



EMPLOYMENT TRIBUNALS

Claimant

Mrs L Wilcox

v

Respondent

**Nationwide Diamond Contracts
Limited**

PRELIMINARY HEARING

Heard at: Hull

On: 7 June 2018

Before:

Employment Judge T R Smith

Representation:

Claimant:

In person

Respondent:

Mr R Morton, Solicitor

JUDGMENT ON RECONSIDERATION

The Tribunal grants the Claimant's application for a reconsideration

1. Paragraph three of the judgment sent to the parties on 29 December 2017 is amended to read:-
"The Claimant's complaint of breach of contract (failure to pay the contractual notice) is well-founded."
2. Paragraph 4 of the judgment sent to the parties on 29 December 2017 is amended to read:-
"The Claimant's complaint of unlawful deduction from wages is well-founded."
3. Paragraph 1 of the judgment sent to the parties on 26 February 2018 is varied to read: –
*"The Respondent is ordered to pay to the Claimant **£7160.15**. by way of compensation for unfair dismissal."*
4. The following paragraphs are added to the judgement sent the parties on 26 February 2018: –
*"2. The Respondent is ordered to pay the Claimant the sum of **£1870.12** as damages for breach of contract namely failure to pay contractual notice.
3. The Respondent is ordered to pay to the Claimant the sum of **£3508.57** representing an unauthorised deduction from wages for the period on 1 January 2017 until 22 February 2017."*

4. Pursuant to section 38 of the employment act 2002 the Respondent is ordered to pay to the Claimant two weeks pay amounting to £935.06.

The paragraph numbered (“2”) of the judgment sent to the parties on the 26 February 2018 is renumbered to paragraph 5.”

REASONS

Background to the Reconsideration Application.

1. At a Tribunal hearing held at Hull on the 11th and 12th of December 2017 the Tribunal determined that the Claimant had been unfairly dismissed by the Respondent (the First Judgment).
2. The Claimant’s complaint of non-payment of holiday pay was found to be not well founded.
3. The Claimant’s complaint of breach of contract, that is non-payment contractual notice was found to be well founded and the Respondent was ordered to pay the Claimant four weeks pay less tax and national insurance.
4. The Claimant’s complaint of unlawful deduction from wages between 1 January 2017 and 22 February 2017 was also found to be well founded and the Respondent was ordered to pay the Claimant the wages due less tax and National Insurance.
5. The Tribunal did not have evidence before it to specify the exact sums due to the Claimant for non-payment of contractual notice and the unlawful deduction from wages in the First Judgment. It was for this reason that the Tribunal set out a formula to permit accurate calculation.
6. In view of the lack of time at the hearing the issue of remedy for the Claimant’s unfair dismissal claim was adjourned to the next available date.
7. A copy of the First Judgment together with the reasons was sent to the parties on 29 December 2017.
8. A remedy hearing was held on 20 February 2018 at Hull. Unfortunately, due to a technology issue it was not possible for the judgement of the Tribunal to be recorded and therefore the Tribunal reserved its decision.
9. A reserved decision (the Second Judgment) was sent to the parties on 26 February 2018.
10. The Claimant requested a reconsideration of the Second Judgment by a letter dated 12 March 2018, that is within 14 days of the decision being sent to the parties.
11. In essence the Claimant contended the Tribunal had not addressed the possibility of an award under Section 207A of TULCRA 92 (failure to comply with ACAS code) or an award under section 38 of the Employment Act 2002 (failure to give statements employment particulars).
12. The Claimant also stated that the Second Judgment did not include the award for pay for unlawful deductions from wages from 1 January to 22 February, or her entitlement to damages for breach of contractual notice, and that the

Second Judgment also did not take into account the failure of the Respondent pay the contractual pension contribution.

13. The Respondent made written representations by means of a letter of 19 March 2018. The Respondent's case was that any concerns as regards unlawful deduction from wages and notice pay were already included in the Second Judgement calculation.
14. The Respondent further contended that Section 207A had not been raised and the Respondents had therefore been unable to make representations and a similar situation arose with the Section 38 claim.
15. The Respondents case was that these were effectively new issues which could not be raised for the first time under the Tribunal reconsideration procedure set out in rule 70 to 72 of the Employment Tribunal's (Constitution and rules of Procedure) Regulations 2013 (the Regulations).
16. There was various other correspondence exchanged between the parties and copied to the Tribunal. The only relevant issue arising from that correspondence, that was material to the deliberations of the Tribunal, was that the Claimant had attempted to enforce the First Judgment but had been unable to do so because specific figures had not been determined.
17. The Tribunal decided under Regulation 72 that having had regard to the written representations it could not be said there was no reasonable prospect of the original decisions being varied or revoked. It was not in the interests of justice to make a determination on the papers and it was more appropriate that the matter be listed for an oral hearing before the same Tribunal.

