



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102732/2019 Hearing at Edinburgh on 15 May 2019

Employment Judge: M A Macleod (sitting alone)

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Leigh Jordan

Claimant
In Person

Family Circle Care Ltd

Respondent
Represented by
Mr M Stevenson
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims fail and are dismissed.

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 28 February 2019 in which she claimed that the respondent had unlawfully deprived her of mileage payments and wages.
2. The respondent submitted an ET3 in which he resisted the claimant's claim and sought to present an Employer's Contract Claim (ECC).
3. A hearing was fixed to take place on 15 May 2019. The claimant appeared on her own behalf, and the respondent was represented by Mr Stevenson, its director and owner.
4. Each party produced documents. Documents produced by the claimant are referred to below by the prefix "C", and by the respondent by the prefix "R".

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5. The claimant gave evidence on her own behalf, and Mr Stevenson gave evidence for the respondent.
6. Based on the information available and the evidence presented, the Tribunal was able to find the following facts admitted or proved.

5 **Findings in Fact**

7. The claimant, whose date of birth is 24 September 1973, commenced employment with the respondent as a home carer on 1 August 2004.
8. The claimant could not recall receiving a contract of employment or written statement of terms and conditions of employment, and none was produced.
- 10 9. On 1 August 2011, Maria Sands, of the respondent, wrote to carers (though the claimant did not recall seeing this email and her name does not appear on the recipient list of the email) (1a) attaching a new mileage claim form (1b) together with a document headed “Guidance for Claiming Mileage Allowance” (1c).

- 15 10. That guidance states as follows:

*“It is the responsibility of individual carers to submit their ‘mileage allowance’ form **timeously each week.***

*Forms must be completed for a week, Monday – Sunday and submitted to the office by the Wednesday of the **following week.***

- 20 *The form should be sent to the office and addressed, **for the attention of Lara Ritchie.** Claim submissions will be checked and authorised and forwarded to **Finance for payment.***

*Claim submissions will only be accepted on **a weekly basis** and no more than **one claim submission sheet will be accepted at any one time.***

- 25 ***Failure** to have claim submission form in for authorisation on agreed day, will result in **payment not being authorised or paid.***

There is no opportunity for late submissions to be paid.”

11. The claimant acknowledged that she must have seen this document, or something similar, as she was aware that she should be submitting her claims on a weekly basis, and that she was not good at doing that.

12. At 1d, a further document from 2011 was produced, being a message to carers who used their car for work, from Maria Sands.

13. In that document, Ms Sands confirmed that due to the high cost of fuel, the respondent had made the decision to contribute to mileage of carers at the rate of 20p per mile. In order to be able to claim mileage allowance, carers were asked to bring a copy of their current insurance, MOT and driving licence to the office, to be copied and kept on file; and to follow the guidance notes to ensure payment.

14. The document went on:

“Payment will only be made, while at work. No payment will be made for travelling to your first client visit and from your last client visit. In effect to and from work.

This is not travel expenses, therefore is not available to people who use any other mode of transport.

Payment will only be made when authorised by Care Manager...”

15. The claimant maintained that she would, prior to 31 October 2018, receive payment in respect of 25 miles per day, including her travel to and from her home to the place where she was to work, on average.

16. She accepted that she was “terrible for putting the claims in late”, but maintained that she was never told that she would not be repaid the money.

17. Mr Stevenson confirmed that up until 31 October 2018, the front office had been making payments on the basis of the claimant’s claims of 25 miles per day, but were remiss in failing to pursue the details of these claims. Since then, the respondent has been paying the claimant’s actual mileage, as set out in her claim forms, though these have been received typically 3 to 6 months late.

18. With regard to the claimant's unlawful deductions from wages claim, the claimant maintained that she was receiving £10.50 per hour for weekend working, which is usually on a Sunday. She maintained that her pay was reduced from 20 September 2018.

5 19. A number of documents were produced in this regard.

20. 4a shows a letter from the respondent to Care at Home staff, including the claimant, setting out the care at home pay rates as £9.00 per hour Monday to Friday, and £9.50 per hour for weekends. That letter was dated 20 August 2018, and specified the date upon which the change of rate would
10 take place would be 3 September 2018.

21. On 3 November 2018, the respondent wrote to the claimant (4b) to advise that her gross pay rates as at 3 September 2018 were £9.00 per hour Monday to Friday, and £9.78 per hour at weekends.

