Case Number: 2223873/2024

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
BETWEEN:

Ms C Nchama

Claimant

AND

Not Just Cleaning Ltd

Respondent

ON: **17 October 2024**
Appearances:
For the Claimant: **Mr J Taylor, union representative**
For the Respondent: **Mr S Wyeth, counsel**
Interpreter in the Spanish language: **Mr A Janbaz**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim form presented on 7 August 2024, the claimant Ms Cristina Oyana Obiang Nchama brought claims of unlawful deductions from wages and failure to provide a written statement of employment particulars.

This remote hearing

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

3. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

4. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

5. The participants were told that was an offence to record the proceedings.

6. Each of the witnesses, who were in different locations, had access to the relevant written materials. I was satisfied that neither of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

7. The respondent had provided a list of issues which was agreed by the claimant. We confirmed and clarified the issues at the start of the hearing as follows.

8. Was there an unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996 ("ERA 1996").

    a. What wages was the claimant entitled to be paid from 15 February to 10 April 2024
    b. Were the wages paid to the claimant from 15 February 2024 less than the wages she should have been paid? It was not in dispute that no wages were paid from 15 February to 10 April 2024.
    c. If so, was any deduction required or authorised by a written statement of the claimant's contractual terms.
    d. Did the claimant signify in writing or verbally her consent or agreement to the making of the deductions
    e. Did the claimant have a copy of her contractual terms before the deduction was made.

9. The claimant says there was a deduction of £4,102.80 between 15 February 2024 and 10 April 2024 - Statement of Employment Particulars (section 1 ERA 1996).

10. Was the claimant ready willing and able to work, so as to be entitled to be paid her wages? Was the claimant required to be available to work during the period 15 February 2024 to 10 April 2024 so as to be entitled to her wages?

11. Did the respondent provide the claimant with written particulars under section 1 ERA?

12. Was the claimant provided with a statement of employment particulars on or before the start date of her employment? The respondent submits the claimant was provided with this on 14 April 2023, 30 January 2024 and 28 March 2024.

13. In accordance with section 38(2)(a) and section 38(3)(a) of the Employment Act 2002 ("EA 2002"), an award for failure to provide a statement of particulars can only be made where an employee has successfully brought one of the substantive claims listed in Schedule 5 to the EA 2002. An award for this claim can only be made if the Tribunal determines that the claim for unlawful deductions is successful.

14. For an award to be made, section 38(2)(b) requires that when the proceedings were begun, which in this case was 7 August 2024, the employer must have been in breach of the duty to provide written particulars of employment.

Remedy

15. What, if any, award of compensation should be made?

Witnesses and documents

16. There was an electronic bundle of documents of 196 pages.

17. For the claimant, the tribunal heard from the claimant herself. I checked with the claimant that she understood her witness statement which was written in English. She confirmed that it had been interpreted for her and she understood it.

18. For the respondent, the tribunal heard from Mr Kieran Soar, HR Director from April 2024 and at most of the material time, Senior HR Manager.

19. There were oral submissions only from the parties. All submissions and any authorities referred to were fully considered, whether or not expressly referred to below.

Findings of fact

20. The claimant worked for the respondent for about a year, from 14 April 2023 to 10 April 2024 as a Cleaning Operative. The respondent is a provider of cleaning services for commercial, mixed use and residential properties.

The provision of documents to the claimant

21. On 14 April 2023 an HR Administrator at the respondent sent a number of documents to the claimant including her offer letter, contract of employment and the staff handbook (email page 69). The email address used was oyana70@hotmail.com. This was the email address given by the claimant to the respondent on recruitment. The claimant confirmed in oral evidence that the email address she gave on recruitment was oyana70@hotmail.com. I find on her evidence that this is the email address that she gave.

22. The respondent's witness Mr Soar, HR Director, was not aware of any "*bounce back*" from this email address. The contract was electronically signed by the HR officer on 14 April 2023 (page 76). The respondent had no record of the claimant signing the contract.

