



EMPLOYMENT TRIBUNALS

Claimant: Ms Ugoagu

Respondent: Mays Homecare Limited

Heard at: Watford by CVP

**On: 13, 14 and 15 November
2023**

Before: Employment Judge Warren

REPRESENTATION:

Claimant: Mr Izezie, Solicitor Advocate

Respondent: Mr Salan, former director

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant is not a qualifying employee with 2 years service and her claim of unfair dismissal is dismissed.
2. The claim of automatically unfair dismissal for the assertion of a statutory right is ill founded and is dismissed.
3. The claimant was not dismissed in breach of contract. Her claim for notice pay is ill founded and is dismissed
4. The claim for unpaid holiday pay is ill founded and is dismissed.
5. When the proceedings were begun the respondent was not in breach of its duty to provide the claimant with a written statement of particulars.
6. The respondent did not make an unlawful deduction from the claimant's wages. The claim is ill founded and is dismissed

REASONS

BACKGROUND

1. By an ET1 issued on 4 October 2021 the claimant asserted that she was an employee of the respondent and had been unfairly constructively dismissed. She claimed unpaid holiday pay, arrears of pay and a failure to provide written particulars of employment, and wrongful dismissal (notice pay). She later amended her claim to include automatic unfair dismissal for asserting a statutory right She submitted a schedule of loss amounting to £94,154.65. The respondent denied the claimant's alleged start date, and asserted that her claim that she was to be paid £28,800 per annum for a 12 hour week was ill informed as the rate was based on a 40 hour week and was to be pro rata. The claimant argued that she was entitled to childcare payments and travel expenses as well, which were denied by the respondent. The respondent asserted that she had been provided with written particulars of her employment, albeit late

EVIDENCE

2. The claimant gave evidence on her own behalf. For the respondent, evidence was given by Mr Salan, ex director of the respondent. Mr Kipkebut, a consultant, and Mrs Dahir, Mr Salan's mother (and at the outset the intended director of the business). Mrs Dahir gave evidence through an interpreter. Her evidence was far from straightforward. She and the claimant had been friends at the outset, which led to many of the earliest discussions between the parties being informal and unrecorded. Mr Kipkebut is a consultant who assists businesses to get CQC approval. He was as close to a business - like witness as this case had, in that he kept notes of meetings and appeared independent in the evidence he gave. Mrs Dahir had a previous career as a carer. Mr Salan worked in education. The claimant was an experienced CQC approved manager. I preferred the evidence of the respondent witnesses. I found the claimant to be incredible when she asserted that she had not read the offer of employment (she had altered it before signing and returning it) and that she did not understand the term 'pro rata'. As an experienced manager she must have either understood it, or at the very least been alert to its existence in her contract and been able to seek advice. These are just two of several examples.
3. There were 3 bundles of documents, none agreed. Documents in the first bundle are referred to by their pagination and prefixed with A, in the second by their pagination prefixed with B, and in the third (supplemental), prefixed by C. All of the witnesses had made statements and relied on those as their evidence in chief. All were cross examined.
4. The standard of proof applied was the balance of probabilities and the burden lay with the claimant to prove to that standard that she had been underpaid as described in her case, and that the respondent had breached the implied term of trust and confidence thus rendering her resignation a constructive

dismissal. In relation to the claim of automatically unfair dismissal the burden of proof is further described in the section headed The Law

ISSUES

5. The agreed issues were set out at page B9 and are as follows:-

5.1 Unfair dismissal – constructive dismissal. Sections 94, 95 and 98 Employment Rights Act 1996 (“ERA 1996”)

5.1.1 Did the respondent do the following things:

5.1.1.1 Fail to pay the claimant her commensurate/agreed salary or wages, or deducted her salary/wages

5.1.1.2 Wrongfully varied the claimant’s contract

5.1.1.3 Not properly handle or address the claimant’s grievance

5.1.1.4 Fail to provide her with the necessary facilities, equipment and or information to fulfil her duties

5.1.2 Identifying the employers conduct as referred to above has there been a breach of an express term of the contract? If so which term?