The Tribunal's Powers.

18. The powers of the Tribunal are set out under Regulation 70. On a reconsideration the Tribunal may confirm, vary or revoke the judgment which it has been asked to reconsider. If a judgement is revoked it may be taken again.
19. An application for reconsideration must be made in writing within 14 days of the date on which the original decision was sent to the parties and must set out why the reconsideration of the original decision was necessary.
20. The Tribunal has power under Regulation 5 to extend or shorten time.

The Reconsideration Application.

21. It was not disputed that the Respondent had not paid the awards made to the Claimant for unlawful deduction from wages and non-payment of contractual notice made in the First Judgement. The Respondent was of the view that the sums due were included in the calculation found in the Second Judgment.
22. It was agreed that the sum set out in the Second Judgment of £7125.53 had been paid by the Respondent.
23. The Tribunal raised with the parties at the commencement of the hearing that it appeared that the Tribunal had made a mathematical error in the Second Judgment in reaching the figure of £7125.53. The correct total was £7160.15. This comprised a basic award of £2395, four weeks net pay of £1824, employers pension contribution of £46.12, a sum equivalent to a statutory redundancy payment of £2395 and an agreed sum for loss of statutory rights of £500. Both parties agreed that mathematically the correct figure was £7160.15 and not £7125.53 as found in the Second Judgment.

24. The Tribunal raised the point with the Respondent that the Claimant was asking, in relation to the First Judgment, for the sums to be specified rather than setting out a formula for calculation.
25. It was common ground that this was raised after the expiration of 14 days from the date the First Judgment was sent to the parties.
26. The Tribunal indicated that its provisional view was that having regard to the overriding objective, and given the Claimant was not to know within 14 days the payment would not be made, that it was minded to consider extending time under Rule 5 of the Regulations.
27. After listening to submissions from both parties it was agreed that the Tribunal would in the First Judgment revoke the formula set out in paragraphs 3 and 4 and any sums due would be incorporated into the Second Judgment.
28. The Claimant contended in her review application that an adjustment should have been made to her award of 10% relying on Section 207A of TULCRA 1992 even though she had not expressly raised the point.
29. It was not disputed that the Claimant had made claims that fell within the jurisdiction set out in schedule A2 of TULCRA 1992.
30. The Tribunal came to the conclusion that even if the point was not expressly raised by the Claimant at the substantive hearing the Tribunal should have considered the matter of its own motion.
31. That said when the Tribunal reconsidered the matter it declined to make any adjustment.
32. Section 207A only operates where there has been a failure to comply with the ACAS Code of Practice number one: disciplinary and grievance procedures (2015).
33. The code is only applicable to cases of misconduct and/or poor performance.
34. The Claimant was not dismissed for misconduct or poor performance.
35. The Tribunal makes reference to its findings in the First Judgment.
36. The Respondent believed the Claimant was not even an employee. It led no evidence as to the reason or principal reason for dismissal.
37. The Claimant succeeded in her complaint of unfair dismissal because the Respondent could not establish the reason or principal reason for dismissal.
38. As the Respondent did not dismiss the Claimant for misconduct or poor performance the aforementioned Code was not engaged. As the Code was not engaged there can have been no breach. It follows therefore that the Tribunal declined to vary the Second Judgment on this point.
39. The Claimant also contended that an award should have been made under Section 38 of the Employment Act 2002.
40. The Claimant had made complaints that fell within schedule five of the 2002 Act.
41. The Claimant had succeeded and it was accepted that the Claimant never received a Section 1(1) or 4(1) statement as defined in the Employment Rights Act 1996.