23. The respondent's practice is to send the offer letter and contract documents prior to the start date of the employment. Mr Soar said that at a later date the claimant filled out an Electronic Starter Pack in which she gave a different email address of oyana07@hotmail.com. This was after the contractual documentation had been sent out. The difference in the two email addresses is the transposition of the figures 0 and 7.

24. This email address oyana70@hotmail.com was used by the claimant during her employment with the respondent – for example pages 87 and 89 in early May 2023. She accepted that this was the email address she provided on recruitment (statement paragraph 3). She said she *"lost access*" to this address "*a few weeks later*" and says that as a result she did not receive a copy of "*the alleged contract*".

25. On 9 September 2024 the respondent's HR Director Kieran Soar emailed the claimant to say that it appeared that she was using a different email address of oyana07@hotmail.com. The claimant confirmed by email on 11 September 2024 (page 160) that oyana07@hotmail.com was her new email address. She sent a copy of that email to her original email address of oyana70@hotmail.com. I find that oyana70@hotmail.com was an email address that remained in operation. If the claimant lost access to it, I find that she regained access to it and continued to use it.

26. The claimant accepted in evidence that she used the address oyana70@hotmail.com in box 1.10 of her ET1 presented on 7 August 2024. This supports my finding that this email address remained and remains in operation and the claimant has access to it. It is the address used by the tribunal for correspondence with her.

27. It was an issue for the tribunal as to whether the respondent provided the claimant with written particulars of her employment. I find on a balance of probabilities that the claimant received the contract sent to her on 14 April 2023. It was sent to an email address that she was actively using in early May 2023. On her own admission it was the address that she gave to the respondent when she was recruited. It did not "*bounce back*" to the respondent. It is an email address that she continues to use.

Third party pressure to remove the claimant from site

28. An incident took place on Friday 5 January 2024 when the claimant was working at the site to which she was deployed, at 10 Broadway. She was cleaning in the post room. The client complained that the claimant was mopping the floor using dirty water.

29. The Service Support Manager at the client, Mr Carrion, emailed Mr Soar to ask whether he could ask the claimant to stop work immediately or whether he should let her finish her shift (page 89). Mr Soar said in oral evidence that the client "*made it categorically clear*" that they did not want the claimant back on site. This was a clear case of third-party pressure to remove the worker from site.

30. The HR officer at the respondent replied to the client at 15:44 on 5 January to say that the claimant should be removed from site and it should be explained to her that the client requested this because of poor cleaning standards (page 92). The claimant was asked by Mr Carrion to leave the site. This was followed with a suspension letter on 9 January 2024 (page 100) suspending the claimant with full pay pending an investigation. The claimant was not asked to attend work from 5 January 2024 to 15 February 2024. It is not in dispute that she was paid during this period.

<u>Contractual documents</u>

31. The respondent's business operates such that its employees are often required to work at different sites to meet business requirements. In the contract of employment issued to the claimant clause 4.1 states that employees may be required to work at any site operated by the respondent (page 71). This says: "*You will normally be required to work at any site on which NJC operates as directed by your Line Manager from time to time".*

32. The claimant normally worked at 10 Broadway, but she had worked at least at one other site with the respondent. This was in August and September 2023 at a site called The Bryanston.

33. The claimant was also issued with the Staff Handbook which states that Part A of the Handbook is contractual (page 79). Part A clause F deals with Job Flexibility and states *"It is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business".* (page 80). Part A clause G under the heading Mobility says: "*Although you are usually employed at one particular site, it is a condition of your employment that you are prepared, whenever applicable, to transfer to any other of our sites. This mobility is essential to the smooth running of our business".*

34. The claimant accepted in evidence that the respondent was contractually entitled to move her to different sites and duties.

35. The terms of business between the respondent and its client at 10 Broadway commenced at page 55. Clause 3.5 said:

> *3.5 If the results of such enquiry, comparison, inspection or testing cause the Client to believe that the Deliverables do not conform or are unlikely to conform with the Order or to any specifications*

and/or patterns supplied or notified by the Client to the Service Provider, the Client shall inform he Service Provider and the Service Provider shall immediately take such action as is necessary to ensure conformity and in addition the Client shall have the right to require and witness further enquiry, comparison, testing and inspection.

36. The "*Deliverables"* in this case included the cleaning of the common parts and amenities of the building as set out in Schedules to the contract.

Dealing with the complaint of 5 January 2024

37. In addition to the suspension letter, the claimant was also invited to a meeting titled "*Third Party Pressure Consultation Meeting*" This was set out in a second letter of 9 January 2024 (page 101). One of the purposes of that meeting was to discuss alternative roles that may be suitable for the claimant. It was not a disciplinary hearing.

38. The meeting was rescheduled at the claimant's request, to 30 January 2024. The claimant was accompanied by her union representative Ms Molly De Dios Fisher. The hearing was chaired by Evelina Mikuleniene. Mr Soar was present from HR. There was a translator present to assist the claimant whose first language is Spanish.

39. The claimant accepted in evidence that at that meeting she was offered alternative work at Kings Road Park in Fulham. The claimant was informed by Mr Soar that if she was unable to accept this, the respondent would have to terminate her employment given the third-party request to remove her from site at 10 Broadway and due to lack of other opportunities (meeting notes page 115).

40. Immediately following the meeting, Mr Soar sent an email to the claimant (page 143) making an offer of 2 different sites as alternatives. The first was the one mentioned in the meeting, at Kings Road Park in Fulham and the second was at Mizuho Bank, at 30 Old Bailey in EC4. For the first vacancy, the respondent was waiting to see whether the client would renew their contract at the end of March, so it was available initially until then and for the second vacancy, it was temporary cover until the end of February.

41. There was a duplicate copy of that email in the bundle at page 180 and it showed that there was an attachment, being her contract of employment. It was copied to the claimant's union representative who raised no issue about whether it was the correct version of the contract. I find that this was the second time on which the claimant was provided with written particulars of her employment.

42. The claimant's union representative raised a number of questions with Mr Soar about the vacancies. One of the complaints about Kings Park Road was the travel time which Ms Fisher de Dios said was not a wholly

reasonable alternative. She asserted that the travel time was 1 hour 40 minutes on 3 buses (email page 143). She asked whether there would be guarantees of more suitable vacancies in the future.

43. Unsurprisingly Mr Soar said that they could not give guarantees as to future vacancies as it depended on variable factors such as client need and staff attrition. He said that if a more suitable role came up, they would strongly consider the claimant and would keep her informed.

44. Mr Soar had also done a TfL search and did not agree with Ms Fisher de Dios about the travel time. He sent 2 screen shots showing that the travel to the Fulham site was about the same as the travel to 10 Broadway, about 1 hour 10 minutes (pages 136 and 137), including travel just by bus, which was less expensive for the claimant than using the tube. The claimant did not accept that the journey times were the same because of traffic. I find that there can always be variations due to traffic, wherever you travel on the bus. I find based on the TfL searches that the journeys were comparable. The duties of the role at Kings Park Road were similar to 10 Broadway involving cleaning of common parts at a high-end residential building.

45. By the afternoon of Wednesday 31 January 2024 the claimant, via her union representative, accepted the alternative site at Kings Park Road (page 134). The claimant said she would be ready to start at the beginning of the following week, which was Monday 5 February. The claimant also agreed in evidence (statement paragraph 8) that she accepted the role at Kings Park Road. I find based on her acceptance of that role on 31 January that it was a suitable role.

<u>Sickness absence and alternative roles</u>

46. On 1 February 2024, the claimant had a hospital appointment and was told that she was not fit for work due to an infected burn. She was signed off until 14 February 2024. Mr Soar replied (page 130) that the claimant's sickness would be processed in line with company policy. In the meantime the client at Kings Road Park said they no longer required another cleaning operative so the respondent would have to look at other vacancies.

47. It was put to Mr Soar that the respondent withdrew that offer of that vacancy. Mr Soar agreed that they withdrew it and said that they are a client-led business and it is not uncommon for clients to change their cleaning requirements at particular sites. I accepted his answer and find that this was correct.

48. On 8 February 2024 Ms de Dios Fisher told Mr Soar that the claimant would be fit to return to work on 15 February 2024 and she asked for a list of vacancies. Mr Soar was able to offer fixed term cover at Kings Road Park until the end of February whilst the client was making decisions about their requirements for cleaning support. Mr Soar was

also able to offer another location, The Bryanston in London W1. This was a location at which the claimant had previously worked. It was a permanent role starting at the end of February so the claimant was told she could begin this once she had finished the two weeks at Kings Road Park.

49. At 12:50pm on 14 February Mr Soar asked whether the claimant would be attending at Kings Road Park at 10am the following day (page 148). This is what he was expecting. The claimant suggested in her witness statement that the respondent had given the job to someone else (statement paragraph 8), but I find that this is not correct. There was no evidence to support this. As shown in his email, Mr Soar was expecting the claimant to attend Kings Road Park on 15 February. The job had not been given to anyone else.

50. Ms Fisher de Dios said this role did not seem like a reasonable alternative as the claimant "*may be redundant in 2 weeks' time*." (page 147). Mr Soar replied on the evening of 14 February (page 146) that the claimant could take the role at Kings Road Park and move to The Bryanston at the end of February. He did not understand the claimant's hesitation. Mr Soar told Ms Fisher de Dios in that email (page 146) that if the claimant did not attend work on 15 February, they would not be paying her.

51. On the morning of 15 February, when the claimant did not turn up at Kings Road Park, Mr Soar informed Ms Fisher de Dios that the claimant was now being "*classed as unpaid"* and asked her to revert "*ASAP"* (page 126).

52. Ms Fisher de Dios did not reply until 21 February because she was on leave. She said that with regard to The Bryanston, it was an afternoon rather than a morning shift, and "*it [did] not seem like a wholly reasonable alternative*" (page 124). This was despite the fact that the claimant had worked there before, as shown by her payslips for September and October 2023 (pages 173 and 174).

53. For the first time in the email of 21 February Ms Fisher de Dios raised an issue about the management of The Bryanston and contended that the request for removal from 10 Broadway was not for genuine reasons. She suggested that the respondent and the client had colluded to seek the removal of the claimant and complained that the respondent had not tried to persuade the client to allow the claimant to return (page 124). The respondent was not under an obligation to do this.

54. Ms Fisher de Dios said that she was "*struggling to believe*" that the alternatives offered to the claimant were the only options available (page 125). She said that they could go down the route of a formal grievance and resist the client request for removal, "*although that is a much lengthier process for you and all Cristina wants is to work in peace".* Ms Fisher de Dios said that the claimant had been available for work since

15 February and should be paid. I find the claimant had not made herself available for work. She had failed to attend work on 15 February 2024 at Kings Road Park.

55. Mr Soar replied that same day, 21 February, saying that there were no other vacancies and what they had offered did not involve the claimant working with the managers she had complained about. He said that they believed that the alternatives were suitable offered as an interim measure to keep the claimant in employment and she had refused these. He said that the claimant would not be paid from 15 February (page 123). He told the claimant's representative that the managers she complained about were not going to be present at the two sites they had offered. They were the only suitable vacancies they currently had.

56. At no point did the claimant inform the respondent, either personally or via her union representative, that she was prepared to work at The Bryanston or Mizuho Bank.

<u>Was the claimant ready, willing and able to work from 15 February 2024?</u>

57. I find that the claimant was not ready, willing and able to work from 15 February 2024 to 10 April 2024. She was offered Kings Park Road, which she initially accepted which leads me to find that it was a suitable vacancy. There was no right, as suggested by the claimant, for her to have a period of time to consider whether she would accept the vacancy. The respondent had a contractual right to move her to a different site. It was a site at which she had said on 31 January 2024 that she was prepared to work and I find it was suitable.

