



THE EMPLOYMENT TRIBUNAL

SITTING: at London South (By CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

Jaline Joseph

and

Sam Tutoring Limited

Claimant

Respondent

ON: 26th June 2023

Appearances:

For the Claimant: In person

For the Respondent: Ms Asch-D'Souza (solicitor)

JUDGMENT

1. Ms Joseph's claim for unauthorised deduction from pay is well-founded. Contrary to Part II of the Employment Rights Act 1996, the respondent made an unauthorised deduction from Ms Joseph's pay in respect of the period from 1st June 2022 to 14th August 2022. The respondent is ordered to pay Ms Joseph an amount to be decided at the remedies hearing on 13th July 2023.
2. The respondent failed in its duty to provide Ms Joseph with a written statement of the main terms of employment pursuant to section 1 Employment Rights Act 1996. Under section 38 of the Employment Act 2002 the respondent is ordered to pay the claimant an amount to be decided at the remedies hearing on 13th July 2023.

REASONS

Introduction

1. Ms Joseph worked as a tutor for the respondent company from May 2022 until she resigned on 14th August 2022.

2. Ms Joseph claims on 27th April 2022, the respondent's director, Mr Adu-Gyamfi, made her a firm offer of employment. She says the position offered was for a full-time tutor, starting on 1st June 2022, with an annual salary of £25,000. She says she accepted that offer, and in so doing, the parties entered into a binding contract of employment. She also says the parties agreed that, before she started full time employment on 1st June, she would provide ad hoc tutoring to a few of the respondent's students, paid at an hourly rate. She began doing so in May 2022 and continued working sporadically until she resigned. Therefore, she never worked full time, nor did she receive the monthly equivalent of a £25,000 annual salary.
3. The respondent contests the claim. Mr Adu-Gyamfi denies making a firm offer to Ms Joseph. He states on 27th April 2022 they agreed an annual salary of £25,000 would be paid if she worked as a full-time tutor. However, he states essential details required for a binding contract were never finalised. In particular, he says 1st June 2022 was suggested as a provisional start date only, rather than a firm start date. He also says the offer was conditional on the respondent securing a contract with a local school, and that he had told Ms Joseph this. It's further argued they agreed Ms Joseph would provide tutoring as and when required, pending a binding contract of full-time employment. Finally, it's said that pursuant to their agreement, Ms Joseph began tutoring as a worker in May 2022, and continued in that role until she resigned in August 2022. In other words, she was never engaged under a full-time contract of employment on the terms Ms Joseph claims.

The hearing

4. I heard the claim on 26th June 2023. Ms Joseph had prepared a signed witness statement dated 1st June 2023, and Mr Adu-Gyamfi relied on an unsigned witness statement prepared on behalf of the respondent.
5. Ms Joseph was unrepresented. She gave evidence at the hearing, adopting her statement as evidence in chief. Ms Asch-D'Souza, a solicitor, was instructed by the respondent. She called Mr Adu-Gyamfi to give evidence; he also adopted his witness statement. Both gave evidence under affirmation and were cross examined.
6. I considered documents from a 123-page agreed bundle of documents. The bundle contained transcripts of some voice notes left by Mr Adu-Gyamfi on Ms Joseph's telephone. Ms Joseph confirmed she agreed the transcripts were accurate. In addition to the bundle, I considered the parties' witness statements. Ms Joseph also e-mailed an employee information form which had been omitted from the bundle.
7. After hearing evidence and submissions, I adjourned the hearing to 13th July 2023. I confirmed my reserved judgment would be sent out in the interim, the next hearing would be a remedies hearing, if the claim is upheld. If the claim is dismissed, the hearing would be vacated.

Preliminary Matters

8. In its Grounds of Resistance, the respondent argued Ms Joseph was self-employed and not an employee. At the start of the hearing, before I heard any evidence, Ms Asch-D'Souza, confirmed the respondent conceded Ms Joseph was a worker, but not an employee. We took a 20-minute break to allow Ms Joseph time to consider how that concession might affect the way she presented her case.

