



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Bailey
Respondent: The Old Vicarage (Ely) Ltd
HEARD AT: NORWICH ET **ON:** 22nd & 23rd May 2017
BEFORE: Employment Judge Postle

REPRESENTATION

For the Claimant: In person
For the Respondent: Mr L Hutchings (Solicitor)

JUDGMENT

1. The Claimant is entitled to a redundancy payment in the sum of £1,350.
2. The Respondents are ordered to pay the Claimant's Tribunal Fees in the sum of £390.
3. The Claimant is entitled to notice pay in the sum of £147.60.

REASONS

1. The Claimant brings claims to the Tribunal for redundancy payment and notice pay. The Respondents resist the claims on the grounds that the Claimant is not an employee rather a 'zero hours worker' and is therefore not entitled to a redundancy payment. On the question of notice the Respondent's assert that she was not dismissed, she left without giving notice in order to take up new employment.
2. In this Tribunal we heard evidence on behalf of the Respondent's Mr Rham, Finance Manager; Mrs Pardoe formerly Deputy Manager and

Mr Paling, Managing Director all giving their evidence through prepared witness statements. For the Claimant, the Claimant gave evidence again through a prepared witness statement, there was also on behalf of the Claimant a witness statement from a Mrs Walker who didn't give live evidence. I have the benefit of two bundles of documents, 75 pages (Bundle A) and 143 (Bundle B).

3. The Respondent is a residential care home providing residential care for elderly residents and at its peak was housing something in the region of approximately 22 residents.
4. The Claimant was originally engaged by the Respondents in 2010 as a carer and then as an employee working various hours per month, anything from 78, 76, 70, 68, 69 that was in 2010; 54.5, 50, 88, 56, 67, 91, 67, 57, 58, 76 and 80 hours per month 2011, and so it goes on in 2013 and 2014. Although there was not always a set pattern of hours, the Claimant was providing substantial hours every month, she was therefore a permanent part time employee at that stage. For reasons best known to the Respondents, although Mr Paling indicates in his evidence this was due to the employees frequently failing to provide their services for shifts. The Claimant and other employees were provided with new contracts in October 2014 and we see those at 128. The Tribunal have not seen the Claimant's original contract one would suspect that largely these new contracts are the same, they cover the usual terms which one would expect to find in a contract of employment e.g. the duties and responsibilities, probationary period, place of work, hours – in that respect that is I suspect the only change from the Claimant's original contract in that it says:-

“They have no obligation, the Respondents to provide you with work, your hours of work will vary depending on the operational requirements of the Old Vicarage. You'll be informed of your hours that you are required to work, rotas arranged in advance to cover services provided 24 hours a day. You may be required such additional hours as may be necessary over the proper performance of your duties.”

5. The contract then goes on to deal with holiday, Bank Holidays, reporting absence, sick pay, medical examinations, grievance and disciplinary procedures, refers to polices, health and safety, confidential information, company property and ongoing conditions of employment etc. All the things you would expect to find in a normal contract of employment. Thereafter the Claimant's hours in 2014, 2015 and 2016 we see certainly from October 2014; 89, 75, 69.25 hours, 2015; 66.5, 83, 82, 79, 91, 63, 42 and 30, September she's off sick October 26.5, November 37, December 36 and then in 2016 we see January 55.25, March 78.75, April 68 or 80 not clear from the timesheets, May 72 or 78, June 73, July 74, August 75 and September 76. So looking at the hours the Claimant worked it has to be said that the Claimant would have had a reasonable expectation that she would be given substantial hours on an ongoing

basis every month, and those would have been agreed with the Deputy Manager all the hours and shift each month in advance, otherwise it would have been impossible to run the care home. Oddly a further zero hours contract was issued in February 2016, the reasons for that further issue are not entirely clear.

6. By the summer of 2016 it was decided by Mr Paling that following a loss of several residents and a strained relationship with the Local Authority that no new residents would be accepted, the home was to close. A meeting was held on the 31st August with the staff and the Minutes of that meeting we see page 51, those Minutes prepared by Mr Paling and Mr Rham – it says:-

“To all members of staff it is with great sadness that we have to announce after the 35 years of trading The Old Vicarage Ltd will shortly cease to trade. Over recent years it has become increasingly difficult to attract sufficient residents willing or able to pay the required fees to enable us to trade profitably. Changes in Local Authority practices and funding cut backs have worsened the situation. The restrictions we have faced on new admissions have caused a funding crisis and the company is trading at a substantial loss at the present time. Mr Paling has funded the trading losses personally but this cannot continue. We have given notice to the Local Authority to re-house all our residents. Until that happens there will continue to be some work available but we cannot give any guarantees. Those with guaranteed hours are thus given formal contractual notice period. Thereafter any work available will be offered on a normal hourly rate. The Directors wish to express their thanks to you all and express their sadness that closure is now the only possible option.”

