



EMPLOYMENT TRIBUNALS

Claimant:
Mrs B Oyerinde

v

Respondent:
Murphy Shipping and
Commercial Services Limited

Heard at: Reading

On: 6 June 2017

Before: Employment Judge George

Appearances

For the Claimant: Mr B Uduje (Counsel)

For the Respondent: No attendance or representation

JUDGMENT

1. Unauthorised deduction from wages:

The respondent is to pay to the claimant wages which fell due between 1 February 2016 and 31 October 2016 in the sum of £33,467.54. To that should be applied an uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 of 10% for an unreasonable failure to consider the claimant's grievance of 17 October and 23 November 2016, making a total sum due by the respondent to the claimant in respect of unauthorised deduction from wages of **£36,814.29**.

2. Breach of contract:

The respondent is to pay to the claimant the following sums in respect of breach of contract:-

- (a) **£6,494.92** in respect of unpaid notice pay. That is calculated as being 12 weeks at £940.41 being £11,284.92 less £4,790.00 received from the National Insurance Fund.
- (b) £11,605.82 for a breach of the employment contract by failure to pay pension contributions to the pension provider for the period 1 January 2014 to 23 January 2017 being the end of the notice period. To those sums should be applied an uplift of 10% under

section 207A of the Trade Union and Labour Relations (Consolidation) Act 1998 for the same unreasonable failure to consider the claimant's grievance making a sum due for those breaches of contract of **£25,179.82**.

- (c) The sum of **£190.80** for a breach of the contractual obligation to pay contracted annual leave accrued but untaken on termination of employment calculated at 1.17 days at £163.09 per day.

This makes a total award for breach of contract of **£25,370.62**.

3. Unfair dismissal:

The respondent is to pay to the claimant a sum of **£34,142.16** in compensation for unfair dismissal calculated as follows:-

3.1 Basic award

The basic award is calculated as 20 x £479.00 x 1.5, namely £14,370.00.

From that falls to be deducted £13,412.00 received from the National Insurance Fund, paid in respect of the redundancy payment, leaving a sum owing of £958.00.

3.2 Compensatory award

For the period 24 January 2017 (the end of the notice period) to the date before the date of hearing: 5 June 2017, 19 weeks will be awarded the following weekly amounts:-

Loss of salary and other benefits: £940.41

Loss of the employee's pension contributions of £11.17.

Loss of the employer's contributions of £69.80

Making a total weekly loss of £1,021.38.

That is awarded for 19 weeks making a compensatory award up to the date of today's hearing of £19,406.22.

To that should be added statutory rights which I award in the sum of £500.00.

Future loss is to be calculated from 6 June 2017 to 5 September 2017, being 13 weeks at the rate of £1,021.38, a total of £13,277.94.

- 3.3 That makes a total award for unfair dismissal compensation of **£34,142.16**.

3.4 The recoupment provisions apply to this award.
The prescribed element is £19,406.22
The prescribed period is 1 November 2016 to 5 June 2017.
The excess of the total award for unfair dismissal over the prescribed element is £14,735.94.

4. Holiday pay:

The respondent is to pay to the claimant payments in lieu of leave accrued but not taken at the date of dismissal pursuant to regulation 14 of the Working Time Regulations 1998 of **£4,566.24**.

5. Total award:

This makes a total award under all heads of **£100,893.31**.

6. Costs:

The respondent is to pay to the claimant costs in the sum of **£1,200.00** under rule 76(4) in respect of the Employment Tribunal fees.

