



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4104280/2023 Hearing by Cloud Video Platform at Edinburgh on 4
December 2023**

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Employment Judge: M A Macleod

Jennifer Loy

**Claimant
In Person**

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Community Integrated Care

**Respondent
Represented by
Mr M Haywood
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The Judgment of the Employment Tribunal is that the claimant's claims fail,
and are dismissed.**

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 11 August 2023 in which she complained that she had been unlawfully deprived of notice pay, holiday pay, arrears of pay and "other payments".
2. The respondent submitted an ET3 in which they resisted the claimant's claims.

3. A Hearing was listed to take place by Cloud Video Platform (CVP) on 4 December 2023. The claimant appeared on her own behalf, and Mr Haywood, barrister, appeared for the respondent.
4. The claimant gave evidence on her own account. The respondent
5 presented 2 witnesses, Don Roth and Rachel Fourie.
5. The respondent helpfully provided a bundle of productions which was relied upon by the Tribunal in the course of the Hearing.
6. Mr Haywood confirmed at the outset that the respondent no longer sought to advance its strike out application, on the basis that the claimant had now
10 complied with the Tribunal's Order. He also advised that he was aware that his instructing agents, based in England, had assumed that the Scottish Tribunal practice was the same as the English and Welsh Tribunals, and had produced witness statements to stand as the evidence in chief of their two witnesses. He apologised and asked the Tribunal whether or not it
15 would be prepared to rely upon those statements. He confirmed that the two witnesses were available and ready to be called. The claimant having advised that she had no objection to the witness statements being relied upon, I directed that the evidence of Mr Roth and Ms Fourie should be taken, in chief, from their witness statements.
- 20 7. Albeit that this was presented as a claim for unlawful deductions from wages, the critical issue on the evidence related to the claimant's employment status during her work with the respondent. She alleged that her manager, Mr Roth, moved her to a bank contract without her consent. The respondent's position was that the claimant agreed to alter her
25 contractual base. As a result, the claim centred on the claimant's employment status.
8. Based on the evidence led and information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 9 March 1976, commenced employment with the respondent as a support worker, providing a service to a number of service users in their homes.
- 5 10. The claimant was provided with a contract of employment (30ff) which she signed on 14 December 2023. Although her contract specified that she was to commence her employment on 15 December 2021, her first date of employment with the respondent was in fact 18 January 2022. Her normal place of work was Wauchope, Hays Community Business Centre in
10 Edinburgh.
11. The first 3 months of the claimant's employment was to be a probationary period (4.1).
12. Paragraph 7.1 of the contract provided that her rate of pay was £10.20 per hour, plus any enhancements applicable to the service which she worked.
- 15 13. Paragraph 8.1 provided:
"You will be expected to work 37.5 hours per week on a flexible rota system, which may include evenings, nights, weekends and public/bank holidays as necessary in accordance with the needs of the service(s) and people we support."
- 20 14. The respondent's annual leave year ran from 1 April to 31 March each year, and the claimant was entitled to 28 days' leave per year, including entitlement to the 8 usual public holidays.
15. Don Roth was the claimant's service manager, and her direct line manager was Donna Hamilton.
- 25 16. On 30 March 2023, the claimant sent a text message to Mr Roth (59):
"Hi Don, I've just checked Maxtime. I'm not sure if DH made you aware but I can't work Fridays. I've just been through lawyers etc for custody of my grandson. I now collect him from nursery at 12.30pm every fri. Due to legal

papers only I can collect him. I advised this about 3 weeks ago and have been put in for 3 Fridays since. DH has sent me a flextime sheet to print off but due to isolation I've not been able to complete yet. I'm contemplating going Bank. I'll give you a wee call tomorrow."

5 17. Maxtime was the name of the online rota where each employee's rotas would be noted, sometimes a week in advance of the relevant date.

10 18. Mr Roth responded that day (60): *"If you can't work Fridays then you have to put in a flexible working agreement – however, we are not able to accommodate any more staff unavailable on Fridays, if this is going to be an issue then we will need to move you to either a bank worker or see if other services can accommodate the request. please send the flexible working agreement as soon as possible."*

19. The claimant replied to say that that was fine, and that her grandson was her priority.

15 20. Mr Roth called the claimant that day, to discuss what options were available. The claimant said that if she could not be guaranteed Fridays off she would just go on the bank. Mr Roth explained to her the implications of moving her from her permanent role and on to the bank, and in particular that she would not be guaranteed shifts and that annual leave would be
20 dealt with differently. At the conclusion of that call, the claimant said "I'll just go bank".

