



EMPLOYMENT TRIBUNALS

Claimant: Mr MD Rashed Molla
Respondent: Tendercare Management Ltd
Heard at: East London Hearing Centre
On: 12 and 13 October 2023
Before: Employment Judge Townley

Representation

For the Claimant: Mr S Hawes (Free Representation Unit)
For the Respondent: Ms J Twomey (Counsel)

Judgment having been sent to the parties on 2 November 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Procedural history

1. By claim presented on 3 July 2022, after an ACAS early conciliation period between 19 May 2022 and 29 June 2022, Mr Molla (the Claimant) claimed unauthorised deduction from wages. Paragraph 8.2 of the narrative of the claim form stated - 'I came to this country on 29 January 2022 and Tendercare Ltd is my sponsor. According to the CoS [certificate of sponsorship] they should give me 39 hours a week and £22,000 a year. But till now I worked 2 days in the last 6 months and get paid £105 from the company. I have all the bank slips and other correspondence evidence about this transaction. So I want to get this money back. According to CoS [certificate of sponsorship] I should have '£22,000 wages a year. Within the last six months I am paid £105. I want to get all the wages from February till now'.

2. The Response Form was received by the tribunal office on 31 August 2022. A preliminary hearing in public (PHP) listed for 18 November 2022 was postponed until 28 March 2023. The Claimant sought advice from a Citizens Advice Bureau caseworker, Mr A Jackson, and in advance of the preliminary hearing, submitted two documents entitled 'Further and Better Particulars' and 'Claimant's Application To Amend'. The Application to Amend related to claims of wrongful dismissal and for unpaid, but accrued, holiday pay. The Claimant also sought to recontextualise his unlawful deduction from wages claim. By 28 March, the Claimant had secured a representative from the Free Representation Unit (FRU). An application drafted by Ms Meadows of FRU was submitted on that day editing the document drafted by Mr Jackson to include a claim for automatic unfair dismissal on the basis of assertion of a statutory right, namely the claimant had suffered an unlawful deduction from wages as alleged in his claim form and a claim for breach of contract in respect of an assertion that the Claimant had entered into an agreement with the Respondent to work for it in return for £28,000.
3. The amended Further and Better Particulars document, dated 27 March 2023, alleged that the £28,000 represented '... a prohibited job-finding fee under rule 7 of the Gangmasters (Licensing Conditions) Rules 2009. It also alleged that the £28,000 payment '... enriched [the Respondent] at the Claimant's expense. There was a failure of consideration, insofar as the fee was prohibited. The Claimant seeks restitutionary damages of £25,000 ...'.
4. At the PHP on 28 March 2023, EJ Travers allowed the application to add claims for holiday pay outstanding at the date of termination of employment and wrongful dismissal. The application to add claims for breach of contract and automatically unfair dismissal was refused (the latter decision was later set aside by EJ Travers and reconsidered on 21 August 2023, when EJ Porter refused the application for leave to amend the claim to include an automatically unfair dismissal claim) .
5. In ruling that the tribunal had no jurisdiction to hear the claim for breach of contract in respect of the £28,000 payment that the Claimant says he made to the Respondent, EJ Travers stated (Bundle/103 – 104):

'85. *Gangmasters (Licensing) Act 2004* – The Gangmaster Rules which are relied on by the Claimant are made under the authority of s 8 of the 2004 Act. Section 3 (1) of the Gangmasters (Licensing) Act 2004 sets out the sectors to which the Act applies. Under certificate of sponsorship the Claimant's employment falls within 'Job type: 6141 Nursing auxiliaries and assistants – Band 3 & equivalent'. This is not a sector to which the 2004 Act applies. The Gangmaster Rules cited on behalf of the Claimant have no application to the claim for breach of contract.

86. *Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994* – The effect of Article 4 of the Order and section 3(2)(a) of the Employment Tribunals Act 1996 is that the tribunal has jurisdiction in respect of, 'a claim for damages for breach of a contract of employment or other contract connected with the employment'. Section 42 of the Employment Tribunals Act 1996 states that, '“contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

87. The alleged agreement for the claimant to pay £28,000 in exchange for sponsorship is not of itself a contract of employment. The availability of a contract of employment may feature as an essential component of sponsorship in order to satisfy Home Office requirements, but the agreement to sponsor is not in itself a contract of employment.

88. The purpose of the agreement to sponsor is to secure a visa which will *then* permit the worker to live and work in the UK,

89. On the claimant's account, the £28,000 was to provide a UK visa and a contract of employment. The claimant's agreement to pay £28,000 is not a term of the contract of the employment itself.

90. It was also not a, 'contract connected with employment', within the meaning of Article 4 of the 1994 Order. There was no employment at the time the agreement to pay the £28,000 was made. It was neither incidental to, nor arising from any employment. On the claimant's account it was an agreement that, in exchange for the payment, the respondent would enable him to obtain a visa which would then permit the claimant to live and work in the UK.

91. In all the circumstances the claimant has not satisfied the tribunal that the tribunal has jurisdiction to hear the claim for breach of contract in respect of the £28,000 payment.

92. This decision does not exclude the breach of contract jurisdiction of the civil courts which remains available to the claimant, subject to the applicable law and procedure, including limitation periods. The tribunal expresses no view as to the merits or otherwise of such a claim'.

6. The Claimant's claim for wrongful dismissal was later withdrawn. The only claims remaining before the tribunal to be determined are claims for unlawful deduction of wages and holiday pay, accrued but unpaid and outstanding, at the date of termination of the employment. The Claimant's case is that he is entitled to be paid wages and holiday pay from 29 January – 27 May 2022 further to, what he claims to be, an 'offer letter' dated 19 October 2021 signed by 'Mohammad Yasin Jibon' and 'Sharman Sultana Shetti' on behalf of the Respondent. He says that these named individuals were acting as authorised agents capable of legally binding the Respondent. The Respondent's case is that this letter is a document that created by the Claimant to advance his case, that the purported signees of the letter are unknown to the Respondent, and that they are not the Respondent's agents. The issue to be decided is whether 'Mohammad Yasin Jibon' and 'Sharman Sultana Shetti' were acting as authorised agents of the Respondent and, if so, whether the 'offer letter' dated 19 October 2021 was such as to create a contract of employment between the Claimant and the Respondent so as to entitle the Claimant to be paid wages and holiday pay as either an 'employee' or 'worker' of the Respondent during the relevant period of time.
7. Prior to this hearing, the Respondent paid all wages and holiday pay that it owed to the Claimant for the work that he had undertaken between 28 May 2022 (when he worked his first shift for the Respondent) and 16 September 2022

when the employment relationship was terminated. The Claimant served an amended schedule of loss to the tribunal on the first day of the hearing reflecting that this payment had been made and that no wages or holiday pay were outstanding for the period that the Claimant worked for the Respondent from 28 May 2022 onwards.

The hearing

8. I was provided with a bundle with a total of 522 pages by the Respondent's counsel. Witness statements were supplied by the Claimant (Bundle/Witness Statements A1/3-10); Mrs Muhubo Mohamoud (Director of the Respondent) (A1/11-22) and Mr Jama A Mohamoud (HR Manager of the Respondent) (A1/23-30). I heard evidence from the Claimant, who was assisted throughout the hearing by Mr N Deb, a Registered Interpreter of the Bengali language; and, on behalf of the Respondent, from Mrs Muhubo Mohamoud and Mr Jama Mohamoud. The Claimant and both witnesses for the Respondent elected to give their evidence under affirmation.

The Claimant's application to admit evidence of four 'covertly recorded' conversations (12.10.23)

The Submissions

9. At 8.17 am on day 1 of the hearing, Mr Hawes forwarded, by email, to the tribunal four 'covert recordings' which had been made by the Claimant of conversations that he had had with a number of individuals (labelled as below) which he sought to admit in evidence. One of the recordings is of a conversation in English and the other three record conversations in Bengali. Each of the recordings were accompanied by transcripts in English. The translations of the conversations in Bengali did not contain an attribution to the translator, any statement of truth, date, or any other information or certification in relation to the translation. The conversations are between the Claimant and the Respondent's witness, Mr Jama Mohamoud (in English); and the Claimant and individuals whom he identifies as 'Mohammad Yasin Jibon', 'Sharmin Sultana Shati' and another individual identified only as 'Saimon' (or 'Suhel') (none of these individuals have had any involvement in this case but it is the Claimant's case that they were 'agents' of the Respondent).
10. The transcripts were labelled as follows (my numbering):
- (i) Conversation between Jama Mohamoud and Rashed Molla (the Claimant) (dated May 2022) [although is referred to in the Claimant's written argument as having taken place in April 2022] (Recording and transcript in English)
 - (ii) Conversation between the Claimant, 'Saimon' and 'Mohammad Jibon' (23.03.23) (Recording of conversation in Bengali with transcript in English)
 - (iii) Conversation between the Claimant and 'Mohammad Jibon' (25.03.22) (Recording of conversation in Bengali with transcript in English)

- (iv) Conversation between the Claimant, 'Mohammad Jibon' and 'Sharmin Sathi' (undated) (Recording of conversation in Bengali with transcript in English)
11. The recordings were disclosed to the Respondent on 22 September 2023 followed by the 'transcripts' on 6 October 2023. In respect of the Bengali to English 'translations', Mr Hawes submitted that any prejudice flowing from the late disclosure was limited as the Respondent's witnesses, Mr Jama Mohamoud and Mrs Muhubo Mohamoud, who were present, understood Bengali. Ms Twomey then clarified that neither of the Respondent's witnesses spoke or understood the Bengali language. As a result, Mr Hawes abandoned that aspect of his argument.
12. Mr Hawes said that the late disclosure of this material was due to the Claimant having had health issues which had contributed to the delay and that he had only just realised the relevance of the recordings and had needed help to make the transcripts. Mr Hawes submitted that the test to be applied when considering the admission of the evidence, was one of relevance and public policy (the latter consideration having particular relevance to the conversations that had been 'translated' from Bengali into English).
13. He submitted that four conversations were relevant to the Claimant's case in that they established that the Claimant was 'recruited' to work for the Respondent by 'Mohammad Jibon', 'Sharmin Shati' and 'Saimon' who were acting as 'agents' of the Respondent. This was further supported by the fact that the recordings refer to the Claimant's his brother going to the Respondent's office in March 2022. Mr Hawes argues that it followed that the Respondent was aware of the Claimant's whereabouts before March 2022. He also states that the conversation between the Claimant and Mr Jama Mohamoud of the Respondent was acrimonious and that, if the Claimant had just started working for the Respondent in May 2022 (which was the Respondent's position), there would have been no need for acrimony at that early stage of the employment relationship.
14. In addition to his oral argument, Mr Hawes made the following written submissions (reproduced below with my numbering):
- (i) **'Conversation between Mr Molla and Jama Mohamoud, April 2022, in English)** In this conversation, a director of the Respondent calls Mr Molla to rebuke him for bringing his brother (who he mistakenly believes is his uncle) to a meeting at Tendercare's office. During this interaction, Mohamoud says: "You work for me, you got the visa through me, I don't want anyone else to come with you and represent you in this office." This is further evidence of the Respondent's direct involvement in Mr Molla's arrival in the UK.'
- (ii) **'Conversation between Mr Molla and 'Saimon' and Mohammad Jibon 23.03.22, in Bengali).** In this conversation, one of the Respondent's agents questions Mr Molla about who visited the Respondent's office on Mr Molla's behalf. The agent repeatedly threatens to cancel Mr Molla's Certificate of Sponsorship and tells him that he should only contact the Respondent through one of the agents. This conversation indicates that these agents were acting on behalf of the Respondent, both because of their knowledge of events at the office and their ability to cancel Mr Molla's sponsorship. This is important as Mr Molla's claim that he was to start working on the 29.01.22 (rather than a later date) is based on conversations he had with the Respondent's agents.'

- (iii) **‘Conversation between Mr Molla and Mohammad Jibon 25.03.22, in Bengali).** In this conversation, another of the Respondent's agents discusses filling out the Respondent's application form. This again demonstrates that they were actively involved in the Respondent's recruitment process.’
 - (iv) **‘Conversation between Mr Molla, Mohammad Jibon and Sharmin Sathi, late March, in Bengali).** In this conversation, Mr Molla brings up the fee of around £28,000 that he paid to the agents in return for his job. He asks why he still had not started the job which he paid for. The Respondent's agent tells him that he needs to be more patient. This demonstrates that Mr Molla did pay the respondent's agents this money, as this is not denied in the conversation. Furthermore, it shows that the agents were aware that Mr Molla's understanding of their agreement was that he would start work early in 2022.’
15. Ms Twomey objected to the admission of the transcripts of all four conversations. In relation to conversation (i) (conversation and transcript in English) she takes no issue with the accuracy of the transcription, but states that it is not relevant to the disputed issue in the case, namely the start date of the Claimant's employment with the Respondent. This was because the contents of the conversation had no probative value in relation to the start date of the contract between the Claimant and the Respondent and that both parties were in agreement that the Claimant worked his first shift for the Respondent on 28 May 2022.
16. In relation to conversations (ii), (iii) and (iv) (in Bengali with English transcription), Ms Twomey argues that the English transcriptions of these conversations contain no dates or certified translation, statement of truth or signature. The conversations were also with named individuals and that the Respondent did not know who those people were. Furthermore, due to the late service of the transcripts, the Respondent had had only three working days to try to arrange for their own translation and this had not been enough time. It followed that the Respondent was severely prejudiced by the late disclosure. Ms Twomey further submitted, that, in any event, the information contained in the transcripts had no relevance to the current proceedings as it did not assist the tribunal in determining the start date of the contract between the Claimant and the Respondent and that the matters stated therein were covered in the Claimant's statement in any event.
17. In summary, the contents of the conversations are as follows:
- a. Conversation (i) with Mr Jama Mohamoud, the Respondent's witness, relating to the Claimant's 'Uncle's' attendance at the Respondent's office in March 2022.
 - b. Conversation (ii) with Saimon and Mohammad Jibon (dated 23.03.23) mentions the Claimant 'going into the office' and Saimon saying 'we no longer want to employ you'.
 - c. Conversation (iii) between the Claimant and Mohammad Jibon (dated 25.03.22) relates to the Claimant completing an application form and a conversation about obtaining a reference.
 - d. Conversation (iv) with Mohammad Jibon and Sharmin Sathi (undated) makes reference to a 'Saimon' and a 'Sir'. Mohammad Jibon agrees with

the Claimant when he says that he paid £30,000 for the CoS (certificate of sponsorship).

The law to be applied

18. In considering the Claimant's application to admit 'covertly obtained' material, I apply the judgment in relation to the admission of unauthorised recordings of Underhill J (as he then was) in *Vaughan v Lewisham LBC UKEAT/0534/21/SM 2013 WL 617510* at para 22:

'... it is necessary in the case of any piece of evidence to assess how relevant it is, and in what way and also the extent to which the individual matters that may have been pleaded are themselves central to the allegations. This itself involves questions of degree and, to use the term with which we are now familiar, proportionality.'

In exercising any discretion, I must also consider 'the overriding objective' of *The Employment Tribunals Rules of Procedure 2013*. Any discretion must be exercised in a way that ensures that cases are dealt with fairly and justly, that all parties are placed on an equal footing, at proportionate cost, while avoiding any unnecessary formality and delay and saving expense.

Conclusions on the law

19. The crux of the Claimant's case is that he entered into an oral contract of employment with individuals, whom he identifies as 'Mohammad Jibon', 'Sharmin Sathi' and 'Saimon', and whom he claims were acting as agents of the Respondent. The terms of that contract provided that the Claimant was to work for 39 hours per week for the Respondent in return for a gross annual salary of £22,000 starting on 29 January 2022. The Claimant has also said that he paid in excess of £28,000 which he considered to be 'for a job' at the behest of these individuals into various bank accounts. The payment of the £28,000 and any contract in relation to that has been found to be outside of the jurisdiction of the tribunal. The only issue that remains to be decided is whether a contract of employment existed between the Claimant and the Respondent from 29 January – 27 May 2022.
20. The Claimant argues that the 'contract' was evidenced by an 'offer of employment letter' dated 19 October 2021 which the Claimant says was given to him by 'Mohammad Jibon' and 'Sharmin Sultana' in Bangladesh.
21. In respect of conversation (i) between Jama Mohamoud and the Claimant (in English)), Mr Hawes seeks its admission on the basis that it provides further evidence of the Respondent's direct involvement with the Claimant's arrival in the UK and that the acrimonious nature of the conversation indicates a relationship between the Claimant and the Respondent that was already in existence prior to April/May 2022. It is not disputed by the Respondent that Mr Jama Mohamoud had interviewed the Claimant in September 2021 and that he, on behalf of the Respondent, agreed to issue the Claimant with a Certificate of Sponsorship (which would enable the Claimant to apply for a UK visa). It is therefore not denied by the Respondent that it had a relationship with the Claimant prior to April/May 2022. The central point of contention that remains is whether a contract of employment existed between the Respondent and the

Claimant with a start date of 29 January 2022. The conversation makes no mention of any start date and it therefore has no relevance or probative value to that issue. I therefore declined to admit it in evidence.

22. Conversations (ii) – (iv) raise an additional issue. Firstly, the recordings themselves are in the Bengali language (one that it is not spoken or understood by the witnesses for the Respondent). Secondly, the translations into English are unattributed, undated, and contain no signature or statement of truth. While I bear in mind that the Claimant has limited means, the need to avoid unnecessary formality, and also that Mr Hawes had gone to great efforts to bring this material before the tribunal, I consider that it would be unfair to admit this material in all the circumstances. The Respondent's witnesses do not speak Bengali and I accept Ms Twomey's argument that the late service of the material did not give the Respondent enough time to have the translation verified and I decline to admit them.
23. If I am wrong about the this, I consider the conversations would be inadmissible in any event. Mr Hawes has relied on the conversations to show that individuals whom the Claimant identifies as 'Mohammad Jibon', 'Sharmin Shati' and 'Saimon' have knowledge of the Respondent's office processes (conversations (ii) and (iii)) and that an individual identified as 'Saimon' agrees that the Claimant paid him around £28,000 for a job (conversation (iv)). These matters have no relevance or probative value in relation to the disputed issue, namely the start date of the Claimant's contract of employment with the Respondent. What these individuals had known or not known about the Respondent's office processes is of no assistance on that point (conversations (ii) and (iii)). The payment of the £28,000 and any contract in relation to that has been ruled to be outside of the jurisdiction of the tribunal (as it is not a contract of employment) and whether and to whom that amount was paid is not relevant to issue remaining in this case.

The Claimant's application to admit WhatsApp messages (13.10.23)

24. At the start of the second day of the hearing, after the Claimant and both of the Respondent's witnesses had given their evidence, Mr Hawes made a further application to submit in evidence screenshots of two 'WhatsApp' messages taken from the Claimant's mobile phone of a conversation between the Claimant and a contact that he identifies on his telephone as 'Jibon vi. UK'. The Claimant says that this is 'Mohamoud Jibon' (who, he argues, is one of the Respondent's agents). The first screenshot (dated 20 February 2022) is of a message that the Claimant had completed on the contact page of the Respondent's website, saying:

'Name MD Rashed Molla
[email and contact telephone number removed from this judgment]

Message I am support worker appointed in your company. Now I am have come uk and collect my brp card. Now can how can I join you company. Please help me. My cos issue your company'.

And, a second screenshot (dated 13 April 2022) of a 'forwarded' message saying:

'Suhel bhai

Can you ask Rashid mullah to attend the induction on Monday 18th April 9am at tendercare office.

Documents he need to take:

Passport

BRP

DBS

Proof of address.

Attend the induction on Monday'.

Mr Hawes said that he had not previously disclosed these messages to the Respondent and that that was an oversight on his part. He submitted that the texts had real relevance to the case as there was a dispute as to the role that individuals played in relation to the Claimant coming to the UK and how he was recruited by the Respondent. Mr Hawes says that the messages show that agents (in this case an individual identified by the Claimant as 'Mohammad Jibon') were mediating the messages sent between the Claimant and the Respondent and that the first message shows that the Claimant attempted to contact the Respondent as early February 2022. Therefore, the messages are relevant to show that the Claimant was telling the truth about his contact with the Respondent's 'agents'.

Ms Twomey objected to the admission of the messages on the basis that all the evidence had been called and that to admit new evidence now would mean having to recall witnesses and that this would impact on the amount of time needed to complete the hearing and therefore overall costs. She also said that the first message supports nothing more than the fact that the Claimant was attempting to get in touch with the Respondent to ask about work in February 2022 (and that, in his evidence, Mr Jama Mohamoud had been questioned about this and had said that he did not recall having seen this message on the website) and that, in any event, both the messages had no probative value to the issue in the case, namely the start date of the contract.

