



EMPLOYMENT TRIBUNALS

Claimant:

Miss J Breach

v

Respondent:

Bow House Lifestyle Ltd (in
voluntary liquidation)

Heard at:

Reading

On: 18 October 2018

Before:

Employment Judge Hawksworth
Members: Mrs AE Brown and Mr N Singh

Appearances

For the Claimant: Ms N Hillier (HR Consultant)

For the Respondent: No attendance or representation

JUDGMENT

1. The Claimant's complaint of unauthorised deduction from wages/breach of contract in respect of hourly pay and her complaint of breach of regulation 12 of the Working Time Regulations are well-founded.
2. The Claimant is awarded compensation in the sum of:
 - 2.1. £480.00 in respect of the unauthorised deduction from wages/breach of contract; and
 - 2.2. £1,000.00 in respect of the breach of the Working Time Regulations.
3. The Claimant's complaints of constructive unfair dismissal, health and safety detriment and unauthorised deduction from wages/breach of contract in respect of commission payments do not succeed and are dismissed.

REASONS

1. In a claim form presented on 22 January 2017, the Claimant brought claims of constructive unfair dismissal, health and safety detriment contrary to section 44 of the Employment Rights Act, unauthorised deduction from wages, breach of contract, and breach of the Working Time Regulations. The Respondent defended the claims.

2. By the time of the hearing before us, the Respondent had gone into voluntary liquidation. The Respondent's liquidators confirmed in a letter to the tribunal that they did not intend to take any part in these proceedings.

EVIDENCE

3. The hearing took place on 18 October 2018. We heard evidence from the Claimant, Mrs W Breach (the Claimant's mother), Mrs S Kingham-Paxton (the Claimant's grandmother).
4. There was a bundle of 208 pages prepared in the course of proceedings by the Respondent. This was helpful although it did not include all the emails and documents the Claimant wished to refer to. The Claimant had made requests for disclosure of the Respondent but these were not answered and there were some missing documents.

ISSUES

5. We identified the issues for determination as follows:
6. Unfair dismissal claim
 - 6.1. Did the Claimant resign in response to one or more fundamental breach of contract by the Respondent such that she was entitled to treat herself as constructively dismissed? The Claimant relies on breaches of the implied term of trust and confidence.
 - 6.2. If the Claimant was dismissed, was the dismissal fair?
7. Health and safety detriment
 - 7.1. Was the Claimant subjected to any detriment on the ground that she brought to her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?
 - 7.2. If so, was the Claimant an employee at a place where there was no representative or safety committee; or was it not reasonably practicable for her to raise the matter by those means?
8. Unauthorised deduction from wages/breach of contract
 - 8.1. Was the Claimant entitled to:
 - a) an hourly pay rise from £8.50 an hour to £10.00 an hour, and if so from what date? and/or
 - b) commission payments, and if so, of what amount?

8.2. Did the Respondent in breach of contract fail to pay the Claimant her full rate of pay or commission or alternatively did the Respondent make an unauthorised deduction from her wages?

9. Working Time Regulations, regulation 12

9.1. Did the Respondent fail to provide the Claimant with a rest break of not less than 20 minutes when her daily working time was more than 6 hours?

9.2. If so, what compensation would it be just and equitable to award the claimant in respect of any breach of regulation 12 of the Working Time Regulations?

10. In her claim form the Claimant referred to having to work more than 48 hours per week in some weeks, but there was no evidence that her average hours exceeded 48 hours in a 17 week reference period and this was not pursued.

FINDINGS OF FACT

11. The Claimant worked for the Respondent as an apprentice interior designer from 21 July 2014 to 7 December 2016. The Claimant's job description which was included with her contract of employment said that she would have her own clients and assist in the Respondent's retail store. The Claimant's contract required her to work reasonable additional hours to meet business requirements without additional payment. The Claimant's contract had no reference to any entitlement to a lunch break, paid or unpaid.

12. Following an office move from Marlborough to Hungerford in January 2015 and some staff departures, the Claimant found her workload was becoming heavier; she was busy with her own clients and she also began to be required to help out in the Respondent's shop, as well as undertaking her role as an interior designer.

13. The Claimant often received work-related messages and texts out of hours. On one occasion, she undertook work activities on a Sunday. She felt unsupported, especially as she was junior and at the start of her career. The Claimant provided a list of additional hours worked and calls/messages taken outside work hours. There was no evidence that her average hours exceeded 48 hours in a 17 week reference period.

14. On about five occasions, the Claimant complained to her manager about being overloaded and not having enough support. On one occasion the Claimant also complained about being required to work at heights in circumstances which were not safe. The Claimant was not a health and safety representative or a member of a health and safety committee. The Claimant did not consider that she was subjected to any detrimental treatment as a result of making this health and safety complaint.