21. On 31 March 2023, the following day, Mr Roth emailed the claimant (65):

"Hi Jennifer

25 *After our conversation yesterday, I am going to reduce your hours to 25 per week as of tomorrow (April 1st) before moving you down to Bank, I'll also remove you from Friday shifts. It gives you a bit of time to work things out a bit.*

Please let me know if you would prefer to go straight to Bank, and if so, what, if any, shifts can you confirm between now and April.

Please complete the Flexible Working Agreement as soon as you can so that we can see what, if anything, can be done.

Kind regards,

Don”

5 22. The claimant replied that afternoon:

“Hi Don,

I’ll go Bank tomorrow please. Can confirm the 03/04/23, 06/04/23, 11/04/23 and 16/04/23. I’ve got no more shifts after that.

I’ll complete forms tomorrow.”

10 23. Mr Roth replied shortly thereafter to ask if the claimant was coming to work the following day, to which she responded that she would be.

24. The claimant described her response to Mr Roth, to put her on the Bank, as “spitting the dummy out”. She said that she considered that he was unwilling to bend. She believed that in order to be placed on the Bank it would be necessary for a formal discussion to take place between herself and Mr Roth, and that a formal document would then be signed.

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25. The claimant then went off work due to stress, from 6 to 17 April 2023 and submitted a Fitness to Work statement signed by her GP (70).

26. On 18 April 2023, Mr Roth wrote to the claimant (72) attaching the respondent’s contract for bank staff. He asked her to read, sign and return it to him, so that it could be processed. He also requested that she provide him with her availability as far ahead as possible, into May.

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27. The claimant responded that afternoon (72):

“Hi Don,

25 *Feeling much better, thanks. I’ll give you a wee call tomorrow as not sure how everything works.*

Kindest regards

Jenni”

28. The terms of the Bank Contract were set out in the document attached by Mr Roth to the claimant (73ff). Paragraph 2.2 stated that as a bank worker,
5 *“you are not an employee and the services you provide to Community Integrated Care are on an ad hoc and casual basis. There is no guarantee of work. Community Integrated Care will not be under any obligation to provide you with work and you are under no obligation to accept any work offered to you. consequently, you may find that any work offered to you will*
10 *fluctuate in terms of hours, location and duties.”*

29. The claimant’s evidence was that she felt pressurised into moving on to the bank, and insisted that she had never wanted to do that, but had simply said that due to her need to take Fridays off to look after her grandson, she could not work Fridays. She maintained that she was not told how everything
15 worked, when she spoke to Mr Roth, though she could not remember whether she phoned him the following day.

30. In fact, the claimant did not contact Mr Roth again until 25 April 2023 when she telephoned him. She asked him why she had been put on the bank when she had not signed a contract. Mr Roth reminded her of the
20 conversations which they had had in March, and that she had requested to move to the Bank, but the claimant terminated the call.

31. Mr Roth emailed the claimant the following day, 26 April 2023 (84):

“Hi Jennifer

I just wanted to follow up on your phone call yesterday.

25 *I am a bit surprised that you didn’t feel supported by myself or Community Integrated Care. Having spoken to Donna, she said that she had sent you a Flexible Working Agreement twice, neither of which has been completed or returned to us. She also confirmed that when you spoke to her, it was after the courts had made their decision regarding you picking up your grandson;*

it would have been helpful for us if you had made us aware ahead of time that this was possibly in the pipeline, rather than rely on your co-workers to swap shifts – something you mentioned they were happy to do, however, at least one member of the team had mentioned it was becoming an issue.

5 *You also stated in the conversation that it was only a Friday that would be affected, however, looking back on Maxtime, there have been a few occasions recently, when you were unable to come to work for a weekend shift due to nobody else being able to support your grandson. When we spoke, I felt that I was supportive, and fully understood that issues within the*
10 *family came first. I was a little taken back when in your words yesterday you ‘spat the dummy out’ and decided to become a bank worker.*

Having thought about it, I then sent you an email which included the option of working part-time with no Friday shifts (as you had requested) and followed this with a text message to ensure you had time to process the
15 *information and potential impact of moving to a Bank position, and your reply was even more emphatic, saying you wanted to move to bank as of the following day. you also confirmed 3 additional shifts and then contacted oncall on the first of those days saying you couldn’t support due to issues with your grandson. Then you called in unwell for the remaining two shifts*
20 *you had confirmed. Following that I’ve asked you to provide your availability so that I can see what shifts we are able to offer you but have had nothing back from you apart from an email saying that you were going to call me on Wednesday 19th. However, it was not until yesterday (25/4) that you contacted me and expressed that you felt let down and then hung up on me*
25 *when I was explaining that on Dare to Learn there should be information regarding the Maxtime bidding process.*

I’m sorry you feel unsupported, that is not, nor ever has been my intention, as I hope you can see. If there’s anything else you need further clarification around, please email me and I will do my best.