REASONS

1. The claimant, who was born on 19 March 1959, started work for the respondent on 5 November 1990. In October 2016, she was given 13 days' notice of the closure of the company for which she had worked for so many years and she left their employment with an effective date of termination of 31 October 2016.
2. She brought these proceedings by an ET1 that was presented on 17 January 2017 following compliance with the early conciliation procedures. No response has been entered by the respondent. Judgment was therefore entered under rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That was sent to the parties on 24 April 2017. The automatically listed liability hearing was then converted to a Remedies Hearing.
3. I heard evidence from the claimant who confirmed the figures in her amended schedule of loss with some amendment and clarification as set out in these reasons. I received some documents from her, namely three pay slips, a copy of her most recent P60, and an email exchange that she had with her former employer on 17 October 2016 and 23 November 2016. I have also taken into account documents which were already on the employment tribunal file, namely her contract of employment and a letter from the respondent to the claimant dated 24 March 2014 which confirmed her basic annual salary. That, at the time of her dismissal, was £62,500.00 per annum gross but in addition to the basic salary, the

claimant received of a number of contractual benefits. These were paid through payroll. She was entitled to and was paid a car allowance. She also had a pension which had been taken out with Virgin Money. She paid contributions to that pension by means of deductions from her salary of 0.8%. Her employer undertook to contribute of 5% of basic salary and the entitlement to and amount of those contributions (but not the fact of them) is evidenced by the payslips. There was also a contractual entitlement to contributions to her private health insurance which she was reimbursed for through her pay slips.

4. It seems to me that had she received proper notice under the contract she would have been entitled to the benefit of these contractual payments during that notice. Therefore, when calculating the damages for breach of contract in failing to pay her notice pay that loss should be calculated to include the value of the car allowance, pension contributions and health insurance contribution. Likewise, when calculating the unfair dismissal financial compensation, the compensatory award should incorporate an award for the loss of salary and all of those three benefits.
5. In order to calculate what those are, I have taken an average of the three pay slips that I have been given. They show the net pay (inclusive of the financial value of the car allowance and the health insurance) but also after the deduction of the employee's pension contribution as follows:
 - 5.1. The February 2016 pay slip shows a net payment for the month of £4,071.07;
 - 5.2. The March 2016 pay slip shows £4,071.08;
 - 5.3. The April 2016 pay slip shows a net payment of £4,083.16.

The average of those is £4,075.10 net per calendar month or £940.41 net per week. That seems to me to be the right figure to compensate the claimant for basic salary, car allowance, and contributions to health insurance. However that does not compensate her for the employer's pension contributions and it is a figure from which her own pension contributions have been deducted. The amount of that deduction for employee's pension contribution was £48.40 per calendar month or £11.17 per week.

6. The respondent had clearly been in financial trouble for some time. They had made deductions from the claimant's basic pay for the amount that she was contributing to her pension and included on the pay slips the amount that they should have been paying to her pension but in fact paying neither their own contributions nor her contributions over to the pension provider. It had failed to pay the claimant any wages that were due and owing for the whole of the period from 1 February 2016 onwards. On 17 October 2016, the respondent told the claimant that the business was to close at the end of the month with the loss of all jobs. The claimant

wrote that same day to ask when they would be paying the employees' salaries, the pension contributions and redundancy payments.

7. There was no response to that complaint of 17 October and she repeated her complaint on 23 November. Looking at those two, it seems that the emails can fairly be regarded as a formal grievance to which the ACAS Code of Practice applies. The respondent merely asked the claimant to wait in response to her second email and there was no substantive response to her grievance and this I regard as being a breach of their obligation to hold a meeting to discuss the grievance. The Code of Practice does not apply to redundancy dismissals. I have concluded that the respondent was in breach of contract in respect of their failure to pay to the pension provider from 1 January 2014 the sums that they ought to have been handing over and that they had deducted from the claimant for that end. The respondent's response to the claimant's email of 23 November is evidence that her complaint about unpaid wages was justified and I accept her evidence that she was not paid from 1 February 2016 onwards.
8. The claimant brings a claim under section 13 Employment Rights Act 1996 for unauthorised deduction from wages in respect of the salary that was not paid to her from 1 February 2016 onwards. For the first three months we have the actual figures and they total £12,225.31. I do not have the pay slips from May onwards but the average of the previous months suggests that it would have been in the region of £4,075.10 per calendar month. I therefore award 6 x that sum for May to October 2016. That is £24,450.60 for the 6 month period. Added to the £12,225.31 deducted between 1 February and 30 April 2016 makes a total for the period 1 February 2016 to 31 October 2016 of £36,675.91 net of tax. To that must be given credit for the sum of £3,208.37 which has been paid by the National Insurance Fund in respect of unpaid wages. Therefore the sum still owing to the claimant is £33,467.54. It is just and equitable to increase that for the unreasonable failure to comply with the Code of Practice by not dealing with the claimant's grievance by increasing it by 10%; that makes the amount awarded for unauthorised deduction from wages £36,814.29.
9. There are two different head of loss for breach of contract which I find proved against the respondent (in addition to the failure to pay contractual holiday pay accrued but not taken on termination for which see paragraph 11 below).
 - 9.1. The first is a failure to pay notice pay for 12 weeks which I award in the sum of £940.41 per week making a total of £11,284.92. Credit must be then be given for the sum paid by the National Insurance Fund (£4,790.00) meaning that the sum still owing in relation to notice pay is £6,494.92.

- 9.2. The second head of the breach of contract claim is a failure to pay to Virgin Money Personal Finance Services Ltd, in breach of contract of employment, sums that were due under it by way of the employer's pension contributions and the employee's pension contributions that had been validly deducted from the claimant's salary. The loss to the claimant is the diminution in the value of her pension pot. I accept the sums claimed in the schedule of loss for the years 2014, 2015 and 2016 which total £11,362.94. To that must be added contributions that should have been made for the balance of the notice period up to 23 January 2017. The employer's pension contributions were £69.80 per week; the employee's contributions were £11.17 per week meaning that the total loss is £80.97 per week, three weeks of that is £242.91 and therefore the loss of the claimant for the breach of contract and failing to pay pension contributions to the pension provider from 1 January 2014 to 23 January 2017 is £11,605.82.
10. The claimant was unfairly dismissed. The reason for dismissal was redundancy and she is not entitled to both a basic award and a redundancy payment. She has received something from the National Insurance Fund and credit for that contribution towards the statutory redundancy payment should be given. I start the compensatory award for unfair dismissal from 24 January 2017 in order to avoid double recovery with the notice period. I accept that the claimant had made reasonable attempts to find work and she has been hampered by being perceived as being over-qualified and the fact that she was employed by a single employer for such a long time. It is very difficult to make an estimate as to the length of future loss in circumstances such as this. She has been advised that the average period of unemployment in her area is eight months: she has already reached that point. I therefore think it is likely that she will obtain work at an equivalent rate of pay in about three months' time. I therefore award the financial loss to date and three months' future loss. No uplift is applicable to this part of the award since there is no applicable code of conduct.
11. In relation to annual leave, under the claimant's contract of employment (at clauses 12.2 and 12.3), she is entitled to the statutory bank holidays and also 25 days' annual leave which is in excess of the minimum set out in the Working Time Regulations 1998. Under clause 12.5.1, on termination she is entitled to be paid for annual leave that has accrued but not yet been taken at the date of the effective date of termination. That mirrors the like provision that appears in regulation 14 of the Working Time Regulations. Under her contract of employment, she is entitled to be paid for that accrued annual leave at the rate of 1/261 of her annual basic salary. Her annual basic salary was £62,500.00 gross per annum. The pay slips and the P60 show the value of her package which is of course slightly more than that. In order to calculate the net amount of her annual basic salary, I have calculated the marginal rate of tax that she pays as

shown by the P60. According to that document she paid tax and national insurance in the financial year to 5 April 2016 of £23,158.26 and had a gross income of £72,591.50. That is a marginal tax rate of 31.9%. Applying that figure to the basic salary, her net annual basic salary without any benefits was £42,562.50 and therefore the amount that she falls under her contract of employment to be compensated for her annual leave by is £163.08 per day. I award the same daily rate under regulation 14 of the Working Time Regulations. She is entitled therefore under that regulation to 28 days at £163.08 being £4,566.24 and for breach of contract the remaining 1.17 days accrued and not taken at the date of termination of employment which at the same daily rate is £190.80. This head of claim was not included in the grievance and therefore is not subject to an uplift.

Employment Judge George

Date: 20 June 2017.....

Judgment and Reasons

Sent to the parties on: 25 July 2017

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For the Tribunal Office