



EMPLOYMENT TRIBUNALS

Claimant: O E OLEKWU

Respondent: OAKTREE HOMECARE SERVICES LIMITED

Heard at: Watford Employment Tribunal (in person)

On: 10 October 2024

Before: Employment Judge Din (sitting alone)

Appearances

For the Claimant: Representing herself

For the Respondent: A Wright, Citation Ltd

RESERVED JUDGMENT

- 1) The Respondent was in breach of contract by not paying the Claimant her contracted hours of 40 hours per week. The Respondent is ordered to pay the Claimant damages for that breach of contract, such damages to be assessed.
- 2) The Respondent did not make an unlawful deduction from the Claimant's wages by not paying the Claimant for 175 hours in October 2023. The Claimant's claim for the unlawful deduction of wages in this respect is therefore dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent, a domiciliary care provider, as a care worker, from 7 February 2024 until March 2024.
2. Early conciliation started on 8 November 2023 and ended on 23 November 2023.
3. The claim form was received by the Tribunal on 23 November 2023. In that claim form, the Claimant stated that she was making another type of claim (to

the other options set out in the claim form). Within the relevant box in the claim form, the Claimant stated:

“Pay cut

I worked for 175 hours and was paid for only 108 hours”.

4. The Claimant set out further background and details of her claim in the claim form. The Claimant stated that she is claiming compensation. She also ticked the box “If claiming discrimination, a recommendation”. In terms of compensation, she asked for the following:

“1. A refund of the balance of my October salary (66 hours outstanding)

2. To be given the full hours I signed in my contract (40 hours) weekly

3. To work alternate weekends”.

5. In the additional information section of the claim form, the Claimant stated: *“I have already been threatened by the care manager after ACAS reached out to her and my hours cut immediately by the next day as evidenced by the rota.*

I would want my full contractual hours returned”.

6. The Respondent provided a response on 9 February 2024.
7. On 10 March 2024, the Tribunal sent the parties a notice of a hearing to take place on 22 May 2024. The notification also set out case management orders.

Hearing – 22 May 2024

8. A hearing before Employment Judge Graham took place on 22 May 2024.
9. The hearing was due to be a final hearing. However, Employment Judge Graham stated that the hearing was not effective. This was because the Tribunal’s case management orders had only set a date for the exchange of witness statements to take place 24 hours before the hearing, giving the parties insufficient time to prepare.
10. Employment Judge Graham converted the hearing into a private preliminary hearing for case management. Employment Judge Graham added that there were connectivity issues and the Claimant was at work. This appeared to present a risk of unfairness to both parties if they continued further. Employment Judge Graham ordered the relisting of the hearing.
11. Employment Judge Graham recorded that the Claimant agreed that her current claim was limited to the issue of 66 / 67 hours that she says is missing from her October 2023 pay. Employment Judge Graham went on to say *“There was reference to other matters in [the Claimant’s] ET1 however they had not been particularised and the Claimant confirmed to [Employment Judge Graham] that this hearing was really just about the alleged shortfall in pay”.*
12. Employment Judge Graham further stated that the Claimant’s witness statement appeared to refer to matters outside of her ET1 claim form. If the Claimant wished to bring additional matters before the Tribunal, then the Claimant must

either make an application to amend her claim or issue a fresh ET1. Employment Judge Graham made clear that they had not granted any amendment of the claim on that day.

