EMPLOYMENT TRIBUNALS

Claimant: Ms Rita Adjei

Respondent: Virtue Care Limited

Heard at: Bury St Edmunds (via CVP)

On: 14 February 2024

Before: Employment Judge Graham

Representation
Claimant: Ms J Twomey, Counsel
Respondent: Mr M Dzade

JUDGMENT

ON APPLICATION FOR INTERIM RELIEF

1. The Tribunal granted the Claimant's application for interim relief.

2. The Tribunal ordered the continuation of the Claimant's contract of employment from the date of termination of employment (26 June 2023) until the determination or settlement of this claim.

3. The Respondent is ordered to pay the Claimant the sum of £7,073.40 within 28 days. This figure represents her salary from the date of termination to today's date.

4. The Respondent is ordered to pay the Claimant the sum of £798.40 on the last Friday of each month, this being a net sum (being the difference in her previous salary to her current salary) from today until the final determination or settlement of her claim. The sum due for February 2024 will be reduced to £399.20 to account for the sums awarded under paragraph 3 above.

REASONS

1. By a claim form presented on 3 July 2023, the Claimant claims that she was automatically unfairly dismissed by the Respondent for trade union activities contrary to Part X Employment Rights Act 1996 and s. 152 Trade Union and

Labour Relations (Consolidation) Act 1992 ("TULR(C)A"). Reference was also made to other provisions of that Act within her ET1 claim form.

2. This application for interim was presented within seven days of the effective date of termination which was 26th June 2023.

3. I was also presented with a Trade Union Certificate dated 3 July 2023 signed by Justin Bowden Regional Secretary of the GMB Union, Southern Region.

4. Whereas the claim was initially rejected by the Tribunal on 14 July 2023 due to the lack of an EC certificate and because the exception ticked did not apply, the claim was then accepted by the Tribunal on 6 February 2024 following a successful application for a reconsideration made by the Claimant on 25 July and supplemented by a letter from her solicitors on 23 November 2023 after the application had not been dealt with by the Tribunal.

5. That reconsideration application was granted by Employment Judge Gumbiti-Zumoto on 6 February 2024 who noted that it was clear that the claim was brought under s. 152 TULR(C)A and that the application for interim relief was made in time, and that the claim should be accepted and the matter should be listed for an interim relief hearing promptly.

6. The issue I had to determine in relation to this interim relief application was whether it appears to me to be likely that the Claimant will succeed at the final hearing in showing that the reason for the dismissal was that she had made use, or proposed to make use, of trade union services at an appropriate time. This is a case where it is also alleged that the trade union raised a matter with the employer on behalf of the Claimant as one of its members. In such a case the Claimant needs only to demonstrate that this was only one of the reasons for her dismissal, due to the wording of the statute it does not need to be the principal reason for the Claimant to succeed at a final hearing.

7. I made clear at the outset that I would not hear any oral evidence as this was not a fact finding hearing, but I would decide the application on the basis of the written documents to which I was specifically referred and also the submissions of the parties. I was provided with a bundle of 137 pages and witness statements from the Claimant, Lara Johnson (GMB volunteer), and also Laurie Miller-Cook who is the son of the service user whom the Claimant was employed to care for prior to her dismissal. I was provided with written submissions from the Claimant's counsel which I reviewed.

8. On 11 February 2024 the Respondent filed an ET3 denying the claims. That Response has not been served on the Claimant yet and the Respondent has not been notified if it has been accepted yet, nevertheless it was appropriate for me to consider the contents for the purposes of today's hearing.

9. I also considered the three attachments to that ET3 which comprised (i) an email from the Respondent to Basingstoke and Deane QA Community Teams dated 23 June 2023 about the service user having developed a pressure sore, (ii) file notes from 10 – 11 June 2023 of which one was made

by the Respondent on 11 June stating that the Claimant had failed to complete client notes and had refused to confirm if care had been provided and medication administered, and three notes from the day before prepared by the Claimant on 10 June 2023 about the care given to the service user; and (iii) a copy of the Respondent's code of conduct.

10. Both parties delivered oral submissions which I found to be clear and helpful.

The Law

11. Section 152 Trade Union and Labour Relations (Consolidation) Act 1992 provides:

Dismissal of employee on grounds related to union membership or activities (s.152).

"(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –

… ba) had made use, or proposed to make use, of trade union services at an appropriate time.

(2A) In this section—

(a) "trade union services" means services made available to the employee by an independent trade union by virtue of his membership of the union, and

(b) references to an employee's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee's consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba)."

12. As regards an application for interim relief s.161(1) states:

"An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief."

13. Section163 set out the procedure the Tribunal should follow when considering an application for interim relief and it states:

"(1) If on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed, the following provisions apply.

(2) The tribunal shall announce its findings and explain to both parties (if present) what powers the tribunal may exercise on the application and in what circumstances it will exercise them, and shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee, that is to say, to treat him in all respects as if he had not been dismissed, or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(3) For this purpose "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means as regards seniority, pension rights and other similar rights that the period prior to the dismissal shall be regarded as continuous with his employment following the dismissal.

(4) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(5) If the employer states that he is willing to re-engage the employee in another job, and specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions; and—

(a) if the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect, and

(b) if he is not, then, if the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and otherwise the tribunal shall make no order.

(6) If on the hearing of an application for interim relief the employer fails to attend before the tribunal, or states that he is unwilling either to reinstate the employee or re-engage him as mentioned in subsection (2), the tribunal shall make an order for the continuation of the employee's contract of employment."

14. The test for interim relief applications was initially set out in the decision in the case of ***Taplin v Shippam Ltd*** **[1978] ICR 1068 EAT** which defined the word "likely" as a "pretty good chance of success". That test has been reaffirmed in a number of other cases including ***Dandpat v The University of Bath and Ors*** **UKEAT/0408/09.**

15. I also remind myself that the word "likely" in this context does not mean simply more likely than not - that is at least 51% - but connotes a significantly higher degree of likelihood - ***Ministry of Justice v Sarfraz*** **[2011] IRLR 562**.

16. The Claimant must show a pretty good chance of succeeding on each required element of her claim. In other words she must show that there is

a pretty good chance that (i) she was an employee; (ii) that she made use of trade union services (such as seeking advice or they attended a meeting on her behalf) at the appropriate time; (iii) and that this was one of the reasons for her dismissal.

17. The standard of proof required is greater than the balance of probability test to be applied at the main hearing. The EAT recognised in the ***Dandpat*** case that such a high burden of proof is necessary as the granting of such relief will prejudice a Respondent who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Such a consequence should not be imposed lightly.

18. It is not enough to show that the Claimant could possibly win on the balance of probabilities. I need to be satisfied on the evidence before me that it is likely that each element of the test to which I have referred is likely to be met, and that the final Tribunal is likely to find that the reason for dismissal was that she had made use or proposed to make use, of trade union services at an appropriate time.

19. The burden of proof is on the Claimant in this application.

20. With regard to the reason for a dismissal, in ***Abernethy v Mott Hay and Anderson*** **[1974] ICR 323** the Court of Appeal identified this as what was in the mind of the employer when it decided to dismiss the employee.

21. When making a decision on an interim relief application I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing, amongst other things, the likelihood of disputed facts being proven in the Claimant's favour at the final hearing. There is only limited material available to a judge on an interim relief application but my decision has to be based on whatever material is available.

Background

22. The Claimant says that she started working for the Respondent as a care worker from 9 January 2023 however there were concerns about the contract she was given on 13 January 2023 as it provided that she would be required to work Monday to Sunday for 39 hours per week, her hours would be 7am to 9pm, and she may be required to work additional hours.

23. The Claimant says she had concerns about her entitlement to breaks and that there was no mention of her being a live-in carer when she joined. The Claimant says she did not take any breaks or days off for her first three months of employment, and when she raised this with the Respondent at the end of March 2023 her request for paid leave was refused and she was offered unpaid leave instead.

24. The Claimant says she requested a review of her contract in mid April 2023, and again requested a week's annual leave to which she said she was forced to take two weeks unpaid leave. The Claimant says that she was told on 2 May 2023 that if she took a two hour break each day then £154 would be deducted from her.

25. The Claimant says in mid May 2023 she sought advice from the GMB Union. I have been provided with copies of messages between the Claimant and her Union on various dates throughout May and June 2023.

26. The Claimant says that she was issued with a new contract later in May. The Claimant has provided me with a copy of that contract and referred me to the term which provides that she would need to work for the Respondent for two years before she would be permitted to terminate her employment.

27. The Claimant says she sought further advice from the Union who she says made repeated attempts to engage with Mr Dzade of the Respondent during June 2023. I have been referred to copies of correspondence from the GMB Union to Mr Dzade dated 31 May, 1 June, 8 June, 16 June 2023 which references the concerns about the Claimant's contract and also her entitlement to paid annual leave and other matters.

28. The Claimant says a meeting took place between the Union and the Respondent on 20 June 2023 to try and resolve the contractual issues.

29. Lara Johnson is a volunteer for the GMB Union and in her witness statement she says that she attended the meeting on 20 June 2023 and she describes Mr Dzade as visibly angry during the meeting, and she says he called the Claimant a liar and threatened to take further action against her.

30. Mr Dzade tells me that it was the Union staff who called him a liar, and that they threatened to report him to the CQC and elsewhere. Mr Dzade also says that the Claimant who misunderstood the way in which the contract worked. Mr Dzade says that the Claimant is from overseas and that he sponsored her to work for him and that he complies with the Home Office rules on what he pays the Claimant.

31. The Claimant says that the next day on 21 June 2023, Mr Dzade sent the Claimant a Quality Alert Form in which she was accused of negligence. The Claimant draws to my attention that the form is dated 11 June 2023 but it was only sent to the Claimant on 21 June 2023 which is the day after the Union had met with the Mr Dzade.

32. The Quality Alert Form references an incident on 7 June where it is alleged that the Claimant declined to take part in supervision with a colleague. The form also records an incident on 11 June the Claimant allegedly declined to engage in conversation with a colleague about completing care records, that the care the Claimant was delivering was unsafe and that she abandoned her duties without permission or reasonable excuse. Thirdly the Form records that the service user developed pressure sores under the Claimant's care which she did not report.

33. Mr Dzade says that a relief worker, Laura, was sent to the Claimant on 14 June 2023 and on 15 June 2023 Laura noted that the service user had pressure sores. Mr Dzade has attempted to explain why the QA report he completed which recorded this matter was in fact dated 11 June 2023 which is before the relief worker even arrived.

34. The Claimant says she raised a grievance on 22 June about her daily and weekly rest breaks, her pay and also being accused of negligence. The grievance makes reference to the Working Time Regulations 1998. In the grievance the Claimant says that she believed the allegation that she had been negligent was false and had been made because of her trade union membership and the meeting with her trade union representatives to discuss her working pattern.

35. The Claimant says that on 23 June she received payment of four days in lieu of annual leave which was the first time she had received any payment for leave.

36. The Claimant says that she was summarily dismissed on 26 June 2023 by Mr Dzade for allegedly having provided negligent care. The Claimant has referred me to a copy of the dismissal letter in the hearing bundle. My attention has been drawn to the concluding remarks in the letter that the decision was final and that *"there is no opportunity for reconsideration or reinstatement."*

37. Mr Dzade does not dispute that the Claimant was summarily dismissed, however his arguments today suggested on the one hand that the Claimant had been provided good quality care but that she had not been undertaking compliance, and he then suggested that the Claimant's work had been adequate but was unsafe as she had not been completing daily reports or recording medication. Mr Dzade also informed me that the Respondent had been judged as inadequate by the Care Quality Commission and that he was required to undertake more supervision and reviews as the Respondent had been placed in special measures.

38. Today Mr Dzade also says that the service user previously fell out of the bed twice under the care of the Claimant, however the Claimant points out to me that this is not something which was raised at the time nor referenced at the time of dismissal and nor does it appear in any of the documents for today's hearing.

39. Mr Dzade also tells me that the true reason for dismissing the Claimant was due to her conduct and unsafe work, and that he spent money sponsoring her to come here to work so it would make no sense to then terminate her employment without a reason.

40. The Claimant places significant weight on the 11 June 2023 Quality Alert Form as she queries why no investigation was conducted, why she was not spoken to about the alleged incidents of 7 and 11 June 2023, and she raises concerns about the accuracy of that document given it is dated 11 June 2023 but appears to relate to matters which had yet to occur on 14 June 2023 when Laura came to relieve her. The Claimant also refers me to the witness statement of Laurie Miller-Cook in which states that the service user's GP did not consider the pressure sore to have been serious or as a result of negligence.

