Case No: 2300775/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms Asha Grant

Respondent: NHS Counter Fraud Authority

Heard at: **London South** **On: 21 to 23 November 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: In person

Respondent: Ms Naomi Cunningham, instructed by DAC Beachcroft Solicitors

JUDGMENT

1. The claimant's complaints of:

    a. breach of contract;

    b. unlawful deduction from wages; and

    c. automatically unfair dismissal for asserting a statutory right;

    are dismissed.

REASONS

Introduction

1. The NHS Counter Fraud Authority is a new body, established on 1 November 2017 as a successor to NHS Protect, whose goal was also to tackle fraud in the National Health Service. It was organised on different lines, and new employees were recruited to fit the new structure. The claimant, Ms Grant, was one such and she was employed from 2 November as a Corporate Stakeholder Officer.

2. She is a US national and was in the UK at the time on a student visa, having studied for a Master's degree. The visa expired on 31 January 2018 and she was hoping to obtain a new visa under the Highly Skilled Migrant (HSM) Programme – one of a group of what are known as Tier 2 visas. Such visas require an employer to have a sponsor's licence. The employer can then provide a certificate of sponsorship to the individual, who makes an application, for which there is a fee of over £1000. If successful he or she is then able to live and work in the UK for a fixed further period.

3. The respondent was aware of Ms Grant's need to obtain a further visa but they were not in the end able to supply a certificate of sponsorship. Although NHS Protect had a sponsorship licence, the relevant formalities had not been put in place for this successor body and so at the last-minute Ms Grant had to submit an application for further leave to remain in the UK on grounds of her private and family life. I was not provided with a copy of that application and have no information about its prospects of success, but such applications are made on the basis that removal from the UK would involve a disproportionate interference with the private and family life she has established here. While that application is pending, she is entitled to continue to live and work in the UK, and at the date of this hearing I was told that no decision had been made by the Home Office.

4. There was a fee for this type of application is £1,493. On the last day the respondent lent the money to Ms Grant on the basis that this would be paid back from her wages in 10 monthly instalments. She was not happy about being put to that extra expense, and once the immediate hurdle of submitting this application was overcome she complained about it by email and ultimately on 23 February 2018 raised a grievance.

5. During all this she was in her six-month's probationary period. In January, concerns were raised about her time-recording. Members of staff are required to complete timesheets to record when they arrive for work and when they leave the office. Each entry can be checked against the time they actually entered the door to the offices and when they logged on to their computer. An investigation showed that Ms Grant had recorded about 36 hours more time than she had actually worked over this relatively short period and this led to a probationary review meeting on 14 March 2018. On the same day she also had a grievance hearing. The outcome of the former was that she was dismissed on notice. The respondent did not then seek to recover the rest of the outstanding loan.

6. Her claim form, submitted on 2 March 2018, only raised complaints of unpaid wages and "other payments". By the time of the preliminary hearing on 12 July 2018 however she had applied to add a complaint of automatically unfair dismissal for asserting a statutory right – the right not to suffer unlawful deduction from wages. Her claim for breach of contract is that the respondent undertook to provide a certificate of sponsorship which it failed to do, causing her loss.

7. After that hearing she raised in correspondence with the Tribunal her complaint of discrimination. Judge Baron, who had held the preliminary hearing, notified her in response that she would need to apply to amend her claim and if, as she stated, she was seeking to bring a complaint of indirect race discrimination (which includes nationality) she would need in her application to specify the provision, criterion of practice (PCP), which she states put her as a US citizen at a particular disadvantage.

8. No such application was made, although there were various emails from Ms Grant to the Tribunal staff querying whether her complaint of race discrimination had been added. By the first morning of this hearing a full panel had been arranged, on the basis that it included or may include such a complaint, although no clear written application had been made and nowhere was the basis of the potential complaint set out, including by describing the PCP.

9. Much of the first day of the hearing was taken up with this application to amend. Although Ms Grant ultimately elected to withdraw her application on the basis that it would necessitate an adjournment for a longer hearing, the Tribunal independently concluded, having heard the arguments on both sides, not to allow the amendment.