7. On the same date the 31st August a letter was also handed to staff it read:-

“Dear Member of Staff, As you will know as a result of the Local Authority continuing to decline to send us new admissions, the number of residents has fallen to what is now an unsustainable level. With no immediate resolution to this unacceptable situation in sight the Directors have decided that The Old Vicarage (Ely) Ltd your employer will cease to trade once the current residents have been re-housed. For those of you on zero hours contracts nothing will change although it is realistic to presume that your work hours will reduce as residents are re-housed elsewhere. For those on fixed hours this memorandum gives you formal legal notice of the termination of your contract. The company will, if at all possible honour it's legal responsibilities to you in all respects. Beyond any notice period it is possible that your services may be required and if you are in agreement payment will be made on the basis of hours worked at the Living Wage. We will endeavour to keep you fully informed as matters progressed.”

8. It is clear by about the 18th September there are few residents left. The Claimant gives notice of her intention to claim her redundancy after it appears she was offered no further work after the 21st September and we see that at 54:-

“To Michael, attached this letter I wanted to hand over to you on the 21st September but as you said I may be offered some more work I felt I would hold back. I haven’t been offered any further work. I don’t have any confidence I will so I wish to serve my notice. Michaela”

9. And that was hand delivered, I believe on the 26th September because a response is received from Mr Rham on the 26th September at 57 in which he refers to being handed the letter on that date saying she was entitled to a redundancy payment, and attached to that letter from Michaela was:-

“I’ve been advised by ACAS that I need to formally request 6 weeks notice pay and 9 weeks redundancy and give you 14 days notice of this to be paid. I look forward to hearing from you.”

10. The response received from Mr Rham sets out all the reasons why particularly they’re not going to pay a redundancy payment, the main reason is the belief that the Claimant is on a zero hours contract, but what it doesn’t do is offer her any further work. There is no clear, offer of further shifts or hours available for her to work. The Claimant was clearly redundant. The Claimant takes up new employment around about the 26th or 27th September. The Respondents seemingly burying their heads in the mis-apprehension that the Claimant was not an employee and therefore not entitled to a redundancy payment.

CONCLUSIONS

11. On the 1st point as to whether the Claimant is a worker or an employee. The Claimant commenced her employment as an employee in 2010. She worked a number of hours each month, they varied each month but they were considerable in number. In 2014 the Respondents appear to have forced employees to accept zero hour contracts because in the words of Mr Paling “people weren’t doing their shifts”, however that is not a reason for forcing people to go onto zero hour contracts when the facts suggest something entirely different in the contractual and employment relationship. Particularly as after that date nothing much changes to what the Claimant had done before and that is her hours continued to be fairly considerable each month as they were before. The Claimant was working on many occasions on regular shifts usually on specific dates and I repeat they were considerable hours each month. There clearly was more than a reasonable expectation by this Claimant that regular work was to be provided by the Respondents on a regular basis. By any objective analysis of the timesheets found in the bundle the

Respondents were providing her with regular and lengthy part time hours. The Respondent also had a high level of control over the Claimant when she was working, the zero hours contract also refers to a disciplinary procedure and policies, sanctions and time keeping. So taking all the factors into account which the Tribunal has to do in deciding whether the Claimant is a worker or an employee, I conclude that she clearly is an employee, a part time employee of the Respondent's.

12. It is also clear that the Claimant's employment as others was effectively terminated by reason of redundancy on the 31st August, it does not make it clear whether the employee is required to work their notice or not. In those circumstances where an employee is not being offered any further work the majority of residents having left, she is entitled to leave and claim her redundancy.
13. So far as notice is concerned adopting the common law principles of course the Claimant has to give credit for any income she has derived from her new employment against the balance of the 3 weeks notice payment. Dealing with a final matter in the Tribunal's view a red herring of the lamp, the Claimant was quite clearly given the lamp by a resident with the clear consent of that resident's family. This was a further and I hesitate to say a cynical attempt by the Respondents to avoid making a redundancy payment. So the balance of notice pay amounts to £147.60, and the Court Fees that the Respondents are also ordered to pay are £390.00.

Employment Judge Postle, Norwich.
Dated: 08 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS