



EMPLOYMENT TRIBUNALS

Claimant: Miss Y Laidlow-Weir

Respondent: Finesse Bridal Ltd

Heard at: Carlisle

On: 4 April 2018

Before: Regional Employment Judge Parkin

REPRESENTATION:

Claimant: Mr D Weir, Lay representative (father)

Respondent: Mr D Lister, Owner with Ms S Mackay, Manager

JUDGMENT having been sent to the parties on 9 April 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim which was accepted on 15 August 2017, the claimant claimed that the respondent had made unlawful deductions from her final wages, outstanding holiday pay or compensation for accrued leave and notice pay in respect of the termination of her employment as a sales assistant by the respondent on 26 June 2017. Although the claimant originally ticked "Age Discrimination" in the claim form, no such claim was identified in Employment Judge Nicol's Case Management Order setting out the claims and the issues following the subsequent case management hearing.
2. The respondent presented a response on 22 November 2017, acknowledging outstanding wages but disputing any outstanding holiday pay entitlement and contending that the claimant had been summarily dismissed for gross misconduct because of unauthorised absences, unauthorised use of the company telephone, dereliction of duty, abuse of break rules and use of abusive language to a customer.
3. On 8 January 2018, there was a case management hearing which the claimant attended but the respondent did not attend where clear Case Management Orders were laid down following the identification of the issues. Regrettably, the parties did not completely cooperate in complying with those orders, but the Tribunal

was able to proceed at hearing on the basis of an agreed bundle and, once provided to the other party, witness statements from the claimant and from the respondent's owner, Mr Lister, and manager, Ms Mackay, who all gave oral evidence.

4. This was at times a heated hearing with very personal evidence given by the parties because of the setting for the claimant's employment within the small town of Penrith. The parties repeatedly needed to be reminded they were in a Tribunal hearing, the purpose of which was to the hearing to consider and determine the claims and no more. At the start of the hearing the respondent conceded, as indeed it had always done, that it had not paid the claimant £175 for her final week's pay, an agreed figure, withheld waiting for the claimant to collect it or her to provide some confidentiality confirmation.

5. The parties, especially the claimant herself and Ms Mackay, were unable to hide the strength of their feelings, which meant that their whole evidence could not be accepted because it was tainted by emotion or hindsight, for instance when the claimant dealt with paid annual leave. Initially in oral evidence, she was adamant that she had only received payment for one day's Bank Holiday leave, but even during her evidence she confirmed that she had received payment for another day; in those circumstances, she may be mistaken as to taking and being paid for other days of holiday which she had given dates to the respondent at the commencement of her employment and which she hoped to be able to take. Whilst the respondent was adamant that it had documentary records which supported its case that it had actually "overtake" her paid leave entitlement, it had failed to disclose these or bring them to the hearing.

The facts

6. From the oral and documentary evidence, the Tribunal made the following key findings of fact. The claimant commenced employment with the respondent which ran a small family bridal shop in Penrith on a probationary period of three months on 17 March 2017, starting working 7 hours a day on 4 days a week at the rate of £7 an hour but later agreeing to work an extra day for 4 hours every other week. In short, she was in sole charge of the shop on two of the days she worked, including opening and locking up notwithstanding her age, since she did not reach 18 years of age until 6weeks into her employment.

7. The respondent did not find her satisfactory in many ways. She brought smelly lunchtime food into the shop and, like other colleagues, smoked outside the front door allowing smoke to enter. The respondent suspected she was using the business telephone for her own purposes and was sometimes absent from her duties. However, it never issued any formal warning to the claimant, still less put anything in writing to her, and it failed to provide a statement of particulars to her setting out the main terms and conditions of her contract of employment once two months had passed.

8. Perhaps through a mistaken sense that the shop staff could work well together, Ms Mackay, who managed the shop from the respondent's separate jewellery shop along the road, considered even as the probationary period came to an end: "I really hoped I could try and pull it around and we could work together as a

team". She therefore never told the claimant her employment would not be continued after the probationary period. I

9. In the event, the employment did continue on after the three months' probationary period, perhaps because Ms Mackay was herself experiencing health problems at that time. However, the last straw came when the claimant texted some time after midnight on a Friday night that she was unwell and would not attend work the following day, Saturday 24 June. As a result, the respondent through Ms Mackay dismissed her peremptorily on Monday 26 June 2017, only then putting in writing on 27 June 2017 a very generalised basis of dismissal without notice for gross misconduct, purporting to rely upon numerous unauthorised absences (theft of company time), unauthorised use of company business telephone, dereliction of duty (numerous and continued use of mobile telephone during working hours), abuse of break times, use of abusive language to a customer. However, that none of or certainly most of these general allegations had ever been put to the claimant in detail or dealt with so she understood the respondent's full dissatisfaction with her.

10. The claimant's average weekly gross pay, based on £196 gross for the 28 hour week and £224 gross for the 32 hour week, is £210, approximately £185 net.

The Law

11. The applicable law is to be found in various sources. In respect of the holiday pay claim under the Working Time Regulations of 1998, regulations 13 and 14, together with the unlawful deductions provisions at Part II of the Employment Rights Act 1996, and in respect of the notice pay claim under section 3(2) of the Employment Tribunals Act 1996, and articles 3 and 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, read together with section 86(1) of the Employment Rights Act 1996. The notice pay claim is of a wrongful dismissal/breach of contract claim for a week's statutory minimum notice pay, but there is a defence under section 86(6) if the respondent is able to establish that it had a reason, such as the commission of gross misconduct by the employee for summary termination.

12. Under section 38 of the Employment Act 2002, there is an additional award of two or four weeks' pay if an employee with two months' service or more is not provided with a statement of particulars of main terms of employment (or contract of employment) by the employer.

Conclusion

13. Once the deduction of wages was conceded by the respondent, it was for the claimant to prove there was a further non-payment of holiday pay or that she was entitled to compensation for holiday pay or accrued paid annual leave. In essence, she claimed an extra five or six days' pay under the statutory provisions, maintaining that she did not have and did not receive pay for any other days of leave. Notwithstanding the respondent's initial letter apparently conceding holiday pay accrued, the claimant did not satisfy the Tribunal on the balance of probabilities that she had not received pay for the days of holiday which she had initially requested at the start of her employment. That claim is accordingly dismissed.

14. However, in respect of the notice pay claim, once the claimant established the right to statutory minimum notice of one week, it was effectively for the respondent to prove that it had lawfully terminated her employment summarily by reason of gross misconduct or other repudiatory breach by her entitling it to dismiss summarily. The respondent in no way did so. Not only did the respondent fail to provide documentary evidence supporting any of the vague acts of misconduct alleged against the claimant in the dismissal letter, the Tribunal concluded that those would need to have been established (whether a single gross act of misconduct or cumulatively) to amount to a fundamental or repudiatory breach of contract by a junior employee during a probationary period such that the employment was not extended thereafter, but with no notice of termination given. No formal warning that the employment would not be continued was ever provided and no detail of these defaults by the claimant was ever provided to her, notwithstanding the respondent's decision that she was not proving to be a satisfactory employee. In those circumstances, the proper way to terminate her employment was giving the statutory minimum notice for the claimant to work or making payment of a week's pay in lieu. Accordingly, the Tribunal orders the respondent to pay damages in the net sum of £185.00 to the claimant.

15. The claimant did not establish any additional entitlement to compensation under section 24(2) of the Employment Rights Act 1996 for late payment or non-payment of wages by the respondent. The only interest charges established related to earlier payments by the respondent which may have been somewhat late, and there was no documentary evidence supporting an additional charge of £80 from the DVLA as a result of vehicle excise licence not being paid in time. However, the Tribunal awarded an additional two weeks' pay, the minimum award under section 38 Employment Act 2002 in circumstances where the respondent, albeit a very small business, wholly failed to provide the statement of particulars which is required under statute when an employee reaches two months' continuous service.

Regional Employment Judge Parkin

Date: 20 April 2018

REASONS SENT TO THE PARTIES ON

21 April 2018

FOR THE TRIBUNAL OFFICE