EMPLOYMENT TRIBUNALS

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL (Ashford Hearing Centre)

Before: Employment Judge Martin

BETWEEN

Mr Stephen Dean **Claimant**

and

Hypo Hounds **Respondent**

Hearing dates: 25 July 2023 and 11 September 2023

Claimant's representative: in person

Respondent's representative: Ms Vermea – Peninsula representative

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed and his claim for unfair dismissal succeeds.
2. The Claimant's claim of automatic unfair dismissal is dismissed
3. The Claimant suffered a detriment due to trade union membership
4. The Claimant did not seek compensation so no remedy was awarded

RESERVED REASONS

1. By a claim form presented to the Tribunal on 6 January 2023 the Claimant made claims of unfair dismissal (both ordinary and automatic) and detriment

for trade union membership. The Respondent defended the claims by way of its response. The hearing was held on 25 July 2023. There was no time for submissions or deliberation, so a further hearing was listed for 11 September 2023 to hear submissions and give judgment. Oral reasons were given at the conclusion of the hearing. These written reasons are being provided at the request of the Claimant.

2. The Respondent is a diabetic alert assistance dog charity that train dogs to detect and be alert to dangerous changes in their Type 1 Diabetic owner's blood sugar levels.

3. The Claimant is an ex-dog handler for the police. In 2017 he donated a dog to the charity. He worked for the Respondent on an ad hoc basis from 2018. In August 2020 he was offered a self-employed contract. In 2021 he was offered a fixed term contract of employment.

4. The terms of the two contracts can be compared as follows:

5. On 28 July 2022 all dog trainers (only the Claimant was an employee at this point) were called to a meeting where they were told that they would be moved to a zero-hour contract. Those that were previously classified as self employed workers were put on an employment contract. The Claimant's job title was changed from Head Trainer/Puppy Manager to Assistance Dog Trainer. This was a demotion, and he was very unhappy that the Respondent had not spoken to him privately before announcing it in front of his colleagues. He later received an apology from the Respondent about this. All staff were told that if they did not accept the zero hours contract their contracts would be terminated. The Respondent purported to give notice orally to terminate the Claimant's contract. Written notice was contractually required.

6. That evening the Claimant joined a trade union. On 1 August 2022 he wrote to Ms Pearman (Chief Executive) and amongst other things said he had joined a union, and was prepared to use them in any legal challenge he might make. He attached a copy of his trade union card as proof of membership. A couple of hours later, Ms Pearman wrote to her Trustees asking them to deal with the Claimant. She forwarded the Claimant's email which contained details of his union membership.

7. By this time the Claimant's relationship with Ms Pearman was strained. This is because he challenged Mrs Pearman's decision to terminate Mr Harrison's employment; He objected to how the demotion was announced, and he said he would only sign the zero hours contract under duress. Notwithstanding the legal advice available to the Respondent, Mrs Pearman took this to mean that the Claimant flet he was being bullied into signing the zero hour contract.

8. On 8 August 2022 Ms Pearman drafted a letter to the Claimant withdrawing the offer of a zero hour contract, notwithstanding that in her letter to the Claimant of 1 August (just before the Claimant had notified her he had joined a union) she had reiterated her offer of a zero hours contract. This letter was not given to the Claimant until 12 August 2022. At the same time the

Claimant was given formal written notice (as required contractually) of termination of his employment with the effective date of termination being 10 September 2022.

My conclusions

9. I find that the issue of the zero hours contract is not relevant to the substantive issue of unfair dismissal. The Respondent gave formal notice to terminate the employment contract on 15 August 2022. Previously this had been orally discussed with the option to enter a new contract for zero hours and a demoted position.

10. This is not simply a change of terms and conditions it is more fundamental than that. I referred myself to the case of **Hogg v Dover College [1990] ICR 39, EAT**. Therefore, for the purposes of the unfair dismissal claim I am only looking at the employment contract and not the zero hour contract. The zero hours contract would be relevant to any mitigation argument but as the Claimant is not seeking a financial remedy is it not necessary to examine this further.

11. The decision to terminate the Claimant's employment contract was made on 28 July 2022 even though it was not formalised until later. This was before the Claimant joined the trade union. Therefore, I find on the balance of probabilities that the reason for the decision to terminate his employment was not because he joined the union. His claim for automatic unfair dismissal is therefore dismissed.

12. Mrs Pearman says that at a trustees meeting on 13 August 2022 the decision was made to withdraw the offer of a zero hours contract; however she had already drafted the letter dated 8 August 2022 withdrawing offer of zero hours contract. This was five days before the purported board meeting which is said to have decided to withdraw the offer.

13. The Claimant disputes that there was a board meeting saying it was Mrs Pearman's decision not the board's. There were no minutes of the meeting in the bundle, no documentation setting up such a meeting and in evidence Mrs Pearman unable to say who was present, or where or how the meeting was conducted. She said she was not at the meeting. No trustee gave evidence. This clearly relevant information which was not presented by the Respondent. I can only make my decision on the evidence presented to me.

14. There is reference to an HR department, this in fact is the Respondent's legal advisors, Peninsula. There is or was a trustee responsible for HR and this trustee liaised with Peninsular. The Claimant says no one spoke to him about any other alternatives to dismissal and there is no evidence of any other alternatives being discussed. Only a vague unspecified assertion by Mrs Pearman who had no knowledge of what might had been discussed. On this basis, and on the balance of probabilities, I find that there was no discussion about alternatives to dismissal.

15. I find on balance of probabilities that decision to withdraw zero hours contract made by Mrs Pearman on or about 8 August 2022 when she

drafted the letter withdrawing this offer. Significantly, this is the date the Claimant returned to work from annual leave and when he had suggested meeting Mrs Pearman to discuss the zero hours contract. Despite the souring of relations between the Claimant and Mrs Pearman referred to earlier, the Respondent was still prepared to offer a zero hours contract up to 1 August 2022 when it referred to the zero hours contract being sent to the claimant and answered some questions he has posed.

16. The email sequence on 1 August 2022 was that Mrs Pearman sent an email to the Claimant at 2.44 pm. This reiterated the offer of a zero hour contract. The Claimant replied at 6.52 and in this email said he had joined a union. At 8.33 pm the same day, Mrs Pearman emailed the board of trustees saying she was leaving this to them to deal with.

17. On the balance of probabilities, I find that the principal reason the Claimant was not offered a zero hour contract was because of his trade union membership. Whilst there were certainly other matters of contention between him and Mrs Pearman, those do not appear to have triggered the decision to rescind the offer of a zero hour contract. I find that the motivating factor was his union membership. This would that the withdrawal of the zero hours contract was a detriment to the Claimant and was because of the Claimant's trade union membership. I therefore find that the Claimant's claim in this respect is proven.

18. Having dismissed the claim of automatic unfair dismissal, I turned my mind to ordinary unfair dismissal. First I must determine the Claimant's employment status as he needs two-year continuous employment to bring a claim of unfair dismissal. I find that the Claimant had the necessary continuous period of service required to bring a claim for unfair dismissal. I find that the Claimant was an employee from August 2020. The effective date of termination of employment was 10 September 2022.

19. S230 Employment Rights Act 1996 provides that an "employee" means an individual who has entered into or works under a contract of employment. No comprehensive statutory definition of 'employee' exists although a body of case law has developed various tests to distinguish a 'contract of service' from a 'contract for services', none of which is conclusive. There is now an enormous diversity of working arrangements and the Tribunal when faced with the task of considering whether a claimant is an 'employee' must weigh all the factors put before it. These factors will include the provisions of the contract under which the claimant worked, the extent to which and the way in which the work was controlled by the Respondent employer, whether there was a requirement for personal service and mutuality of obligations between the parties.

20. The question as to whether the Claimant is an employee is a mixture of fact and law with no individual fact being determinative of the issue.

21. The fact that the contract says self employed is not determinative. I have looked at how the parties conducted themselves in conjunction with the written agreements to determine the reality of the working arrangements. I

looked to see what changed from the August 2020 contract and the March 2021 contract which the Respondent accepts is a contract of employment.

22. There are some differences in the written agreements. However, there are also significant similarities. Overall, there was no indication that the working arrangements changed on a day-to-day basis, or that the duties the Claimant undertook were any different between the two contracts notwithstanding the change in job title. The Claimant has produced a table of comparison which I have examined and accept is accurate. This shows that the written contract is very similar for both the self employed contract and the contract of employment. There is the right to substitute in the self employed contract limited to those trainers were approved by the Respondent.

23. Factors which point towards 'employee' status include:

a) The fact that C is paid a fixed amount every month did not differ, (although the actual amount did change). This was not called a retainer or similar. It was payment for work done. Therefore, I find that the Claimant was under an implied obligation to carry out work required by the Respondent and the respondent is under an obligation to pay the Claimant a fixed amount. Being a charity, they are required to utilise their resources efficiently and therefore by implication would be required to offer work to cover the payment made to ensure value for money.

b) The Claimant was provided with a desk, a desk computer, a laptop computer, and a mobile telephone.

c) The Respondent provided training

d) There was personal service required. Whilst the Claimant could under the purported self-employed contract ask someone on the bank of approved trainers to cover his work, this was a limited right to substitution controlled by the Respondent. I find that this does not negate the obligation to offer personal service.

e) There was sufficient control by the Respondent that is required for a contract of employment. The Respondent could discipline the Claimant, review absence levels, and monitor what the Claimant did.

f) The Claimant was contractually entitled to rest breaks, and could be put on garden leave.

g) I find that there was sufficient integration into the company, the Claimant was required to wear a uniform and was subject to company rules and procedures including discipline and grievance procedures. Additionally the Respondent provided equipment and training.

h) There was no differentiation between the Claimant and Mr Harrison who was also an employee, in the workplace, and Mr Harrison said he always thought the Claimant was an employee.

24. Having found there was the requisite continuity of employment, I then considered if the dismissal was fair. The reason for dismissal was some other substantial reason. This is a 'scoop up' provision to cover situations not contained in the other potentially fair reasons for dismissal. A process is still required to make the dismissal fair. Here I find that there was no process of engaging with the Claimant to see if there was any way in which his employment could continue. The absence of any documentation about the circumstances leading to the termination of employment or any evidence from the Trustees leads me to find on the balance of probabilities that there was no procedure in place, and the Claimant was simply presented with an ultimation. In all the circumstances I find the dismissal to be unfair.

25. The Claimant does not want financial compensation and therefore the case is concluded.

Employment Judge Martin
Date: 18 September 2023