Issues for the Tribunal

9. The issues in this claim are as follows:
 - 9.1 Whether or not the parties reached a binding agreement during the telephone conversation on 27th April 2022, by which Ms Joseph would be employed full time, starting on 1st June 2022, on a salary of £25,000 per annum.
 - 9.2 If the parties entered into a binding contract of employment as set out at paragraph 9.1 above, did Ms Joseph's subsequent conduct amount to an implied agreement to vary the contract.
 - 9.3 Was Ms Joseph engaged by the respondent as a worker or as an employee from 1st June until 14th August 2022.
 - 9.4 Were the wages properly payable to Ms Joseph from 1st June 2022 to 14th August 2022 a pro rata salary of £25,000 per annum, or payment as a worker only for hours actually worked.
 - 9.5 Whether the respondent complied with its duty to provide Ms Joseph with a written statement of the main terms of her employment in accordance with section 1 of the Employment Rights Act 1996.

Findings of Fact

Background

10. These written reasons are not intended to repeat all of the evidence and argument. It contains the findings of fact I have made that are relevant to the issues in the case.
11. Page references relate to the 123-page bundle unless I state otherwise. My findings of fact are as follows.
12. The respondent posted a recruitment advertisement on Indeed for full or part time tutors. The post did not state the vacancy was subject to conditions. Ms Joseph applied for the position and attended interviews on 25th March 2022 and 14th April 2022. In an e-mail sent on 22nd April 2022, Mr Adu-Gyamfi, who conducted both interviews, wrote confirming Ms Joseph had successfully completed the interview process. Acknowledging she wished to work full time, Mr Adu-Gyamfi wrote:

"I know you're eager to join on a full-time basis, I do think this is possible, we'll just need to figure out how. With this in mind I would like to invite you into the office to have further discussions on your role and contract."
13. Ms Joseph met Mr Adu-Gyamfi on 25th April when they discussed her salary. Mr Adu-Gyamfi offered £18,000 per annum. Ms Joseph asked for £25,000 per annum because she needed to earn enough to secure a mortgage. They agreed Ms Joseph would speak to her bank to find out the minimum salary needed to secure a mortgage. They discussed broadening her role beyond tutoring, to encompass supporting parents who wished to complain or appeal against school and/or examination board decisions. These additional responsibilities would be a way to justify the higher salary she hoped to achieve.
14. At the 25th April meeting, they also discussed Ms Joseph's start date. Allowing for the required notice to her then employer, Ms Joseph said the earliest date she could

start would be 1st June 2022. Ms Joseph says Mr Adu-Gyamfi agreed to this. Mr Adu-Gyamfi acknowledges 1st June was discussed, but he says only as a provisional start date. Mr Adu-Gyamfi adds, he made clear to Ms Joseph during the meeting that any employment would be conditional on the respondent securing a tutoring contract with Eden Park High School (“Eden Park”), a local school he worked closely with. Ms Joseph denies they discussed the job being conditional. She also denies Eden Park was discussed during that meeting.

15. Both parties accept no firm offer of employment was made at the meeting on 25th April 2022. Ms Joseph needed to make enquiries with her bank, so a salary had not been agreed. But she says on 25th April 2022 they had agreed on 1st June 2022 as a start date. Whereas Mr Adu-Gyamfi says 1st June was discussed only as a possible start date. His position is that at the meeting on 25th April, neither salary nor start date had been agreed.
16. On 27th April 2022, Ms Joseph texted Mr Adu-Gyamfi that her bank advised her she needed a minimum annual salary of £25,000 to obtain a mortgage. She asked whether they could negotiate her salary. They spoke that evening but give different accounts of the conversation. Ms Joseph’s evidence is that Mr Adu-Gyamfi made a firm offer that the respondent would employ her full-time, starting on 1st June 2022, on an annual salary of £25,000.
17. Mr Adu-Gyamfi’s witness statement doesn’t deal with the 27th April 2022 telephone conversation. So, at the hearing, I asked him whether the conversation took place, and if so, what was discussed. He confirmed they spoke, initially saying he couldn’t exactly recall what else was discussed. But then added they agreed on an annual salary of £25,000. He also said Ms Joseph explained she needed to give her employer one month’s notice. They discussed 1st June 2022 provisionally, and he made it clear Ms Joseph’s employment was conditional on the respondent securing a tutoring contract with Eden Park. Mr Adu-Gyamfi’s written and oral evidence was, he couldn’t recall when he later informed Ms Joseph the 1st June provisional start date was no longer achievable, but he says he’s sure he told her this.
18. Unbeknown to Mr Adu-Gyamfi, also on 27th April, Ms Joseph received another job offer at an annual salary of £26,000. He was aware she wished to leave her then employer but was unaware she had an alternative job offer. Ms Joseph said that the respondent’s objectives were more aligned with her values, so she declined the other better-paid job offer. An e-mail confirming that job offer was at page 122 of the bundle.
19. The following day, Ms Joseph gave her employer one month’s notice.
20. As discussed between the parties, Ms Joseph began tutoring a few students in May 2022 at an agreed rate of £15.00 per hour. She understood this to be an interim arrangement only, pending her starting full time employment on 1st June. Mr Adu-Gyamfi states this was intended to be the arrangement unless or until the respondent was in a position to enter into a binding contract of full-time employment with Ms Joseph.
21. Ms Asch-D’Souza cross examined Ms Joseph regarding her working arrangements with the respondent from May 2022 to August 2022. I understand this was in order to demonstrate that Ms Joseph was engaged as a worker throughout this entire period. Therefore, Ms Asch-D’Souza’s questioning was intended to show Ms Joseph was not a full-time employee from 1st June as she claims.
22. As to the work arrangements, Mr Adu-Gyamfi’s evidence was that he met parents for an initial consultation. He would find out the parents’ objections and

expectations, he might briefly and informally meet and assess the student. He would explain the payment structure and handle payments. He then provided the students' details to Ms Joseph before the first lesson, so she had no prior opportunity to meet or speak with them. He provided the teaching materials that Ms Joseph used. He denied extensive involvement with the lesson plans. However, the WhatsApp exchanges demonstrate Ms Joseph would seek his agreement to, or at least his comment, on lesson plans. The messages show she would update him periodically on progress, the child's availability, topics covered. Although the updates were less frequent as time passed. Nonetheless, Mr Adu-Gyamfi was involved in how and what the students were taught.

23. On 30th May Ms Joseph requested a meeting with Mr Adu-Gyamfi that week, suggesting they meet ideally on 1st June 2022. He initially agrees, but subsequently asks to postpone the meeting, giving 3rd June as a possible alternative date, but he says he will confirm in due course. However, 3rd June was a bank holiday, so they did not meet on that date. Mr Adu-Gyamfi leaves a voice note for Ms Joseph on 7th June saying he's very busy because of GCSE exams but acknowledges it's important that they meet. They were again due to meet on 11th June, but Mr Adu-Gyamfi requested they move the meeting. Ms Joseph asks about his availability to re-arrange the meeting. He initially suggested 11am on 17th June, they discussed various times on the same day, and when Ms Joseph looked to confirm 11am, Mr Adu-Gyamfi remembered he wasn't available at that time after all. Ms Joseph therefore rearranged her plans so that she could meet him at 2pm on 17th June. Mr Adu-Gyamfi doesn't deal with the 17th June meeting in his witness statement. In her witness statement Ms Joseph says at that meeting he told her that he was waiting for his HR consultants to complete her written employment contract.
24. Around the same time, on 16th June 2022, Ms Joseph requests timesheets so she could record the work carried out to date. Although she doesn't expressly say so, the implication is, she will submit these to request payment, and that is in fact what she later did.
25. Ms Joseph continues to request a meeting with Mr Adu-Gyamfi. And in a voicemail message left on 4th July, Mr Adu-Gyamfi confirms he's working on her contract, but also says he is even busier now that exams have finished. Ms Joseph requests a copy of her contract ahead of them meeting, and she suggests they meet on 8th July, but Mr Adu-Gyamfi is unavailable. Later Mr Adu-Gyamfi says he's working on how Ms Joseph's additional duties of supporting parents with complaints can be incorporated into the written contract. He says he will contact her to arrange a meeting in the week beginning 11th July. On 11th July Ms Joseph asks what date he'll be available to meet.
26. On 12th July 2022 Ms Joseph messages Mr Adu-Gyamfi explaining she's had no income for 2 months; is worried about the time it's taking to finalise her contract and asks if she can start working full time within 2 weeks.
27. Mr Adu-Gyamfi's WhatsApp response reads (at pages 62 to 63):

"In regard to working full time there is more than enough work for that I've been ensuring that from September we will be swamped.