Conclusion

41. In coming to my decision, I must take an impressionistic view of the documentary evidence before me, noting that no oral evidence has been

given on oath or tested by cross examination. I have therefore carried out a summary assessment of the material before me to form a view as to whether the Claimant is likely to succeed in his claim.

42. There was no suggestion by the Respondent that the Claimant was not an employee of the Respondent. It seems to me that it is likely that the final Tribunal will find that she was an employee and therefore falls within the protection of s. 152 TULR(C)A. I record that this was not disputed by Mr Dzade today in any event.

43. I also record that Mr Dzade had not sought to dispute that the Claimant made use of trade union services at an appropriate time. The hearing bundle contained numerous exchanges between the Claimant and her Union at this time. It therefore appears likely to me that a Tribunal conducting the final hearing will likely find that the Claimant made use of trade union services at an appropriate time. The issue of "appropriate time" has not in any event been challenged by Mr Dzade today.

44. Mr Dzade has also not sought to dispute that the Union sought to raise matters with the Respondent on behalf of the Claimant. The hearing bundle contains numerous documents where the Union attempts to engage with Mr Dzade to discuss the Claimant's situation. In addition, it is not disputed that a meeting took place between Mr Dzade and the Union on 20 June 2023 in order to discuss the Claimant's situation.

45. It therefore seems to me that it is likely that the Tribunal at a final hearing will also find that the Union raised matters on the Claimant's behalf in June 2023.

46. The above matters to which I have referred are not issues which I understood to be in dispute between the parties. However, I will now come to an area of dispute which is the reason for dismissing the Claimant.

47. The issue of concern in this matter is the decision to dismiss the Claimant. It appears to me, having reviewed the limited material before me, and having heard submissions from both parties, that it is likely that the Tribunal at the final hearing will find that the decision to dismiss the Claimant was not due to the reasons which the Respondent gave at the material time or has given to the Tribunal today. Rather it appears to me likely that the Tribunal at a final hearing will likely find that the reason for the dismissal was due to the Claimant having made use of trade union services by engaging with her Union for advice about her contract, her hours, her breaks and her pay, and further that they in turn sought to engage with the Respondent on her behalf by meeting with Mr Dzade on 20 June 2023 where they raised the Claimants concerns on her behalf.

48. I find support for that view because of the chronology to which I have been referred as it does not appear, from the material before me, that the Respondent took steps to investigate or to dismiss the Claimant prior to 20 June 2023, whereas she was then dismissed soon after the meeting between Mr Dzade and her Union. It was the day after this meeting on 21 June when the allegations of negligence appear to have been raised, and then on 23 June the untaken annual leave was paid to the Claimant, followed by the Claimant's dismissal three days later on 26 June 2023.

49. There is an argument, as the Claimant suggests, that had the allegations been as serious as the Respondent now suggests, it is likely that these would have been raised at the material time, and not some two weeks or so later by which time the Union had become involved and were raising concerns on the Claimant's behalf. In addition, the Claimant seeks to rely heavily on the Quality Alert of 11 June 2023 which purports to reference a matter which had yet to take place, namely the identification of the service user's pressure sores by Laura on 15 June 2023.

50. I note that given the wording of s. 152(2B) TULR(C)A, where an independent union raises matters on behalf the member, that needs only to be one of the reasons for dismissal in order to succeed. It does not need to be the principal reason. It appears to me that even if the Tribunal at a final hearing finds that there were a number of reasons for dismissal, but that the Union raising matters on behalf of the Claimant was one of them, then the Claimant will likely succeed in her claim.

51. In such a case as this, it appears to me that it is likely (or there is a pretty good chance) that the Claimant's claim under s. 152 TULRCA will succeed at a final hearing. I have found the submissions delivered by Ms Twomey to be compelling. It is therefore appropriate for me to grant the Claimant's application for interim relief.

52. I then went on to consider the appropriate order to make, noting that the Claimant found new employment from August 2023, some five weeks after the termination of her employment.

53. I asked Mr Dzade if he would reinstate the Claimant. I asked this question a number of times as Mr Dzade was dissatisfied with the judgment and sought to question the basis for upholding the application. Having listened carefully and patiently to Mr Dzade, I did ask on a number of occasions if he would reinstate the Claimant. After some time Mr Dzade did suggest at one point that he would consider reinstating the Claimant but that he said that she would need to understand certain conditions. It was clear to me from the non-committal language used by Mr Dzade that he was not in fact agreeing to reinstate the Claimant at all.