13. On 31 July 2024, the parties were notified that a final hearing would take place on 10 October 2024.

Application to amend

14. On 23 May 2024, the Claimant wrote an email stating that she wishes to amend her original claim. The Claimant said, "*My amended claim includes additional claims of favoritism and targeted treatment, breach of contractual terms and illegal withholding of staff salaries – February and March 2024. This is in addition to the original claim relating to Pay Cut and Victimisation*".
15. The Claimant followed this with emails on 14 June 2024 and 15 July 2024.
16. On 29 July 2024, the Tribunal wrote to the parties. The case file had been referred to Employment Judge Graham. Employment Judge Graham stated "*If the claimant wishes to make an application to amend her claim she should set out in writing what the proposed amendment is, including what specifically is complained about, who was responsible and when it occurred. There is no cause of action of favoritism – if the Claimant is complaining of discrimination she should say so, and she must confirm why she says she believes she was discriminated against*".
17. On 1 August 2024, the Claimant set out her amended claim. She stated the following.
 - 17.1 The Respondent breached the Claimant's employment contract by failing to pay the annual salary stated in a Certificate of Sponsorship provided by the Respondent to the Home Office.
 - 17.2 The Claimant was not given her signed and agreed contractual hours from the beginning of the contract.
 - 17.3 On 3 November 2023, the Claimant was paid her salary for October 2023. The Claimant states that she worked a total of 176 hours but was only paid for 109 hours.
 - 17.4 After attempting (and failing) to resolve the dispute internally, the Claimant contacted ACAS. ACAS contacted the Respondent. This led to threats by the Claimant's care manager "*...and she told me I should do my worst and take her to the Tribunal if I [the Claimant] so wish*".
 - 17.5 Following the Claimant's objections to the pay cut, the Claimant experienced a series of retaliatory actions that constituted victimisation. According to the Claimant, these included "*...cut in hours, being removed from [the Claimant's] usual routine and Service Users*". The Claimant said that she had accommodation close to where the majority of her Service Users were located. However, the Claimant was "*being*

sent as far away as possible". The Claimant said that this affected her physical and mental health. She said that she could not take any breaks as the travel time made it impossible to do so.

17.6 The Claimant's colleagues have also suffered.

17.7 The Claimant was paid late every month from December 2023 until when she left in March 2024. This resulted in the Claimant falling behind with her bills and incurring debts to meet her obligations.

18. On 9 August 2024, the Respondent stated that the Claimant had failed to clearly set out what additional claims she is making beyond the wages complaint identified by Employment Judge Graham at the hearing on 22 May 2024. The Respondent went on to say that the timing of the Claimant's alleged complaints and alleged retaliation by the Respondent are unclear and cannot be understood. On this basis, the Respondent argued that the Claimant's application should be dismissed.

Application for strike out of claim or postponement

19. On 8 October 2024, the Respondent wrote to the Tribunal (copied to the Claimant) regarding an email from the Claimant of the same date about materials that the Claimant had not yet disclosed.

20. The failure to disclose those materials form the basis of a Respondent application to have the Claimant's claim to be struck out. The Respondent said that, if the Tribunal is not minded to strike the claim out, then the Respondent makes an application for the 10 October 2024 hearing to be postponed.

Evidence and other materials

Bundle of documents

21. There is a 163 page bundle setting out relevant materials (**Hearing Bundle**).

Witness statements

22. The Tribunal was provided with a witness statement from the Claimant dated 22 May 2024 and the Tribunal heard from her.

23. The Tribunal was provided with witness statements on behalf of the Claimant from Kudirat Alamu and two other anonymous individuals. None of Kudirat Alamu nor the two anonymous individuals appeared. The Claimant stated that they were unable to attend.

24. The Tribunal was provided with a witness statement from Fadila Sule, a co-director of the Respondent and its registered manager, and the Tribunal heard from her.

Additional materials

25. When asked what other materials the Claimant would be relying upon at today's hearing, the Claimant referred to her notebook, which (so she states) contains certain of her records. Copies of certain pages of the notebook had been disclosed by the Claimant and are in the Hearing Bundle. However, not all of the notebook had been disclosed. The Claimant confirmed that all relevant pages had been disclosed.
26. The Claimant referred to payslips in addition to those contained in the Hearing Bundle. The Claimant sent a complete set of the payslips that she is relying upon to the Tribunal and the Respondent during a break at today's hearing.