The summer will be busy preparing for this but we're in this weird state where we're in between.

I want to be 100% honest with you that i know long term we're good but it might be a bit tight this summer (mainly August) but I'll be going ahead regardless."

28. He continues:

“So what i will do is pay as you you [sic] go and make your start date 1st August/1st September either way you’ll be paid for all the time you do.”

29. Ms Joseph explains she cannot wait until 1st September, so chooses 1st August.
30. When asked during cross examination why she didn’t protest or leave if, as she claims, the respondent breached a binding agreement, Ms Joseph gave two reasons. Firstly, she said she wanted to discuss the matter in person with Mr Adu-Gyamfi. And their various WhatsApp exchanges confirm she was repeatedly pressing him to meet, with him being unavailable or postponing a number of planned meetings. Secondly, she said she felt she was under a duty to the students she was tutoring.
31. I also note that for the remainder of July and into August she continues to press for a meeting or discussion with Mr Adu-Gyamfi. Ms Joseph messages Mr Adu-Gyamfi on 19th July and 20th July 2022 to request a meeting. They meet on 20th July 2022 as Mr Adu-Gyamfi arranges for Ms Joseph to meet students at the Eden Park High School site. Ms Joseph says this was the first time she’d heard of Eden Park, and the first time she learnt Mr Adu-Gyamfi’s had a connection with the school. She said she raised her contract when they met. In late July Ms Joseph takes time off work to deal with a family bereavement, and after she resumes work, she messages him on 2nd August requesting they meet.
32. On 8th August Ms Joseph is still chasing for a copy of the draft written contract. Mr Adu-Gyamfi promises to send it that day, and he e-mails it to her at 10.49pm. Ms Joseph e-mails Mr Adu-Gyamfi on 9th August, noting the contract does not include her name, job title, start date, salary, hours of work, and other details usually contained in an employment contract. She expressly raises whether her work from June 2022 will be reflected in her probationary period but received no response to that question. She again asks to discuss her contract, although this time she suggests by telephone rather than a meeting.
33. The next lengthy WhatsApp exchange is on 14th August 2022 when they deal with tutoring sessions in the coming week, and Ms Joseph explains she has insufficient money to travel to the students’ homes. While Mr Adu-Gyamfi offers to reimburse these expenses if they are added to her timesheets, Ms Joseph explains she doesn’t have the money to pay pending reimbursement. So, he offers to send her the funds.
34. Later that evening, Ms Joseph sends her resignation message saying she had left her previous job when she accepted the offer to begin full time in June but notes she has not been able to work full time under that arrangement. She says she has effectively been left unemployed, has fallen into rent arrears, and is at risk of losing her home.
35. Around a fortnight later, Mr Adu-Gyamfi begins an e-mail exchange with Eden Park’s head teacher seeking clarification on the respondent providing tutoring services. These e-mails cover the period from 1st September to 5th October 2022 (see pages 115 to 117). They show in the end, the school did not enter into a contract with the respondent for tutoring services as Mr Adu-Gyamfi had hoped.

Findings

36. The first finding I need to make is what was agreed during the telephone

conversation on 27th April 2022. Did the parties agree Ms Joseph's salary, without a firm agreed start date, as the respondent states. Or did they agree both start date and salary as Ms Joseph claims.

37. At various times the parties exchanged e-mails, WhatsApp and text messages, but there is no written communication regarding what was discussed or agreed on 27th April. Therefore, to decide what was agreed I have considered the written and oral evidence, and the surrounding circumstances as evidenced by documents in the bundle.

38. Taking all of these into account, on this issue of what was agreed on 27th April, I prefer Ms Joseph's evidence. My reasons are as follows.

38.1 On the whole I found Ms Joseph's evidence to be clear and consistent as to what was discussed on 27th April 2022. I found Mr Adu-Gyamfi's evidence less clear, and he initially admitted he couldn't recall exactly some of that discussion.

38.2 The surrounding circumstances support Ms Joseph's account that 1st June 2022 was the agreed start date. Ms Joseph gave her former employer notice on 28th April 2022, so it expired shortly before 1st June. That timing is consistent with her being given 1st June as a firm start date during their conversation on 27th April as she claims. That she gave notice, and turned down an alternative job offer, is also consistent with her being given a firm start date. More broadly, these actions are also consistent with her receiving and accepting a firm unconditional offer of employment.