The law to be applied

25. While neither party sought to make any legal submissions in relation to the application, it is trite law that the general rule on whether evidence is admissible is one of relevance to the issue(s) between the parties. I also note that while case management is a consideration, it is not the primary consideration in relation to allowing parties to rely on evidence before a tribunal. However, in exercising my discretion, I nevertheless have to also have regard to the tenets of the 'overriding objective'.

Conclusions on the law

26. It is common ground between both parties that the first screenshot relates to a message left on the Respondent's contact page on its website by the Claimant. Mr Jama Mohamoud had already been cross-examined on this issue on behalf of the Claimant and he said that he did not recall seeing this message. That the Claimant attempted to make contact in this way at this time is not disputed by the Respondent, so the admission of the screenshot does not assist the Claimant's case. It also does not assist in the determination of the start date of the employment. The second message is a forwarded message (the

screenshot shows 'forwarded message' (with no further details). The message relates to the Claimant's induction training at the Respondent's office. Without further context, this message does not assist the Claimant's case. That the claimant attended induction training is not in dispute and as the only issue to be determined is the start date of the of the contract between the Claimant and the Respondent, the text has no probative value. I therefore declined to admit both screenshot messages due to their lack of relevance to the issue to be determined.

Findings of fact

27. The Claimant is a citizen of Bangladesh who arrived in the UK on 28 January 2022. The Respondent was his sponsor and he then obtained his visa which permitted him entry clearance to undertake work in the UK. He commenced work for the Respondent on 29th May 2022, working shifts as a support worker in the residential care sector. Prior to that date he had not undertaking any work for the Respondent.
28. The Respondent is an employment agency providing domiciliary care, residential care, and cleaning services. Mr Jama Mohamoud and Mrs Muhubo Mohamoud are the Human Resources Manager and Director of the Respondent respectively. The Respondent's registered address is Citybase, City Gate, 246 – 250 Romford Road, Forest Gate, London E7 8HZ.
29. The Claimant had been working as a healthcare assistant five years In Bangladesh. In January 2021 he was approached by three Bangladeshi individuals who offered to provide him with work in the care sector in the UK. They identified themselves to the Claimant as 'Mohammad Yasin Jibon', 'Sharmin Sultana Shati' (who were a couple) and 'Saimon' (also known as 'Suhel'). From the Claimant's conversations with them, he understood that they were recruiting agents who recruited people from universities in his area to work in the UK and other countries. It was his understanding that they would be able to get him a work visa for the UK and a job with a company that they referred to as Tendercare Management Limited, whom they said that they represented. The Claimant also understood from these conversations, that he would be given indefinite leave to remain after five years of working in the UK and that this would then enable him to bring his family to the UK. The individuals known to the Claimant as 'Mohammad Yasin Jibon', 'Sharmin Sultana Shati', and 'Saimon' (also known as 'Suhel'). However, despite what the Claimant might have been led to believe, as a matter of fact, these individuals were not acting as agents on behalf of the Respondent.
30. On 6 August 2021, the Claimant contacted the Respondent seeking a job as a support worker, saying 'I am very good and very dedicated person. Please give me the opportunity to work for your company' (Bundle/168). The Claimant also enclosed supporting documents, including his CV and a reference (Bundle/187 – 190; 223). This documentation was stamped as having been received at the Respondent's office on 16 August 2021.
31. Sometime during September 2021, Mr Jama Mohamoud of the Respondent interviewed the Claimant via an online video platform. He was impressed with the Claimant's ambition and qualifications. Mrs Muhobo Mohamoud of the Respondent agreed to sponsor the Claimant to come to the UK.

32. On 7 October 2021 Mr Jama Mohamoud of the Respondent wrote to the Claimant at his home address in Dhaka, Bangladesh, on the Respondent's headed notepaper, saying (see Bundle/270; 272-274):

'We have issued your CoS [certificate of sponsorship] on the 6th October 2021, please find attached Cos with this letter. You can now make your visa application to UKVI for entry clearance. If you are successful in your visa application we require you to inform us immediately so we can start the process for you to be a part of the company. Please do let us know your travel plans and do contact us as soon as you can once you have safely arrived. If required assistance with the visa application please do not hesitate to get in contact to be assisted'.

33. On 19 October 2021 the Claimant was given a letter (Bundle/271) in Bangladesh. The letter was written on an otherwise blank sheet of paper with no header or footer. It contained a correspondence address in Uxbridge (which the Claimant says was the home address of the individuals identifying themselves as 'Mohammad Yasin Jibon' and 'Sharmin Sultana Sathi' [this address was supplied to the tribunal but has been omitted from this judgment]). The letter states:

'Ref : Offer of employment

Dear Molla

We were all very excited to meet and get to know you over the phone in past few days. We have been impressed with your background and would like to formally offer you the position of Support Worker. This is a full time position weekly 39 hours. We will be offering you an annual gross salary of £22000. It is 3 years of employment with the company and will sponsor your visa after 3 years and also further help you with permanent residency in the UK. We are all looking forward to having you on our team.

**Regards, M. Jibon & Sharmin Sultana Sathi
On Behalf of Tender care Management Ltd.'**

The letter contained no reference to when any employment was due to start and while the letter purports to be written on behalf of the Respondent, it is not written on headed notepaper and misspells the Respondent's name splitting it into two words 'Tender' and 'care'. Despite saying that it was written on 'behalf of Tendercare Management', and contrary to what the Claimant might have believed, this letter was not one that was written acting as an agent of the Respondent. The Respondent did not know the individuals and it could therefore not have given them authority to write such a letter on their behalf.

34. From 21 October 2021, the Claimant paid sums of money, in Bangladeshi Taka, over several installments, amounting to the equivalent of a total of over £28,000, into various bank accounts on the instructions of the individuals identifying themselves as 'Mohammad Yasin Jibon', 'Sharmin Sultana Sathi and 'Saimon'/ 'Suhel'. The Claimant says that they told him that the money was in return for their processing the relevant documents required for him to come to the UK, including his Certificate of Sponsorship and a 'visa fee'. The Claimant understood that 'All of these sums were paid in return for my obtaining the right to work in the UK and a job with the Respondent for five years' (Witness

statement bundle/4, para 8). In order to pay this amount of money, the Claimant had to obtain loans from family and friends and he also sold a piece of land belonging to his father. It was his understanding that he would get all this money back within two years of arriving in the UK. The Claimant produced bank slips recording payments made into numerous named accounts (none of the named individuals are involved in this case) at different banks (Bundle/260 – 269).

35. The Claimant says that he was contacted in January 2022 by 'Mohammad Yasin Jibon', 'Sharmin Sultana Sathi' and 'Saimon'/ 'Suhel' and was told that he needed to arrive in the UK by 28 January 2022 as his job was due to start on 29 January 2022 and that if he was not there his visa would be cancelled. The Claimant said that he was told to delete any records of communications that he had had with any of these individuals before coming to the UK so that the Home Office could not see them.
36. The Claimant arranged a flight to the UK and was collected at the airport by the individuals identifying themselves as 'Mohammad Yasin Jibon' and 'Sharmin Sultana Sathi', who the Claimant says were now living in the UK. He was driven to an address in Uxbridge (which was the same as the correspondence address on the 'offer of employment' letter dated 19 October 2022 that the Claimant was given in Bangladesh). He thereafter lived at that address. The claimant says that he asked 'Mohammad Yasin Jibon' and 'Sharmin Sultana Sathi' to put him in touch with the Respondent and he was told that this would happen when 'Saimon/Suhel' returned from a trip to Portugal. 'Mohamoud Yasin Jibon' told the Claimant to apply for his driving license and Biometric Residency Card (BRC) and said that if they took too long to arrive that he would throw the him out of the house.
37. On 20 February 2022, the Claimant contacted the Respondent via the 'Contact Us' section of its website. The Claimant did not receive a reply from the Respondent. Mr Jama Mohamoud of the Respondent does not recall having seen the Claimant's message.
38. The Claimant says that 'Mohammad Yasin Jibon' had arranged for him to work several shifts at a warehouse but he did not like it and he thought that it was making him ill. On 3 March 2022, the Claimant says that he was told to leave the house in Uxbridge. He stayed at a mosque for a few nights and then went to live with his brother in east London, where he still lives.
39. The Claimant's brother visited the offices of the Respondent on 25 March 2023 (the Respondent thought it was the Claimant's uncle). The Respondent refused to give out any details about the Claimant's employment.
40. On 28 March 2022, the Claimant went to the Respondent's office for the first time since his arrival in the UK and delivered his completed application for the role of support worker (Bundle/174). The form bears the Respondents logo and the Respondent's registered address of Citybase, City Gate, 246 – 250 Romford Road, Forest Gate, London E7 8HZ (Bundle/173 – 183; 217 - 221). The Respondent provided the Claimant with a contract of employment for the post of support worker with a start date of 28 May 2022 (Bundle/275).
41. Thereafter the Respondent commenced what is known as its 'onboarding' process. This comprised of a number of pre-employment checks and training

that were mandatory requirements either by law or on the part the healthcare regulator. The Claimant was issued with his Disclosure and Barring Service certificate on 6 April 2022 (Bundle/285 – 286) and a copy of the Respondent's handbook (Bundle/185). On 13 April 2022, he completed his induction training at the Respondent's office and was provided with an ID badge (Bundle/216).

42. The Claimant worked his first shift with the Respondent on 28 May 2022, by which time he had notified ACAS about his dispute with the Respondent and that he had not been paid (saying that he had arrived in the UK on 29 January and, according to the Certificate of Sponsorship the Respondent should have given him 39 hours a week and £22,000 a year, but that he had only worked two days in the last six months and got paid £105 from the company). Thereafter he worked for the Respondent 16 September 2022 when the Respondent terminated the Claimant's employment after he refused to sign the contract of employment (Bundle/293). The parties are in agreement that the Claimant has been paid in full for any work that he had undertaken between 28 May and 16 September 2022 (albeit that he was paid the majority of the monies owing to him only after the date that his employment was terminated).

The law to be applied

Employment status

The Employment Rights Act 1996 ss 230(1) and 230(3)(a) and (b):

Section 230(1) provides that: 'an employee is an individual who has entered into a contract of employment (whether express or implied).'

Section 230(3) provides that: 'a "worker" is an individual who has entered into or works 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.'

43. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433* it was held that a contract for service exists if three conditions were fulfilled:

'(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

44. The Supreme Court in *Autoclenz Ltd v Belcher [2011] 41 SC*, affirmed the principles set out in *Ready Mix Concrete* stating that it was now well-accepted in law that there are three irreducible minima without which a contract of employment cannot be said to exist, namely, (1) mutuality of obligation (without

which there cannot be said to be any contract at all), (2) a requirement of 'personal performance' and (3) control.

45. The Court of Appeal in *Revenue and Customs Commissioners v Atholl House Productions Ltd* [2022] EWCA Civ 501 confirmed the above and stated irreducible minima are preconditions, which only once satisfied, would require a tribunal to then make an overall assessment of all relevant factors in a multi-factorial approach to determine whether the relationship was one of employment. In short, to be an employee or worker, there must first be a contract between the individual and the other party alleged to be 'the employer', and second, a requirement on the individual personally to undertake the work.

The submissions

46. Both parties made oral submissions.
47. For the Claimant, Mr Hawes accepted that the period from 28 May 2022 onwards was no longer in dispute as the Claimant had been paid all sums owing to him for work undertaken after that date until the date of termination of his employment. He said that there was only one issue to be decided, namely whether the Claimant was an 'employee' or 'worker' of the Respondent entitled to be paid from 29 January and 27 May 2022. He asked the tribunal to look beyond the terms of any written contract and to decide what the actual agreement was, bearing in mind that the balance of power in this relationship was in favour of the Respondent.
48. Mr Hawes argued that there was an oral contract between the Claimant and the Respondent from 29 January until 27 May 2022 by virtue of oral agreement between the Claimant the Respondent's 'agents'. That oral agreement, made when the Claimant was resident in Bangladesh, was evidenced by the Certificate of Sponsorship issued by the Respondent and the 'offer letter' (dated 19 October 2021) signed by 'Mohammad Yasin Jibon' and 'Sharman Sultana Shetti' 'on behalf of Tender care Management Limited'. The letter had provided that the Respondent work 39 hours per week for the 'Respondent' in return for a gross annual salary of £22,000. It followed that he was therefore a 'worker' from that date and was entitled to be paid his wages and holiday pay accruing up until 27 May 2022.
49. The Claimant had been ready and willing to work from 29 January 2022 onwards (the WhatsApp message (Bundle/501 demonstrates that he attempted to contact the Respondent on 23 March 2023). He did apply promptly for his DBS and other documents (required by the Regulator) himself but these were left in the Uxbridge house when he was asked to leave. The only letter that he had received was the 'offer of employment' letter of 19 October 2021. The wording of this letter demonstrates that the Respondent's agents were holding themselves out as its agents. It was not produced at the Respondent's office hence not on its notepaper. The mistakes contained therein were because the letter was not written by the usual office staff, but it is otherwise official and was demonstrative of the oral agreement made between the Claimant and the Respondent's 'agents'. The Claimant asserts that he was instructed to delete any WhatsApp messages by the Respondent's agents before coming to the UK in order to obscure the true nature of what was going on.

50. While the dates after the Claimant went to the Respondent's office on 28 March 2022 were broadly agreed, the Claimant alerted ACAS to his dispute with the Respondent on 19 May 2022. This indicated that the dispute had been going on over the Claimant's pay before 28 March 2022. On the original claim form, the Claimant said that he had been paid only £105 and had only worked for two days in the last six months.
51. In relation to his coming to the UK, the Claimant was acting on the instructions of the Respondent's 'agents'. The Respondent had made no attempt to contact him after the Certificate of Sponsorship had been issued. It was disputed that it was in the Respondent's interests to do so as they had paid to sponsor him. It had always been the Claimant's case that he paid substantial sums of money for his 'visa and employment contract'. He cannot say where that money ultimately went but the real question was what was really going on here. It was submitted that the written employment contract had to be viewed in the context of a larger relationship, including that he had paid large sum of money into a number of bank accounts in order to come to the UK.
52. For the Respondent, Ms Twomey said that any agency relationship between the Respondent and the individuals named by the Claimant as 'Mohammad Yasin Jibon', 'Sharmin Sultana Sathi' and 'Saimon'/ 'Suhel' was denied in its entirety. In order to succeed in establishing that any agency relationship existed, the Claimant first had to establish that an agency relationship existed as a matter of fact. Secondly, if such a relationship did exist (which was denied by the Respondent), it had to accord with the law of agency (in other words that the agent had the authority to enter into legal relations on behalf of the principal).
53. There was only one document that linked the Respondent to the 'agents', namely the letter of 19 October 2021 (Bundle/271) which mentioned Tendercare Management Limited by name. The Respondent argued that the Claimant himself had written that letter in order to substantiate that link which was crucial to his case. While that was a weighty allegation to make it was not unsupported by other evidence in the bundle (Bundle/154 contains a letter from the Chairman of 'Green Labs', a hospital, dated 30 July 2022 attested by a notary public in Bangladesh on 4 August 2022, stating that the Claimant had fraudulently made documents under that hospital's name (namely a certificate of internship, pre and post patient care and health care course, and a first aid and basic life support course - none of which the hospital offers) to obtain employment). There was nothing to support the Claimant's contention that the Respondent's agents had bribed officials to write this letter and if the Respondent had wanted to do so to retaliate, it would have taken steps then to sanction the Claimant for gross misconduct for producing forged documents in support of his job application which it did not.
54. The only other evidence that provides any link between the agents and the Respondents were screenshots of WhatsApp messages (Bundle/501 – 502) which the Claimant relied on as evidence of a broker referral. The Respondent contends that the correct interpretation of this message was just someone repeating that the Claimant's brother had come into the Respondent's office on 23 March 2022 and there were questions over how the Claimant had come into possession of these messages and what they actually established.