22. The claimant raised the matter again with Mr Stevenson by letter dated 14
15 November 2018 (4d), who responded on 22 November 2018 (4c) as follows:

"We refer to your letter dated 14/11/18 and advise pay rates were confirmed by letter 20/08/18 and discussed with yourself by telephone call.

*Your accrued holiday entitlement is paid in lieu of wages, when on annual leave, but cannot be included in Fortnightly hourly rate and in lieu of wages.
20 I.E. Holiday pay is not part of your Hourly Gross Rate.*

*Regarding your mileage claims, you were asked to submit a revised accurate claim, which to date we have not received, you were paid actual mileage. It appears you have been claiming excessive mileage for some time, also please submit future claims timeous to match current payrolls, not
25 months in arrears..."*

23. The claimant asserted that she had had her terms and conditions altered, without her agreement. The respondent disagreed.

24. Mr Stevenson's explanation in relation to the holiday pay was that for a period of time, the claimant was paid by way of "rolled up" holiday payments.

25. Payslips were produced for the benefit of the Tribunal. At C2, the claimant's
5 payslip dated 6 September 2018 showed that the claimant carried out a number of roles, and that "Community Care W/End" was paid at £9.78 per hour. Similarly, at C3, a payslip dated 20 September 2018 showed that her weekend rate was paid at £9.78 per hour.

26. In November 2018, the claimant was advised by Mr Stevenson, by letter
10 dated 3 November, (4b) that the claimant's weekend pay rate would remain at £9.78 per hour, notwithstanding the letter sent to carers on 20 August (4a) confirming that the weekend rate was £9.50 per hour. A payslip dated 18 April 2019 was produced (4h) in which it was confirmed that the weekend pay rate for the claimant remained at £9.78 per hour.

15 **Discussion and Decision**

27. The claimant seeks payment in respect of two heads of claim. Firstly, she argues that she is due a payment of £310 of unpaid mileage expenses, and secondly, that she has been deprived of the correct rate of pay in respect of her weekend shifts.

20 28. With regard to the mileage claims, there are two difficulties facing the claimant here. The first is that the mileage claims process has been clearly set out by the respondent, and it is quite plain that if a mileage claim is submitted late it will not be guaranteed to be paid. The claimant herself accepted that she has a very bad habit of presenting her mileage claims
25 late, and in such circumstances it is not surprising if the respondent chooses to withhold payments. However, the respondent has paid some of the claimant's mileage claims, because they have chosen to do so.

29. More problematically, however, section 27(2)(b) of the Employment Rights Act 1996 excludes from unlawful deductions claims any claims in respect of
30 expenses incurred in the course of the claimant's employment. In my

judgment, the claimant's mileage payments are payments in respect of expenses, and not wages, in the sense that they are reimbursements paid at an agreed rate by the employer for travel carried out by the claimant in her own car. They are intended to restore to the claimant a sum of money which she is considered to have expended in travelling for work in her own vehicle.

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30. Accordingly, the Tribunal cannot make any award under this heading, and this aspect of the claim must fail.

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31. The second head of claim relates to the claimant's rate of pay for weekend working. It appears to me that this is simply a matter of confusion. The letter of 20 August 2018 to care staff (4a), which the claimant received, caused her to believe that her rate of pay for weekends was being changed from £9.78 per hour to £9.50 per hour. As a result, she considered that her terms and conditions had been unilaterally altered. It is not surprising that she would make a claim like this in such circumstances.

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32. However, a subsequent letter should have provided reassurance on 3 November 2018 confirming her rate of weekend pay as £9.78 per hour. The payslip produced for April 2019, and the evidence of Mr Stevenson, make plain that the claimant still receives the same rate of pay for weekend working as she did a year ago, before the change which she perceived to have taken place.

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33. Accordingly, the claimant has not suffered a reduction in her weekend rate of pay, and I am unable to find that her terms and conditions have been amended unilaterally as she alleged.

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34. In light of the evidence, the claimant's claim must fail, and is dismissed.

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35. It should be said that this was a dispute which clearly went beyond the issues of pay, and the Tribunal was glad to see that at the conclusion of the hearing, the parties were able to shake hands in a courteous and cordial manner. Both parties conducted themselves politely and helpfully towards each other and the Tribunal, and they are to be commended for that.

Employment Judge: Murdo Macleod

Date of Judgment: 31 May 2019

Entered into the Register: 06 June 2019

And Copied to Parties