54. Ms Twomey had already indicated to me in any event that given the circumstances of the case, the Claimant would not agree to be re-engaged and she asserted that would have been a reasonable decision for her to make. Having heard Mr Dzade's response to the issue of reinstatement, together with my overall impression of the evidence to which I had been referred, I formed the conclusion that refusal of re-engagement would have been a reasonable decision for the Claimant to have reached in these circumstances.

55. I therefore determined that it was appropriate to make a Continuation of Contract Order.

56. I then moved on to consider the terms of the Order. I examined the Claimant's earnings with the Respondent at the time of dismissal. This was another matter of dispute. The Claimant informs me that her net weekly pay was £536.44. I was referred to the payslip dated 27 January 2023. The

other payslip in the bundle was only for two days and was therefore of no assistance to me.

57. The Respondent disputes the Claimant's weekly wage. Mr Dzade tells me that the payslip was wrong, although he then suggested it was accurate but that the Claimant had been paid for overtime. Having considered the payslip I note that there was no mention of overtime in it. Mr Dzade then informed me that the Claimant's pay would have been much less and in the region of £340 - £390 per week based upon her contract and that he could have transferred her to work anywhere. I could not agree with that suggestion as I was presented with a payslip from the Claimant issued by the Respondent which clearly showed that she had been paid £536.44 net on 27 January 2023. That is the figure which I will use for the basis of my calculations.

58. The Claimant informed me that she commenced her new role in August 2023 and that her new net salary is £1526.17 per month. The Claimant's previous net monthly salary, based upon the one complete payslip before me, would have been £2,324.57. The difference between the two amounts is therefore £798.40 per month.

59. I went to on to consider the Claimant's lost wages up to the date of her new role. This was a period of 5 weeks. I therefore calculated the sums due to August 2023 to be £2,682.20 (based upon five weeks at £536.44 per week).

60. I then went on to consider the Claimant's wages from August 2023 to today's date. The difference between her previous monthly pay and her new monthly pay is £798.40 per month. Therefore, the lost pay amounts to £4,391.20 (based upon five and a half months at £798.40 per month).

61. These two figures amount to £7,073.40. I note the size of this award and have taken into consideration that in the usual course of events the interim relief hearing would have been listed much earlier. In this case that did not happen, however that is no fault of the Claimant. Having granted the application for interim relief, it is therefore appropriate to make the award to the Claimant.

62. By virtue of s. 164(3)(b) Trade Union and Labour Relations (Consultation) Act, I am required to specify a date for payment. Having heard representations from both parties, I determined that the period of 28 days was appropriate. Mr Dzade informed that he could not afford to pay that amount. Whilst I listened carefully to what Mr Dzade had to say, affordability is not one of the factors which I am required to take into account.

63. I then moved on to consider the issue of the Claimant's pay going forward. As set out above, I have calculated the difference between the current and previous monthly pay to be £798.40. It is appropriate for the Respondent to make that payment to the Claimant until the claim is finally determined or settled. I have considered the date for payment as I am required to do under s. 164(3)(a). I note that whilst the Claimant's contract provided for her to be paid on the last Friday of the month she appeared to have been paid weekly from the payslip I was presented with. However, it appeared to me that it was appropriate that she should be paid £798.40 on the last Friday of

the month as per the terms of the contract. This should commence from today's date.

64. In producing this judgment, it appears to me that the payment due at the end of February 2023 should be reduced given that I have already awarded the Claimant her pay up to today's date which is half way through the month of February 2024. It is therefore necessary for the payment to her due at the end of this month to be reduced to take account of that fact. I have therefore determined that for February 2024 the amount due shall be reduced to £399.20, and then from March 2024 it will rise to £798.40 per month until the claim is determined or settled.

65. At the end of today's hearing at 3.31pm counsel for the Claimant indicated that the Claimant sought permission to amend her claim. I indicated that there would not be time to deal with the application today, moreover the Respondent had no notice of that matter, therefore it would not be fair to the Respondent to deal with it then. I indicated that any application to amend should be submitted in writing as soon as possible.

66. Further case management orders will follow in due course.

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Employment Judge **Graham**

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Date 14 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
16 February 2024

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/