5.1.3 Identifying the employer’s conduct as referred to above has there been a breach of the implied term of trust and confidence? The Tribunal will need to decide:

5.1.3.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent; and

5.1.3.2 Whether it had reasonable cause for doing so.

5.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end (a repudiatory breach).

5.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was the reason for the claimant’s resignation.

5.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant’s words or actions showed that they chose to keep the contract alive even after the breach.

5.2 Reason for dismissal

5.2.1 What was the reason or principal reason for the dismissal, i.e what was the breach of contract?

5.2.2 Was it a potentially fair reason?

5.2.3 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

5.2.4 Does the claimant have the requisite length of continuous service to bring a claim for ordinary unfair dismissal?

5.3 Automatic Unfair Dismissal for asserting a statutory right s.104 ERA 1996.

The issues above must be addressed and then the following:-

5.3.1 If the claimant was (constructively) dismissed by the respondent:

5.3.1.1 Did the claimant make an allegation that the respondent had infringed her statutory rights?

5.3.1.2 Did this constitute an allegation that the respondent had infringed a right of hers?

5.3.1.3 If the claimant alleged the respondent had infringed a statutory right, was that the principal reason for dismissal? In a claim of constructive unfair dismissal that requires the employee to show that the respondent's actions which constitute the repudiatory breach related to the claimant's assertion of a statutory right.

If so, the claimant will be regarded as unfairly dismissed

5.4 Wrongful dismissal/Notice pay

5.4.1 What was the claimant's notice period?

5.4.2 Was the claimant entitled to be paid for that notice period?

5.4.3 What should she be paid.

5.5 Holiday pay.

5.5.1 What was the claimant's leave year?

5.5.2 How much of the leave year had passed when the claimant's employment ended?

5.5.3 How much leave had accrued for the year by that date?

5.5.4 How much paid leave had the claimant taken in the year?

5.5.5 Were any days carried over from previous holiday years?

5.5.6 How many days remain unpaid?

5.5.7 What is the relevant daily rate of pay?

5.6 Unauthorised deductions Ss13 – 27 ERA 1996

Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

5.7 Other payments

5.7.1 What sums does the claimant believe due to her?

5.7.2 On what basis does she assert she is entitled to payment?

5.7.2.1 Was the employer in breach of contract?

5.7.2.2 If it is a breach of contract did this claim arise or was it outstanding when the claimant's employment ended?

5.7.3 What is the total amount claimed?

5.8 Schedule 5 Employment Act 2002 – failure to give written statement of employment particulars.

5.8.1. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

5.8.2 if the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002. If not, the Tribunal must award two weeks' and may award four weeks' pay. Would it be just and equitable to award four weeks' pay?

5.9 Remedy for unfair constructive dismissal

5.9.1 Does the claimant wish to be reinstated to their previous employment?

5.9.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

5.9.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal whether it would be just.

5.9.4 Should the Tribunal order re – engagement? The Tribunal will consider in particular whether re-engagement is practicable and , if the claimant caused or contributed to dismissal, whether it would be just.

5.9.5 What should the terms of re-engagement be?

5.9.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.9.6.1 What financial losses has the dismissal caused the claimant?

5.9.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.9.6.3 If not, for what period of loss should the claimant be compensated?

5.9.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

5.9.6.5 If so, should the claimant's compensation be reduced? By how much?

5.9.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance procedures apply?

5.9.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

5.9.6.8 If so is it just and equitable to reduce the claimant's compensatory award? By what proportion?

5.9.6.9 Does the statutory cap of fifty two weeks' pay or relevant sum at the time of dismissal apply?

5.9.7 What basic award is payable to the claimant, if any?

5.9.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal? If so to what extent?

5.10 Remedy for other claims

5.10.1. How much should the claimant be awarded?

5.10.2 Did the ACAS Code of Practice on Disciplinary and Grievance procedures apply?

5.10.3 Did the respondent or the claimant unreasonably fail to comply with it?

5.10.4 Is it just and equitable to increase or decrease any award payable to the claimant?

5.10.5 By what proportion, up to 25%?

6. FACTS

These are the facts as the Tribunal has found them.

6.1 The respondent is a provider of domiciliary care. Its activities are regulated by the Care Quality Commission and it can only operate within its terms. It is a limited company.

6.2 Mrs Dahir was an experienced carer. She wanted to set up her own domiciliary care business, but lacked both finances and business experience. Her son, a teacher, Mr Salan, offered to assist her. In 2019 he set up the respondent company and he applied to the CQC to be the registered manager.

6.3 It was always intended that Mrs Dahir would recruit staff and manage the business day to day, including marketing the business. Mr Salan did not meet with the approval of the CQC, lacking experience in the care industry.

6.4 Mrs Dahir knew the claimant and approached her to discuss whether she would like to work for her as a CQC registered manager in the event of them getting approval. The claimant was unhappy in her then job (as a CQC approved manager) and saw this as a good opportunity. She had a very young family. The two ladies met and discussed the possibilities in a McDonald's restaurant. The claimant made it clear that she did not want a full time job. Mrs Dahir does speak English but cannot be said to be fluent. The Tribunal had the assistance of an interpreter when she gave evidence.

6.5 Mr Salan brought Mr Festus Kipkebut on board as a consultant. Mr Kipkebut was experienced in assisting care businesses to 'get off the ground' – dealing with the extensive requirements of registration and CQC approval. The plan was for the claimant to seek CQC approval as the registered manager of the respondent's business.

6.6 In August 2019 Mrs Dahir and Mr Kipkebut met with the claimant. The meeting appears to have been quite informal, and Mr Kipkebut supplied the claimant with a proposed draft contract of employment setting out terms. It appears to have been generic, referring to a 40 hour working week and a salary of £25000 per annum. All parties understood that until CQC approval was obtained the business could not commence trading. There is no mention in the contract of childcare being paid, or any other remuneration.

6.7 The claimant sent a copy back, but Mr Kipkebut did not see it. She signed it after notating it to suggest working 3 days. She did not alter the proposed salary, or comment on the lack of other remuneration like child care which she suggested in her evidence had been agreed. Neither Mr Kipkebut nor Mrs Dahir recalled any suggestion that this would be paid. The claimant suggested the agreed salary had been £28000 for a 3 day week, or £28800, at different times in her evidence.

6.8 The claimant was then put forward as a CQC manager and interviewed on 20 July 2020. She obtained approval on 22 July 2020 and the company began to trade. She was very much left to her own devices by Mr Salan, as she had prior experience both as a care worker and manager. A company of accountants was employed to deal with the finances and wages.

6.9 The claimant had left previous employment because of a failure by her employers to provide her with a contract of employment. She was responsible for ensuring that staff were employed, and their details given to the accountants for wages to be paid. She did not report herself to the accountants as an employee, and it was clear that Mr Salan didn't think of it himself.

6.10 On 24 April 2021, the claimant wrote to Mr Salan asking for a contract of employment and pointing out that she had not been paid for 10 months. In a further letter she explained that she wanted her contract and her pay 'that is all'. (pA90). She set out her complaints in a meeting on 30 April 2021 with Mr Salan.

6.11 Mr Salan produced a contract of employment (p.A73) showing a start date of 1 May 2021. It referred to an annual salary of £25000 pro rata, and a 16 hour week. The claimant received a copy and altered the start date to 22 July 2020. She accepted it by signing and returning it. In her evidence she said that she did not understand the term pro rata and thought she was to receive £25,000 whatever hours she worked. She had expected £28800 but accepted £25000. In her evidence she suggested she had not read it before signing, but she had altered the working hours to 3 days rather than 4 – totalling 12 hours, not 16.

6.12 Mr Salan asked her to contact the accountants and arrange for herself to be added to the employees, and paid. She asked the accountants for £25000, without any suggestion of pro rata. The accountants queried this with Mr Salan who wrote to her explaining in detail that she would be paid calculated on a pro rata basis for her part time hours. He also agreed to pay over 250 hours overtime which she claimed to have incurred beyond her part time hours. She claimed 312 hours, the balance having been undertaken outside of normal working hours. It was clear from the emails and correspondence that the claimant had other employment at the same time. This does not seem to have been an issue. However her claim that she should be paid the annual salary of £25000 regardless of her working hours was difficult to reconcile with her claim for overtime.