55. Ms Twomey drew my attention to the fact that the Certificate of Sponsorship of itself did not give the Claimant the right to work in the UK. Only once the Claimant had applied for and obtained his visa, could the process begin for the him to start working for the Respondent. The existence of the Certificate of Sponsorship was distinct from any contract of employment and was not evidence of one. There was also no obligation on the Respondent to employ the Claimant because it had sponsored him. Furthermore, the sponsorship could not be evidence of any oral agreement made between the Claimant and the Respondent's agents that he start work on 29 January 2022 because, on the Claimant's own evidence, that conversation did not occur until January 2022 whereas the certificate of sponsorship was issued in October 2021 before the alleged conversation had occurred. In any event, the Claimant's account of his conversation with the agents prior to coming to the UK was vague and contradictory (for instance, he gave differing accounts of which 'agent' he spoke to).
56. Prior to any employment commencing in the healthcare sector, an 'on-boarding' process had to take place. This takes time and it would not make business sense for an employer to agree to any start date for employment before this process had occurred. In the healthcare sector legal and regulatory requirements mandated DBS checks and training prior to the start of any employment. Therefore, to agree a start date before this process had even started was implausible and would have been in breach of legal and regulatory requirements. In such situations, it would be rare for the offer and commencement of employment to occur simultaneously.
57. Ms Twomey conceded that it was possible that the Claimant genuinely believed that his employment would start as soon as he moved to the UK. However, for a contract to be legally binding it must be agreed between the parties. The Claimant could not unilaterally decide on the start date of his employment. There were many business reasons, why the Respondent would not have agreed to the Claimant starting his employment immediately upon his arrival in the UK. It was more likely that the Claimant misunderstood that he would have to undergo weeks of training and fulfil other pre-employment checks and requirements. It was also unlikely that the Respondent would take the risk of sponsoring the Claimant and offering him employment and then seeking to sabotage this employment by delaying it. From the moment the Respondent became aware that the Claimant was in the UK it had taken steps to ensure that he started his employment with it and it was also not in its interests to sponsor him to come to the UK and then not employ him.

Conclusions

Contract of employment

Was there a contract of employment in existence between the Claimant and the Respondent from 29 January and 27 May 2022 inclusive?

58. For the purposes of ss 230(1) and 230(3)(a) and (b) of the Employment Rights Act 1996, in order for an individual to be an employee or worker, there must first be a contract between the individual and the other party alleged to be 'the employer' and second, a requirement on the individual personally to undertake the work.

59. There was no express written or oral contract between the Claimant and Respondent from 29 January to 27 May 2022 inclusive. The only contract that existed between the parties was a written contract of employment and there is no dispute between the parties that that contract did not commence until 28 May 2022.
60. I accept the Respondent's submission that the Claimant was under a misapprehension that he had entered into an oral contract with individuals, whom he mistakenly believed were acting as 'agents' of the Respondent, to start work as soon as he had arrived in the UK on 29 January 2022. Unfortunately, the Claimant had paid large sums of money into a number of bank accounts of unknown individuals in the mistaken belief that he would be given 'a visa and employment contract in return'. The letter of 19 October 2021 that the Claimant relied upon to substantiate the existence of oral contract was not capable of doing so because it had neither been written by the Respondent nor been written on its behalf.
61. The fact that the Respondent had assigned a Certificate of Sponsorship to the Claimant, as a migrant worker, was not evidence of the existence of any contract of employment between the parties. A certificate of sponsorship was distinct from any contract of employment and, of itself, placed no obligation on an employer to employ any individual whom it had sponsored.
62. In order to imply any contractual relationship between the Claimant and the Respondent, the Claimant would have had to have demonstrated a necessity to imply such a contract in order to give business effect to the reality of the existing situation. By the Claimant's own admission, he did not carry out any work for the Respondent prior to the 28 May 2022 and therefore he has not demonstrated any such necessity to imply that a contract was in existence before that date. In this respect, it also must be kept in mind that workers in the healthcare sector are required to complete a number of pre-employment checks, including DBS checks, and mandatory training before they undertake any work in the sector. This is both a legal and a regulatory requirement. Therefore, until the Claimant had fulfilled those requirements, his commencing work as a care worker would potentially have rendered him and any employer in breach of their respective legal and regulatory obligations.
63. There being no contract of employment between the Claimant and the Respondent between 29 January and the 27 May 2022 inclusive, it follows that the Claimant was not an employee or worker of the Respondent during that time. He had not undertaken any work for the Respondent and therefore was not entitled to be paid any wages or any other contractual payments related to employment.

Unauthorised deduction of wages

Was the Claimant entitled to wages from 29 January to 27 May 2022 when he was not given any shifts by the Respondent during that period?

64. For the same reasons as stated in paragraph 63 above the Claimant is not entitled to be paid any wages from 29 January to 27 May 2022.

Holiday pay, accrued but outstanding at the date of termination of employment

Was the Claimant entitled to holiday pay accrued but unpaid from 29 January to 27 May 2022 when he was not given any shifts by the Respondent during that period?

65. For the same reasons as stated in paragraph 63 above the Claimant did not accrue any holiday pay between 29 January to 27 May 2022 and is not entitled to be paid any.

Employment Judge L Townley

3 January 2024

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