38.3 The documentation is also consistent with an unconditional offer being made to Ms Joseph. It's agreed that the original job advertisement did not state the position was being offered on a conditional basis. Nor were any conditions mentioned in the e-mail Mr Adu-Gyamfi sent on 22nd April 2022 confirming Ms Joseph had successfully completed the interview process.

38.4 In fact, I could not see he had informed her the position was conditional in any of their various written exchanges. He also didn't mention Eden Park High School in any of their written exchanges prior to July 2022. And when he did mention the school, it was when arranging a meeting at the school. He did not mention it in the context of Ms Joseph's position being subject to the respondent securing a tutoring contract with the school.

38.5 In his WhatsApp message sent on 12th July, Mr Adu-Gyamfi was trying to reassure Ms Joseph that there will be a lot of work in September. But there is no hint in that message of any doubts about the abundance of work in September, or that the amount of work was subject to any other factors. Mr Adu-Gyamfi's message displays an optimism that proved to be misplaced, because by autumn 2022, the school confirmed it would not enter into a contract for tutoring services.

38.6 Finally, there are various written exchanges where Ms Joseph is pressing for a written contract of employment. Mr Adu-Gyamfi explains the delay in producing it is due to him being busy, waiting for his HR consultants to deal with it, or him wanting clarity about what additional roles she could fulfil beyond tutoring. However, he doesn't state that the reason he cannot provide a full-time written contract is because the job is conditional on securing a tutoring contract with Eden Park.

39. Although I find Ms Joseph did not expressly protest about the failure to offer full

time working hours, I find she did not agree to a variation of her start date. My reasons are as follows.

- 39.1 During the period up to 1st June 2022, the absence of protest is explained by her receiving no express notification from the respondent proposing a variation of the start date agreed on 27th April 2022. Therefore, up to 1st June, she was entitled to proceed on the basis that she would begin working full time on that date.
- 39.2 As to the period after 1st June, I accept Ms Joseph's evidence that she felt she owed a duty to her students. She came across as someone who acted out of principles. An example of this was when she turned down a better paid job to work for the respondent, which she did because the respondent's objectives were more closely aligned with her values.
- 39.3 I find that after 1st June 2022 Ms Joseph did not expressly protest against the hours she was given. The matters referred to at paragraphs 29 to 34 above, explain Ms Joseph's response to Mr Adu-Gyamfi's proposed variation. Her actions were consistent with someone pressing for an opportunity to clarify her position by continuing to ask for a written contract. She also repeatedly sought an opportunity to meet and/or discuss the matter with Mr Adu-Gyamfi.
- 39.4 Around one month after Mr Adu-Gyamfi proposed a new start date, Ms Joseph resigned. Significantly, her resignation was only a few days after she was sent the draft written contract. The absence within that contract of any information relating to the agreed terms of her employment, including that the June start date was not reflected in it, is relevant. She expressly raised this in her e-mail sent on 9th August 2022, and she confirms she received no response. Therefore, I find her actions after 1st June 2022 were consistent with her seeking clarification of her position.
40. It is common ground that the draft written contract Mr Adu-Gyamfi e-mailed to Ms Joseph on 8th August 2022 is the only written document containing details regarding her full-time employment.

The Law

41. The essential elements to create a binding contract of employment include one party making a firm offer, which the other party accepts, and the terms of the contract must be sufficiently clear and certain.
42. However, an offer of employment may also be a conditional offer. If so, it must be clear the offer is subject to conditions. A prospective employer may rely on the condition or conditions not being satisfied to vitiate the contract, but only if it has made clear the offer was conditional.
43. The terms of a contract may be varied by an express and mutual agreement between the parties. Or if one party seeks to unilaterally vary the terms of the contract, if the other party's conduct shows they have acquiesced, the contract may also be varied.
44. To imply a variation of terms, the acquiescing party's conduct must only be referable to them accepting the new terms.
45. By section 13 of the Employment Rights Act 1996, where an employer fails to pay a worker the amount of wages properly payable, the shortfall amounts to an

unlawful deduction from wages.

46. Finally, by section 1 of the Employment Rights Act 1996 a worker is entitled to the main statement of the terms of employment including the date on which employment began, the hours of work and the rates of pay.