6.13 Throughout the complaints and grievance process the claimant asserted that her employment started on 22 July 2020, when CQC approval was received. One such example can be seen at page 115 when she refers to 'starting the job'.

6.14 On the 5 August 2021 the claimant received the outcome of her grievance. One of her complaints was that her holiday year was described in her contract as running from January to December, when the company policy was from April to March. Mr Salan agreed that it should be amended to meet company policy. He agreed that she had not been paid for annual leave that she had taken, that this was a mistake, and that it would be corrected, and there was evidence that it was. He noted that the claimant's expectation was that she would work 12 hours a week over 3 days of 4 hours. He had a message from her to that effect dated 12 February 2021. He noted that the original draft supplied by Mr Kipkebut in 2019 was predicated on a working week of 40 hours and a salary of £25000.

6.15 The overall outcome of the grievance was that the claimant would receive most of the overtime she had asked for, plus 12 hours a week pro rata from £25,000, from 22 July 2020 to date and ongoing, her contract would be altered to change the leave year start and finish dates, and she would receive outstanding holiday pay. She would not be paid £25,000 per annum regardless of the hours worked.

6.16 The claimant gave evidence that she did not understand the words 'pro rata' and that she had not read the contract. She further said that she now believed her employment had started in August 2019 but with payment deferred until the company began to trade. Her evidence was unsupported in this regard. Further her evidence that she had an agreed contractual right to be paid childcare of £600 a month and transport costs was not supported by any witness, nor any document.

6.17 The claimant resigned on August 24th 2021 claiming that her salary had been reduced from £28800 to £10,000 per annum and that was a fundamental breach of her contract entitling her to resign.

7. The Law

7.1 Unfair constructive dismissal

- 7.1.1 Section 95(1) (c) ERA 1996 . There is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that they are entitled to terminate it without notice by reason of the employers conduct.
- 7.1.2 Western Excavating (ECC) Ltd v Sharpe 1978 ICR 221 CA, the Court of Appeal set out the test to be applied. The employee must establish that there was a fundamental breach of contract on the part of the employer. The employers breach caused the employee to resign and the employee did not affirm the contract by delay.
- 7.1.3 It is first necessary to establish the terms of the contract, which may be express or implied. A term can only be implied if necessary to give the contract business efficacy or it represents custom and practice in that employment and is reasonable, certain and notorious, or an inherent legal duty central to the relationship between employer and employee. A term may further be implied from the conduct of the parties, or because it is so obvious that the parties are assumed to have intended it.
- 7.1.4 An actual breach of contract arises when an employer refuses or fails to carry out an obligation imposed by the contract when that performance is due.
- 7.1.5 Is the breach fundamental? What effect does the breach have on the employee? If the breach is to the implied term of trust and confidence then the breach will inevitably be fundamental. *Morrow v Safeway Stores plc* 2002 IRLR 9 EAT
- 7.1.6 Once established that there has been a repudiatory breach by an employer then the employee must show that they terminated the contract by resigning.
- 7.1.7 Mere delay does not lead to affirmation of the contract, but if delay goes on for too long it could be persuasive evidence of an affirmation

7.2 The qualifying period

- 7.2.1 The right to claim lies only with employees.

7.2.2 Section 108 (1) ERA.

Employees must have at least two years continuous service to qualify for the right (although there is no qualifying period for a claim of automatic unfair dismissal, as in part of this case)

7.2.3 It is necessary to establish if the dismissal was for one of the inadmissible reasons which do not require a qualifying period.

7.3 Wrongful dismissal

7.3.1 Any dismissal by the employer in breach of contract, alleged in this case to be constructive, will give rise to an action for wrongful dismissal in common law. In this case the type of wrongful dismissal would be dismissal with no notice where summary dismissal is not justifiable. The question to be asked is whether the contract has been breached by the employer, if so, and it resulted in dismissal, then it is wrongful.

