deduction before it was made?*
- 1.6 *How much is the claimant owed?*

**2. *Breach of Contract - Notice pay***

- 2.1 *What was the claimant's notice period?*
- 2.2 *Was the claimant paid for that notice period?*
- 2.3 *Did the claimant resign with immediate effect on 13 June 2022 and thereby waive any right to the balance of notice pay due to her?*
- 2.4 *If no, what is the claimant owed?*

**3. *Breach of Contract - Expenses***

- 3.1 *Did this claim arise or was it outstanding when the claimant's employment ended?*
- 3.2 *Did the respondent fail to properly reimburse the claimant for her travelling expenses?*
- 3.3 *Was that a breach of contract?*
- 3.4 *How much should the claimant be awarded as damages?*

**Law**

9. The statutory law relating to claims of unauthorised deduction of wages is contained in sections 13 to 27 of the Employment Rights Act 1996 ("the ERA"). The word 'wages' is defined in section 27 ERA and includes "any fee, bonus,

commission, holiday pay, or other emolument referable to [a worker's] employment.”

10. Failure to notice pay is a breach of contract and is therefore dealt with under Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
11. Expenses, such as travel expenses, are specifically excluded from the definition of 'wages' and are also dealt with under Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

### **The Hearing**

12. An interpreter in Portuguese was provided for the claimant.
13. The hearing was scheduled to start at 14:00pm for 2 hours. There was a long delay to the start of the proceedings because the claimant was unable to get her video camera to work. With the help of our clerk, the claimant was able to join in audio and video via her phone at 14:20pm.
14. The claimant complained about an alleged delay in the respondent's provision of documents and witness statements. Ms Worcester complained that they had been sent to an address that the claimant had moved from. My focus was on the fact that both parties had each other's documents and evidence. The claimant complained that she had been working long hours since she had received the respondent's documents, so had had limited time to read them. I asked her if she wanted to postpone the hearing or take some time to read the documents. She declined both options.
15. I had ordered the parties to exchange list and copies of documents, agree a final file of paginated documents and then for the respondent to produce a single PDF file of the agreed index and documents. What I received was 10 PDFs from the claimant and a hotch potch of 10 documents in different formats (I could not open one document at all) from the respondent. There was no index of what the documents contained.
16. Both parties produced a witness statement. The respondent's witness statement was mostly about alleged breaches of contract by the claimant that had nothing to do with the List of Issues that had been agreed at the preliminary hearing.
17. I went through the List of Issues with the parties. Both Ms Fernandes and Ms Worcester were argumentative and unhelpful throughout the hearing.
18. Ms Fernandes gave evidence first with the assistance of the interpreter. Ms Worcester cross-examined the claimant. I asked the claimant some questions.
19. Ms Worcester gave evidence for the respondent. She said she had a witness statement from a Scheduler (who I think set up the shifts and visits for Care Assistants such as Ms Fernandes) but had not served it on the claimant or the Tribunal. The witness was not in attendance. I therefore declined to accept the statement. The procedure for preparing and sharing witness evidence was fully

explained in my case management order of 1 March 2023. Ms Worcester was cross-examined by Ms Fernandes and I asked Ms Worcester some questions.

20. Both witnesses gave evidence on affirmation.
21. At the end of the evidence, I asked Ms Worcester to sum up first. I then asked Ms Fernandes to sum up. It was 16:00pm by the time both had finished, so I announced that I would reserve my decision.

### **Findings of Fact**

#### **Preliminary Comments**

22. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure, obtain more documents, or call more evidence, so I have dealt with the case based on the documents and evidence produced to me and the claim as set out in the list of issues.
23. I used the principle that "she who alleges must prove", which means that if a party made an assertion about something that they said happened, they have the burden of showing on the balance of probabilities that it did happen.
24. It is rare for a witness to be entirely incredible or unreliable in their evidence. Similarly, it is unusual for a witness to be entirely credible. I have made no general findings that either witness was either entirely credible, or entirely not credible. Where I have made findings that one witness was more credible than another on a particular point, I will explain why I made the finding.

#### **Undisputed Facts**

25. I should record as a preliminary finding that several relevant facts were not disputed, not challenged, or agreed by the parties. These were:
  - 25.1. For the purposes of this claim, the claimant was employed by the respondent as a Care Assistant, from 20 February 2022 until 13 June 2022 (both dates were agreed by the parties in their respective ET1 and ET3). Early conciliation started on 6 July 2022 and ended on 16 August 2022. The claim form was presented on 28 September 2022.
  - 25.2. The claimant was employed under a contract of employment that ran to 9 pages, which was produced as Exhibit 5 of the claimant's documents (although the copy produced was unsigned, neither party suggested that the contract was not genuine or that it did not contain the claimant's terms and conditions of employment). It confirmed the claimant's working week as 48 hours per week. The claimant's evidence that she worked 6 days per week was not challenged.

- 25.3. The contract required the claimant to work in Chelmsford or Maldon and required her to travel within a 50-mile radius of her home address. Her normal weekly working hours were stated, but the respondent reserved the right to vary start and finish times to meet the needs of the business.
- 25.4. The claimant was paid at the rate of £13.00 per hour on Monday to Friday and £14.00 per hour at weekends. She was entitled to £17.00 per hour on bank holidays and 30p per mile for travel to clients.
- 25.5. The contract referred to the respondent's staff handbook, but this was not produced. The respondent reserved the right to make deductions from wages for several reasons that I do not have to detail in these reasons.
- 25.6. The claimant was required to give 4 weeks' notice to terminate her employment.
- 25.7. It was agreed that the claimant and other Care Assistants receive notifications of which clients they had to visit to give care and the order in which they had to visit the via a mobile phone app called "Birdie". Ms Worcester's unchallenged evidence was that this may be the night before the work was done or the morning of the working day itself. It isn't particularly relevant.
- 25.8. It was relevant, however, that Ms Worcester's evidence that the phone app worked out the most economical route for the Care Assistants to take by using Google Maps was unchallenged.
- 25.9. It was agreed that the claimant resigned by letter dated 9 June 2022 (Exhibit 6 of the claimant's documents). The claimant gave the required 4 weeks' notice and calculated that her last day of work would be 10 July 2022.
- 25.10. Ms Worcester gave unchallenged evidence that the Care Assistants were required to login on the Birdie app when they arrived at a client's home to give care. They would then give care and return to their vehicle where they would write up their notes of the visit and logout on the Birdie app.
- 25.11. Both parties acknowledged that there was a practice known as 'forced login' aka 'forced check in' where a Care Assistant would enter data onto Birdie indicating that they had arrived a client's home before they had actually arrived. I will return to the relevance of this practice to this case later in the disputed facts section.
- 25.12. Following her resignation on 9 June the claimant worked as normal until 13 June 2022. Whilst there appears to have been an extensive conversation on WhatsApp between the claimant and Ms Worcester, I was only shown a short excerpt (Exhibit 9 of the claimant's documents).

- 25.13. At 11:39, the claimant messaged Ms Worcester and said “ Do you know what? I don’t work for you anymore from today.”
- 25.14. At 11:40, Ms Worcester responded “Why are you saying that? You can’t breach your contract Isabel.
- 25.15. At 11:40, the claimant replied “OK...my contract is 40 hours?”
- 25.16. Ms Worcester produced an undated screenshot that appears to continue the exchange. At 11:41, Ms Worcester said “I am just explaining to you that your pay may be inaccurate due to the force check ins and outs. Why are you acting so defensive?”
- 25.17. The claimant replied at 11:41 “I don’t force check outs.” She added at 11:42 “And just force check in in my first call...7 minutes before I get there.”
- 25.18. Ms Worcester’s response at 11:43 was “I have a record of every single forced check in and out. That is why I asked you why you do it. Because it affects pay. It’s better if you do not force any at all.”
- 25.19. There is another part message from Ms Worcester that is untimed which states “Then your pay will be accurate”.
- 25.20. The claimant says that she was locked out of the Birdie system on 14 June and tried to contact the respondent without success.
- 25.21. The claimant returned her staff uniform on 17 June 2022. Ms Worcester produced a WhatsApp exchange between her and the claimant dated 17 June 2022 that started at 16:09pm in which Ms Worcester asked the claimant if she had dropped her uniform off. The claimant replied that she had and that she had left it outside because there was no one there. The claimant then apologised.

### **Points of Dispute**

26. I make the following findings on the points of dispute between the parties.
27. I find that there had been a dispute between Ms Worcester and the claimant concerning forced logins on the morning of 13 June 2022. I make that finding because there was a clear reference to an earlier dispute about the practice in the exchange between them in the later exchange that was produced by both parties.
28. I find that the Birdie system recorded the claimant as forcing login throughout her employment because I find Ms Worcester’s evidence on the point to be credible. However, I do not find Ms Worcester’s evidence that she only became aware of it on 13 June 2022 not to be credible because I find it highly unlikely that a system that produces such data would be ignored. I find it more likely that the respondent chose to ignore the practice because it was struggling to recruit and retain Care Assistants, which was Ms Worcester’s unchallenged evidence.

29. I find that the alleged breaches of contract by Ms Fernandes are irrelevant to the issues I have to determine in this claim. Whether or not the claimant gave notice of holidays, for example is immaterial.
30. I find that the respondent has accepted that it underpaid the claimant by £789.97 because Ms Worcester provided this figure in her document titled "Schedule of loss for EDEN BROOK HOME CARE LTD". That figure had been calculated in another document titled "Courtcalculations".
31. I find that there is no legal provision in sections 13 to 27 of the ERA that allow a respondent to counterclaim or set off monies it has underpaid a claimant against monies it alleges the claimant 'owes' it because of historical forced logins. As I have found above, the respondent was aware of the forced logins and chose to do nothing about it. They waived the alleged wrongdoing.
32. I find that the claimant has not shown on the balance of probabilities that she is owed any more than £789.97 for unauthorised deduction of wages. I make that finding because:
- 32.1. The claimant's argument relies on suppositions that she has not been able to prove on the balance of probabilities, such as the alleged malfunction of the Birdie software.
  - 32.2. The claimant had no written record of any previous complaints about underpayments of wages or travel expenses.
33. I find that the claimant has not shown of the balance of probabilities that she is owed the balance of her notice pay. I make that finding because:
- 33.1. The claimant's message to the respondent on 13 June 2022 is clear and unequivocal – "Do you know what? I don't work for you anymore from today."
  - 33.2. The claimant made no written attempt to seek an explanation from the respondent for the alleged failure to give her work on 14 June 2022.
  - 33.3. The claimant gave no evidence of any attempt to phone the respondent about the failure to give her work.
  - 33.4. The claimant returned her uniform on 17 June 2022.
34. I find that the respondent acted reasonably in deciding to accept the claimant's message of 13 June 2022 as an immediate resignation. I make that finding because:
- 34.1. The respondent has an important function in delivering vital care services to vulnerable people. It is important that it can rely on its workers to turn up for work and deliver a service.
  - 34.2. The claimant had indicated that her employment had ended.



35. I find that the claimant has not shown on the balance of probabilities that she is owed travel expenses. I make that finding because:
- 35.1. The claimant's argument relies on suppositions that she has not been able to prove on the balance of probabilities, such as the alleged malfunction of the Birdie software.
  - 35.2. The claimant had no written record of any previous complaints about underpayments of wages or travel expenses.
  - 35.3. I find that it was reasonable for the respondent to rely on the Birdie software to calculate the mileage undertaken by the claimant.

### **Applying the findings to the law and issues**

#### **Unauthorised Deductions from Wages**

36. The wages paid to the claimant between 20 February 2022 and 13 June 2022 were less than the wages she should have been paid by £789.97.
37. The deduction was not required or authorised by statute or by a written term of the contract.
38. The claimant had a copy of her contract before the deduction was made.
39. The claimant did not agree in writing to the deduction before it was made.
40. The claimant is owed £789.97 (gross without deduction of income tax or National Insurance).

#### **Breach of Contract - Notice pay**

41. The claimant's notice period was 12 weeks.
42. The claimant resigned with immediate effect on 13 June 2022 before her notice expired.
43. The claimant was paid for the period of notice that she worked and she resigned with immediate effect on 13 June 2022 and thereby waived any right to the balance of notice pay due to her.
44. The claimant is not owed any notice pay.

#### **Breach of Contract - Expenses**

45. This claim was outstanding when the claimant's employment ended.
46. The respondent did not fail to properly reimburse the claimant for her travelling expenses.

47. The claimant is not entitled to damages because there was no breach of contract.

**Employment Judge Shore  
Dated: 4 August 2023**