Claims and issues

27. There is a dispute regarding the claims and issues. The Respondent states that the only claim is that set out by Employment Judge Graham at the hearing of 22 May 2024, namely whether the Claimant was underpaid by 66 / 67 hours for the month of October 2023. The Claimant refers to her application to amend her claim of 1 August 2024.
28. The Respondent states that the Claimant's proposed amendments are not particularised. The Claimant says that they are in her notebook and, with respect to pay, in her payslips. With respect to the payslips, the Claimant says that they had been provided but not all are in the Hearing Bundle. In relation to the Claimant's proposed claim of victimisation, the Claimant states that she was treated differently following her approaching ACAS. The Claimant says that she could explain what had happened using the Hearing Bundle and her notebook. The Claimant concedes that she has not set out the particulars of her additional allegations. Following discussions with the Claimant, the Tribunal remains unclear as to how the payslips and the notebook would assist in explaining the Claimant's proposed claim for victimisation.
29. The Respondent says that, as set out in the case management orders sent to the parties on 10 March 2024, the Claimant was ordered to provide disclosure by 1 April 2024. There is no reason why the Claimant could not have provided all relevant parts of her notebook before today's hearing. Further, there is substantial material in the Hearing Bundle, including payslips. However, no context has been provided by the Claimant as to what they are intended to show.
30. Following further clarification, the Claimant confirmed that she seeks to make the following claims:
 - 30.1 Underpayment of pay for 66 or 67 hours of work in October 2023 (**October Underpayment Claim**);
 - 30.2 Breach of contract by the Respondent by failing to give the Claimant 40 hours of work per week and pay for that amount (**40 Hour Claim**);
 - 30.3 Breach of contract by the Respondent by failing to pay the Claimant on the 3rd of the month (**Late Payment Claim**);
 - 30.4 Victimisation (**Victimisation Claim**).

31. The parties accept that the October Underpayment Claim proceeds as part of the Claimant's original claim.
32. The other matters described above are proposed amendments to the Claimant's claim. At the hearing I explained my conclusions and findings with respect to the amendment of the Claimant's claim to include the 40 Hour Claim, the Late Payment Claim and / or the Victimisation Claim. These are summarised below.
33. When deciding whether to grant an application to amend, the Tribunal must carry out a balancing exercise of relevant factors, having regard to the interests of justice and the relevant hardship that would be caused to the parties by granting or refusing the amendment. This is founded on *Selkent Bus Co Ltd v Moore* [1996] I.C.R. 836 and subsequent cases.
34. The proposed amendment regarding the 40 Hour Claim is easily defined. It was flagged in the Claimant's claim form (albeit not as a formal claim) and has been addressed in Ms Sule's witness statement. It is based on the employment contract and other materials (such as the Certificate of Sponsorship) that are part of the Hearing Bundle. In light of this, no material new factual enquiry will be required on the part of the Respondent. It is accepted that, should the Claimant succeed with respect to this claim, further enquiry would need to be made regarding remedy. However, in the Tribunal's view, this does not prevent the liability aspect of the 40 Hour Claim being decided upon today.
35. Applying the *Selkent* principles, the Tribunal allows this amendment to proceed. This is because the *Selkent* balance falls in favour of allowing the Claimant's amendment.
36. By contrast, the Tribunal does not see particularised evidence in relation to the Late Payment Claim. In particular, the Tribunal has not seen when these matters took place. Further, the impact of the alleged breaches (if any) are also not set out.
37. Further, there are insufficient particulars provided with respect to the Victimisation Claim. Although the term "victimisation" was used in the Claimant's claim form, it was not set out in such a way as it constitutes a claim. This was reflected in Employment Judge Graham's comments at the 22 May 2024 hearing. On 29 July 2024, Employment Judge Graham specifically stated that any proposed amendments need to be detailed. The Claimant has not done this.
38. There appears to have been some attempt to do this in the Claimant's 1 August 2024 document. However, the information that was provided then is insufficient to particularise the Victimisation Claim beyond some general statements. As a result, the Respondent is not able to respond to the claim and neither the Respondent nor the Tribunal can make a proper assessment of the claim at this time.
39. Even if the Victimisation Claim is now particularised, it would require further witness evidence. This would inevitably cause this hearing to be postponed and for further delay to take place.

40. Accordingly, and again applying the *Selkent* principles, the Tribunal does not allow the addition of the Late Payment Claim or the Victimisation Claim to the Claimant's claim. This is because the *Selkent* balance in respect of each falls in favour of the Respondent.
41. Having established the claims and issues, the Tribunal decides, in accordance with the overriding objective as set out the Employment Tribunals Rules of Procedure 2013, to proceed with the final determination of those claims and issues at today's hearing.