7.3.2 Where an employee's contract has been terminated without notice, the damages period is the equivalent to the period of notice that should have been given by the employer. The period of notice will depend on the terms of the employee's contract. If no specified notice period, then the period of notice is in any event subject to a statutory minimum set out in s.86 (1)ERA

7.4 Automatic unfair dismissal for asserting a statutory right

7.4.1 Section 104 (1)(b) Employment Rights Act 1996 - an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal is that the employee alleged that the employer had infringed a relevant statutory right.

7.4.1.1 The employee must have asserted a statutory right

7.4.1.2 The assertion must have been made in good faith

7.4.1.3 The assertion must have been the reason for principal reason for the dismissal.

7.4.2 The relevant statutory right in this case is pleaded as the protection of wages rights namely sections 13, 15, 18 and 21 of the ERA.

7.4.3 These rights are included in s.104(4)(a) and as such are relevant rights.

7.4.4 *Mennell v Newell and Wright (Transport Contractors) Ltd* 1997 ICR 1039 CA. The allegation need not be correct, either as to entitlement to the right or infringement, provided it is made in good faith.

7.5 Unlawful deductions from wages

7.5.1 Section 13(3) ERA requires that wages must be properly payable. In this case that would mean under the terms of the employment contract whether

written or otherwise. Section 13 gives a right to recover unpaid wages in the employment tribunal.

7.6 Failure to supply written terms and conditions

7.6.1 Section 1(1) ERA requires that where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

7.6.2 Sections 7 states that an employer complies if it provides a contract of employment which contains information which would comply with their obligations under section 1 ERA and it is given not later than the beginning of employment.

7.7 Holiday pay

7.7.1 A worker has the right under Reg 13 of the Working Time Regulations 1998 to paid annual leave. The required minimum is 4 weeks basic paid annual leave in each leave year along with additional annual leave. If there is a relevant agreement which provides a worker with an additional 8 days leave then additional statutory rights are not implemented

8. SUBMISSIONS

Submissions were supplied by both parties in writing after the hearing and are summarised below.

The claimant

8.1 The claimant sought to have the Tribunal find that there was an oral agreement between the parties in August 2019 that the claimant would work for the respondent for a salary of £28,800 with the payment deferred until the respondent started to make money, citing Mr J Scicluna v Zippy Stitch Ltd and others UKEAT0122/16/DA. Mr Kipkebut had agreed in his evidence that Mrs Dahir and the claimant had discussed terms in a meeting between the three of them, and that constituted the terms of the oral contract. The claimant gave evidence that they had agreed a salary of £2,400 a month, and that the claimant was the more credible.

8.2 The respondent failed to pay the claimant until May 2021, and then not at the rate of either £25,000 or £28,800.

8.3 The contract of employment was varied in 3 aspects.

8.4 There was no mention of 'pro rata' in the conditional offer. There was such a mention in the contract of employment. The claimant gave evidence that she did not understand the meaning of 'pro rata'.

8.5 Her period of continuous employment. There is reference to the conditional offer to August 2019 which is when the continuous employment began. The conditional offer letter referred to August 2019. The claimant provided services from August 2019 to July 2020 to carry forward the task of registering the business with the CQC. It damages the respondent's case that they refused to accept that the tasks undertaken by the claimant towards registration were 'work'. Mr Salan and Mr Kipkebut accept that Mr Kipkebut was paid for his services. Mr Salan stated he was a company director for the respondent from July 2019 to January 2022. There must have therefore been an active business.

8.6 There is no evidence to show that the claimant was the registered manager of another business at the same time as she was the registered manager for the respondent's business.

8.7 Although the claimant stated several times in evidence and documents that her work started in July 2020, she was mistaken. Emails from her of 28.12.20; 21.5.21; 14.5.21, and 17.8.21 (pages A629; A643 and A129; A720 and A721) support her mistaken view.

8.8 Her hours of work were always intended to be 4 hours a day 2-3 days a week. She amended the conditional offer to read 3 days and crossed out Monday to Friday. Mr Kipkebut did not see the signed conditional offer letter so was unaware of this alteration.

8.9 The 40 hours was not altered in the conditional offer letter, but would have been unrealistic as the claimant was a nursing mother. The 40 hours was a typographical error and should have read 4 hours.

8.10 The Tribunal is invited to find that the contract is vitiated by unilateral/common/mutual mistake, misrepresentation of the facts and or undue influence.

8.11 The claimant made the mistake of repeatedly referring to July 2020 as her start date when she meant to say the start of deferred payments. There was a mistake in the contract about holiday dates which was later corrected.

8.12 The claimant asserted in an email of 21 July 2021 that she had not been paid correctly and had been misled by the company. There is no mention in the notes of the meeting of 14 May 2021 of 'pro rata'.

8.13 The claimant said she suffered undue influence because she was desperate to be paid and so signed the contract of 14 May 2021. Mr Salan accepted there was a breach by failing to pay her and which they attempted to put right when brought to Mr Salan's attention. He was in a dominant position to her.

8.14 The company failed to handle her grievances properly. The first 2 were 'roundly dismissed.' To quote 'The matter of contract and pay is closed'

8.15 The final grievance outcome failed to uphold, incorrectly, her complaint about wrongful variation of contract (salary, wages, period of continuous employment and hours of work), and failed to reconsider her first grievance despite being asked to do so.

8.16 She was unable to fulfil her duties because of changes to the passwords, twice, and being overridden by Mrs Dahir, loss of access to work emails, and general lack of access to the working software of the business after August 2021

8.17 There was a fundamental breach of contract and the claimant resigned on 24 August 2021

8.18 The claimant asserted her right to be paid and as such her dismissal was automatically unfair.

8.19 The claimant was entitled to but not paid notice pay.

8.20 There is evidence in the bundle to support her claim for holiday pay (A124).

8.21 She was not paid the agreed salary of £28,800 from August 2019 and this is an unauthorised deduction from wages.

8.22 There was a binding agreement to pay the claimant child care costs, travel costs, advertisement costs and sundry expenses. She remains owed these.

8.23 The Employment Tribunal is asked to find that the claimant was a credible witness and the respondents were not, attempting to resile from their statements and were evasive.

9. The Respondent

9.1 The claimant acknowledged that she was employed part time, and confirmed that she had signed both the conditional offer letter dated 12 August 2019, signed on 21 August 2019 and the employment contract dated 30 April 2021, signed on 14 May 2021. Her grievances were answered, some in her favour and some not.

9.2 The issue of the claimant's pay divided the parties. The claimant asserted that she was offered £2,400 a month irrespective of the hours worked. The conditional offer signed by her referred to £25,000 per annum for 40 hours a week. She claims to have agreed a rate of 28,800 verbally with Mrs Dahir and Mr Kipkebut. Neither of whom agreed with that in their evidence.

9.3 The claimant's acceptance of the terms and amended terms of the offer and contract confirm her employment, salary, job title and conditions. The claimant accepted them in an email dated 3.5.2021 (A97).

9.4 The grievances were handled swiftly and effectively. The first dated 28.4.21 alleging lack of written contract and immediate payment of wages from July 2020 and was dealt with in her favour. The second, 20.5.21 related to her understanding that she was to be paid the full cited salary regardless of her part time hours. When explained that there was a reference to pro rata she simply rejected the argument and did not accept the outcome. The third relating to holiday pay, overtime, calculation of her hourly rate and overall salary and received a thorough consideration and outcome.

9.5 The respondent denied acting in a way which was calculated or likely to destroy or seriously damage the trust and confidence with the claimant.

9.6 The claimant accepted the contract of employment and signed it after raising the arrears of pay, which the respondent had accepted and dealt with. The arrears were paid in full at the correct rate from 22.7.20 as requested by her. The respondent asserts that she had affirmed the contract.

