EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bradley

Respondent: Ms S Williams

Heard at: **London Central** **On:** **20 November 2023**

Before: EJ Joyce

Representation
Claimant: Miss Bradley (Daughter)
Respondent: In-person

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The claimant's claim for unauthorised deduction from wages is dismissed;
(ii) The claimant's claim for unpaid holiday pay is dismissed.

REASONS

Claims and Issues

1. This matter related to a claim for approximately £2,000 for alleged arrears of pay and unpaid holiday pay. At the start of the final hearing, the parties agreed with my calculation for the claim of £2719.16. The central issues, as agreed with the parties at the outset of the hearing, were (i) whether a contract entered into between the claimant and respondent on 27 May 2022 was in force when the claimant began working on 1 November 2022; (ii) whether there were any sums properly payable under that contract; (iii) if so, whether the respondent made a deduction that was unauthorised; (iv) whether the claimant was owed holiday pay (v) if so, what sum is due to the claimant?

Hearing and Procedure

2. The hearing was attended by the claimant and her daughter who was representing her. The respondent also attended. Both the claimant and respondent gave oral evidence. There was a bundle of documents of approximately 51 pages consisting of WhatsApp messages between the parties. There were other relevant

documents on file. Both parties made oral closing submissions. Given the time available I informed the parties that I was reserving judgment.

Facts

3. The claimant and respondent knew each other previously through another member of the community. In early 2022, the claimant posted an advertisement requiring a nanny as she was intent on obtaining employment of her own. In order to be employed (by an airline) the claimant would have to undertake training on a pass or fail basis.

4. In April 2022, the parties met in order to discuss the claimant's role as nanny to the respondent's children.

5. On around 10 May 2022, per the WhatsApp messages in the bundle, the parties met in person and had discussions to finalise a contract.

6. On 15 May 2022, the respondent sent the claimant a draft contract by email.

7. On 26 May 2022, the respondent informed the claimant that her work training would commence on 21 June 2022.

8. On 27 May 2022, the contract was signed by both parties.

9. The contract provided that the claimant would start work on 1 August 2022 and would "normally work" three different types of shifts to be agreed between the respondent and claimant "adhoc" each month: 6-9pm (Evening), 9pm to 7am (Night) and 7am to 9am (Morning). The days and shifts were to be given at the start of the month in question with an estimate of 12 shifts per month "Est 12 times per month".

10. The contract further provided that the claimant's pay for both Morning and Evening shifts would be £12 per hour and for a Night shift would be £60 per shift. The salary was listed as £289.83 net weekly, payable in arrears.

11. On 16 June 2022, the respondent informed the claimant that her work training had been delayed slightly and would commence on 27 June 2022.

12. On 8 July 2022, the claimant contacted the respondent in order to find out how her training was going. The respondent replied on 13 July 2022 to say that training was ongoing and suggested meeting after the training to which the claimant agreed [2].

13. On 22 July 2022, the respondent informed the claimant that she had failed one of the training exams and had consequently been taken off the training course. She said she was waiting to be put on a further training course. She said that she "would still love to work with [the claimant] in similar times but could be slightly different but it is nights still so still need the same childcare really" [3].

14. On 29 July 2022, following further enquiry from the claimant, the respondent informed her that she had decided to start training in October with another airline. She stated that she would need childcare from September and not August 2022 as had originally been envisaged but that if this was not agreeable to the claimant then she would proceed with the original plan of the claimant commencing for her in August.

15. On 13 August 2022, the respondent wrote to the claimant asking her whether she could provide the respondent with a statement for her potential employer to the effect that the claimant had "signed a contract for August (…) but that [the claimant had] been willing to still be available in August/September (…)" [3].

16. On 3 October 2022, the respondent sent the claimant a list of the dates and times on which she would require the claimant to work as a nanny during her training.

17. On the morning of 11 October 2022, the claimant and respondent met in person [10]. According to the respondent, they discussed the fact that the respondent was due to start training with the 'new' airline on 1 November 2022. The respondent states that they agreed to not be bound by the terms of the contract signed in May 2022 and that they would discuss a contract again in the new year. The respondent stated in her oral evidence (and in her WhatsApp messages to the claimant) that the claimant had used the word "bin" or "binned" in relation to the contract, meaning the contract would not be in force. In her oral evidence, the claimant stated that she did not say that the contract was to be "binned" and would never say that.

18. I consider that it is more likely than not that at the meeting on 11 October 2022, the claimant and respondent agreed to not be bound by the contract they had signed in May 2022. I found the respondent's account as to the conversation on 11 October 2022 to be clear and credible. She was adamant that the word "binned" was used by the claimant. This was supported by her subsequent WhatsApp message (referenced below) to the claimant wherein she referred to the same word being used.

19. On 28 October 2022, the respondent informed the claimant that she would start training with British Airways the following week, and she asked the claimant whether she was able to start work as of the following week.

20. Although not entirely clear from the evidence, the claimant appears to have begun work for the respondent in November 2022.