Law

42. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

"An employer shall not make a deduction of 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 signified in writing his agreement or consent to the making of the deduction".

43. Section 23 of the Employment Rights Act 1996 gives a worker the right to complain to the Employment Tribunal of an unauthorised deduction of wages.
44. Further, an Employment Tribunal can deal with breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Relevant findings of fact

Background

45. The Respondent is a domiciliary care provider in the North London area, employing approximately 50 staff. The Respondent has contracts with Barnet and Enfield local authorities and with the NHS.

Certificate of Sponsorship

46. The Claimant was recruited from Nigeria on a Healthcare Worker Visa. As part of this process, the Respondent provided a details to UK Visas & Immigration, a part of the Home Office, setting out the sponsorship details.
47. The Certificate of Sponsorship, dated 2 December 2022, stated that the Claimant would be paid £22,568 per annum in gross salary, with 40 total weekly hours of work.

Offer of employment

48. The Respondent sent the Claimant an offer of employment on 3 December 2022. This stated:
- “Your salary will be £22,568 per Annum. And your working hours will be 40 hours/week”.*
49. As requested by the Respondent, the Claimant signed the offer of employment letter confirming her agreement on 12 December 2022.

Employment Contract

50. The Claimant started her employment as a care worker with the Respondent on 7 February 2024. Although the Claimant states in her witness statement that she started her employment with the Respondent on 6 February 2024, her claim form states that she started on 7 February 2024 and this accords with the date referred to by the Respondent. The Tribunal finds that she started on 7 February 2024.
51. Shortly after starting work, the Claimant signed a contract with the Respondent on 15 February 2023 (**Employment Contract**).
52. The Respondent used an electronic monitoring system to, amongst other things, monitor the time spent working by care workers, such as the Claimant. This system is called Electronic Call Monitoring (**ECM**).
53. In common with other carer workers, the Claimant, was allocated “planned hours” in advance of a month being completed. The Claimant was then required to document actual time spent working via ECM. The Claimant could access ECM through an app on her mobile phone. For the relevant period, the Claimant could submit paper timesheets if hours had not been correctly logged through ECM.
54. The Employment Contract states in relation to pay arrangements:
- “Your rate of pay is £10.85 per hour.*
- Payment is made monthly in arrears, directly into your bank/building society on or around the 3rd of each month...”.*
55. In respect of hours, the Employment Contract states:
- “Your contracted hours are 40hours/week. This will be spread from Monday to Sunday.*
- Your days off will be either 1 or 2 days-based on the business need and determined by your manager. You will have to complete a minimum 40hrs/week.*
- The weekly hours may vary, based on the service need.*
- Monthly hours will not exceed 160hours.....”.*

56. The Employment Contract further states:

"You must observe Company procedures on confirming hours of work and work completed for the Client. You are required to clock in when you arrive at the Client's premises and clock out when you leave via the Electronic monitoring system on your phone. You are also required to complete the daily observation log and timesheet, which must be signed by the Client before you leave the Client's premises.

Failure to adhere to this procedure will prevent the Company from confirming work completed for the Client which will affect wages paid for that week, as this information is required to secure payment from Clients and an estimate will have to be made based on a minimum number of proven hours. Any shortfall will only be corrected at the next pay period following production of a valid timesheet".

57. The "Client" here refers to the person that the care worker is caring for. The Client would sometimes be known as a service user.

58. The Respondent also had an Employee Handbook. In this respect, the signed Employment Contract says, on behalf of the Claimant:

"I have read, understood and am willing to abide by the terms and conditions laid down in the Employee Handbook and accept that they form an integral part of this Contract of Employment".

59. There appear to be two versions of the Employee Handbook in the Hearing Bundle. One is from 13 July 2023. The other appears to be from 20 April 2020. Both say:

"Your will be paid only for time worked".

60. The Respondent provided a further possible contract of employment in the Hearing Bundle dated 5 February 2024. It is unsigned. It is unclear what the status of this document is and so the Tribunal has disregarded it for the purposes of its decision.