9.7 The claimant has insufficient service to claim unfair constructive dismissal. Her persistent reference to her start date on 22.7.20 on multiple emails, was she claims, a mistake. She now asserts her start date to be 21.8.19. The respondent lists 11 occasions when she has referred to her start date as July 2020 (the date the claimant confirmed in her evidence as the date of registration with CQC). She was able to confirm that under CQC requirements there must be a registered manager, approved by the CQC before regulated activities could be undertaken. There was no recruitment of staff before that registration.

9.8 The claimant was not automatically dismissed for asserting her statutory right to be paid. She made the assertion, payment terms were agreed, and she signed a new contract. This is not a repudiatory breach.

9.9 The claimant resigned without giving notice. Her contractual notice period was 1 month. She is not entitled to be paid

9.10 The claimant's holiday pay was included in her wages. Nothing is outstanding.

9.11 The claimant asserts she has been paid at the wrong rate. The Tribunal is invited to find the facts relating to her wages in accordance with the evidence from the offer letter and contract of employment.

9.12 The respondent holds the view that there was no agreement for childcare or transportation. The evidence showed that Mrs Dahir offered her husband as a driver, or shared taxis with her for which the company paid.

9.13 The claimant was the less credible witness. She had no concrete evidence of the alleged offer of a salary of £28,800.00. There is no mention in the paperwork or evidence of a deferred payment agreement from 2019. The conditional offer was not complete as per Mr Kipkebut, as it was conditional upon the CQC registration being successful. She claimed not to have read it before signing, but admitted discussing its contents. This was not a verbal contract of employment supported by the offer letter. It was dependent on CQC registration. At the heart of the issues is the claimant's assertion that she was entitled to a salary of 28,800 irrespective of hours worked. The claimant though signed the offer letter – £25,000per annum for 40 hours, and the contract, £25,000per annum pro rata.

9.14 The parties all agreed that she said she would work part time – the claimant said 12 hours a week. The respondent believed 16 hours.

9.15 The claimant in her evidence said that she had resigned as CQC registered manager from her previous employer, before she claims to have begun with the respondent. On the respondent's case that is right, on hers it is not.

9.16 The claimant said she had not read the conditional offer letter before signing and returning it, then losing her own copy. This was not credible because the letter was produced in the presence of Mr Kipkebut and Mrs Dahir with herself; she had both copies before signing and returning one after 9 days; she crossed out an element and amended it; she admitted signing it.

9.17 The conditional offer did not contain any typographical errors around the hours of work. The claimant altered it to 3 days when she signed it.

9.18 The claimant repeatedly referred to 20 July 2020 as her start date when she meant to say the start of the deferred payment. There is no reference in the correspondence to a deferred payment, the issues of her arrears of pay from 20 July 2020 have been dealt with in full.

9.19 With regard to undue influence after resolving her first grievance. suggested by the claimant, Mr Salan claimed she had expressed 'joy' to accept the terms and conditions. Her handling of her demands was forceful and aggressive.

10. CONCLUSIONS

10.1 I found the claimant's evidence to be muddled and at times difficult to follow. She for instance, claimed that a salary had been agreed of £28,800 in the initial meeting in 2019. This was not however reflected in the draft terms that she signed which listed £25000 as the salary. She claimed not to have read them, but had returned them altered without reference to this discrepancy. She altered the terms to reflect that she did not want to work a 40 hour week. She cannot realistically expect the terms of payment to remain the same regardless of her working hours. Neither she nor the others in that first meeting described any such discussion or agreement.

10.2 Throughout the paperwork I found 5 references by her (and the respondent had found a further 6) to a start of employment date of 22 July 2020. She now says her employment commenced in August 2019. The paperwork speaks for itself. She even altered the start date in her contract to reflect her understanding that she started work on 22 July 2020. Throughout her grievances and complaints she asked for pay from 22 July 2020 to date, not earlier. Her claim now is inconsistent with all of the contemporaneous written evidence – particularly her own

10.3 The claimant's employment commenced when the company began trading on 22 July 2020. She resigned on 24 August 2021 without giving notice (1 month under the terms of her contract)