58. The claimant may have had concerns about the duration of the vacancy. This did not make it unsuitable from 15 to 29 February 2024. She was not entitled to stay at home and be paid because of this. There was another vacancy available from the end of February at The Bryanston.

59. It was also suggested by the claimant that the respondent should have allowed her time to consider whether she was prepared to accept a vacancy. I find that the claimant had no such entitlement. There was an obligation on the respondent to provide a suitable vacancy. Those offers were suitable. The claimant was expected to attend Kings Park Road on 15 February and failed to do so.

60. At no point did the claimant say she was prepared to work at The Bryanston. I find this was a suitable vacancy because she had worked there previously.

61. As such, she was not ready and willing to work. This is an essential component of the wage/work bargain. As such she was not entitled to be paid.

The grievance

62. Three weeks later on 12 March 2024 Ms Fisher de Dios raised a grievance on behalf of the claimant. It complained about unlawful deductions from wages and failure to offer suitable alternative employment (pages 120-122).

63. Mr Soar responded on 19 March 2024 with his comments in red on the grievance email (page 121). He said that the claimant would not be paid unless she was at work and that she had refused offers of work. He attached the offers of alternative work previously made and said they were awaiting new vacancies which he would communicate as soon as he had them.

64. There was a complaint about the two managers and Mr Soar said the claimant would be invited to a grievance hearing in due course.

65. On 28 March 2024 Ms Fisher de Dios complained that there had been a breach of section 13 Employment Rights Act and that the claimant was due £3,261.20 gross pay between 15 February and 28 March 2024. She also complained of a failure to provide the claimant with written particulars of employment under section 1.

66. Mr Soar replied within the hour to say that the respondent's position was unchanged. He said that the claimant's contract was sent to her numerous times, on 14 April 2023 and 30 January 2023 and on 28 March 2024 he attached it again. This email was also copied to the claimant's union representative. I find that this was the third time on which the claimant was sent written particulars of her employment.

67. Ms Fisher de Dios replied 15 minutes later saying that the respondent's position appeared to be unlawful (page 116). She said that the claimant accepted the offer at Kings Road Park, but the respondent withdrew the offer. She asked for a signed copy of the claimant's contract of employment as she noted that the contract was sent was not signed. There is no doubt that the contract was received by the claimant and her union representative on 28 March, because Ms Fisher de Dios made reference to it in her reply (pages 116-117).

Termination of employment

68. On 10 April 2024 Mr Soar sent the claimant a letter with the outcome of the Third Party Pressure meeting that took place on 30 January 2024 (page 149). The letter explained that at the meeting on 30 January the claimant had raised some complaints about a poor working culture and she was asked if she wanted to raise a grievance. She did not do so until 12 March 2024.

69. The letter of 10 April outlined the 3 offers of alternative employment made

to the claimant. These were at Kings Road Park on a temporary basis initially until the end of March, but later varied until the end of February. There was a second offer at Mizuho Bank in EC4 which was temporary until the end of February while the client made decisions about what it needed and a third offer at The Bryanston. The vacancy at The Bryanston was permanent and the claimant had worked there before.

70. The claimant had said that she did not want to work with the 2 managers and/or that the travel was too difficult. Mr Soar had told the claimant that she was not required to work with the two managers about whom she complained. There were no other vacancies.

71. Mr Soar said that as the claimant had refused all vacancies after her sick leave ended on 15 February 2024 she was dismissed. The claimant was given a right of appeal.

Grievance hearing

72. After some delays, the grievance hearing went ahead on 3 September 2024. The claimant and her representative did not attend. As it was the third date that had been fixed, it went ahead in the claimant's absence. The grievance officer did not uphold the grievance. The outcome letter dated 9 September 2024 was at page 165.