10. Given Ms Grant's desire to withdraw that application, the reasons can be briefly stated and mainly concerned the merits of the potential complaint. The act complained of was the same as the alleged breach of contract – the failure by the respondent to provide her with a certificate of sponsorship so that she could apply for a further visa. Ms Grant suggested that this was an allegation of indirect discrimination but was unable to suggest any PCP that applied to *all* employees. She was concerned only about the situation of those who needed a visa. It might have been argued that the requirement to have the legal right to work in the UK was such a PCP, but it is possible for an employer to justify indirect discrimination, and given that this is a legal obligation there did not appear to us to be any prospect of success on that basis.

11. We considered the alternative of direct discrimination under section 13 Equality Act 2010 but this requires her to show less favourable treatment on grounds of her nationality. The phrase "less favourable" invites the question - less favourable than whom? This real or imagined person is known as the comparator. She proposed comparing her treatment with that of a UK or EEA citizen who did not require a visa, but section 13 requires her to show that the respondent treated her less favourably than it treats or would treat others. They did not treat UK or EEA citizens in this way, nor would they, as they did not need a visa. The comparator in these cases has to share all of the characteristics of the claimant save for the protected characteristic, in this case her US nationality. In simple terms, she has to compare herself with others in the same boat. That would be individuals from other countries outside the EEA, and there would be no reason to believe that she was treated any less favourably as an American than such others - nor did she suggest as much.

12. There were also allegations raised in her witness statement, not previously mentioned, about being ostracised at work towards the end of her employment. These were therefore raised at a very late stage and were described as direct discrimination, although in fact they appear to be allegations of what might be described as low-level harassment. There was no real explanation for the lateness of these allegations, and the fact that, on her account, the mood changed towards the end of her employment, after she had raised a grievance, indicated that this was the likely cause, rather than her nationality.

13. We considered the Presidential Guidance on such amendments, which incorporates the guidance in the case of **Selkent Bus Company v Moore [1996] ICR 836** to the effect that the key test is the balance of prejudice to the parties. That has now to be read in light of the decision in **Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN.** that a new complaint is to be dated from the dated of

amendment and so may then be out of time. Here there would have been considerable prejudice to the respondent from the delay to a longer hearing, which would have been in late August 2019, giving rise to further legal cost and time demands on the witnesses.

14. There would also have been potentially very serious prejudice to Ms Grant also. Her immigration status is now precarious. If the Home Office refuse her application and she is unable to appeal successfully, she may by then have no right to live in the UK. She would be obliged to leave, and so her opportunity to bring a claim whilst in the UK would have gone. She would at best have to apply for a visit visa to attend the hearing. This is in addition to the normal frustrating effects of delay for a claimant. That downside naturally lay behind her decision to withdraw the application.

15. For those main reasons therefore we decided that in any event the application ought not to be allowed. The remaining complaints did not require a full panel and so the hearing continued with me sitting alone.

16. I then heard evidence on the second day of the hearing. The witnesses were Ms Grant, and then on behalf of the respondent: Robin Marsden-Knight, a Senior HR Advisor; Gary Blackhurst, the manager who recruited Ms Grant; John Manuel, Head of Business Support Services; and Susan Frith, the Authority's Chief Executive Officer. I was also assisted by a bundle of about 700 pages. Having considered this evidence and submissions, I make the following findings of fact.

Applicable Law

Breach of Contract

17. To succeed in a claim for breach of contract it is necessary to establish the legal obligation in question, that it has been breached, and then to establish the resulting loss. In her further particulars Ms Grant asserted that it was agreed verbally and via email by Gary Blackhurst and HR in October 2017 that she would receive a certificate of sponsorship, so she is relying on an express, verbal agreement, confirmed in writing.

Unlawful deduction from wages

18. This right is set out in section 13 Employment Rights Act 1996 (**ERA)**:

> **13. Right not to suffer unauthorised deductions.**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless— …
>
> (b) the worker has previously signified in writing [her] agreement or consent to the making of the deduction.

19. This is not the same as a breach of contract. The question is not whether the money is owed but whether the employer is entitled, under this section, to make the deduction. There may be times when an employee owes money to an employer such as for damaging property. If there is nothing in the contract or an express agreement in writing, the employer cannot just take the money from his or her wages. They have

to sue in the civil courts. In other cases the contract may allow the employer to make the deduction and it is the employee who would have to pursue a court claim.

Unfair dismissal for asserting a statutory right

20. The right not to suffer unfair dismissal for asserting a statutory right is governed by s.104(1) ERA.

> **104. Assertion of statutory right.**
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee— …
>
> (b) alleged that the employer had infringed a right of [hers] which is a relevant statutory right.
>
> (2) It is immaterial for the purposes of subsection (1)— …
>
> (b) whether or not the right has been infringed;
>
> but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

21. The first step therefore is to show that Ms Grant actually asserted the right not to suffer unlawful deductions from her wages, whether or not it was actually infringed, as long as the allegation was made in good faith. It is then necessary for the employee to show that the assertion was the reason or principal reason for dismissal.

22. To resolve these complaints it is necessary to set out the relevant findings of fact.

Findings of Fact

23. Ms Grant first applied for the post of Media Relations Officer but this required a degree in journalism. Having had only one application for the post of Corporate Stakeholder Officer the Authority had already decided that any unsuccessful applicants for the Media Role might be offered the Corporate role and that is what then happened. The authority was not expressly recruiting for non-UK/EEA nationals but it had had no success in its recruitment generally. The wording of the job advert made clear that they were happy to recruit non-UK/EEA applicants and to sponsor a Tier 2 visa, but they would need to satisfy UKVI in due course that there were no suitable EEA applicants available. Given the difficulties that they had recruiting however, it was always likely that they would be able to satisfy this test.

24. Ms Grant was clearly concerned about this. She had three months left on her student visa. That should have been plenty of time but much depended on it. On 19 October, before her employment began, (320) she emailed the HR department for confirmation. HR support was being provided by a separate NHS body, NHS Business Support Authority. She asked Julie Field, an HR Adviser, to ask her to confirm that her

certificate of sponsorship could be issued in January.

25. Ms Field responded by suggesting that they apply after Christmas. There were then exchanges about increasing her salary slightly as there was a £30,000 threshold for the HSM programme. This was resolved satisfactorily and they proceeded on the basis that it would be dealt with after Christmas. There is nothing in those emails to suggest a promise to provide a certificate of sponsorship, only that the issue would be addressed at that stage.

26. In fact, it was soon obvious to others that this would be more difficult than first imagined. Robin Marsden-Knight, a Senior HR Adviser in the Business Support Authority, picked up this issue and emailed John Manuel as early as 30 November to say that the new authority did not in fact have a sponsorship licence from the Home Office and so could not yet issue a certificate of sponsorship. Indeed, it would take about eight weeks to get one and so it was "highly unlikely" that they would be able to get one in time for Ms Grant. Despite this, nothing was said to her, nor was anything done to address this problem at the time.

27. It was not until the week of 25 January 2018 that Ms Grant realised the position in which she found herself. She would either have to be dismissed, or return to the US. It is not necessary to document in detail the scramble of activity which followed. There was indeed no sponsorship licence. The position of the respondent was not particularly sympathetic at the time. They took the view that ultimately it was her responsibility to have sorted out her visa. She had to take her own advice on what to do and came up with the plan of the application for leave on grounds of her family and private life. This involved a long form and the hefty fee, which the respondent agreed to fund, with deductions from her wages over the next ten months, as already described.

28. Ms Grant's witness statement did not suggest any particular conversation with Gary Blackhurst about providing the certificate of sponsorship and she did not suggest to him in evidence that he had made any verbal promise to provide one. He mainly works from home and was only in the office once or twice a week. They discussed the sponsorship delay in December but neither of them was aware then of any serious problems. The main concern at that stage was over her salary to meet the Tier 2 requirement.

29. Ms Grant agreed in writing to the deductions in question by email on 31 January 2018, the last day although she says that that was under duress.