42. The Tribunal was satisfied that whether the matter was expressly raised or not it had to consider making an award given the word “must” found in Section 38.
43. Mr Morton contended that given the Claimant’s husband was a director and had day-to-day management of the Claimant it would be unjust for the Respondent to have to pay an award of two weeks pay or even, if it was just and equitable, a maximum award of four weeks pay.
44. He also relied upon the fact that the Claimant had a responsibility for HR whilst employed by the Respondent.
45. The Tribunal preferred the argument of the Claimant that neither she nor her husband was the employer. The employer was the Respondent and it was the Respondent’s responsibility to ensure that the statement of employment particulars had been issued.
46. The Tribunal decided that the appropriate award was two weeks pay. It is not just and equitable to award a higher amount of four weeks pay given there is some weight to Mr Morton’s argument that the Claimant had an involvement in HR and further the Tribunal took into account this was a small company. It was also the Respondent’s belief that the Claimant was not an employee and although the Tribunal found against the Respondent on that point in the First Judgment it cannot have been said that the argument did not have some merit.
47. It follows therefore that the Tribunal determined that the Second Judgment would be varied by the addition of two weeks net pay namely the sum of **£935.06** (two weeks net pay at £456 pw plus pension)
48. Mr Morton argued that there had been double counting in the Second Judgment because the Tribunal had awarded the Claimant a basic award and a sum equivalent to a redundancy payment. The Tribunal rejected that submission. If an employee is unfairly dismissed for redundancy and receives a redundancy payment then that redundancy payment can be used to offset the basic award. This is however predicated upon a dismissal by reason of redundancy. The Respondent was unable to establish that the reason or principal reason for the Claimant’s dismissal was redundancy and therefore the sum the Tribunal awarded the Claimant equivalent to a redundancy payment cannot be offset against the basic award. Further the Tribunal would stress that it awarded the Claimant a sum equivalent to a redundancy payment because there was a loss of a potential entitlement within the meaning of Section 123 (3) (a) of the Employment Rights Act 1996. It follows therefore that there was no element of double counting. Although there was no review by the Respondent the Tribunal have dealt with this issue as it was used as justification for the non-payment of sums due to the Claimant under the First Judgment.
49. Allied to the above matter it was argued that there was a further element of double counting between the First and Second Judgments in that in the First Judgment the Claimant was awarded four weeks notice for breach of contract and then received four weeks pay being the Tribunal’s estimate of how long it would have taken the Respondent to fairly dismissed the Claimant by reason of redundancy. Again, the Tribunal rejects that submission. If the Respondent’s had fairly dismissed the Claimant by reason of redundancy she would have been entitled to notice or money in lieu of notice. The Tribunal made it clear in its Second Judgment at paragraph 91 that it would have taken a maximum of

four weeks for a fair procedure and consultation to be undertaken. It follows only then would dismissal had taken place.

50. The Claimant contended that the award of unlawful deduction from wages and award of contractual notice found in the First Judgment should be calculated take into account the employer's pension contribution. It was common ground that, at the earliest, the Claimant was not entitled to a pension contribution from the Respondent until 19 January 2017. The Tribunal was persuaded that the Claimant must be put in the position she would have been put in had the Respondent complied with its lawful obligations. The sum therefore due in relation to notice pay is £1870.12 and this sum was mathematically agreed between the parties (£1824+£46.12). The sum therefore due in relation to unlawful deduction from wages was £3508.57 (£3452.57+£56). In the circumstances the Tribunal varied its judgment.

Summary.

51. By consent the formula for calculating the Claimant's claim for non-payment of contractual notice and unauthorised deduction from wages set out in the First judgment sent to the parties on 29 December 2017 is deleted.
52. The Tribunal has calculated the sums due to the Claimant in relation to her complaint of failure to pay contractual notice and unlawful deduction from wages in the sums of £1870.12 and £3508.57 respectively. It was agreed that the sums would then be incorporated into the Second Judgment so there was one document setting out the financial liability of the Respondent.
53. The Tribunal did not find any element of double counting in either the First or Second Judgment.
54. The Tribunal declined to vary the Second Judgment to incorporate an uplift under Section 207A of TULCRA 1992.
55. The Tribunal varied the Second Judgment to include an award under section 38 of the Employment Act 2002 representing two weeks pay inclusive of pension in the sum of £935.06
56. The Tribunal also varied the Second Judgment to correct the mathematical error. The Second Judgment recorded the award to be £7125.53 whereas in fact it should have been £7160.15
57. The net effect of the adjustments are that the total award under the Second Judgment amounts to £13473.90. The Claimant must give credit in any enforcement proceedings, if such proceedings are necessary, for the sum of £7125.53 already paid by the Respondent

Employment Judge T R Smith

14/06/2018