Conclusions

47. The relevant law is set out at paragraphs 41 to 46 above. I have applied that law to my findings of fact to reach the following conclusions.

Was There A Binding Contract of Employment

48. I conclude the terms agreed between the parties during the telephone conversation on 27th April 2022 were sufficiently clear and certain for them to enter into a binding contract of employment.
49. It was common ground that Ms Joseph's annual salary was agreed at £25,000. For the reasons stated at paragraphs 38.1 and 38.2, I found in Ms Joseph's favour that 1st June 2022 was a firm start date agreed between the parties, and it was not provisional. For the reasons given at paragraphs 38.3 to 38.6, I have also found Mr Adu-Gyamfi made an unconditional offer, which Ms Joseph accepted. Accordingly, the respondent is not entitled to subsequently vitiate the contract by relying on unfulfilled conditions which it failed to inform Ms Joseph about.
50. Although she applied for a position as a full-time tutor, the parties envisaged she would have additional responsibilities. I appreciate those additional responsibilities had not been finalised. But the parties had agreed her salary, the start date, full time working, and her role as a tutor, and that is sufficient to enter into a binding contract of employment.

Variation

51. If, as I have found, there was a binding agreement that Ms Joseph would begin full time employment on 1st June 2022, it was open to the parties to vary that agreement, for instance, by postponing the start date. Variation could be implied by the parties' conduct. However, for that to be the case, Ms Joseph's conduct could only be referable to her accepting a variation of the terms.
52. I conclude Ms Joseph's conduct was not only referable to her accepting a variation to her start date. I take into account that there is no express proposal to vary her start date, at most this is implied by Mr Adu-Gyamfi's 12th July 2022 message. This proposal postdates what I have found to be Ms Joseph's contractual start date. Ms Joseph's subsequent actions are consistent with someone looking to clarify what her position is, by requesting a written contract. She's also pressing for an opportunity to discuss matters with Mr Adu-Gyamfi. Her conduct cannot be taken to accepting be a retrospective variation of her start date when she's still trying to clarify and discuss her position.
53. There was a period of just over one month between Mr Adu-Gyamfi's proposal and Ms Joseph resigning. But she wanted to discuss matters, and was unable to do so sooner, largely because Mr Adu-Gyamfi was either too busy or working on the written contract, which was never finalised. Ms Joseph received a draft written contract, which contained no information relating to her agreed terms or start date, which she queried. She resigned a few days after it was sent to her, having received no response to her queries. Her actions throughout this period are not only referable to her accepting a variation of her start date, and I find there was

no variation of that term.

Employment Status

54. In light of the conclusions at paragraphs 48 to 53 above, it follows that I consider Ms Joseph was an employee from 1st June to 14th August 2022, pursuant to the oral contract agreed during the telephone conversation on 27th April 2022. In particular, at paragraphs 51 to 53 I give my reasons why I do not consider there was a variation to the contract entered into on 27th April.
55. Therefore, I find that Ms Joseph was an employee, and not a worker, from 1st June to 14th August 2022.

Unauthorised Deduction from Wages

56. Under the terms of the employment contract which I have concluded existed between the parties, I find the wages properly payable from 1st June to 14th August 2022 were £25,000 per annum, pro rata. That is the salary they agreed on 27th April 2022.
57. Ms Joseph was not paid the sum referred to at paragraph 55 above. I therefore find that the deficit between the above sum and the amount Ms Joseph was actually paid amounts to an unlawful deduction of wages.

Written Statement of Terms

58. As stated at paragraph 32 above, the written contract e-mailed to Ms Joseph on 8th August 2022 did not include information relating to her full-time employment such as her start date, pay, or her working hours. According to section 1 of the Employment Rights Act 1996, these are amongst the terms that must be provided to a worker in writing.
59. The respondent does not make any substantive positive assertions in response to this aspect of the claim. For instance, it does not assert a written statement of terms was provided, nor has a written statement of terms been produced. Its only response is that this claim cannot be pursued in isolation if Ms Joseph's other claims fail.
60. In light of my findings in favour of Ms Joseph, and in the absence of any substantive challenge to this aspect of the claim, I find the complaint that the respondent failed to provide a written statement of terms is well-founded.

Employment Judge Tueje

Dated: 11 July 2023