



EMPLOYMENT TRIBUNALS

Claimants: Mrs G Gill

Respondent: Mrs A Cornes

HELD AT: Liverpool

ON: 24 January 2019

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person

Respondents: In person

JUDGMENT

The decision of the Tribunal is that the claimants' claims of unpaid wages and constructive unfair dismissal fail and are dismissed.

REASONS

Issues for the Tribunal to decide

1. The issues for the Tribunal to decide were discussed with the parties at the start of the Hearing. They are:-
 - 1.1 whether the claimant, having only received statutory sick pay for periods of absence from November 2017 to 27 July 2018 was entitled to contractual sick pay and had therefore received an underpayment of wages contrary to s13 Employment Rights Act 1996; and
 - 1.2 whether the claimant was constructively unfairly dismissed, having resigned from the respondent's employment by letter dated 27 July 2018. The claimant will say that she resigned in response to a

fundamental breach of trust and confidence on the part of the respondent due to a series of actions relating to the under-payment of wages and the breakdown in their day-to-day working relationship.

2. As a preliminary issue, the Tribunal was required to consider the fact that the respondent's response to the claimant's unfair dismissal complaint was submitted to the Tribunal two days late. It was due to be submitted on 5 September 2018. The respondent has presented in evidence an electronic receipt that shows that it was submitted on 7 September 2018, however it was not received at the Tribunal until 11 September 2018.

3. The respondent's reasons for being two days late were that this was due to an oversight and that she had misread the deadline in the Tribunal correspondence. I accept that two days' lateness is not sufficient to cause a material delay in these proceedings and has not caused any prejudice to the claimant. Accordingly, I am prepared to accept the respondent's response two days late.

Findings of Fact

4. Both parties appeared in person before the Tribunal. The respondent had prepared a short statement and a bundle. The claimant had not drafted a written statement to put before the Tribunal. Following a discussion with the parties at the start of the hearing, it was agreed that both the claimant and the respondent, Mrs Cornes, would be sworn in and rather than the hearing proceeding by way of formal cross-examination of written statements, would instead proceed by way of a discussion between the parties in response to questions from the judge.

5. There was very little relevant documentation before the Tribunal and the Tribunal heard directly contrary recollections by the claimant and the respondent of key conversations that took place during the relevant time. It was explained to the parties that the findings of fact would be made by the Tribunal carefully considering the parties' evidence and deciding on the balance of probabilities whose evidence was preferred.

6. The claimant started work for the respondent in June 2016. The respondent is a very small employer, employing only four employees in a small local branch of the Post Office. The respondent staffed the branch with two employees at a time behind the counter during opening hours. The claimant worked part time as did all of the respondent's other staff. She worked every Monday and Tuesday and until January 2018 also worked alternate Saturdays. On Mondays and Saturdays, the claimant and the respondent were the only two members of staff in the branch.

7. The claimant was paid £7.75 per hour and no written statement of terms and conditions were issued to her at the start of her employment. The claimant's claim for unpaid wages is based on her claim that all staff were paid full pay when off sick. However, the parties agree that there was no discussion at the time when Mrs Gill first took the job as to what her entitlement to sick pay was.

8. A written statement of terms and conditions was subsequently issued in May 2018, which the claimant signed. This statement of terms and conditions is not

relevant to the issues that the Tribunal has to decide. The key issues and the key findings of fact as to the claimant's entitlement all lie prior to May 2018. At the end of May 2018 the claimant began a period of sick leave that lasted until her resignation on 27 July 2018 and so never properly worked under that new set of terms of conditions.

9. Prior to November 2017 when the dispute that led to these proceedings began, the following had taken place:-

- (i) In holiday year 2016 to 2017 the claimant had been paid approximately £300 by the respondent in lieu of accrued but untaken holiday entitlement; and
- (ii) The claimant had been absent from work on approximately four separate occasions, each lasting one day or less, and had been paid her normal wage on each of these days.

10. The respondent told the Tribunal that her recollection was that all of the claimant's absences from work had either been emergency time off in order look after her daughter, who was an infant at the time, or alternatively were occasions when the claimant was in work and became ill and was given permission to go home early.

11. By contrast, the claimant told the Tribunal that, as at least some of the four days absence were due to her own sickness, they should all be treated as "sick leave".

