



EMPLOYMENT TRIBUNALS

Claimant: Miss E Ivanova

Respondent: New York Laser Clinic Limited

Heard at: London Central Employment Tribunal **On:** 4th March at 10am

Before: Employment Judge Hopton

Appearances (by video):

For the Claimant: In person

For the Respondent: Mr Willingham (Director)

RESERVED JUDGMENT

The judgement of the tribunal is that:

1. The claimant's claim for breach of contract in respect of notice pay succeeds. However, as the claimant worked under a zero hours' contract, no sum is owed to the claimant by the respondent.
2. The claimant's claim for unlawful deductions from wages does not succeed and is dismissed.

REASONS

1. This was a remote hearing to which the parties did not object. The form of remote hearing was V, video, by Cloud Video Platform. A face to face hearing was not held because it was not practicable due to the coronavirus pandemic and the temporary closure of Victory House.

Claims and issues

2. The respondent company has a small number of clinics providing services such as laser hair removal. The claimant accepted a job as a receptionist but never started work at the respondent due to the national lockdown which closed the clinics.

3. The claimant claims unlawful deduction from wages and breach of contract for failure to pay notice pay. She says that she was offered and accepted a role where she would work guaranteed hours. She claims her employment started on 1 April 2020 and ended on 16 May 2020 when the respondent dismissed her without notice.
4. The respondent agrees that the claimant was an employee but points out that she never started work. The respondent argues that the contract terminated by reason of frustration on 16th May, and in the alternative, that the claimant was dismissed for a fundamental breach of trust and confidence on 21st May when the claimant posted one star reviews about the respondent on social media. The respondent says in any event that the contract was a zero hours' contract, that no work was guaranteed, and that it therefore does not owe the claimant wages or notice pay.

Procedure, documents and evidence heard

5. I was referred to an agreed bundle of 59 pages, a list of documents, and a witness statement from Mr Talfourd-Cook, one of the respondent's Directors, numbering 25 paragraphs. The claimant had not produced a witness statement and asked the Tribunal to treat her claim form as her witness statement. The respondent did not object to this.
6. I heard oral evidence from the claimant and from Mr Talfourd-Cook.

The facts

7. These findings are confined to the facts relevant to the legal issues.

Overview

8. The claimant applied for the role of receptionist with the respondent. She was interviewed by the respondent's manager, Jenny Rickards, and was offered the job by email on 2nd March 2020. The offer email attached a job offer letter which set out various conditions of the role.
9. The claimant accepted the role by email on 4th March. She was due to start on 1st April 2020.
10. As a result of the coronavirus pandemic, the claimant did not start work on 1st April because the respondent's clinics were required to close from 23 March 2020 due to the national lockdown. The respondent furloughed its other staff from that point.
11. The respondent did not contact the claimant to let her know the business had closed or what would happen regarding her employment. After some effort trying to contact someone from the respondent company, the claimant tracked down Mr Talfourd-Cook on Facebook.
12. Mr Talfourd-Cook explained that he was not able to lawfully furlough the claimant because she was not on the payroll on 19th March 2020. After some correspondence, on 16th May Mr Talfourd-Cook wrote to the claimant telling her that "*due to the Coronavirus your contract of employment was legally frustrated.*"

13. Following that, the claimant posted some negative reviews about the respondent on social media sites. One of the reasons that she did this was because Mr Talfourd-Cook had suggested that she should threaten to write a negative review about her previous employer if they refused to re-employ her and put her on the furlough scheme.

The offer letter

14. Amongst other details, the offer letter stated that: *“The standard hours (from which holidays etc. are calculated) is 45 hours per week. ...You would start on a pro rata salary of £9.50 per hour, which equates to: £22,230 per annum for 45 hours per week.”* The letter goes on to talk about the probationary period, and then states: *“you will be paid based on actual hours worked. Whilst you would be paid on an hourly basis pro rata, we would expect that you would work your agreed hours each week. “*
15. The offer letter describes commission on sales of products and explains its holiday policy, *“for every hour that your (sic) work you would get 7min and 24 seconds accrued paid holiday up to a maximum of 224 hours per calendar year for pro rata... The 224 hours is in effect 28 days holiday (being 20 days plus 8 public holidays for full time”.*
16. The claimant had an interview with Jenny Rickards, the respondent’s manager, in which they discussed pay and hours. The claimant discussed with Ms Rickards that she would work 5 days a week for 8 or 9 hours a day. The work would be done in shifts because the clinic was open very long hours and they discussed start and finish times. They also discussed the commission the claimant would earn for selling products. There was no discussion about a zero hours’ contract at that meeting.
17. The claimant says that she was guaranteed 45 hours work per week in that meeting and that she would not have given up her previous role for a zero hours’ contract.
18. Mr Talfourd-Cook gave evidence that all staff work under the same contract, both consultants and reception staff. Although the clinic is often busy, there are times of year where they are less busy, and at those times staff often work shorter hours. For example, during the summer and over Christmas are less busy times. Mr Talfourd-Cook gave the example that if on a Saturday afternoon they had no clients after 4pm, the staff would be told to go home and they would not be paid for the hours they did not work. This was also the case in March 2020 when a number of appointments were cancelled due to safety concerns because of the coronavirus pandemic. Staff were only paid for the hours they worked.
19. Mr Talfourd-Cook explained that the standard contract of employment they issue staff required staff to ask permission to work for another employer, but on the expectation of the hours offered by the respondent, most did not.
20. I accept that the claimant was given the impression at her interview that she would be guaranteed 45 hours work per week, and that there was no discussion of zero hours’ contracts at her interview. However, the job offer letter is clear that she would be paid only for the hours that she worked. I considered whether the contract

was a sham and whether, in reality, the claimant would have worked 45 hours a week every week. I accept Mr Talfourd-Cook's evidence that, in practice, staff were only paid for hours worked, even though, most of the time, when the clinic was busy, they could expect to work full time hours.

Termination of the contract

21. The respondent says that frustration occurred due to both parties being unable to fulfil the contract. The respondent was not able to pay the claimant under the agreed terms and they did not know when they might be able to open again. They say they were not legally in a position where they were able to pay the claimant anything. It was three or four months from the 23rd of March until they were able to reopen.
22. Another new employee was due to start at around the same time as the claimant. Like the claimant, she was not paid during the lockdown, but did eventually start work at the respondent on 1st October. That employee's contract was not frustrated as she is now working for the respondent.
23. The respondent refers to the claimant's posts on social media on the 21st May and says that there was a fundamental breach of trust and confidence on that date which amounted to gross misconduct and would have enabled the respondent to dismiss the claimant without notice.

Law

24. The claimant claims breach of contract under article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and unfair deductions from wages under s.13 Employment Rights Act 1996:

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him [..]

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"

25. I also considered whether s.88 or s.89 ERA 1996 applied to the claimant:

88.— Employments with normal working hours.

(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

(a) the employee is ready and willing to work but no work is provided for him by his employer [...]

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

89.— *Employments without normal working hours.*

(1) If an employee does not have normal working hours under the contract of employment in force in the period of notice, the employer is liable to pay the employee for each week of the period of notice a sum not less than a week's pay.

(2) The employer's liability under this section is conditional on the employee being ready and willing to do work of a reasonable nature and amount to earn a week's pay.

Conclusions

Unlawful deduction from wages

26. The claimant's contract provided that she would be paid based on the hours she worked. Due to the closure of the clinic, she worked no hours for the respondent. The amount 'properly payable' to the claimant in wages was therefore £0.

Breach of contract

27. I considered whether the contract had been frustrated because an unforeseen event made performance of the contract impossible or radically different from what the parties originally intended *Davis Contractors v Fareham UDC* 1956 AC 696, HL. I concluded that such an event had not taken place, and the contract was not frustrated. Although the contract could not be performed as envisaged for the period of lockdown, there was no expectation on 16th May that clinics such as the respondent's would never be able to open again, and in fact the clinic reopened a few months later. The fact the other new employee due to start in early April did start work for the respondent in October further demonstrates that the claimant's contract was not frustrated.

28. The claimant's employment was therefore terminated by Mr Talfourd-Cook on 16th May without notice. This was a breach of contract. She had been employed from 1st April 2020 to 16th May 2020 so she was entitled to one week's notice under section 86(1)(a).

29. The claimant is therefore due the amount of pay she would have earned, had she been given proper notice. As the respondent's clinics were closed during what would have been her notice period, she would not have earned any pay in that period, and she was not entitled to furlough because she was not on the respondent's payroll on the date specified by government to be eligible for that scheme.

30. I considered whether the claimant was entitled to a payment under section 88 or 89 ERA 1996. Given my conclusions above regarding the claimant's working hours, these provisions do not help the claimant. The claimant's week's pay under

the statutory calculation in s.222 ERA 1996 is £0 as her normal working hours for the period before her week of notice were also zero.

31. The claimant is therefore successful in her claim for breach of contract, but is not entitled to any compensation.
32. Regarding the allegation of gross misconduct on 21 May 2020, as the parties agree that the termination date was 16th May, and given my conclusions that no sum is payable for notice pay, I have not considered the gross misconduct point.

Employment Judge Hopton

4th March 2021

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/03/21.

Olu..

FOR THE TRIBUNAL OFFICE