30 *Kind regards,*

Don”

32. The claimant did not directly respond to this email, but emailed Elaine Balfour, in the respondent's HR department on 1 May 2023 (86). She asked Ms Balfour to give her a call at her earliest convenience, as she was looking for advice regarding her contract.

5 33. She sent a reminder to Ms Balfour on 4 May 2023 (87). In the meantime, Mr Roth emailed the claimant (89) advising that he had left a message on voicemail, and was following up with an email. He confirmed that he and Ms Hamilton had met with Ms Balfour to discuss the best way forward. He went on: *"To be clear, if you are looking for a 37.5-hour contract, then it would*
10 *need to be over all 7 days of the week. If you are unable to work a Friday, then you would need to immediately complete the Flexible Working Agreement that Donna sent, for us to consider if the service is able to accommodate the request."*

15 34. The claimant replied to Mr Roth, copying her message to Ms Hamilton and Ms Balfour (88). She suggested that Mr Roth had already made the decision to put her on bank without a signed contract, or even verbal confirmation, and that since she had not had any shifts the previous 3 weeks, this had financially left her in *"an awful position"*. She made reference to the email of 18 April *"where you confirmed you would require a*
20 *signed contract to be able to process my transition to bank. As you did not receive anything back, I would have assumed you would have put shifts in for me – nothing was agreed otherwise."*

25 35. She said that she was unsure as to why there had been such confusion about this matter, having said that she only wanted not to work on a Friday, and that there was enough staff available to accommodate that day off. She went on to assert that *"In our initial and only conversation regarding going*
30 *bank, I expressed my frustration of being unable to get a Friday off (due to legal reasons), and that if going bank was my only option to get a Friday off that's what I would need to do. This is the only thing that has been said on the matter, so for my shifts to be cut thereafter this conversation is completely confusing, disappointing and caused me a lot of distress due to many different factors."*

36. The claimant believed, however, that matters were on the way to being sorted out, as she had taken the matter up with Ms Balfour.

37. The claimant submitted a Flexible Working Application (90ff) on 5 May 2023 (notwithstanding that the date on the Application was 10 April). In it, she simply sought to retain her full-time hours, and to work the same pattern as ever, but not on Fridays. She stated that it was her understanding that there were enough staff for the change not to affect anyone.

38. Mr Roth wrote to the claimant on 9 May to acknowledge receipt of the Flexible Working Application, and to arrange a meeting to discuss the application on 15 May 2023 by Microsoft Teams (94). As it turned out, the meeting was rearranged to take place on 16 May 2023.

39. The claimant attended at the meeting, where Mr Roth, Ms Balfour and Ms Hamilton were also in attendance. She prepared a document with a short agenda (which included "Financial Reimbursement"), action and meeting points. The meeting points form notes of what took place. Mr Roth disputed the terms of these notes, though the respondent did not take or retain notes of the meeting.

40. The meeting was a confrontational one. Mr Roth became frustrated with the claimant as he believed that she was not listening to what was being said, and was refusing to accept that she was the one who had asked to be a bank worker. In addition, the internet connection was not strong and as a result Mr Roth struggled to hear everything that was said. He accepted that he had raised his voice.

41. Mr Roth maintained to the claimant and at the meeting that he was unable to accommodate her request to work full time but not work Fridays. He said that they were very short-staffed on a Friday and relied heavily on agency staff.

42. On 18 May 2023, the claimant emailed Ms Balfour (103), referring to the "*disastrous, unresolved meeting on Tues*". She observed that the respondent had not answered her query about her contract being changed

without her filling in or signing any documentation, and confirmed that she had been in touch with ACAS who had advised, she said, that she should be entitled to holiday pay, statutory sick pay and contracted hours up until going back to work.

5 43. On 23 May 2023, Mr Roth wrote to the claimant (109), reiterating the respondent's position.

44. The claimant responded on 28 May 2023 (111) setting out her version of what had happened at the meeting. She complained that nobody on the call had been putting her best interests at heart.

10 45. Rachel Fourie, Regional Manager, took the matter up for the respondent, and wrote to the claimant on 8 June 2023 (113) to invite her to attend a meeting on 12 June 2023 to discuss her flexible working request and the questions to which she was seeking answers.

15 46. The meeting took place on 12 June 2023 by Microsoft Teams. Ms Fourie chaired the meeting, with the assistance of Ms Balfour, and the claimant attended. Minutes of the meeting were taken by the respondent (114ff). When Ms Fourie asked the claimant what resolution she wished, she said that she did not feel she could return to the Wauchope service, so there was a discussion about alternative places where she might be moved. The
20 claimant expressed concern about the distance she would have to travel from home, and then said that she wanted to leave the respondent's organisation.

25 47. Following the meeting, Ms Fourie required to be absent from work after having suffered a broken ankle. While she was off, the claimant wrote to the respondent on 26 June 2023, and stated that with much sadness, after the way in which she had been treated she felt that there was no other option than to hand in her two weeks' notice. She assumed that since she had not been given a shift since April she would not be working her notice period. She expressed the hope that a mutual and fair agreement through ACAS
30 could now be reached.

48. Ms Fourie, upon her return to work, not only noted that the claimant had submitted this letter, but also spoke to Mr Roth to establish what options might be available. Having done so, she wrote to the claimant on 26 July 2023 (118), summarising the meeting and her further inquiries. She
5 concluded that Mr Roth had explained that he was unable to accommodate the hours requested by the claimant, due to the inability to recruit sufficient new staff and the inability to reorganise work among the remaining available staff. She expressed the hope that this provided her with clarification and a satisfactory explanation as to why the respondent was unable to
10 accommodate her request and the steps taken to ensure her request was given thorough and fair consideration.

Submissions

49. Both Mr Haywood and the claimant made brief submissions, which I took into account in determining this case.

Discussion and Decision

50. As Mr Haywood pointed out, this fundamentally a simple question of fact: did the claimant change her contract on 1 April 2023?

51. The claimant's argument has slightly shifted throughout both the internal process and the Tribunal proceedings. Initially, she argued that she had
20 never agreed to join the bank, but developed that argument to say that she was pressurised into doing so, and that in any event, she had not signed a bank contract, which she required, on the respondent's own evidence, to do in order to be transitioned into a bank role.

52. It is necessary to consider the evidence carefully to decide whether or not
25 there was an agreement between the parties that the claimant should move from a full-time employment contract to a bank contract.

53. The claimant made the first approach to management, by texting Mr Roth, having spoken initially to Ms Hamilton, explaining that due to a change in her circumstances (namely, that she had been awarded custody of her
30 young grandson on Fridays), she could no longer work on Fridays.

54. The claimant's contract of employment required her to be available to work 37.5 hours per week, on all days of the week. She was able to comply with this requirement until her circumstances changed.

5 55. Her approach to Mr Roth on 30 March included the statement that she was contemplating "going Bank". The claimant's own evidence suggested that she was somewhat unclear as to the impact of doing so, but in my judgment, she raised the subject, and must be taken to have considered the matter or at least understood that it was a means by which she would not be required to work on Fridays. Whether she fully understood the implications
10 of this when she sent the text message is not clear.

56. Mr Roth did not immediately tell her to move to the bank. He offered her the choice of making a flexible working request or moving to become a bank worker. Ms Hamilton sent her a copy of the document which she would require to complete for such a request, twice, but the claimant did not
15 submit the request until 5 May 2023, for reasons which are not clear.

57. Having commenced this process, the claimant and Mr Roth had a discussion in which the claimant said that if she was unable to secure each Friday off, she would go on the bank. She concluded that call by telling Mr Roth that she would just "go bank".

20 58. Following that, Mr Roth wrote to her the next day and asked her what her preference was, and asked her to complete the flexible working request as soon as possible. She responded by stating, simply, that "I'll go Bank tomorrow please" and submitting dates when she would be available for shifts in April (4 dates). She advised that she had not more shifts after that.

25 59. In my judgment, the claimant said both verbally and in writing, without qualification, that she wished to move to become a bank worker.

60. Further, on her return from sick leave, on 18 April 2023, when Mr Roth sent her the bank contract, the claimant's response was in apparently cheerful terms, confirming that she was feeling much better and that she would give
30 him a call the next day as she was unsure how everything worked. There

was nothing in that email which could be seen to contradict her clearly expressed wish to join the bank, and it is clear that her previous communication, in which she gave dates for shifts, demonstrated that she did understand the way in which being a bank worker would allow her considerable flexibility.

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61. The claimant did not sign the bank contract, but it is not necessary in these circumstances for the contract to have been written and signed. The claimant had signalled her agreement to the change both verbally and in writing, namely by email. She argued that since Mr Roth stated that she should sign and return the contract to him “so that it can be processed”, that meant that the change would and could not be effective if it were not confirmed by the signed agreement. I do not interpret that statement in that way. I consider that this was simply an indication that in order for the respondent’s documentation to be up to date and fully accurate, an administrative priority, she should sign the agreement. I do not consider that it was a condition of the claimant’s move to the bank that she signed the contract.

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62. The issue is whether or not the evidence demonstrates that there was an agreement between the parties that she should move on to the bank from her full time contract with effect from 1 April 2023. In my judgment, the evidence unambiguously demonstrates that to be the case.

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63. Precisely why the claimant sought to undo this agreement later is not entirely clear, other than that she may have changed her mind. However, that is not the issue before me. She agreed to move to the bank, and accordingly her claim requires to be interpreted according to that fact.

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64. Essentially, then, it is my judgment that the claimant was, from 1 April 2023, a bank worker, meaning that there was no mutuality of obligation between the parties, in that the respondent was not required to offer shifts to the claimant, and if they did, the claimant was not obliged to fulfil those shifts. She was, in my view, a worker, and not an employee, from that date.

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65. The claimant's claim is for two weeks' notice pay, payment in respect of shifts which she should have been offered and pay in respect of outstanding holiday pay.

5 66. Taking the last of these three claims first, it is plain from the Working Time Regulations 1998 as amended that a worker is entitled to paid annual leave. However, the respondent admitted this and maintained that they had paid her all outstanding annual leave. The claimant's payslips (120ff) confirm that she was paid holiday pay throughout her employment and during her time on the bank. The claimant did not in her evidence dispute any amounts put
10 forward here, and accordingly I do not consider that she has proved that she was subject to any unlawful deductions from wages in respect of holiday pay.

15 67. The claimant is not entitled to a notice payment as a worker. She simply confirmed to the respondent that she was, in effect, no longer available for shifts. On the basis that a bank contract only entitles the claimant to pay in respect of shifts worked, there were no outstanding payments due on termination of the working arrangement between the parties.

20 68. Finally, the claimant's claim for payment in respect of shifts which she should have been granted cannot be sustained. Firstly, she was only due to be paid in respect of shifts actually worked, rather than paid a salary. Secondly, the claimant did not carry out any work after being moved to the bank, having submitted a statement of fitness to work for the first two weeks of April, and thereafter not attending at all. She was not entitled to pay for shifts which she did not work.

25 69. I note in passing that if she were an employee at the point when she returned from sick leave (as she insists she was), it is not clear on what basis she could have sought payment. She did not attend work, and was not absent due to ill health (on the basis that no further statements of fitness to work were submitted). On any view, the claimant was absent without
30 leave at that stage.

70. This is, in any event, a claim of unlawful deductions from wages. Her claim appears to be that the respondent treated her unfairly by failing to offer her work, but the question is whether or not she was at work on any date for which she was not paid, and the evidence simply does not support such a conclusion.

71. One puzzling aspect of this case is that the claimant persisted in her claim that she was forced or pressurised into moving on to the bank, but only submitted a flexible working request some four weeks after the change of her contract. Why she did not submit this at the point when it was clear that Mr Roth was offering her the opportunity to do so, accommodating her in the meantime, is entirely unclear, but not ultimately a matter for this Tribunal to address. However, I am unable to find that the claimant was somehow forced or pressured into moving on to the bank. The evidence demonstrates that she was given the opportunity to seek a flexible working request, but she delayed unaccountably in making that request.

72. Accordingly, I have concluded that the claimant was moved to a bank worker position on 1 April 2023, and as a result her claims must fail, and are dismissed.

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Murdo A Macleod
Employment Judge

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21 December 2023
Date of Orders

Date sent to parties

21/12/2023

30 I confirm that this is my Note and Orders in the case of Loy v Community Integrated Care and that I have signed the Note and Orders by electronic means.