EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2014/076

Sherada Walters **CLAIMANT**

AND

National Assistance Board **RESPONDENT**

DATES: June 18th 2019 and July 25 2019

BEFORE: Christopher Blackman Esq, GCM; Q.C Chairman
Edward Bushell, SCM Member
Ulric Sealy, Esq Member

APPEARANCES: Mr. Caswell Franklyn of Unity Workers Union for the Claimant

Mr. Romain Marshall, Attorney-at-Law for the Respondent

DECISION

1. At the end of the hearing of this matter, the Tribunal held that Sherada Walters (the claimant) had been unfairly dismissed. We undertook to give our reasons at a later date. We also deferred a determination of the remedies to be given in light of a request by the claimant for reinstatement. Both matters are dealt with in this decision.

2. The factual background to the matter is as follows: The claimant was employed by the National Assistance Board (NAB) the respondent on August 29, 2007 as a relief home helper working 3 days per week. At paragraph 1 of her witness statement, the claimant stated that "*By letter dated September 1, 2011, I was appointed to act as a full-time fiveday Home Helper from that date to October 31, working five days per week. Thereafter my contract was renewed by a series of short-term contracts as a full-time five day Home Helper.*"

3. The critical provisions of the September 1, 2011 letter was that (a) the appointment to act as a **Full Time (5) day Home Helper**, (emphasis added) was with effect from 2011-09-01 to 2011-10-31 and (b) the appointment was temporary and **terminable with one week's notice** on either side.

4. The claimant at paragraph 2 of her witness statement deposed that "*On October 1, 2013 I was given a letter which purported to extend my contract on a three day week basis from that date until December 31, 2013. That letter had a space for me to sign as accepting the change in my*

working conditions. I refused to sign the letter and carried on working on a five day basis as usual". The material provisions of the October 1, 2013 was that the appointment was as a Relief Home Helper, terminable by one (1) day's notice on either side and (b) that it was to be clearly understood that it was only a temporary relief appointment.

5. The respondent seemingly acquiesced in the position adopted by the claimant by permitting her to work on a five day basis, as shown by letters dated November 1, 2013 and January 1, 2014 in terms similar to those at 3 above, save that the wage was stated in both letters to be $1,007.28 bi-monthly and bus fare of $43.33 also bi-monthly, which took the claimant's employment to January 31, 2014.

6. The claimant at paragraphs eight and nine of her witness statement deposed that:

(8) When the final contract expired the Human Resources Manager, Mr. Lennox Vaughan asked me to sign a contract to work on a three day week. I refused, and in the presence of my union representative, Mr. Vaughan told me that I should not report for work until the Board met.

(9). On February 6, 2014 Mr. Vaughan invited me to a meeting, I went to the meeting with my union representative. At that meeting, Mr. Vaughan presented me with a termination letter dated February 6, 2014, a cheque for the sum of $9, 824.88 and a National Insurance Termination Certificate which gave the reason for termination as "Failure to sign Contract of Employment."

7. Miss Walters's evidence in chief at the hearing was largely corroborative of the matters recited above. However, under cross-examination by Mr. Marshall, Counsel for the respondent, Miss Walters admitted that contrary to her assertion that from September 1, 2011 her contracts had been renewed by a series of short-term contracts as a full time home helper for 5 days per week, in April and July of 2013, she had accepted appointments terminable on one day's notice and which were for periods of three days.

8. Mr. Lennox Vaughan, the Human Resource Manager of the respondent Board who filed a statement of truth, also gave evidence. Paragraphs 4 to 12 of Mr. Wilson's statement are reproduced here:

"(4). That the Claimant was employed by the National Assistance Board as a "Temporary Relief Home Helper" on a three day per week on a tri-monthly basis.

(5). That at the expiry of the contract the Claimant like all other temporary employees was requested to sign a similar contract.

(6). That in some instances, some of the workers were upgraded to a five day week depending on their performance as well as on a needs basis.

(7). That the Board of Directors of the National Assistance Board did not have the authority to permanently employ anyone in that category on a five day per week-hence it was done in some cases on a tri-monthly basis.

(8). That the Claimant who was employed on a three day tri-monthly basis was upgraded from the 1st day of September, 2011.

(9) That it was a term of the contract that the initial three day per week contract had to be signed in order to be temporary upgraded to a five day week.

(10) That this was clearly understood by the Claimant who signed the said contract on each and every occasion from September 3, 2007 except on October 1, 2013 and January 1, 2014.

(11) That in accordance with the terms of her employment the Claimant did household chores for elderly person for whom she was assigned. These chores included washing, sweeping, cooking and bathing the said persons.

(12) That the said Claimant worked reasonably well during her tenure at the National Assistance Board and was given two additional days per week to work from the 1st day of September, 2011 until 31st day of January 2014."