15. The Claimant's daily working time was more than 6 hours. However, she was not able to take any lunch break except on very rare days.
16. During the course of her employment, the Claimant's hourly rate of pay increased several times from the starting rate of £2.17 an hour. By about January 2016, the Claimant's hourly rate was £8.50.
17. In around January 2016, there were some discussions between the Claimant and her manager about the Claimant being given a new entitlement to commission on a percentage basis. However, the precise percentage was not agreed, and the Claimant's evidence was that this issue was under discussion but not finalised before she left her employment.
18. In early September 2016, the Claimant spoke to her manager to request an increase in her pay to £10.00 an hour. After the meeting, the Claimant understood that her manager agreed to this pay rise. The Claimant texted her mother on 6 September to say that she had been told that her pay was to increase (this text was in the bundle).
19. The Claimant was told that her pay rise would take effect from the pay date the following month, 7 October 2016. On 7 October 2016 when the Claimant's pay came through, the increase had not been applied. The Claimant emailed her manager on 11 October 2016 to reiterate that she wished to take the increased hourly rate (this email was in the bundle). The Respondent said this hourly rate was subject to the Claimant completing a course but the Claimant did not agree that this condition had been imposed.
20. On 19 October 2016, the Claimant met with her manager. They discussed her salary increase again. In the same meeting, the Claimant complained to her manager about the conduct of a colleague (the manager's PA). The Claimant raised concerns that the PA made personal calls and had loud, inappropriate conversations in the shop which disturbed the Claimant. The Claimant's manager said that she would speak to her PA about this.
21. A few days later, the Claimant received an email from her manager confirming that the £10.00 hourly rate increase had been agreed and that it would be backdated to 11 October 2016 when the Claimant had formally emailed to accept it. The email confirming the pay rise to £10.00 was not in the bundle but the Claimant recalled it in detail, including that it had different coloured type in certain sections, and we accept her evidence on this.
22. At around the same time, the Claimant received a phone call from her manager's PA who was unhappy that the Claimant had complained about her. The PA spoke rudely to the Claimant saying that the Claimant had stabbed her in the back and should have gone to her with any problems.

The call lasted about five to ten minutes. Afterwards, the Claimant was very upset.

23. On 27 October 2016, the Claimant handed in her notice to her manager. She felt that against the background of her increasing workload and the out of hours contact, the call from her colleague was the last straw. She gave notice and indicated that her last day at work would be 7 December 2016. A week or so later, the Claimant was signed off sick by her doctor and she remained on sick leave until her employment terminated.

THE LAW

Constructive unfair dismissal

24. Section 95(1)(c) of the Employment Rights Act provides that there is a dismissal where the employee terminates the contract with or without notice in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal.
25. Weston Excavating v Sharpe sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show:
 - 25.1. that there was a fundamental breach of contract on the part of the employer;
 - 25.2. that the employer's breach caused the employee to resign; and
 - 25.3. thirdly, that the employee did not delay to long before resigning and affirm the contract.
26. The breach may be of an express term or an implied term of the contract. Here the Claimant relies on breach of the implied term of trust and confidence. This is a term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.
27. In cases where a breach of the implied term is alleged, 'the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it' - Woods v WM Car Services (Peterborough) Ltd.
28. If a constructive dismissal is established, the tribunal must consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98 of the Employment Rights Act 1996.

Health and safety detriment

29. Under section 44 of the Employment Rights Act, an employee has the right not to be subjected to any detriment on certain health and safety related grounds.
30. Where the Claimant was or is an employee at a place where there was no representative or safety committee or where it was not reasonably practicable for her to raise a health and safety matter by those means, the Claimant cannot be subjected to a detriment on the ground that she brought to her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

Unauthorised deduction from wages/breach of contract

31. The Claimant's pay claims relate to her hourly rate of pay and commission payments. In both cases, there is a question about what the Claimant's entitlements actually were.
32. Once that question is determined, the tribunal needs to consider whether the Respondent breached the Claimant's contract by failing to pay her the rate of pay and/or commission payments to which she was entitled under her contract, or, in the alternative, whether the Respondent made any unauthorised deduction from her wages.

Working Time Regulations, regulation 12

33. Under regulation 12 of the Working Time Regulations, where a worker's daily working time is more than 6 hours, they are entitled to a break of not less than 20 minutes. The employer has a duty to ensure that working arrangements permit the worker to take their break; the worker does not need to explicitly request their break (Grange v Abellio London Ltd).
34. Regulation 30(4) of the Working Time Regulations provides a remedy for workers whose employer has breached regulation 12 (and other regulations). The remedy is:
 - 34.1. a declaration; and
 - 34.2. such compensation as the tribunal considers just and equitable in the circumstances having regard to:
 - a) the employer's default in refusing to permit the worker to exercise the right; and
 - b) any loss sustained by the worker attributable to the matters complained of.
35. In the case of Santos Gomes v Higher Level Care Ltd, the Employment Appeal Tribunal concluded that compensation within regulation 30(4)(a) of

the Working Time Regulations could not include injury to feelings. However the EAT said in paragraph 70 of the judgment that 'loss' within regulation 30(4)(b) may include non-financial loss.

36. In considering the employer's default under regulation 30(4)(a) the tribunal should take into account the period of time during which the employer was in default, the degree of default, and the "amount" of the default in terms of the number of hours the employee was required to work and was to be given as rest periods (Miles v Linkage Community Trust [2008] EAT).
37. Although compensation may only be awarded in respect of the period three months prior to the commencement of the claim (Corps of Commissionaires Management Ltd v Hughes), the tribunal may take into account the background, including the full history of the breaches of the Working Time Regulations.

CONCLUSIONS

38. We have applied the law to our findings of fact and reached the following conclusions.

Constructive dismissal

39. The Claimant submitted that the work demands placed on her and the upsetting telephone conversation with her colleague amounted to a breach of the implied term of trust and confidence, entitling her to treat herself as dismissed. We considered the alleged breaches on their own and as a whole.
40. We concluded that the Respondent's treatment of the Claimant was not such that it amounted to a breach of the implied term of trust and confidence. The Claimant's job description included having her own clients and assisting in the retail store and her contract required her to work additional hours to meet business requirements. We do not consider the additional hours the Claimant worked and the level of out of hours texts and other messages she received to have been unreasonable.
41. We accepted that the call the Claimant received from her colleague was upsetting, but we conclude that it did not amount to a breach of the implied term of trust and confidence by the Respondent.
42. Therefore, although there were aspects of the Respondent's treatment of the Claimant which could be criticised, we concluded that they did not amount to breaches of the implied term of trust and confidence entitling the Claimant to treat herself as dismissed. We concluded that the Claimant resigned and was not dismissed, and therefore her constructive unfair dismissal complaint does not succeed.

Health and safety detriment

43. The Claimant raised a health and safety concern with her line manager in relation to working at heights. In doing so she brought to her manager's attention circumstances that she reasonably believed were harmful or potentially harmful to health or safety.
44. The section 44 protection would only apply to the Claimant if there was no health and safety representative at her place of work or if there was a health and safety representative, but it was not reasonably practicable for her to raise her concerns through them. We did not have sufficient evidence to determine this.
45. In any event, the Claimant said during her evidence that she did not believe that she was subjected to any detrimental treatment as a result of the health and safety complaint she raised. The section 44 complaint must therefore fail as we had no evidence of the Claimant being subjected to any detriment on the ground of her health and safety complaint.

Unauthorised deduction from wages/breach of contract

46. In relation to commission, we have concluded on the basis of the Claimant's evidence that no final agreement was reached between the Claimant and the Respondent in respect of the introduction of an entitlement to commission payments for the Claimant. In particular, there was no agreement as to what percentage of invoices would be payable to the Claimant as commission. We have concluded therefore that the Claimant had no legal entitlement to commission payments.
47. In relation to the increased hourly rate, we accept the Claimant's evidence that the Respondent agreed that her hourly rate would increase from £8.50 to £10.00 and that the increase would be backdated to 11 October 2016. The Claimant's evidence on this point was detailed and consistent with the documentation we saw on this issue.
48. There has therefore been a breach of contract and/or unauthorised deduction from the Claimant's wages in respect of her hourly rate from 11 October 2016.
49. The period from 11 October 2016 to the end of the Claimant's employment was a period of 8 weeks. During this 8 week period the Claimant was paid £8.50 an hour when she was entitled to £10.00 an hour; the weekly difference in pay for a 40 hour week between hourly pay of £8.50 and £10.00 is £60.00. This gives unpaid salary totalling £480.00 for the 8 week period.
50. The Claimant's claim form mentioned a claim for overtime pay, although this was not pursued. For completeness, we do not consider that the Claimant was entitled to any payment for out of hours work as her contract provided that she must work reasonable additional hours to meet business

requirements without additional payment. We do not consider the level of additional hours worked by the Claimant to have been unreasonable.

Working Time Regulations

51. In relation to the Working Time Regulations' claim, the Claimant's evidence was that she was not afforded any break during the day whilst working at the Respondent's premises other than on rare days. We accepted this evidence. The Claimant's evidence was supported by the fact that her contract did not refer to any entitlement to a break.
52. The Claimant was entitled under the Working Time Regulations to a 20 minute break as her day exceeded six hours. We conclude that the Claimant's right to this rest break was breached by the Respondent on most days for which the Claimant was working for the Respondent, and we have made a declaration to that effect.
53. As to compensation, we may make an award of compensation having regard to the employer's default in refusing to permit the worker to exercise her right and any loss sustained by the worker which is attributable to matters complained of.
54. Not surprisingly there is no evidence of financial loss arising from the failure to allow a 20 minute break. We have based our conclusion as to compensation on the degree of the employer's default, and in particular that the default occurred for most of the period of the Claimant's employment. We have concluded that £1,000.00 is an appropriate award to compensate for the loss of the break.

Employment Judge Hawksworth

Date: 20 November 2018

Judgment and Reasons

Sent to the parties on: 20 November 2018

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