The relevant law

73. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

74. Under section 1 ERA 1996 when a worker begins employment with an employer, the employer shall give to that worker, a written statement of particulars of employment. Under section 38 Employment Act 2002, where the tribunal finds in favour of a worker in a claim to which that section applies, the claimant is entitled to an award. The claims to which this applies are set out in Schedule 5 Employment Act 2002 and includes a claim for unlawful deductions from wages.

75. It is a requirement under section 38(2)(a) EA 2002 that the tribunal has found in favour of the worker in respect of the relevant claim. If the claimant does not succeed, there is no right to an award for failure to provide written particulars of employment.

76. The starting point for entitlement to wages is that the employee must be ready and willing to work in order to be entitled to their pay. The House of Lords in ***Miles v Wakefield Metropolitan District Council 1987 IRLR 193*** said: "*In a contract of employment wages and work go together. The*

employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."

77. *In **North West Anglia NHS Foundation Trust v Gregg 2019 IRLR 570***, the Court of Appeal described the question of being ready willing and able to work as the "*co-dependency principle*". Coulson LJ set out the following propositions:

> *(a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction of their pay.*
>
> *(b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It all depends on the circumstances. (Unfortunately, his Lordship gave no examples of such decisions or constraints, beyond the third-party suspension in the case before him.)*
>
> *(c) An inability to work due to a lawful suspension imposed by the employer by way of sanction (which was not the position in Dr Gregg's case) will permit the lawful deduction of pay.*
>
> *(d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in Miles v Wakefield) or which was 'involuntary' (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.*

78. It is necessary to consider whether there is any contractual basis for withholding the pay and if not, then the question of being ready, willing and able to work falls to be considered.

79. The claimant initially relied upon ***Devonald v Rosser & Sons 1906 2 KB 728 (CA)***, but subsequently withdrew reliance on this case.

80. The respondent relied upon ***Luke v Stoke-on-Trent City Council 2007 IRLR 777 (CA)***, a case in which a teacher refused to return to work unless certain conditions were satisfied. The Court of Appeal said that the Council was justified in not paying the claimant, in circumstances where she had refused to comply with their reasonable position in relation to her return to work. In that case there was nothing in the contract or in the employment relationship setting out terms on which she would return to work. It was a straightforward case of "*no work, no pay*".

Conclusions

81. I have found as a fact that the claimant was sent written particulars of employment on three occasions, on 14 April 2023, 30 January 2024 and 28 March 2024.

82. I have also found as a fact that the claimant was not ready and willing to work when she was offered work at Kings Park Road on 15 February 2024. It was a suitable location and she had previously accepted the

location on 31 January 2024.

83. The claimant had no right to a particular or guaranteed work location. This is governed by the business needs of the respondent's clients. The contractual position is clear that the claimant could be required to work at any site on which the respondent operates, as directed by the line manager. There was also no guarantee as to the duration of any vacancy. This was dependent on client needs.

84. It was submitted by the claimant that her failure to attend work should have been dealt with as a disciplinary matter. There was no need for the respondent to do this. They had offered suitable vacancies and the claimant did not make herself ready, willing and available to work. The claimant was in breach of this implied term which is an essential part of the wage/work bargain. They were not required to pay her when she declined to work in those circumstances. The ***Luke v Stoke-on-Trent*** case is on point.

85. The claimant failed to attend work at Kings Road Park on 15 February 2024 and thereafter. She did not accept the role at The Bryanston or Mizuho Bank. I have found that Kings Road Park and The Bryanston were suitable vacancies.

86. For these reasons the claims fail and are dismissed.

87. I was grateful to the representatives and the interpreter for the assistance they gave to the tribunal in this case. I had hoped to provide an oral decision for the parties on the day of the hearing, but due to the additional time involved with interpretation, it was necessary to reserve this decision.

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Employment Judge Elliott
Date: 18 October 2024

Judgment sent to the parties and entered in the Register on: 25 October 2024
_________________________ for the Tribunal