21. On 10 November 2022, the respondent informed the claimant that she would not need to attend work for her the following day as she had not passed an aspect of her training. She said that she would recalculate what days the claimant was due to work for her.

22. On 18 November the respondent sent the claimant her shifts: Monday 21 November Morning (6:45 to 8am) and Evening shift, 22nd Evening shift, 23rd Evening shift, and 24th Morning shift (6:45 to 8am). The claimant agreed to the dates and times [9]. The respondent subsequently sent the claimant shifts for the following weeks of 28 November, 5 and 12 December 2022.

23. On 8 December 2022, the respondent paid the claimant £780 which represented 65 hours worked up until the end of the week commencing 12 December 2022.

24. Subsequently, exact date unknown, the respondent informed the claimant that the payment for £780 was a partial overpayment due to the respondent erroneously having paid gross rather than net wages. The claimant replied that she normally does not check her wages payments [25]. The respondent maintained that she should have paid the claimant £624 and paid HMRC £156 (the total amounting to £780).

25. The respondent subsequently emailed the claimant regarding the January roster stating that some days would need to be confirmed and stated that the "possibilities are: the hours change or there is no duty so you wouldn't need to come." The respondent subsequently told the claimant that she had passed her training [26].

26. On 5 January 2023, the respondent messaged the claimant to tell her there was no need for her to come to work the following morning as she did not have any work for the airline that day.

27. This was followed by numerous messages over the coming weeks whereby the claimant's hours of work were altered depending on the respondent's requirements [for example pp. 38-39]. There were also occasions when the claimant could not facilitate the respondent's requirements [for example p. 40]

28. On 25 January 2023, the respondent messaged the claimant as follows "(…) I will update you asap. Been a really quiet month for you sorry hope that didn't affect you (…) I think March will be busier as it all picks up (…)".

29. On 26 January 2023, the claimant replied "(…) Obviously I prefer to work but as I'm paid for hours booked rather than hours worked it shouldn't affect me too much, I appreciate your concern (…)".

30. On 27 January 2023, the respondent messaged the claimant to inform her she had calculated the claimant's hours as 46.15 hours for January at the total sum of £555 gross. By return message the claimant confirmed this was correct.

31. On or about 7 February 2023, the respondent messaged the claimant to inform her she was "going to get a new legal contract from PAYE Nannies [the company assisting the respondent to process the claimant's payslips], the lady from [the claimant's] agency said the one we had is void. I have a better idea now of my shifts with BA so I've gone over everything".

32. The above message then provided the claimant with gross monthly pay of £1274 equating to £318.50 per week and £13 per hour. The respondent also included the claimant's proposed working shifts. Following reservations from the claimant, the respondent proposed different shifts.

33. On 15 February 2023, the claimant responded that she would like to continue working with the respondent but it depended on her working hours for another family which were in the process of being adjusted [48].

34. On 26 February 2023, the respondent wrote to the claimant informing her that she would process 30 working hours for the claimant for February 2023 through PAYE Nannies. She based this on the average hours worked weekly by the claimant since November 2022 multiplied by 3 weeks as they had agreed to the claimant having 2 weeks annual leave plus working for one week in February [thus totally 3 weeks] [50]. She further informed the claimant that she would be putting 'pay on hold' for March as she was waiting for the claimant to inform her what hours she could work, if any.

35. Then, on a date unknown after 26 February 2023, the respondent messaged the claimant stating, among others, that she had understood that the contract she and the claimant had initially agreed had been 'scrapped' until she could "work out [her] work pattern, which is why [she had] been paying for hours worked so far" [51].

36. The claimant by return message stated, among others, "I thought you had said that you would pay what was in the contract (288 each week net)". She further stated she might be able to work some hours in March 2023 but that the respondent would be best to find an alternative nanny going forward. She continued "Maybe that was my misunderstanding then about the contract but I am happy with hours you worked out for holiday pay. So from today we have ended our services with each other (…)" [51].

37. The respondent replied, accepting the claimant's position, and stated that she did not know the claimant had another job until after she had begun working for the respondent.

38. On 2 March 2023, the claimant messaged the respondent stating that her payment

for February was overdue.

39. On the same day, the respondent replied, reiterating that there was no contract in place and that they had both agreed the contract "was out the window" until the respondent had formally arranged her working hours [52].

40. On the same day, the claimant replied stating that she was adhering to the terms of the contract as agreed on 27 May 2022. The respondent replied, reiterating that the contract had been set aside and that the claimant had not raised any issue previously about not being paid in line with the terms of the contract.

41. In subsequent messages the respondent asked the claimant why she had not queried her pay since November 2022 given that it was always below the amount set out in the contract from May 2022.

42. The claimant replied that the issue of pay had been raised with the respondent and also with the claimant's nannying agency. Her position was that as she was available for work, according to the terms of the contract she should be paid in full.