30. The timesheet issue can be briefly described. As noted above, members of staff complete timesheets to record when they arrive for work and when they leave the office. These can be checked against the times on which they actually enter the door to the offices and when they log on to their computer.

31. The system depends on trust. Enquires or checks are only made where some clear discrepancy comes to light. In Ms Grant's case this first occurred on or about 10 January 2018. Mr Blackhurst was staying at a hotel over the road and was arriving at work at about 7.30 am. He sat opposite her. She arrived that day at about 9 and left around 3, surprisingly early. The next day she came it at about 8 but left at 2.30. The next week, he decided to take a closer interest and noted that she was again leaving

in mid-afternoon. This was reported to her line manager, VM - I will use initials for those who were not witnesses - and Mr Blackhurst also emailed a colleague in the office, PD, to the effect that they would have to see what she put on her time-sheets. This therefore arose before any real concern over her visa.

32. As noted above, the investigation showed that she had recorded about 36 hours more time than actually worked over the relatively short period of her employment. An analysis of the figures shows that some times were rounded up or down, but there were a considerable number of times in which she was out by several hours, all in her favour, and so amounting to about 36 extra hours in total. No real explanation was offered in her probationary review meeting on 14 March 2018. She suggested a lack of training, but agreed in her evidence at this hearing that the timesheet forms were simple and she understood that not filling them in properly could be seen as fraud. She suggested too that she may have been completed them several days later and misremembered, but again they were all in her favour. No better explanation appeared in her witness statement, but at this hearing she suggested that it may have been the result of stress and so inattention. However, the furore over her visa only arose in the last week or so of January, whereas the discrepancies in her timesheets were much more extensive.

33. In those circumstances I find that it was reasonable for the Authority to conclude that she had been dishonest, and I also have to conclude on balance that that was the case.

34. The final factual issue relates to her grievance. This was set out in her letter on 23 February 2018 (427). The thrust of her complaint was about the whole sponsorship episode and the way it was handled. The fact that she ended up with an additional cost of £1493 was a natural follow-on from this, and she made clear that "the CFA should not take £1493 out of my final pay check as this would cause more financial hardship."

35. So, although she complained about having to pay this money, she did not specifically mention the fact that the first payment was to be deducted from her salary. She was essentially pleading the injustice of it all falling on her shoulders when she was not to blame for it, and asking them to reconsider the whole payment. She was not saying that there was a legal obligation on the Authority to meet this cost, or that it was not legally entitled to make any deductions.

36. This letter was sent before the probationary review meeting that led to her dismissal. The Authority considered before that meeting what would happen to the monthly repayments if she was dismissed, as seemed likely. It was concluded that no more deductions would be made as it would cause financial hardship, and that is was then occurred. It follows that from a financial point of view the Authority would be better off retaining her services.

37. The probationary review meeting was arranged for the same day as the grievance meeting. No doubt the Authority wanted to ensure that the grievance was resolved first. Having both hearings on the same day was not ideal but was more practical as the relevant managers were all available that day.

38. As a footnote, it should be mentioned that the outcome of the grievance meeting was

sympathetic to Ms Grant. The relevant manager identified a number of lessons to be learned and changes to their recruitment procedure which were put in place as a result. By then however Ms Grant had been dismissed.

Application of the Law to the Facts

39. Applying the law to these facts, it is clear firstly that there was no unlawful deduction from wages since Ms Grant expressly agreed to the deduction in her email of 31 January 2018.

40. I can understand why she did so. On any view she had been badly let down over this issue and was entitled to expect that her employer would have been able to resolve this visa issue without her having to make this additional and expensive application. But that does not amount to duress in law. Duress involves such severe and improper pressure as to vitiate the person's consent. It would involve force or fraud to secure their agreement. It is not necessary to go through the very old cases on that type of situation – nothing approaching that level of pressure applied here. Indeed the respondent was by then aware of the difficult position in which Ms Grant was placed and made the offer of a loan to help her out. The situation was highly unsatisfactory, but as a matter of law this was a genuine consent and so they were entitled to begin making monthly deductions from her wages.

41. Secondly, I do not find that she asserted any such statutory right in this case, for the reasons already given. She was complaining about the general arrangement that she had been left with this liability, rather than the specific point that it was being taken from her wages. That was something she had agreed to.

42. As noted above, the employee has to make reasonably clear what the right in question is. Guidance on the degree of clarity needed was provided by the Court of Appeal in the case of **Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039**. In that case Mr Mennell, an HGV driver, refused to sign a draft contract that would have allowed his employer to make deductions from his wages to recoup training costs. He was told that he would be sacked if he did not sign. He persisted in his refusal and was indeed dismissed. The Court of Appeal found that he had not asserted a statutory right. He was unable to say when, where, to whom or in what terms he had made the allegation. The most he was able to say was that he had told management that he would sign the agreement only if it was amended and this was held not to be sufficient. In the same way, Ms Grant was indicating here in general terms that she was not happy with the arrangement.

43. In any event, given that the concerns about timesheets arose before the visa issue became a serious problem, there is in my view no basis to suggest that they were created or exaggerated to dismiss her, and hence the principal reason for her dismissal was not this issue. The allegations themselves were clear and well founded. Any employer would be entitled to and almost certainly would decide to dismiss in those circumstances, especially a body charged with tackling fraud, which includes timesheet fraud within the NHS. That was in my view the main and indeed only reason for her dismissal.

44. That leaves the complaint of breach of contract. As explained already, she is relying on a verbal exchange with Julie Field or Gary Blackhurst, but the emails do not show

any such promise from Ms Field. Ms Field essentially stated she was aware of the issue and would deal with it later. Any contract based on an alleged conversation with Mr Blackhurst was not pursued at this hearing. In either case, neither would be in a position to give binding promises of this sort on behalf of the Authority, or any reason to do more than say that they would look into it. Mr Blackhurst said essentially that he would raise it with HR and did indeed attempt to resolve it. There is also the obvious fact that there was no sponsorship licence, so they would have been promising what could not be achieved, which again makes it difficult to understand why they would make such a promise. I am satisfied that there was nothing approaching a binding commitment here.

45. Nor was there anything implicit in the circumstances of her recruitment that she would be issued with a certificate of sponsorship by the end of January 2018. Another candidate would not in all probability have needed any such certificate, let alone by that date.

46. I have considered whether there was an implied duty to warn her, once the problem became known, as it was to Mr Marsden-Knight from an early stage. There can be an implied obligation on employers to inform employees of a contractual benefit to which they are or may be entitled. This was the conclusion of the House of Lords in **Scally and ors v Southern Health and Social Services Board and ors 1991 ICR 771, HL**, where a term was implied in relation to a contractual right to purchase extra pension entitlement on highly advantageous terms. The company should have told the staff of this opportunity. But that duty only arose in very limited and specific circumstances which do not apply here, including that it relates to a term of the contract conferring a valuable right. Here it would have to be argued that the employer had a duty to warn her to start looking for other employment, which is a very different situation and not one which has ever been sanctioned. In any event, the case was not put on that basis.

47. Putting the timesheet issue to one side, this was on any view a very unfortunate situation for Ms Grant to have been placed in, but having considered the situation from every angle I cannot see any arguable basis to say that the Authority were contractually bound to provide a certificate of sponsorship by 31 January 2018.

48. If follows that the complaints must all fail even without the timesheet issues. It would only be if one of her complaints succeeded that it would be necessary to consider whether she in fact suffered any loss given her later dismissal. Even if I am wrong in finding that the three complaints should be dismissed, this dismissal on 14 March 2018, for entirely proper reasons, would mean that she could not be entitled to any further damages. Indeed, this failure to declare her hours of work correctly, has to be regarded as a fundamental breach of contract, which took place before the end of January 2018, and so even if there had been an obligation on the respondent to give her a certificate by that date, this earlier breach would have brought that obligation to an end.

49. For all of the above reasons therefore, the claim must be dismissed.

Employment Judge Fowell

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Date 23 November 2018