The claimant's entitlement to contractual sick pay

12. The claimant told the Tribunal that she and Mrs Cornes had a conversation some time after she began work, prior to November 2017, in which Mrs Cornes told the claimant that although she was not obliged to pay full pay when staff were off work on Bank Holidays or off sick, she did do so. The claimant seeks to rely on this conversation as proof of her entitlement to full pay when off sick.

13. However, the respondent disputes that this conversation took place. The respondent told the Tribunal that in approximately the last seven years and certainly for the duration of the claimant's employment, no-one had ever taken enough time off to be entitled to SSP and no-one other than the claimant had ever been off sick for long enough to submit a sick note during that period. The Tribunal accepts the respondent's evidence in that regard.

14. The respondent accepts that the member of staff who deputises for Mrs Cornes when she is not available to work, who is a keyholder for the branch and has more responsibility than other employees, was paid full pay when she was off sick as compensation for her extra responsibilities. The respondent told the Tribunal that this extra benefit was paid because she did not otherwise receive more pay for her extra responsibilities.

15. The claimant agrees that the keyholder received full pay when off sick but maintains that all of the other members of staff were also paid full pay when off sick as well. She refers to being paid full pay herself on the four occasions when she or was off sick or was given emergency time off to care for her daughter as evidence of this. She claims that she was therefore entitled to full pay in the second half of November 2017 when she took two weeks off sick. As she was only paid SSP for this period of absence, she claims that there have been unlawful deductions from her wages.

16. On the balance of probabilities, the Tribunal finds that although the claimant alleges with certainty that all other members of staff were always paid full pay when off sick and that this was a universally adopted practice of the respondent, in fact the claimant does not have the knowledge or the direct experience from which to draw such a conclusion with such certainty. In addition, although she seeks to treat all previous occasions on which she was absent from the respondent as the same, it is clear from both parties' evidence that they were not the same types of absence.

17. I do not accept that there was express agreement between the claimant and the respondent about the payment of full pay when off sick, in that I do not accept that Mrs Cornes told Mrs Gill that she paid everyone full pay when absent due to sickness. I accept that the respondent may on occasion, where an employee was absent for one or two days' sick leave, have chosen to pay those employees full pay for those few days.

18. Furthermore, on the balance of probabilities I accept that neither the claimant nor any other employee at the respondent took sick leave long enough to trigger the payment of SSP during the claimant's period of employment.

The claimant's claim for unfair dismissal

19. The claimant's claim of unfair dismissal is one of constructive dismissal. The claimant accepts that she was not actually dismissed by the respondent but that she terminated her own employment in a letter dated 27 July 2018. From the claimant's evidence it is apparent that the events that led to her considering herself dismissed began with the dispute over holiday and sick pay in November 2017.

20. The Tribunal notes that the claimant does not claim that she is entitled to additional holiday pay before the Tribunal and therefore no determination as to unlawful deductions from wages has been made in relation to holiday pay.

21. One of the few pieces of contemporaneous evidence before the Tribunal is the claimant's letter to the respondent dated 27 November 2017. The Tribunal understands from the claimant that this letter was written following two incidents in early November 2017. The first was that the claimant was told when requesting a day's absence from work that she could not swap her working day with a colleague in order to avoid having to take annual leave. The second incident was that the claimant was told that she would not be receiving a lump sum payment in lieu of her holiday entitlement and that she needed to take her leave as actual days off instead.

22. The claimant was clear to the Tribunal that she had wished to “save” her annual leave and receive a lump sum payment in lieu of actually taking holiday in the holiday year 2017/2018. The claimant was paid a lump sum of £300 at the end of holiday year 2016/2017 in May 2017 due to accrued but untaken holiday entitlement. The claimant told the Tribunal that the respondent had told her at the start of the holiday year 2017/18 in May 2017 that she would be able to be paid in lieu for any untaken annual leave for the following year also, at the end of “the year”. The claimant told the Tribunal that she therefore had expected to receive another lump sum payment prior to the end of the calendar year, in December 2017.

23. However, the respondent told the Tribunal that she had told the claimant that the business could not afford to allow her to “save” all of her holiday entitlement in order to receive another lump sum payment and the parties agree that the respondent told the claimant this in response to the claimant’s attempt to swap working days with a colleague in November 2017.

24. Having been paid a lump sum in lieu of holiday entitlement the previous year, the claimant assumed that she would receive another as of right and I find she took great exception to being told that she would not. The claimant told the Tribunal that she felt that Mrs Cornes was being very unfair to deprive her of money she was expecting before Christmas.

25. The Tribunal notes that the Working Time Regulations that grant employees and workers annual leave are primarily health and safety measures to ensure that employees and workers are permitted to take adequate rest breaks during the day and during the working year. Staff are not permitted to choose to receive lump sums in lieu of holiday entitlement but are encouraged to take their annual leave as time off for this reason. The claimant is therefore mistaken in assuming that a lump sum was due to her and that the respondent was being unfair.

26. Following this dispute over holiday pay, the claimant was off sick for two weeks in the second half of November 2017. When the claimant attended work on 27 November 2017 to collect her pay and found that her two weeks’ sickness absence had only been paid at SSP rates, she wrote the letter dated 27 November 2017 to set out her complaints to the respondent.

27. However, the Tribunal notes that the claimant straight away told the respondent that she would be escalating the matter to ACAS and also suggested that Employment Tribunal proceedings would be forthcoming.

28. In addition, and escalating the dispute further, having been told that she had to take her annual leave during the leave year and not save it up to be paid a lump sum, the claimant then took all of her annual leave in December 2017. The Tribunal accepts that, as a post office, December is the respondent’s busiest time of the year.

29. The claimant’s motivation for taking the whole of December off is unclear but it is apparent, particularly from the claimant’s letter of the 27 November 2017, that the respondent was unhappy with her doing so and that the claimant would have known, or ought to have known, that such an action would cause difficulties for the respondent.

30. Nevertheless, in her letter of 27 November 2017, the claimant complained to Mrs Cornes that it was “*hurtful*” that the respondent was now “*annoyed*” that the claimant would be off for the whole of December. The claimant accuses the respondent also of changing the statutory sick pay rules without notice and of “*bullying*” her. The claimant then states in her letter that she will be in contact with ACAS about her entitlements.

31. In such a small place of work, and notably one where the claimant and the respondent were regularly the only two members of staff on the premises together, threatening to escalate the matter so quickly as the claimant did was bound, I find, to have a serious detrimental effect on her relationship with the respondent.

32. The claimant told the Tribunal that the working atmosphere between her and the respondent became unbearable. The respondent accepts that there was a very awkward atmosphere. Although the claimant seeks to persuade the Tribunal that the respondent was responsible for the breakdown in their relationship, I do not find any examples of the respondent acting in a manner likely to break the relationship between them.

33. I find that it was inevitable that the respondent would treat the claimant differently from the other members of staff due to the fact that she had threatened that she would issue proceedings as early as November/December 2017. In addition, the claimant’s decision to take the month of December off and her accusations of bullying by the respondent inevitably led to a loss of trust and confidence between them.

34. A meeting between the respondent and the claimant over coffee on 12 December 2017 to discuss a suitable way forward did nothing to dissolve the tension and the claimant left the meeting saying that she would go back to ACAS, leaving the respondent to believe that the claimant would be or already had instigated Tribunal proceedings. The claimant told the Tribunal that the respondent was unwilling to discuss anything with her on that occasion. Mrs Cornes told the Tribunal that she felt that she had to be very careful with what she said to the claimant, given the accusation of bullying in the letter of 27 November and the threat of imminent legal proceedings.

35. The claimant began pre-claim conciliation with ACAS on the sick pay and wages issue the day after their meeting, 13 December 2017. Conciliation lasted until 21 December 2017.

36. The claimant returned to work in January 2018. She had to take two days’ leave in February because of childcare issues and, having already taken her annual leave in full in December 2018, had to take the leave as unpaid. The claimant complains to the Tribunal about the loss of two days’ pay. However, it is clear from the claimant’s letter of 27 November 2017 that she was not required to take her annual leave before Christmas and in fact the respondent did not want her to. Therefore, any difficulties the claimant had in February were due to her previous choices and not down to the respondent’s actions. The respondent was not obliged to grant the claimant any more paid holiday entitlement in February 2018.

37. The claimant told the Tribunal that she was optimistic that matters were getting better by March 2018, but then a further dispute arose when the claimant requested an hour off to attend an event at her daughter's school on 27 March 2018 from 10 am to 11 am. Given that the claimant started work at 9 am, the respondent asked her whether she wanted to not come in for the hour between 9 am and 10 am and go straight to her daughter's school. As by this point the claimant had no annual leave left, her time off was understood to have to be unpaid.

38. There was a dispute between the parties as to whether the respondent instructed the claimant to take two hours off or whether the claimant chose to take two hours off but, having taken two hours off and having not received pay for two hours, the claimant then complained to the respondent that she ought to have only had one hour's pay deducted because that was the only amount of time off that she had in fact originally requested.

39. The respondent told the Tribunal that because she was keen to avoid any further disagreements with the claimant she had paid her and all the other members of staff cash in hand for an hour's pay, in an attempt to be fair to all of them. The claimant told the Tribunal that in fact she never received reimbursement for the extra hour's pay that had been deducted. The claimant showed her pay slip from that period to the Tribunal which states that an additional £12 for National Insurance contributions had been deducted on that occasion.

40. The claimant told the Tribunal that this was yet another example of her wages being incorrect. When asked which other occasions she was referring to, the claimant told the Tribunal that she was referring to having been paid SSP in November 2017 and not having been given a lump sum in lieu of holidays in December 2017.

41. From the evidence before me I find that the respondent, having told the claimant that she would reimburse her an hour's pay, did not do so. However, I do not accept that this was done deliberately by the respondent. The relationship between the claimant and the respondent was already under quite some strain at this point and I do not accept that the respondent deliberately under-paid the claimant on this occasion. I find that the respondent was nervous about the possibility of ACAS involvement or litigation and did not wish to increase the threat of litigation or the awkwardness between them.

42. The respondent told me that she used an HMRC website to make the calculations regarding the claimant's extra pay and the website told her that £12 extra National Insurance had to be deducted, so she made this deduction. I accept her evidence in that regard. I find that an error was made by the respondent in relation to the claimant's February pay. However, this act further worsened the relationship between the claimant and the respondent.

43. The claimant commenced Employment Tribunal proceedings on 13 April 2017 in relation to the holiday pay and sick pay issues. This led to the further deterioration of the relationship between the parties. The claimant was also at the time suffering from marital and personal difficulties and told the Tribunal that during this period she

became extremely stressed and upset and visited her GP and was prescribed medication in an attempt to improve her mental health.

44. The claimant was off sick from the end of May 2018 for approximately two months. Her first doctor's note told the respondent that it was because of an ongoing shoulder complaint but the second note told the respondent that it was because of stress. The claimant told the Tribunal that in fact, she could not bear the prospect of returning to work because of the strained and difficult atmosphere.

45. The claimant's resignation letter of 27 July 2018 coincided with her having to come into work to collect her latest SSP payment. In the letter the claimant says that one of the reasons for her resignation was because the respondent was "*deliberately prolonging*" the ongoing Tribunal proceedings. This was a reference to the Tribunal having experienced severe difficulties in listing the claimant's complaint for a hearing. The claimant seeks to place all of the blame for this on the respondent, but Tribunal correspondence shows that the delays in listing were due to the unavailability of both parties and not just the respondent.

The Law

46. An employee does not have an automatic entitlement to full pay during periods of sick leave. The minimum entitlement to pay during periods of sickness absence is statutory sick pay, following the relevant period of qualifying days. An employee only has entitlement to the full contractual rate of pay during periods of sickness absence if this is a term of her contract of employment, whether recorded in writing or agreed orally.

47. If the Tribunal finds that the parties have not expressly agreed, either orally or in writing, that an employee will receive full pay when off sick, the Tribunal must consider whether such a term can be implied into the contract.

48. Terms can be implied into written or oral contracts of employment if the Tribunal finds that including such a term was the parties' intention at the time the contract was agreed (***Courtaulds Northern Spinning Limited v Sibson and anor 1988 ICR 451, CA***). Terms can be implied on four broad grounds; to make the contract workable (for so-called "business efficacy" reasons), because it is normal custom and practice, through the conduct of the parties, or because a term was obviously intended to be included in the contract (the so-called "officious bystander" reason).

49. Single incidents are not enough to establish implied terms due to custom and practice (***Waine v R Oliver (Plant Hire) Limited 1977 IRLR 434 EAT***).