October Underpayment Claim

61. The Claimant agrees that she logged her time on the ECM app. She further agrees that the time logged on the ECM app, plus any supplemental timesheet, formed the basis for her hours worked.

62. The Claimant was allocated 175 hours of "planned hours" for October 2023. However, at the end of October 2023, ECM showed that the Claimant's logged hours stood at 108 hours. The Claimant submitted one paper timesheet for one additional hour on 23 October 2023. As a consequence, the Claimant was paid for 109 hours.

63. Ms Shule stated in evidence that, from August 2023 onwards, the local authorities to which the Respondent was contracted required the relevant ECM records in order for the Respondent to be paid. In light of this, care workers,

such as the Claimant were required to log their hours onto ECM in order to get paid. The Claimant states that neither she nor the other care workers were told this. Ms Shule says that meetings took place and the Claimant was invited to those meetings. Ms Shule does not know whether the Claimant attended those meetings.

64. In evidence before the Tribunal, the Claimant stated that there was often travel time between different appointments, including on public transport. The Claimant accepts that she was not paid for travel time. However, the Claimant said that she often had to leave early from an initial appointment in order to make the start time set for the next appointment. This reduced the amount of time that she could log for the initial appointment as compared with the “planned” time. Also, there were occasions when she would be finished with a service user and she would be asked to leave by the service user. If she did leave early in this way, this would reduce the number of hours logged on ECM as compared with the “planned” time for that visit.
65. Ms Shule, in her evidence for the Respondent before the Tribunal, stated that all service user appointments for a care worker are clustered so as to be in walking distance. As such, public transport is not required. The Claimant disagrees with this. The Claimant provided an example of two appointments that were over an hour’s walk apart. Although Ms Shule continued to insist that all appointments were within 5 to 10 minutes walk, the Tribunal accepts the Claimant’s evidence in this regard.
66. In evidence before the Tribunal, the Claimant stated that she did not understand how the ECM app on her phone recorded time during October 2023. Later, following questioning, she said that in subsequent months the Claimant would ensure that if she had one hour “planned” with a service user, then she would spend one hour with that service user and log that amount of time.
67. When asked about the 108 hours logged on ECM for October 2023, the Claimant refused to accept the figure. The Claimant stated that the figures on ECM may have been doctored. However, she is unable to explain how the figures were doctored, nor to explain why they were, in her view, incorrect.
68. The Claimant said that she is clear that she spent 175 hours with service users, rather than 109 hours. For this, the Claimant relies on her notebook. There is one page from the Claimant’s notebook in the Hearing Bundle that relates to October 2023.
69. This states the following (the Tribunal has not included the names of the service users as they are not relevant to its decision):

“Monday 30th October 2023

[] – 1 hour

[] – 1 hour 30 mins

[] – 3 hours 30 mins

Total – 6 hours

Tuesday 31st October 2023

[] – 45 mins

[] – 2 hours 15 mins

[] – 3 hours 30 mins

Total 6 hours 30 mins

Total October Hours.

175 Hours”.

70. As noted above, the Claimant agreed in evidence that everything that was relevant from her notebook is in the Hearing Bundle. The Claimant insists that, based on her notebook, she did 175 hours in October 2023.
71. The Tribunal finds that the correct figure is 109 hours. The reasons for this are set out in the “Discussions and conclusions” section below.

40 Hour Claim

72. The relevant contractual position is set out above.
73. The Claimant states that she was not always given her contracted 40 hours of work. In particular, her working hours were reduced from November 2023 onwards following, so she states, her contacting ACAS in November 2023. I make no findings as to whether or not the Claimant’s hours were reduced as a result of her contacting ACAS. However, it is clear that the Claimant was not always given, nor paid for, 40 hours of work.
74. In her witness statement, Ms Sule states that the Claimant’s hours were allocated based on service user needs. She states: *“As we run a domiciliary care service, clients go into hospital and some care packages end. Most of the client[s] she supported [were] either in hospital or the package of care ended. Unfortunately, when that happens carers get reduced hours”*.
75. In evidence, Ms Shule agreed that the Claimant’s contractual hours were a minimum of 40 hours per week. However, the actual hours varied from month to month. For the month of August 2023, the Claimant was paid for 128.5 hours. For October 2023, it was 109 hours. This, according to Ms Shule, was down to changes in service user requirements from month to month.
76. Ms Shule went onto explain that it is not possible to move service users from one carer to another. Although this may be helpful spreading work, it is important for service users to see their regular carer. Also, service users are clustered in certain areas. As such, it is difficult to move carers around without increasing travel times between appointments.

