



EMPLOYMENT TRIBUNALS

Claimant: Lorna Allen

Respondent: Unity Care Telford Ltd

Heard at: Midlands West (by CVP)

On: 17 November 2023

Before: Employment Judge C L Taylor

REPRESENTATION:

Claimant: In person

Respondent: In person

JUDGMENT

Wages

1. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages in the period 20 December 2022 to 27 December 2022
2. The respondent shall pay the claimant **£780**, which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

Holiday Pay

3. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended.
4. The respondent shall pay the claimant **£102**. The claimant is responsible for paying any tax or National Insurance.

REASONS

Claims and Issues

5. The claimant brought claims in her ET1 for breach of contract, non payment of wages and loss of earnings.
6. The issues were discussed with the parties at the outset of the hearing and agreed as follows:
 - (i) Whether there was a contract of employment between the claimant and the respondent.
 - (a) Was there an offer of employment?
 - (b) If so was that a conditional offer of employment?
 - (c) If so, what were the conditions?
 - (d) Were the conditions fulfilled?
 - (ii) If there was a contract of employment, what were the terms?
 - (iii) Was there a breach of any of the contractual terms?

Procedure, Documents and Evidence Heard

7. I had before me a bundle of 106 pages from the respondent and an email with 20 attachments from the claimant. I have considered all of the documents, even if not specifically referred to in this decision. I heard evidence from the claimant and from Yasmin Akhtar on behalf of the respondent.
8. Both parties had only received the other's bundle on the morning of the hearing and were given time to consider them at the outset of the hearing.
9. The hearing was conducted via CVP to which neither party objected. There were no technical issues which interfered with the fairness of the hearing.
10. I found the claimant to be a credible witness. Her evidence was consistent and forthright and she made concessions where appropriate.
11. I found the respondent to generally to be a credible witness, however I do not accept some of the explanations given in respect of documents as discussed below.

Fact Findings

Background

12. It is not in contention between the parties that the claimant applied for a position as a Registered Domiciliary Care Manager for the respondent through the recruitment agency Permanent Hire. The claimant attended a formal interview on 07 September 2022.

13. It is not in contention that the claimant was able to maintain her employment with her employer at the time of her interview with the respondent.
14. The claimant's position is that she was offered the position by a letter of 10 September 2022 with a start date of 01 December 2022 and that she accepted that offer.
15. The respondent's position is that the offer of employment was conditional, the main condition being that the claimant became registered as a Registered Manager with CQC before commencing employment and that the conditions were not met and therefore there was no contract of employment.
16. The respondent sent an invitation to the claimant through the CQC portal on 17 October 2022. The claimant did not complete any registration with CQC.
17. The claimant did not physically start working for the respondent on 01 December 2022 and the respondent business had not gained accreditation with the CQC at that date.

Was there a contract of employment and if so on what terms?

18. The claimant produced a copy of an email to her from the respondent dated 11 September 2022 with one attachment. The attachment is entitled, offer letter Lorna. The claimant produced a copy of the letter which is headed "Offer of Employment." The letter states that the terms of employment were a start date of 01 December 2022, a salary of £38,000 and 25 days holiday per year plus bank holidays with the holiday year running from 01 January to 31st December.
19. The letter details that the offer was conditional upon, among other things, the claimant signing and returning one copy of the letter, the company receiving a satisfactory DBS check and two satisfactory written references within one month of starting employment. The letter also stated that, by accepting the offer the claimant was confirming that she was able to accept the position and carry out the work without breaching any legal restrictions.
20. The respondent's bundle contained the offer letter detailed above and a second offer letter dated 10th September headed, conditional offer, and setting out, among other things, that the claimant must be registered as a Registered Manager with CQC before the start date of 1st December 2022.
21. The respondent's bundle also contained a further letter dated 13 October 2022 seeking a copy of the claimant's DBS check, outlining the requirement to register as a Registered Manager with CQC and stated that if this was not done by 31 October 2022, the conditional offer would be withdrawn.