9. In his evidence before the Tribunal, Mr. Wilson said the 3 day contract was the main contract, with the 5 day contract as the bonus. He agreed with Mr. Franklyn the claimant's representative that the letter of January 1 did not reflect what he had said and the observation at paragraph 9 of his statement that the 3 day per week contract had to be signed in order to be temporary upgraded to a five day week, was not reflected in any letter to the claimant.

10. Mr. Wilson was unable at any time to produce to the Tribunal a document supportive of his contention that it was obligatory that the 3 day per week contract had to be signed in order to be considered for a temporary upgrade to a five day week.

DISCUSSION AND DISPOSITION

11. Section 51 of the Employment Rights Act (the Act) provides that the Act applies to statutory corporations, such as the respondent in this matter. The Act came into force on April 15, 2013. Section 13 of the Act provides that an employer shall give to an employee a written statement of the particulars of the employment. Section 14 (1) of the Act provides that a statement under section 13 shall include a note that specifies any disciplinary rules applicable to the employee or refers the employee to the Standard Disciplinary Procedure in the Fourth Schedule to the Act.

12. We note that the several letters exhibited are silent as to the requirement as to work days and the statement envisaged by section 14 of the Act.

13. In this matter, we find that the Respondent Board subsequent to the coming into force of the Act failed to comply with the requirements of section 13. The NAB had the opportunity on several occasions after April 15, 2013 to set out in the terms of engagement, the position advanced by Mr. Wilson both in his statement and in evidence before the Tribunal, and failed to do so.

14. There is another matter. The respondent Board acted as if it was totally oblivious of the Act and in particular, of the requirements of the Fourth Schedule. There was no hearing or pretence of a hearing before the dismissal, as required by section 29 of the Act nor was there any written warning as to the likely consequences for not signing and returning the letter of January 1, 2014. However, in the UK Court of Appeal decision in ***Hazel et al v. The Manchester College*** **[2014] EWCA Civ. 72; [2014] ICR 989,** at paragraph 4, it was noted that when the claimants were sent letters enclosing contracts for their signature, they were advised that they were at risk of dismissal if they did not sign. This admonition was never communicated by the Respondent Board to the claimant.

15. For the foregoing reasons we concluded at the close of the hearing, that the dismissal was unfair. We are however obliged to observe that the claimant was not as candid as she was obliged to be in that she gave the impression in her witness statement as noted at paragraph 4 above, that there had been a two year stint of a five day engagement. In fact as made clear in cross-examination, in April and July of 2013, she had accepted appointments terminable on one day's notice and which were for periods of three days.

THE REMEDY AND AWARD

16. Miss Walters has expressed a wish to be reinstated to her position as a home helper. The Tribunal in the exercise of its discretion may make an order either for reinstatement in accordance with section 34 of the Act, or an order for re-engagement in accordance with section 35. A review of the authorities

on the issue of reinstatement or re-engagement is often unhelpful as the circumstances are very often, fact centred with few clear principles of law to emerge to influence the decision being considered. [See the discussion at paragraphs 10 to 14 in Shikeila ***Johnson v. Ian Griffith Mortuary Service*** [ERT /2018/316].

17. In the circumstances of the instant case, five (5) years on the principal characters at the National Assistance Board are the same as at February 6, 2014 when the claimant was dismissed. During the hearings before us, neither at Case Management Conference nor at the hearings did we see any behaviour that gave us assurance that either reinstatement or re-engagement would be a success. We accordingly decline to make such orders.

18. The Tribunal is now obliged to consider what award for compensation, determined in accordance with section 37 of the Act, should be paid by the employer to the employee. Section 37 (1) (a) provides that where neither an order for the reinstatement of an employee nor for his re-engagement is made, the Tribunal shall make an award for compensation to be calculated in accordance with the Fifth Schedule to the Act. Accordingly, pursuant to s.37(2)(c)(ii) and in the exercise of our discretion, we order that the respondent pay the claimant 26 weeks wages, which amount to $13, 094.64.

19. The claimant is also entitled to the basic award provided for at paragraph 1 (a) of the Fifth Schedule. At the time of her dismissal, the claimant's salary was $503.64 per week and she had worked for just over 6 years. The entitlement is two and a half weeks wages for

each year where the period is 2 years or more but less than 10 years. The calculation is therefore 2.5x503.64x6=$7, 554.60.

20. The amount therefore due to the claimant is $20, 549.24, from that sum must be deducted $6,973.50 which was paid to the claimant as `a severance payment, leaving a balance of $13,575.74.

21. The Tribunal takes note that on termination in February 2014, the correct amount was paid in lieu of notice.

22. The respondent National Assistance Board is ordered to pay the claimant Sherada Walters the sum of **$13, 575.74 on or before 31 December 2019**.

Dated this____________day of November, 2019.

Christopher Blackman
Chairman

Edward Bushell
Employer's Representative

Ulric Sealy
Employee's Representative