50. An employee with more than two years' continuous service has the right not to be unfairly dismissed by her employer (s94 Employment Rights Act 1996). Where the employee has not actually been dismissed by the employer, the employee is entitled to resign and treat herself as dismissed in response to a serious breach of contract by the employer, such as a breach of the mutual duty of trust and confidence. Where the Tribunal finds either no such serious breach by the employer, or alternatively that there was such a breach but that it was not the sole or main

reason for the employee leaving employment, the employee in such a situation is found to have resigned and is not entitled to claim that she has been constructively dismissed.

51. A claimant who was not at the start of her employment provided with a written statement of terms of employment can, subject to s38 Employment Act 2002, be paid compensation by the respondent for such a failure of between two and four weeks' pay. However, the Tribunal only has jurisdiction to make such an award where another of a claimant's complaints before the Tribunal has been successful.

Application of the law to the facts found

52. The Tribunal did not accept the claimant's evidence that the respondent expressly told her that all employees were entitled to full pay when off sick. The Tribunal found there was no express agreement between the parties about the claimant's right to payment when off sick. Can a term be instead implied into the contract that the claimant was entitled to full pay when off sick?

53. Looking at the presumed intention of the parties at the time the contract was made in June 2016, very small businesses such as the respondent's do not usually commit to the financial burden of paying unlimited contractual sick pay. Therefore, it was not at all obvious that the respondent would have agreed to this at the time the claimant was offered the job.

54. It cannot be said that such a term can be implied into the contract by looking at the behaviour of the parties, due to the lack of previous examples of sickness absence at the respondent's workplace of more than a few days. There was no regular and consistent pattern of all of the respondent's staff being paid full pay for lengthy periods of sickness, or even the claimant herself being paid full pay for sickness absence, as I accept that some of the occasions when she was paid full pay for her absence was when she took emergency time off to care for her daughter. This is not classed as a period of sickness absence.

55. It is also not necessary to include a term about sick pay to make the contract workable (for "business efficacy" reasons) as the statutory sick pay rules entitle all workers to statutory sick pay after a qualifying period of absence.

56. The claimant was absent due to sickness in the second half of November 2017 and assumed, without checking, that she would be paid her full salary and not SSP. There was no evidence that entitled her to make such an assumption and no term of employment had been agreed between her and the respondent that entitled her to it. No such term can be implied into her contract either.

57. I therefore find that, having been paid SSP, the claimant has no further right to pay for her periods of sickness absence.

58. In relation to the claimant's claim of constructive unfair dismissal, on the balance of probabilities and taking all of the findings of fact into account, I find that it was not a fundamental breach of trust and confidence by the respondent caused the claimant to resign from her employment.

59. The claimant's own actions made the relationship between her and her employer difficult, in that she made several assumptions about her entitlement to pay and time off and when these led to disputes with the respondent, escalated these disputes very quickly by telling the respondent that she would be in touch with ACAS and by referring to issuing Tribunal proceedings. Their relationship became very awkward and uncomfortable, given the size of the workplace and the fact that the claimant and the respondent had to regularly spend the whole working day alone together. As a result, the claimant did not wish to return to work.

60. I accept that the respondent's behaviour towards the claimant did change from December 2017 onwards. When the claimant alleges that she was treated differently by the respondent than the other people who worked at the branch, I accept that this was the case. However, I do not find that it was because of any malice or deliberate action on behalf of the respondent but because of the awkwardness and nervousness caused by the respondent being sued in Employment Tribunal proceedings by a member of staff who was, for half of the days when the claimant was at work, the only other person than the respondent on the respondent's premises.

61. I find therefore that the claimant was not constructively dismissed due to a breach of trust and confidence on the part of the respondent, but that she resigned. There was no breach of contract by the respondent and the claimant's complaint of unfair dismissal therefore fails and is dismissed.

62. Given that the claimant's other complaints have not succeeded, the Tribunal has no jurisdiction to award the claimant any compensation for a failure on the part of the respondent to supply a written statement of terms and conditions as per s38 Employment Act 2002. The Tribunal only has jurisdiction to make such an award where one of the claimant's other complaints has been successful.

Employment Judge Barker

Date__19 February 2019_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 February 2019

FOR THE TRIBUNAL OFFICE