77. The Tribunal finds that Ms Shule's description of the position is accurate, subject to the point regarding clustering and travel times dealt with above. Notwithstanding this latter point, the Tribunal accepts that moving carers around could increase travel times.

Discussions and conclusions

October Underpayment Claim

78. As set out above, the Claimant logged 108 hours on ECM for October 2023. With an additional hour logged by way of a paper timesheet, this meant that the Claimant had 109 hours logged for October 2023.
79. The Tribunal finds that ECM plus the one timesheet completed by the Claimant for October 2023 is the most reliable record of the Claimant's working hours during that month. The Claimant agrees that ECM contains her records, the Claimant is unable to show that the ECM record was doctored or interfered with, and the Claimant is unable to demonstrate that the ECM record is inaccurate beyond what is contained in her notebook. The Claimant's notebook lacks detail beyond certain entries for two specific days and a headline statement that the Claimant did a total of 175 hours in October 2023. This is insufficient to overturn the evidence of the ECM record for that period.
80. The Tribunal therefore finds that the Claimant worked 109 hours in October 2023. This was the amount that she was paid for by the Respondent.
81. The points regarding the failure on the part of the Respondent to inform the Claimant about ECM being the source for pay and the lack of allowance for travel time may be valid. However, they themselves are not relevant to the amount of hours logged by the Claimant and how much she should have been paid for in October 2023.
82. In light of the above, there was no unlawful deduction of wages in relation to October 2023. This is subject to the points below regarding the 40 Hour Claim.

40 Hour Claim

83. The Claimant's Employment Contract clearly states that the Claimant's contracted hours are 40 hours per week. It further states that the Claimant must complete a minimum of 40 hours a week. However, it goes on to say that weekly hours may vary based on service need and (as set out in the Employee Handbook) the Claimant will only be paid for time worked.
84. This gives rise to potential inconsistencies and contradictions. However, following an analysis of relevant parts of the Employment Contract, the Tribunal finds that the Claimant was contracted to work and to be paid for a minimum of 40 hours per week.
85. The reasons are as follows.

86. Although the Respondent could (and did) provide less than 40 hours per week of work, the Employment Contract refers to contracted hours of 40 hours per week and the Claimant working a minimum of 40 hours per week.
87. This is consistent with the Certificate of Sponsorship and the offer letter. These both refer to the Claimant working 40 hours per week with an annual salary. Although not part of the Employment Contract, these documents provide some evidence of the factual background and the parties' intentions at the time of the Employment Contract.
88. The statement in the Employment Contract that weekly hours may vary based on service need remains sound. However, that does not mean that the Claimant was not entitled to be paid for a minimum of 40 hours per week. Further, the statement that the Claimant would only be paid for time worked cannot override the basic requirements of the Employment Contract in terms of the minimum 40 hour week.
89. There are purported limitations to what the Claimant can work and therefore earn. The Claimant was paid £10.85 per hour and this remains valid.
90. The Employment Contract further states that monthly hours cannot exceed 160 hours. It would only be in a four week month that this could apply as most months have more than four weeks. As such, the 160 hours per month maximum for months with more than four weeks is inapplicable.
91. The above does not mean that the Claimant was not obliged to record her time on ECM. This remained a requirement under the Employment Contract. Amongst other matters, this is not least so that, in the event that the Claimant worked over 40 hours per week, those hours were notified and could be paid for by the Respondent.
92. For the avoidance of doubt, and notwithstanding the findings with respect to the Claimant's claim for an unauthorised deduction of wages in October 2023, the Claimant should have been paid for 40 hours per week in October 2023 (as well as the in the other months of her employment with the Respondent).

Employment Judge Din

4 November 2024

Reserved judgment and reasons
sent to the parties on:

15/11/2024

For the Employment Tribunals: