



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Parry

Respondent: L&D Brothers Ltd

Heard at: Abergele Town Hall **On:** 6 and 7 November 2017

Before: Employment Judge S Davies (sitting alone)

Representation

Claimant: Dr Ahmed, counsel

Respondent: Mr Smith, consultant

JUDGMENT

It is the decision of the Employment Judge sitting alone that:

1. The constructive unfair dismissal claim is upheld;
2. The wrongful dismissal claim is upheld;
3. The claimant is due payment for 4.03 days holiday on termination of employment for the holiday year 2017;
4. The claim for unauthorised deductions in respect of (i) sick pay is dismissed; (ii) keys and iPad is upheld.

The claim for compensation is upheld in the following sums:

5. Basic award: £4,984.56 (sum agreed by the parties);
6. Wrongful dismissal: £2,764.24 (sum agreed by the parties);
7. Keys: £19.20 (sum agreed by the parties);
8. Holiday: £15.55 (sum agreed by the parties);
9. iPad: £100;
10. Loss of statutory rights: £500;
11. Loss of earnings to the date of hearing (less mitigation): £5,036.85;
12. Future loss of earnings (less anticipated future earnings): £3,219.30;
13. Uplift of 10% for failure to follow ACAS Code on Disciplinary & Grievance: £1663.97

Recoupment

For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996 the following information is provided:

- (a) Grand total £18,303.67
- (b) Prescribed element £ 5,540.53
- (c) Period of prescribed element from 10 March 2017 to 7 November 2017
- (d) Excess of grand total over prescribed element £12,763.14

WRITTEN REASONS

Background

1. My written Judgment was sent to the parties on 16 November 2017. Written reasons were requested by the Respondent on 27 November 2017 by email but the request was not referred to me until 31 January 2018. By the time the referral was made, I no longer had notes of my oral reasoned judgment. The parties were informed and their views sought on whether they still sought written reasons, in light of the fact that they would not be precisely mirror the reasons given at hearing. The Respondent confirmed it wished me to reconstruct reasons from the available material.
2. The parties were invited to send in written notes they had retained. The Respondent provided their notes of the judgment; the Claimant did not.
3. These written reasons were constructed on the first available chambers day, 9 March 2018. They are based on the witness statements, agreed bundle, written submissions of the Claimant, Respondent's notes of judgment and my own notes of evidence. They reflect, as best I can, the reasons provided at hearing, based on the material available and my recollection.

Hearing

4. I heard evidence from the Claimant. On behalf the Respondent I heard from Mr David Griffiths, managing director and his wife Ms Diann Griffiths and Mr Vittorio Sardella, service manager.
5. In their statements, Mr and Mrs Griffiths made allegations regarding matters discovered after termination of employment (paragraph 45 and 46 of Mr Griffiths' witness statements and paragraphs 32 – 36 of Mrs Griffiths' witness statement). These issues were not pleaded by the Respondent and when I raised this, no application to amend the response was made. Accordingly, I did not take them into account.
6. The case was heard over 2 days; oral judgement with reasons was given on day 2. Once my judgment on liability was given, I permitted the parties an adjournment to attempt to agree compensation. The parties were only able to reach limited agreement in the following areas; calculation of the basic award, calculation of the award for wrongful dismissal, the amount

due in respect of unauthorised deductions for replacement keys and the amount due in respect of unpaid holiday pay.

7. I proceeded to hear evidence and submissions with regard to the remaining issues of remedy. Following the adjournment to make my decision on remedy, I presented the parties with my calculations for compensation and permitted them time to consider them and make any representations. The parties agreed the calculations of compensation.

Law

8. The relevant law with regard to constructive unfair dismissal, wrongful dismissal and unlawful deduction from wages is well known and I do not repeat it here. The Respondent did not take issue with law as set out in the Claimant's skeleton argument dated 5 November 2017.

Factual findings

9. The Claimant worked for nine years for the Respondent garage as an account manager, dealing with finance related matters including accounts, wages and banking. Her employment started in April 2008 and terminated with her resignation with immediate effect on 10 March 2017 (letter at page 118 – 119).
10. The Claimant was employed under a written contract of employment and subject to a contractual handbook.
11. The Claimant's office was situated upstairs in the Respondent's premises, where the physical accounts records were retained. The Respondent had a safe in the office upstairs and also downstairs in its premises, with copy keys located in the safe downstairs.
12. As part of her role, the Claimant had possession and control of the Respondent's bank card and reader for making payments. Sometimes the Claimant worked from home, which was permitted, for example when caring for her father.
13. Matters came to a head at the work Christmas party on Friday 9 December 2016, at which the Claimant was assaulted by Mrs Griffiths; my finding in this regard is based on the Magistrates Court conviction of assault by beating on 8 May 2017. The standard of proof in the criminal courts is higher than that applicable in the Employment Tribunal and I must take that into account when reaching my conclusion as to whether the assault took place.
14. It is not disputed that the police were called to the Christmas party in light of events following the assault. The Claimant gave a statement to the police on 11 December 2017, indicating that she could not return to work.
15. The Claimant's complaints in the Tribunal are based on events which follow the assault and how the Respondent handled matters thereafter.
16. The Claimant did not attend for work on Monday, 12 December 2016; she presented fit notes and was absent continuously until her resignation.
17. The Claimant contacted the Respondent's receptionist to inform her of her absence and asserts that she was told that Mrs Griffiths was upstairs in

her office on her computer. I found as a fact that on 12 December 2016 Mr Griffiths instructed his IT support company to prevent the Claimant from accessing work computer systems by changing her passwords, on the basis that she no longer worked for the Respondent (page 66 – 67).

18. On 13 December 2016 Mr and Mrs Griffiths visited the Respondent's bank manager, who reported that the Claimant had viewed the Respondent's bank account. It is asserted, although no direct evidence was given, that the bank manager advised removal of the Claimant as a Companies House registered company secretary. Mr Griffiths instructed the Claimant should be removed from Companies House register on 13 December 2016.
19. Mr Sardella spoke with the Claimant on the telephone and produced undated handwritten notes of discussions at the hearing. The notes are not extensive but show that Mr Sardella asked the Claimant whether she was bringing a grievance against Mr Griffiths. An informal meeting was convened on 17 December 2016, at which Mr Griffiths asserted that the Claimant had not been dismissed but asked that she return company property, which he asserted was for continuity of business purposes. The Claimant was supported by her brother at the meeting.
20. Ultimately Mr Griffiths instructed Peninsula's HR team to investigate the Claimant's complaints. I concluded that the Respondent's interpretation of the grievance, as set out in correspondence, failed to capture the totality of the Claimant's concerns. The Claimant did not attend a grievance meeting but instead sent written submissions. The investigation carried out did not include obtaining signed witness statements. A third-party witness to the assault, Carl Haycocks, did not provide a signed witness statement, instead the words it is said are attributed to him appear in an email which the HR consultant, Ms Walberg, sent to herself. The Respondent asserts that Ms Walberg spoke with Mr Haycocks by phone. Importantly Mr Haycocks' statement was not put to the Claimant for her comment, prior to Ms Walberg making her findings and rejecting the grievance.
21. Mr Griffiths elected to adopt the grievance report as his findings and sent them to the Claimant on 1 March 2017. The Claimant did not exercise her right of appeal and instead resigned on 10 March 2017, setting out the reasons for her resignation in a two-page letter (page 118 – 119).
22. I was referred to the fact that the Respondent asserted it wish to commence disciplinary proceedings against the Claimant whilst she was absent and I was shown a draft letter that was not sent, dated 13 December 2016, which date, the Respondent asserts, is a typographical error. I accept the Respondent's evidence in this regard and find that the document should have been dated 13 January 2017.

Conclusion

23. I find that the test for constructive unfair dismissal is satisfied; there was a cumulative breach of the implied term of trust and confidence, the Claimant resigned in response to that breach and has not affirmed the contract.

24. The Claimant identifies the 'last straw' in her resignation letter: "still denying that your wife assaulted me and the way that the grievance has been handled".
25. In reaching my conclusion I note the fact of the assault by Mrs Griffiths; although the Claimant does not rely on the assault itself, rather Mr Griffiths' conduct thereafter, which included comments to the effect that the Claimant "deserved it".
26. The fact that Mr Griffiths instructed the IT company to remove the Claimant's access to the company's systems on 12 December 2016 indicates a desire to remove the Claimant.
27. With regard to any measures to protect her on her return to work, the Respondent did not acknowledge the assault had taken place and so did not provide any assurance.
28. I found that Mr Griffiths had access to online banking and did not accept the Respondent's assertion that it requested the return of company property for business continuity purposes as being genuine.
29. I rely upon the fact that Mr Griffiths instructed the removal of the Claimant from Companies House register on 13 December 2017 and that there was no reasonable and proper cause for doing so; no satisfactory explanation was provided for her removal.
30. The Claimant submitted an ulterior motive in that Mrs Griffiths wanted her job and I note that she has been employed by the Respondent since May 2017; it appears that Mrs Griffiths was present on the Respondent's premises quite a lot. I did not find it necessary however to express my opinion regarding Mrs Griffiths' intentions in order to make my findings.
31. I note that the Tesco vouchers purchased for all staff as a 'thank you' were not given to the Claimant, and are still in the Respondent's safe, and conclude only that this is indicative of the poor relations between the parties.
32. I did not accept the Respondent's assertions with regard to the Claimant allegedly deleting files within dropbox, this assertion was unsupported by documentary evidence or oral evidence from an IT specialist.
33. I do not criticise the fact of the HR investigation into the grievance but the process of investigation was flawed in that signed statements were not obtained and, in particular, Mr Haycocks' statement was not put to the Claimant for her comment. I conclude that the grievance outcome added something to the events that preceded it and that was sufficient as a last straw.
34. The Respondent submitted that trust and confidence would have been gone by 11 December 2016 in light comments made in the Claimant's police witness statement; I consider the comments made were an expression of the Claimant's feelings at that point in time, made shortly after an assault by an individual who at that time did not work for the

Respondent. The Claimant was willing to give Mr Griffiths, whom she had known for a long time, the opportunity to put things right.

35. I did not accept that there was reasonable and proper cause for the Respondent's conduct. I'm satisfied that the breaches of contract identified above were the effective cause for the Claimant's resignation and that there was no affirmation; it was reasonable to allow the grievance process to conclude once commenced by the Respondent.
36. The complaint of constructive unfair dismissal is upheld. It follows that the complaint of wrongful dismissal is also upheld.

Sick pay

37. The handbook refers to the payment of statutory sick pay only. The Claimant asserted entitlement to payment of contractual sick pay by custom and practice but did not present any cogent evidence to support this assertion.
38. I conclude that the correct amount of sick pay has been paid to the Claimant and this claim is dismissed.

Unauthorised deductions

iPad

39. There is a dispute over whether Mr Griffiths gave the Claimant an iPad as a gift. The Claimant used the iPad to access work emails from home and also retained personal photographs on it. The iPad was bought from Tesco and the Claimant presented the receipt for it in the bundle. Mr Griffiths does not recall what he said when giving it to the Claimant. In an email of 16 January 2017, page 84, the Claimant asserts "I do not have a company IT tablet, only an iPad which you gave to me without any reference of it belonging to the company."
40. I found on the balance of probabilities that it was given as a personal gift to the Claimant. On the basis of the Claimant's evidence about purchase price of second hand iPads, I concluded that it was worth £100.

Keys

41. The Respondent asked the Claimant for the return of office keys. The Claimant did not return them but instead invited the Respondent to collect them from her home address. This did not happen. Deduction was made from her salary for copying six keys when, in fact, she retained only two.
42. An unauthorised deduction was made in respect of the cost of copying keys that the Claimant had not retained.

Mitigation

43. The Respondent did not discharge the burden on them to demonstrate the Claimant had failed to mitigate her losses and I awarded future loss for the period claimed (less deductions for paid work).

Uplift failure to follow ACAS Code (grievance)

44. I concluded that there was an unreasonable failure to carry out necessary investigation to establish facts relevant to the grievance, in particular not

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putting Mr Haycocks' statement to the Claimant, was a failure warranting a 10% uplift on compensation.

Employment Judge S Davies

Date 12 March 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE