Case Number: 1801307/2023
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EMPLOYMENT TRIBUNALS

Claimants: **Miss C Goregore**
Mr T Mushonga
Miss M Kapfumvuti
Mr T Kachingamire
Miss F Whati

Respondent: **Manuel Divine Care Ltd t/a Harmony Projects**

HELD by CVP **ON: 27 and 28 November 2023**

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: **Ms B Doma**
Respondent: **Mr Katz, Consultant/Advocate**

Note: A summary of the reasons below was provided orally in an extempore Judgment delivered on 28 November 2023, which was sent to the parties on 5 December 2023. A request for the written reasons was received from the claimant on 5 December 2023. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgment given on 28 November 2023 is also repeated below:

JUDGMENT

1 The claimants' complaints of unlawful deductions from wages succeed and the respondent shall pay to them the gross sums set out below.

2 Each sum is further uplifted by two weeks' pay £787.69 in respect of a failure to provide complete employment particulars pursuant to Section 1 of the Employment Rights Act 1996:

Miss C Goregore: £**2963.32 plus £787.69 uplift. Total payable: £3751.01**

Miss F Whati: £**2963.32 plus £787.69 uplift. Total payable: £3751.01**

Miss M Kapfumvuti:**£3701.01 plus £787.69 uplift Total payable £4494.70**

Mr T Mushonga: **£4558.64 plus £787.69 uplift Total payable £5346.33**

Mr T Kachingamire **£3228.40 plus £787.69 uplift Total payable £4016.09**

REASONS

Introduction

1. These claims are brought in one claim form in which the claimants have been assisted by Ms Doma as their representative. She has appeared yesterday and today on their behalf. She is a lay representative, a registered nurse, and she has done her best to represent them to the best of her capacity. The claimants all travelled from Zimbabwe to England to work as care workers for the respondent company.
2. The respondent has been represented by Mr Katz and he has similarly done his best on its behalf in difficult circumstances.
3. The complaints are unlawful deductions from wages complaints only in respect of pay that was alleged to be owing from the beginning of the claimant's employment to the date when each of their employments variously ended. Those sums were set out in schedules of loss served in compliance with previous case management directions.
4. I record that on the part of the claimants there has been, with the exception of late service of Mr Kachingamire's witness statement (for which I gave permission today refusing a strike out application) compliance with orders throughout enabling this case to be ready, in an orderly way, for a final hearing some time ago which had to be postponed until today.
5. The issues for me derive from Sections 13 to 27 or Part II of the Employment Rights Act 1996 concerning the protection of wages. Given Section 13, the first matter for me to determine is the terms of any employment contract between the parties. Thereafter I have to determine whether sums paid to the claimants were less than the sums properly payable to them. This case is essentially concerned with making findings of facts. The respondent's defence was that the claimants were not ready and willing to work.

Findings of fact

6. I simply record as follows the terms of the offers sent to all the claimants by the respondent:

"Dear [claimant]
Further to your recent interview I am pleased to make you an offer for the full time position of home care support worker at Manuel Divine Care Limited trading as Harmony Projects. This offer is subject to receipt of two satisfactory references, enhanced DBS application and mandatory training. You will be reporting directly to the registered manager Nyarai Muchenje at Office 6, Titan House, Central Arcade, Cleckheaton. We believe your skills and experience are an excellent match for our company." Ms Muchenje is the owner and director of the respondent and from whom I heard evidence on its behalf today.
The offer went on to record that the job title was Home Care Support Worker. The starting salary was £10.50 per hour. The offer further provided for other allowances, mileage, pension, 28 days' annual leave, access to the employer assistance programme, contracted hours of 40 hours per week and "the annual starting salary for this position is £20,480 to be paid on a monthly basis on the last Friday of the month by direct deposit". The offer went on to offer various other matters including potentially more pay, shopping vouchers and so on - matters which the claimants, who all received these offers, might have regarded as very favourable employment terms. The offer provided that employment, "is based on three months probation period, then on a contractual basis for a period of three years subject to renewal".

7. All five claimants returned their agreement and acceptance of those offers made in or around the summer of 2022. All five claimants were in Zimbabwe at the time. They had been interviewed for these positions by Ms Muchenje and her colleague. They had been considered suitable for the posts.
8. The only necessary matter to agree in order for their employment contracts to come into performance was a start date. They all duly did start their employment on 7 December 2022. They attended at the respondent's premises, they completed mandatory training in a number of different areas but including, for example diversity, manual handling, safeguarding and so on, all of which were certificated by the training provider as having been completed over those few days in December 2022. Thereafter there were initially two pay dates which arose under the terms of the contract. The first was on or around 27 December, and the second on or around 27 January 2023. There were no payments made to any of the claimants into their bank accounts on those dates.
9. No details were taken by the respondent of the claimants' bank accounts. At the start of employment in this sector the Tribunal would typically see a new starter form, or electronic equivalent, which confirms these and other details - addresses, next of kin and so forth. Those matters are typically recorded on the first day - often alongside organisational induction - if not done by employers in advance in circumstances such as these.
10. In this case no bank details were taken, and no payments were made to the claimants' bank accounts in December, January and on into February. Further there were very few, if any, shifts allocated to the claimants.
11. The first difficulty apparent to the claimants having completed mandatory training, was a further requirement to shadow other established members of

staff in any work they were undertaking before the respondent would allocate further work. That was understandably necessary in order for the claimants and the respondent to be able to provide quality care to those that contracted or were served by the respondent care company, but it was not expressed as a condition, and its arrangement was wholly within the respondent's control – or should have been.

12. As to that, the company had around about 60 or so care package contracts with Calderdale and Kirklees Council. It was contracted to provide social care to the residents of those two areas. It was employing directly between 30 and 40 staff in order to undertake those contracted care packages. Deploying the Tribunal's industrial knowledge, the care package numbers varied as new care was arranged and other packages ended. It is difficult to make precise findings about it on the basis of Ms Muchenje's oral evidence in response to the Tribunal's questions, but certainly this was the employer's business. It was in the business of providing care pursuant to care packages to members of the community and it needed staff to do it.
13. There were some communication difficulties between the respondent and the claimants in December, January and February, but they arose generally from the respondent's failure to organise shadowing and work for them in an efficient way and to comply with the payment terms of the contract to pay the claimants on the last Friday of the month in accordance with their contractual entitlement.
14. The further background to their employment was that they had each paid around £4,500 to Ms Muchenje prior to the commencement of the employment as part of their arrangements. I say no more about that because the payment of those sums may be the subject of separate proceedings and the respondent denies any wrongdoing. The claimants had further had the expense of flights, accommodation and other expenses incumbent in travelling from Zimbabwe to the UK to work.
15. I should also include in these reasons that at the start of the hearing, in identifying the issues with the parties, it became apparent that in their schedules of loss the claimants sought damages in the sum of £4500 each alleging a breach of, potentially, their employment contracts by the respondent's failure to provide employment – in essence that they had been the subject of mis selling in the transaction for work/visa sponsorship. I explained that there were a number of difficulties with advancing that case. Firstly, it required amendment because it was not within the ET1. That was in circumstances where their main wages case relied upon a valid employment contract, which appeared apparent on all the papers I had seen and which both parties had agreed – its existence at any rate – its interpretation was a matter for me. It also relied upon the respondent's failure to comply with its terms as to payment in circumstances of the claimants being ready and willing to work. There was duplication potentially in awarding damages for the return of the visa related sums, if the claimant's main case was to succeed. Secondly, that any arrangement for the payment of fees in return for, or associated with, work visa sponsorship or similar, was a matter of regulation and a separate contract, it appeared; in this case the respondent's disclosure and preparation for the case had not been done on the basis that the

visa/sponsorship contractual arrangement would be examined and Mr Katz asserted the arrangement was entirely proper, given the fees payable for such visas, but he did not have available on behalf of the respondent the evidence in that respect. Ms Doma also had put the claimants in touch with the respondent because of good experiences in the past, but additional evidence would be necessary from her to address the matter. This was also a case which could be pursued in a different forum if appropriate. In all these circumstances, including assessing the prejudice to the claimants in not permitting amendment by way of allegation in a schedule of loss submitted in August this year, I refused permission to amend.

16. The fact that the events in this case might arise in a different jurisdiction has led me to be circumspect about the facts found, and only to find those facts necessary to decide the claims, notwithstanding allegations of more troubling conduct on the part of the respondent. I consider this consistent with the overriding objective, which includes the need to manage these proceedings in a proportionate and timely manner in relation to the complaints advanced.

Discussion and conclusions (and further necessary findings)

17. To address the respondent's case, firstly that the contract could not come into effect or start until the claimants completed shadowing and they did not all do so. There were three aspects of conditionality within the contracts - references, DBS and mandatory training - and the claimants met those, albeit in one case DBS was delayed through no fault of the claimant in question.
18. As to that, if a contract records a condition, and a condition is not fulfilled by one or other party, it is open to the other party to terminate the contract summarily – the respondent did not do so.
19. Secondly, that the claimants were not ready and available for work. In short they most certainly were. In relation to a handful of isolated dates, if in a salaried employment position where employees are asking for, and are granted leave to visit famly in the employer's diary, as some of the claimants did in the absence of shadowing shifts or other work - it is incumbent upon the employer to record that holiday, if it is granted. It is also open to the employer to refuse that request and allocate work, but this employer did not do so and granted leave.
20. Thirdly, if a member of salaried staff says, "I cannot work that shift because I am not where I expected to be", having travelled away from the area to save money by staying with family, it is open to the employer to explain the instruction and in the absence of a failure to comply, consider disciplinary proceedings, or given the probationary period, terminate the contract. This sort of absence occurred once, but the respondent in effect permitted it without challenge because, in short, it had no interest in enforcing its contract. It plainly did not intend to comply with the payment terms and its failure to comply had caused the claimants to be impecunious such that they needed to rely on family.

21. In respect of all employees apart from Mr Mushonga there were only a handful of shifts suggested to them as work they could undertake. This was at a later

stage in the December to February period, by which time the respondent was already in breach of its contractual obligation to pay each clamant on the last Friday of the month.

22. Fourthly, - the car issue. An alternative case advanced on behalf of the respondent was that it was a similar condition of the contract, mentioned at interview that is for the contract to be effective, each staff member must provide or have a car to travel between clients. That case fails for a number of reasons, including the finding of fact I make.
23. As to the oral evidence that I have heard, I did not find Ms Muchenje clear, nor consistent with the contemporaneous material and I do not consider she is a good historian or that I can safely rely on her evidence unless otherwise corroborated. This is my assessment. As far as the claimants' witnesses are concerned, including Ms Doma, I considered I could safely rely on what they were telling me. I considered that their presentation, even though they were working in a second language and small parts of their evidence was interpreted informally by Ms Doma, it universally had the ring of truth about it. Ms Doma was frank and open and honest and I was very happy to make findings of fact on the basis of anything that she and the claimants said to this Tribunal.
24. For those reasons I do not accept the evidence I have heard on behalf of the respondent that having a car was raised in interview. It was not included in the contractual provisions and likely it would have been if it was, truly, a condition of employment. I also happen to note that in all the summaries of the job descriptions that were provided to the Home Office in the sponsorship arrangement, there is only one mention of home care (as opposed to work in a residential or nursing setting) albeit that in the offer letter that is the nature of the role.
25. There is also no basis to imply the condition that a car is required in order to fulfil the role. This was a salaried position where the employer was promising to provide work at that salary under those payment arrangements and it was incumbent upon the employer to provide the work and for the employees to attend and do it, whether they took public transport, Ubers, car share or any other means of transport at their disposal – the offer provided for a "mileage and travel allowance". It was therefore up to the claimants to arrange how they were to attend work – It was not for the employer to dictate it.
26. The prospect of adding yet more capital cost for the claimants at the beginning of employment, given the background above, would have needed to be explicitly provided were it to be a condition, and it may very well have made the offer unattractive or untenable. I reject the respondent's case both factually and as a matter of law – it cannot say the claimants' wages were not properly payable because they did not immediately have cars available to them (albeit they did ultimately seek to buy cars and both Ms Doma and Ms Muchenje's partner were involved in seeking to resolve car related issues).
27. I apply the terms of Part II of the Employment Rights Act. What were the sums that were properly payable to the claimants and when were they properly due? In relation to each claimant - for their circumstances are all slightly different because the dates of resignation differ - but in simple terms they all ought to have been paid a twelfth of their annual salary which is

£1706.66. They all ought to have been paid that on the last Friday of each month during their employment. They were not. There have undoubtedly been a series of unlawful deductions from wages. They are sums that are clear and I give Judgment for those sums.

28. Mr Mushonga worked four months precisely from 7 December to 8 April. He was entitled to four times £1706.66 which is £6826.64. From that the respondent is entitled to credit for the sums it did pay him in the latter part of his employment. which is his P45 sum of £2268. The total sum payable to Mr Mushonga is £4558.64.
29. In relation to Mr Kachingamire his employment dates are 7 December to 11 February. That is two months and four days. Two months times £1706.66 £3413.32. As for the four further days, I have applied the typical calculation of 260 working days in a year. Four over 260 multiplied by the annual salary - £315.07. The total for Mr Kachingamire is £3728.40 from which the employer is entitled to credit for a sum of £500 which was paid to him. The total sum payable is £3228.40.
30. In relation to Miss M Kapfumvuti her employment was from 7 December to 21 February. That is two months and two weeks or 10 working days. So again applying the same sums, the 10 working days, 10 divided by 260 multiplied by the salary, or £787.69. The total payable to her is £4201.01 less the £500 which was paid to her, and which she honestly accepted was paid albeit no payslip recorded that. The total is £3701.01.
31. In relation to Miss Whati, her circumstances are the same as Miss Goregore. Employment commenced on 7 December and ended on 7 February. That is two times £1706.66 less in each case £450 paid to them via Ms Doma, which they again honestly accepted had been paid, and so they are entitled to Judgment in the sum of £2963.32 each.
32. It will be apparent on my findings of fact that there was no provision of a "section 1 statement" of particulars of employment to the claimants at the beginning of their employment on 7 December. Such a statement must record that start date of employment for continuous employment purposes. Section 38 of the Employment Act 2002 applies. I can exercise my discretion to uplift any awards that I make. I do exercise that discretion. I can award either two or four weeks' pay in each case and given the circumstances of this case I consider those circumstances are such that one might award four weeks' pay. However, I also bear in mind that in this case we are concerned with matters in the care sector which is, as we all know, in some difficulty in sourcing staff. I also bear in mind that the claimants were all in a position to secure new employment having, as it were, given up on the respondent company's ability to deliver on the work/wage bargain. I weighing up all the circumstances including that other important details were within the offer letter, but that in these cases confirmation of the start date would have focussed the parties' minds on the employer's responsibilities. I have decided upon two weeks' pay per claimant.
33. I will do that maths now which involves taking the salary of £20, 480 and dividing by 52 and multiplying by two which is a sum of £787.69 per claimant.

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Employment Judge Wade

Date 10 January 2024