43. The respondent replied that the claimant had agreed that the contract would be "binned", and that these were the claimant's words, until the respondent knew her own working hours. The respondent accepted that a lady from the nannying agency had been in contact with her, and this is what had prompted her to try to get another contract in place as of February 2023.

Law

44. From *Harlow v Artemis International Corporation Ltd 2008 IRLR 629*, QBD I derive the basic principle that employment contracts are "designed to be read in an informal and common-sense manner in the context of a relationship affecting ordinary people in their everyday lives". The aim of interpreting a contract is to give effect to what the parties intended.

45. In *Arnold v Britton and ors 2015 AC 1619 SC*, Lord Neuberger held that 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* . And it does so by focussing on the meaning of the relevant words (…) in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." The applicability of the above to employment contracts was confirmed in *Campbell v British Airways plc EAT 0015/17.*

Conclusions

1. As to the first issue, (i) whether a contract entered into between the claimant and respondent on 27 May 2022 was in force when the claimant began working on 1 November 2022, I conclude as follows.

2. The claimant's position, in summary, is that the contract signed on 27 May 2022 was enforceable throughout the term of her employment. She denied agreeing to terminate/void that contract with the respondent. Her position is that under its terms, she was entitled to a minimum of 12 shifts per week and so should have

been paid £289.83 per week, regardless of how many shifts she actually worked and provided she was available to work 12 shifts per week.

3. Summarising the respondent's position, she states that the Contract was voided following her conversation with the claimant on 11 October 2022 and that it was agreed between them that the claimant would only be paid for hours worked, which in essence amounted to a 'zero hours' contract.

4. Having found above in the Facts section of the Judgment, that the claimant and respondent agreed, as of 11 October to void/terminate the May 2022 contract. I also rely on the subsequent conduct of the parties in determining that they did not intend to continue to be bound by the terms of the Contract as follows:

5. (i) Per the terms of the May 2022 contract, the claimant was due to commence work on 1 August 2022. Yet, she did not commence work until 1 November 2022. There was no attempt to alter the start dates of the Contract. This supports the position that the parties had already agreed to 'set aside' the Contract as of 11 October 2022; (ii) In her message of 26 January 2023, in response to the respondent apologising that she had not provided the claimant with much work, the claimant stated: "Obviously I prefer to work but as I'm paid for hours booked rather than hours worked it shouldn't affect me too much, I appreciate your concern (…)". This is strongly supportive of the conclusion that contrary to being entitled to a minimum number of hours/shifts and corresponding pay, the claimant's own view was that she was entitled to be paid solely for the hours booked by the respondent; (iii) The claimant never queried her pay. It was clear that from her first pay slip that she was not being paid per the terms of the May 2022 contract. She was being paid for hours worked. Had she held a concern in relation to this, she would reasonably have raised it with the respondent. She did not do so; (iv) There were numerous weeks where the claimant did not provide the respondent with 12 shifts per week. This is most clearly evidenced by the position in February 2023. Had the claimant considered she was entitled to 12 shifts per week, it would have been reasonable of her to raise this with the respondent. She did not do so. Again, this supports the conclusion that she did not consider herself contractually entitled to 12 shifts per week.

6. Consequently, I find that the parties orally agreed to set aside the May 2022 contract. As such, it was not in force when the claimant began working for the respondent in November 2022. The arrangement, in effect, became a zero hours arrangement whereby the claimant would be paid for hours worked.

7. Even if I had not arrived at the above conclusion, I would have held that the claimant had no contractual right to be paid for 12 shifts per week. I note that the actual term of the May 2022 contract at clause 1.3 provides for an *estimated* 12 shifts per week. This did not amount to a contractual right to a minimum of 12 shifts, rather it was simply an estimate.

8. As to holiday pay, I find that the claimant was paid holiday pay based on the WhatsApp messages referenced above. Further, the claimant stated in a message to the respondent on a date after 26 February 2023 [see para. 36 above]: "Maybe that was my misunderstanding then about the contract **but I am happy with hours you worked out for holiday pay.** So from today we have ended our services with each other (…)" [51] (emphasis added). Nor did the claimant provide any evidence at the hearing as to the alleged shortfall in her holiday pay. On the evidence before me, I concluded that the claimant had been paid her entitlements for holiday pay.

9. Having made the above finding in relation to the first issue, I conclude on the remaining issues as follows:

10. (ii) whether there were any sums properly payable under that contract: No, as the

contract had been set aside but the respondent paid the claimant in full for the work she carried out.

11. (iii) if so, whether the respondent made a deduction that was unauthorised: No, the claimant did not make any unauthorised deductions. To be clear, the claimant was paid for the work she carried out and no deductions were made, let alone unauthorised deductions.

12. (iv) whether the claimant was owed holiday pay: in line with my findings above, no she was not owed holiday pay.

13. (v) if so, what sum is due to the claimant: In light of the above, no sum is due to the claimant and her claim is dismissed in its entirety.

____

Employment Judge **M Joyce**

_____5 March 2024___________________________
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

19 March 2024
....

....
FOR THE TRIBUNAL OFFICE