- 10.4 She is not a qualifying employee with 2 years service and as such this tribunal has no jurisdiction to hear her claim of unfair dismissal.
- 10.5 The claimant did assert her right to be paid, a legal right, for which she claims to have been dismissed. There is no requirement for a 2 year qualifying period. She therefore qualifies to bring this claim. However, at the point when she resigned, her grievance in relation to her pay had been resolved. Had she resigned between July 2020 and April 2021, when she had not been paid at all, the situation may have been different. The fact remains though, that at the end of the grievance process, her pay had been resolved, just not to her satisfaction.
- 10.6 The terms of the contract that she signed clearly stated that her part time hours would reflect a pro rata pay based on an annual salary of £25,000. Her evidence that she expected to be paid that regardless of the hours she worked was simply not credible and was unrealistic. She was an experienced manager working in the care sector. If she did not understand the contract that she insisted (quite rightly) on having, then she could have asked either Mr Salan or her union, or simply undertaken some research herself. Mr Salan did nothing to disguise the term, to confuse her, or to place pressure on her. He simply supplied the terms, allowed her to alter as she desired, and then signed it noting that she had done so as well. Having signed the contract, her grievance that she had not been paid in accordance with its terms was simply wrong. Mr Salan gave her a detailed explanation in the outcome of her grievance, but she did not accept it. She was paid for the hours she worked pro rata, and overtime on top. Her belief that she was underpaid was not reasonable in such circumstances and her assertion was not made in good faith. The claimant did not show that the respondent's actions which allegedly constituted the repudiatory breach related to the claimant's assertion of her right to be paid in accordance with the terms of her contract.
- 10.7 The claimant did assert her right not to have an unlawful deduction made from her wages. However in the light of the findings above, her assertion was not the reason for her dismissal. Her resignation was based on her mistaken belief that she had been underpaid. She had notice of what her pay should be, but failed to acknowledge the explanation given to her by Mr Salan. Her assertion was not therefore in good faith. Had she read the detailed and straightforward explanations contained within Mr Salan's correspondence on the subject, she would have understood that the respondent was behaving in a totally honest and straightforward way to explain how her pay was calculated – which was in accordance with the terms of the contract that she had willingly signed, after a 14 day period of consideration on her part. She was not unfairly dismissed automatically for asserting her statutory right not to suffer an unlawful deduction from wages. Payment of her outstanding wages was not made a condition of her signing the contract. There was no improper pressure placed on her, the contract was not made void by anything done by Mr Salan. The grievances and complaint were handled with gravitas and integrity.

- 10.8 The claimant resigned without giving notice. Under the terms of her contract she should have given 1 months notice, but as she resigned in any event she is not entitled to notice pay from the re
- 10.9 There was a failure to supply the claimant with a written statement of terms and conditions within 28 days of her commencing work on 22 July 2020. This was corrected when she requested it. There had however been a conditional set of terms and conditions issued prior to her employment, which she had accepted by signing a year earlier. They included a provision for variation which was exercised by both parties when the hours of work were established, the rate of pay remained the same but was pro rata to reflect the change of working hours, and the leave year was altered to fit with the rest of the company's policies. The respondent had complied with the terms of regulation 7, albeit without realising it at the time.
- 10.10 The claimant was not paid for her annual leave when she should have been. However, once she had raised a complaint, and a grievance, her annual leave claim was settled by Mr Salan through her pay. There is no evidence of outstanding holiday pay being owed as an unlawful deduction from wages. Nor is there any credible evidence that the claimant had an agreement that childcare would be paid, nor any other remuneration than that contained within her contract of employment.
- 10.11 The claimant was not paid for a period of 10 months from the start of her employment on 22 July 2022. It is surprising that she did not raise this earlier. It is accepted that Mr Salan had no idea this had happened and moved to put it right when he became aware and reflects his complete lack of management experience, and his reliance on the claimant's management skills. By the time of the second grievance Mr Salan had resolved the claimant's pay and explained to her in very clear terms how it was calculated in accordance with her signed contract. There are no outstanding unlawful deductions from wages

Employment Judge Warren

Date: 25 November 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 November 2024

FOR THE TRIBUNAL OFFICE

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