22. The claimant gave oral evidence that she had not seen the second offer letter, nor the letter of 13 October 2022 before the hearing. The claimant also gave evidence that, to her knowledge, CQC registration cannot start before working for a company because it requires knowledge of the company, policies and procedures in order to be able to pass the application for registration. The claimant states that there was no mention of her registering with CQC before starting employment at her interview.
23. The respondent gave oral evidence that of the two offer letters dated 10 September 2022, one was sent to the claimant via email and one in the post and the letter of 13 October was also sent in the post. The respondent stated that the offer letters were separately sent out in the post and via email because the recruitment agency asked for this and also stated that both offer letters were sent out in the post.
24. The respondent also produced a copy of a handwritten interview score card which states “discussed conditional offer informed the importance of registration with CQC.” The respondent produced an email from the recruitment agency stating “ Thank you for your call discussing Lorna’s start date and offer letter....I understand that you are waiting for CQC accreditation before hiring Lorna. The tentative timeframe is 12 weeks....we will communicate the same to Lorna...Please may I recommend that you issue a conditional offer letter with a potential start date of 1st December. Conditional based on CQC Registration. This way you can secure Lorna’s interest and services when required.”
25. The respondent’s bundle contained an email to the claimant dated 12 September 2022 which states, “ I given 1st Dec due to we have to leave the time to get through the application form for CQC if that completed before the 1st of December and you been through the interview process we can bring it forward.” The claimant’s emailed response states “...Can you please give me a rough idea of what things we will be going through and if there are any work related matters that need my urgent attention do you think I will be needing to bring my start date forward?.”
26. The respondent’s bundle contains minutes of a meeting on 19 October 2022 in which it was noted that the claimant’s DBS checks were out of date. One of the next steps recorded in the minutes was to inform the claimant that she needs to be a Registered Manager before 01 December for her to commence paid employment.
27. The respondent’s bundle contained an email from the recruitment agent to the claimant dated 25 November 2022 stating...” Yasmin is certain that CQC

interview should be conducted soon allowing her to confirm your start date in 2023.”

28. The respondent emailed the claimant on 28 November 2022 stating”....until we don't hear back from CQC I couldn't give you a accurate start date due to im still employed by someone else and they wouldn't be much work for you to do..... I'll give you in enough time to hand in your notice once we here back from CQC...” The claimant responded that she was confused because her offer letter of 10 September said her employment would commence on 1/12/22. The respondent replied that the start date of 1st December was “if we get through our interview with CQC.”
29. The respondent's bundle contained an email from the recruitment agent to them dated 13 November 2023 providing their notes of the claimant's recruitment process. The emails refers to CQC registration and the claimant co-operating with that as the Registered Manager for a successful CQC audit. The record also refers to the claimant's employment relying on CQC registration, a prerequisite for the business to begin operations, the claimant confirming her willingness to support the respondent with CQC related activities and that “no specific start date was confirmed with Lorna as it hinged on Yasmin's business securing CQC accreditation.”
30. There were clearly two separate elements relating to the CQC, the respondent business being accredited and a Registered Manager being registered with CQC. There is no evidence before me that a Registered Manager is required for the business itself to be accredited. I accept the claimant's evidence that the usual practice would be to make an application to be registered as a Registered Manager after being employed by the business because knowledge of the business and its' working practices would be required in order to pass the registration process.
31. I do not accept that the claimant's offer of employment was conditional upon her registering as a Registered Manager with the CQC before 1st December 2022. The earliest document specifically communicating this to the claimant is the second letter of 10 September 2022 which the respondent accepts was not sent to the claimant by email and which the respondent states was sent in the post. I accept that the claimant never received the second letter. It does not make sense that the respondent would not email that crucial document to the claimant nor that half of the offer of employment was sent by email and the rest in the post.

32. There is documentary evidence that the respondent required the business to receive CQC accreditation before it could commence, this was not done by 1st December 2022. This is supported by appendix 8 of the respondent's bundle, an email from the recruitment consultant,.
33. The record of the respondent's meeting on 19 October 2022 records a next step of informing the claimant that she needed to be a Registered Manager before 1st December, the need to inform the claimant, rather than confirm this to her indicates that she had not been informed about this previously. Further, the claimant's correspondence to the respondent expressed her confusion at not starting on 01 December 2022 and enquired what work was required to be undertaken before she could start. It does not make sense for her to be asking this if she had already been told that she had to register personally with CQC.
34. The email from the recruitment agent to the claimant on 25 November 2022, sent after their conversation with the respondent, refers to the CQC interview being delayed and a start date being confirmed after an update from the CQC, it does not refer to the claimant herself being registered. The respondent's email to the claimant of 28 November 2022 refers to hearing back from CQC and not to the claimant herself being registered. I find that both references to CQC are references to the respondent's business being registered or accredited with CQC rather than the claimant personally.
35. The respondent's text to the claimant of 29 November 2022 does not refer to the claimant herself being registered with CQC. The respondent's email of 13 December 2022 to the claimant does not refer to the claimant herself being registered with CQC. The recruitment agents notes on the recruitment process refer to the claimant's start being dependent upon CQC accreditation. This record does refer to the claimant co-operating with this but does not specifically refer to the claimant herself being registered rather than the business.
36. The first offer letter of 10 September states under the heading acceptance "...I agree to the above terms and conditions." Acceptance of the offer of employment required acceptance of the terms in that letter and nothing more.
37. An employer must make it clear that an offer is subject to a condition if, in the event of the condition not being satisfied, it wants to rely on that condition to vitiate the contract. It was not made clear to the claimant that a condition of employment was for her to register with CQC as a Registered Manager.
38. The claimant has provided documentary evidence of returning a signed copy of the first offer letter to the respondent, thus the offer was accepted and the

contract formed on 12 September 2022. Performance of the employment contract was delayed until 01 December 2022.

39. I find that the conditions of the claimant's offer of employment were as contained in the first letter of 10 September 2022, namely:
- a. Returning a signed copy of that letter;
 - b. The respondent receiving a satisfactory basic DBS;
 - c. The respondent receiving two satisfactory written references within one month of commencing employment;
 - d. The claimant providing proof of her eligibility to work in the UK;
 - e. The claimant providing proof of her qualifications, ID and NI number.

Were the conditions fulfilled?

40. The claimant has provided evidence of an email sent to the respondent, the date is not shown, but it was sent before 19 October 2022. The email attached proof of the claimant's qualifications, her NI number, enhanced DBS document and passport. The claimant has also provided a copy of an email returning the signed offer of employment.
41. The respondent gave oral evidence that the DBS check provided by the claimant was out of date and therefore not satisfactory. The record of the respondent's meeting on 19 October 2022 records that the DBS check is out of date and needs to be updated.
42. The claimant gave oral evidence that she provided an enhanced DBS check. Her DBS is part of the updating service which means that, despite the date on the documents, they are still current, the employer needs to log into the DBS system to check for developments and print off the confirmation that the DBS remains clean.
43. The respondent asked the claimant in cross-examination whether she had provided a CQC counter signed DBS. The claimant agreed that she had not provided a counter-signed DBS as the respondent had not asked for this.
44. There is no documentary evidence that the respondent ever asked the claimant for a counter-signed DBS. The respondent's own letter to the claimant dated 29 November 2022 refers to the DBS being out of date seeks for her to re-apply for an enhanced check. The claimant gave evidence that she did not receive this correspondence, which the respondent states was posted and not emailed to her. I accept that the claimant did not receive this correspondence, however this is irrelevant because it did not request a counter-signed DBS.

45. The respondent sought a satisfactory DBS check. The term satisfactory introduces a subjective element to the condition being met. It is the respondent who must be satisfied with the DBS check. However, in circumstances where the claimant has provided a DBS check, linked to the updating service, it would be inherently unfair for the respondent to fail to check the updating service and then claim that the DBS check is unsatisfactory. The respondent's basis for the DBS not being satisfactory was that it was not in date, when in fact it was.
46. The claimant therefore met all of the conditions of the offer of employment save for the provision of references, which were not required until one month of commencing employment.

What were the relevant terms of the contract?

47. The claimant was to receive a salary of £38,000 per annum with 25 days of holiday plus bank holidays. The offer letter purports to give the respondent the right to terminate the contract with 1 days' notice for the first month and then 1 week thereafter. The contractual notice period cannot be less than the statutory notice period and the minimum notice would therefore be one week.
48. The claimant states in her ET1 that her contract has not been terminated. A contract of employment must have ended for a claim for breach of contract to be brought. This is not the case here. The contract may have been frustrated given the respondent's lack of CQC accreditation, however this is not something suggested by either party.
49. The claimant has also claimed for non payment of wages. This would be a claim for unauthorised deductions.
50. In respect of the sums owed to the claimant under the employment contract, in the circumstances where the claimant has never physically commenced work, I find that any wages properly payable would be limited to the notice period, including any holiday pay accrued during that time.
51. If I had found that the contract of employment had ended and therefore a claim for breach of contract could be pursued, I would in those circumstances find that the contract ended after no later than the statutory notice period.

Submissions

52. The respondent submitted that the claim is vexatious and without merit. The offer of employment was conditional upon the claimant being registered with the CQC as a Registered Manager. The claimant also did not provide a satisfactory DBS check. The claimant suffered no loss and was not placed at a

disadvantage. The claimant should pay her costs for accessing the CQC portal which were £200 per month.

53. The claimant submitted that she was emailed an offer on 11 September 2022 with a start date of 01 December 2022 which she accepted. The offer did not require her to register with the CQC in advance of commencing employment. The respondent never requested a different DBS check. A response to the second letter of 10 September was never chased.

Law

Holiday pay

54. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1).

55. Compensation related to entitlement to leave is set out in regulation 14

56. 14.(1) This regulation applies where—

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

- (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

- (3) The payment due under paragraph (2) shall be—

- (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

57. Section 13 of the Employment Rights Act 1996 provides, so far as is relevant:

- (1) An employer shall not make a deduction from wages of a worker employed by him unless –
 - (a) 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
 - (b) The worker has previously significant in writing his agreement or consent to the making of the deduction.

Conclusions

- 58. The respondent made unauthorised deductions of one weeks wages, based upon a salary of £38,000 per annum, this equates to £780 gross. This equates to a daily pay of £146 gross.
- 59. The claimant accrued 0.7 days holiday pay in one week, which equates to £102 gross.
- 60. The claimant made no submissions about consequential losses, there is no documentary evidence before me of consequential losses and no schedule relating to such losses. The claimant was able to maintain her position with her former employer and has not produced details of any other job offers she did not accept because of her offer from the respondent.

Employment Judge C L Taylor

15 January 2024

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