



EMPLOYMENT TRIBUNALS

Claimant: Miss S McCoy

Respondent: SBS Total Facilities Management Limited
(in Creditors' Voluntary Liquidation)

Heard at: Liverpool

On: 14 November 2018

Before: Employment Judge Batten
(sitting alone)

REPRESENTATION:

Claimant: Mr J Tinston, Solicitor

Respondent: Did not attend

JUDGMENT

The decision of the Tribunal is:

1. the claim of unauthorised deductions from wages succeeds. The respondent is ordered to pay to the claimant the sum of £2,048.08 gross, subject to deductions for tax and national insurance for outstanding unpaid wages at the termination of the claimant's employment; and
2. the claim of breach of contract for notice pay succeeds. The respondent is ordered to pay to the claimant 11 weeks' outstanding notice pay being the sum of £15,019.29 gross, subject to tax and national insurance.

REASONS

1. This is a claim by Miss Samantha McCoy against her former employer, SBS Total Facilities Management Limited, for unpaid wages and notice pay outstanding at the termination of her employment with effect from 24 February 2018.
2. The respondent went into Creditors' Voluntary Liquidation on 1 June 2018. Through its insolvency practitioners, the respondent had indicated to the

Tribunal that it did not intend to appear at the hearing which proceeded with the claimant being represented by her solicitor.

3. The Tribunal was provided with a bundle of documents prepared by the claimant's solicitors. This included documents from the respondent which had been filed with its response form ET3. The claimant tendered a witness statement and schedule of loss. The claimant gave evidence on oath and was subject to questioning by the Tribunal in relation to her claims. Her solicitor also provided written submissions.
4. The claims pursued by the claimant were for unauthorised deductions from wages and in respect of unpaid notice pay. The issues to be determined by the tribunal were:-:
 - (1) What, if any, wages were outstanding and owing at the termination of the claimant's employment?
 - (2) What, if any, notice pay was due at termination? How much, if any, notice pay had been paid and what, if any, balance was outstanding?

Findings of Fact

5. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Where a conflict of evidence arose, the tribunal resolved the same on the balance of probabilities. The findings of fact relevant to the issues which have been determined are as follows: -
6. The claimant worked for the respondent as a Business Development Director from 1 March 2017. The claimant had a contract of employment requiring three months' notice from either party.
7. In August 2017, the claimant was paid approximately 44% of her monthly wages, and she was not paid for a number of days. There followed an email exchange between the claimant and the respondent's Managing Director in which it was agreed that the claimant would take some of the unpaid working days going forward as time off in order to pursue her PhD studies. The agreement was reached in order that the respondent would not have to pay the claimant all the wages due to her.
8. However, as time went on, the claimant was unable to take all the time off as envisaged. In early 2018, the claimant subsequently emailed the respondent to point out that there was still 7.5 days' owing. The respondent did not take issue with this contention.
9. In January 2018, the respondent was experiencing financial difficulties. At the beginning of February 2018, the respondent told the claimant that her salary would be unilaterally reduced from £65,000 to £40,000 with immediate effect. The claimant was, unsurprisingly, very unhappy about this and protested. Within two days, the claimant was sent home from work by the respondent. It's managing director made a vague allegation about an issue with the claimant's 'non-work activity' but without providing any details of the nature of the allegation, nor time(s), date(s) or what constituted 'non-work activity'.

10. Having reflected on matters, the claimant tendered her resignation on 7 February 2018. Her resignation letter appears in the bundle at page 83, that resignation being subject to the contractual requirement to give three months' notice.
11. The following day, 8 February 2018, the claimant was called to a meeting and suspended by the respondent. Within a few days, the respondent asked the claimant to reconsider her resignation, which she did, but decided not to change her position and told the respondent so.
12. On 15 February 2018, the claimant received a letter from the respondent accepting her resignation.
13. The following day, 16 February 2018, the Human Resources Department of the respondent wrote to the claimant suspending her again, this time on an allegation of gross misconduct. The letter was accompanied by copies of records of internet usage. A disciplinary hearing was proposed for 20 February 2018.
14. In the interim, on 17 February 2018, the respondent's HR Department wrote to the claimant to confirm that her employment would continue until 7 May 2018, and reminded the claimant that she was under contract until then.
15. On 19 February 2018, the claimant told to the respondent that she was too ill to attend the disciplinary hearing the next day. The claimant heard nothing further until, on 24 February 2018, she received a letter from the respondent, dated 23 February 2018, saying that it had dismissed her on 20 February 2018 for gross misconduct with immediate effect.
16. On 1 March 2018, the claimant appealed against her dismissal but heard nothing further from the respondent.

The Law

17. A concise statement of the applicable law is as follows.

Unauthorised deductions from wages

18. A worker is entitled to be paid for work done under his or her contract of employment. The Employment Rights Act 1996, Part II, provides that a failure to pay wages owing constitutes an unauthorised deduction from wages.
19. Wages are defined in section 27 of the Employment Rights Act 1996. Section 27(1) (a) provides that:
20. "wages includes any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise".
21. The Employment Rights Act 1996, section 13, governs circumstances in which an employer can make deductions from an employee's wages. Section 13 provides that an employer:

22. “shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker’s contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.”

Wrongful dismissal (notice pay)

23. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his contract of employment. The minimum period of notice which an employer is required to give to an employee, where the employee has been continuously employed for one month or more, is one week’s notice for each completed year of service up to a maximum of 12 weeks’ notice. Notice requirements under a contract of employment may be greater.
24. However, an employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.

Conclusions

25. The tribunal applied its relevant findings of fact and the applicable law to determine the issues in the following way.
26. It is clear from the documents including emails between the parties that there was an amount of money outstanding and owing to the claimant arising from an underpayment of wages in August 2017. The agreement that the claimant take time off to cover the shortfall in pay was not then met in full due to circumstances by which the claimant was unable to take all of the agreed time off.
27. The claimant notified the respondent that she believed she was owed 7.5 days’ pay and, whilst the respondent did not challenge this figure, it made no effort to pay what was due at any time up to and including termination of the claimant’s employment. The claimant’s solicitor, at the hearing, suggested that the actual figure might be 8 days’ pay. However, the figure which was confirmed in emails during the claimant’s employment, and which was claimed in the ET1, is 7.5 days. The Tribunal therefore accepts this as the correct figure.
28. Accordingly the claimant is owed pay for 7.5 days, or 1.5 weeks’ pay. In August 2017, when the deduction was originally made the claimant’s gross wage was £1,365.39 per week. The amount owing for 1.5 weeks is therefore £2,048.08 gross, which will be subject to tax and national insurance.
29. In relation to notice entitlement, the Tribunal found that claimant resigned on 3 months’ contractual notice. The the respondent agreed that her notice took the claimant to 7 May 2018 and the claimant was entitled to be paid for that period of notice.
30. The respondent then purported to dismiss the claimant for gross misconduct. The Tribunal considered the allegations made. The respondent’s disciplinary

procedures appear in the bundle. There is a list of examples of gross misconduct on page 65, none of which accord with the allegations of which the claimant was accused, and accordingly the Tribunal did not find those allegations amount to gross misconduct.

31. Instead, on the previous page in the bundle, page 64, within the respondent's disciplinary procedures document, there is a list of 'unsatisfactory conduct and misconduct' which includes "unsatisfactory standards or output of work, failure to devote the whole time and attention and abilities to our business and its affairs during your normal working hours, and unauthorised use of property". None of those matters are said to amount to gross misconduct, from the way the policy is worded.
32. The evidence laid against the claimant was unclear. Nevertheless, whether or not the claimant was in fact guilty of the allegations made, the Tribunal did not consider that the respondent had proper cause to dismiss the claimant for gross misconduct, given that the allegations did not amount to gross misconduct under the respondent's disciplinary procedures.
33. Accordingly, the claimant is entitled to receive her outstanding contractual notice pay. There are 11 weeks of notice outstanding under the contract, at the date of the claimant's dismissal. Her gross weekly wage at termination was £1,249.85. The amount of 11 weeks' pay is £13,748.35 gross, subject to tax and national insurance.

Employment Judge Batten

Dated: 16 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 November 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2413349/2018**

Name case(s):	of	Ms S McCoy	v	SBS Total Management Ltd voluntary liquidation)	Facilities Ltd (In creditors
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The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **22 November 2018**

"the calculation day" is: **23 November 2018**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office

