EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4105212/2018

Held in Glasgow on 22 October 2018

Employment Judge: Peter O'Donnell

Mrs M Relly	**Claimant** **In Person**
Boydfield Garage	**Respondent** **Represented by:-** **Mr W Lane – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The claimant's complaints of unfair dismissal and unlawful deduction of wages in respect of unpaid holiday pay were withdrawn by the claimant at the hearing and are hereby dismissed.
2. The claimant's complaint that she was paid less than the National Minimum Wage was not well founded and is hereby dismissed.

3. The claimant's complaint of breach of contract in respect of the respondent's failure to provide her with notice of her dismissal is well founded and the respondent is ordered to pay the claimant the sum of £200 (Two Hundred Pounds) as compensation for breach of contract.

REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal, failure to pay the National Minimum Wage, unlawful deduction of wages in respect of holiday pay and breach of contract in respect of failure to provide notice of dismissal.

2. The claim is resisted by the respondent. In particular, he argues that the claimant was only entitled to the apprenticeship rate of the National Minimum Wage and was paid more than this and that payments made to the claimant at the end of her employment included pay in lieu of notice.

Preliminary issues

3. At the outset of the hearing, the claimant withdrew her claim of unfair dismissal as she accepted that she did not have the necessary length of service to pursue such a claim. The claim of unfair dismissal is hereby dismissed in terms of **Rule 52 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013**.

4. The claimant also accepted that a payment made to her by the respondent on 25 April 2018 satisfied any entitlement she had to holiday pay and this claim was also withdrawn at the outset of the hearing. This claim is also dismissed in terms of **Rule 52**.

5. For the respondent, Mr Lane clarified that the correct designation of the respondent should be "George Gotch trading as Boydfield Garage". There

being no objection from the claimant, the name of the respondent is hereby amended to "George Gotch trading as Boydfield Garage".

Evidence

6. The Tribunal heard evidence from the following witnesses:-

    a. The claimant
    b. The respondent

7. There was a bundle of documents produced by the respondent. The claimant also produced documents at the outset of the hearing and handed up other documents during the course of the hearing.

8. The claimant also produced an audio recording of a meeting between her and the respondent on 25 April 2018. After listening to the recording, Mr Lane. on behalf of the respondent. raised no objection to the recording being played to the Tribunal and admitted into evidence. He did reserve his position on making submissions about the covert nature of the recording and whether this impacted on the credibility or reliability of the claimant's evidence.

9. There were some disputes of fact between the claimant and respondent-

    a. The most significant dispute related to the meeting of 25 April 2018 and whether or not the claimant was dismissed on that date. In the end, this became more a dispute as to the interpretation that should be put on the words used during the meeting rather than a dispute as to whether certain things were said or not. Where there was any dispute of fact between the claimant and the respondent as to what happened at the meeting then the Tribunal preferred the version of events given by the claimant as it was supported by the audio recording.

b. The other dispute of fact which was relevant to the issues that the Tribunal had to determine was whether the claimant had worked for the respondent under a Modern Apprenticeship contract; the claimant said that such a contract had been signed but the respondent said that it had not. The Tribunal preferred the evidence of the claimant in this regard as she more aware and better informed of the administration that surrounded her work with the respondent and how this interacted with her college course.

Findings in Fact

10. The Tribunal makes the following relevant findings in fact:-

a. The claimant commenced employment with the respondent on 3 January 2018.

b. She had previously been working as an apprentice mechanic at another garage in Ayr but had left that employment in December 2017. The respondent had been thinking of bringing in someone to help him; he did not have any other employees and the amount of work was increasing.

c. The respondent texted the claimant when he learned that she had left her previous employment and she met with him in early December to discuss coming to work for him. Neither the claimant nor the respondent could recall the precise date of this meeting.

d. The claimant did a trial period in December 2017 and officially started working for the respondent on 3 January 2018 with the job title of apprentice mechanic.

e. There was no written contract of employment produced to the Tribunal nor was there a written statement of main terms and conditions of employment provided to the claimant by the respondent.

f. A Modern Apprenticeship contract was signed and the claimant was working with the respondent and attending college under the Modern Apprenticeship scheme.

g. The claimant worked for the respondent 5 days a week which included one day a week (Tuesday) when she attended college. The claimant worked 0900 to 1730 except Mondays and every second Thursday when she finished at 1445 in order to collect her children from school.

h. The claimant was paid £40 a day including the day she attended college and the days she finished early for childcare purposes.

i. On 9 April 2018, the respondent suggested to the claimant that she take that week off as he did not have much work. The claimant was not keen to take time off as she would rather have been working.

j. In the event, this absence continued in the following week, the week commencing Monday 16 April 2018.

k. On 23 April 2018, the claimant sent a text message to the respondent in which she asked whether the previous two weeks were meant to be unpaid.

l. Later that same day, the respondent replied stating *"no work no pay company policy"* and indicated that he had brought in someone called Paul to do work and could not pay out two wages.

m. On 24 April 2018, the claimant sent a further text to the respondent stating that she understood that she was entitled to a certain amount of paid holidays. She asked to be paid for at least one day in the previous week when she attended college.

n. The respondent replied later that same day asking the claimant to *"pop over"*. There was no response to this and the respondent sent a later text message that night stating that he had looked into holiday pay and wanted to discuss this with the claimant the next day.

o. The claimant attended a meeting with the respondent on 25 April 2018.

i. At the start of the meeting, the respondent stated that he owed the claimant £400 and was going to pay this plus £40 for her college attendance the previous Tuesday.

ii. The respondent advised that Stirling Park had been in touch about a wages arrestment and this was going to come off the sum he was paying that day. This related to council tax arrears.

iii. The claimant was not aware of this and believed that she had paid off all arrears. She told the respondent that he should do what he had to do about this and she would sort it out directly with Stirling Park.

iv. The respondent went on to say that he had taken legal advice and was shocked at what he had learned. He stated that he had not been paying the claimant the proper amount of wages.

v. The claimant replied that the respondent knew this and that she was *"skint"*.

vi. The respondent then stated that this was the end of the conversation and asked the claimant to *"please go"*. He stated that he was not talking to her further and asked her to *"please leave my garage"*.

vii. The claimant replied that she had *"not ever gone that way"* and the respondent then stated that there was *"no point talking"*.

viii. The respondent continued that the claimant did not *"get"* what he was saying and that he was not talking to her anymore because he did not want to put himself or his health into this *"position"*.

ix. The claimant responded to this by asking *"what?"* and the respondent replied that he had never paid holiday as he was self-employed. He was in total shock about this and was "*bamboozled"*.

x. There was then a discussion involving the person, Paul, whom the respondent had brought into to do work, regarding how much he was being paid and whether it was compliant with the minimum wage.

xi. The respondent then stated *"right now the conversation is ended"* and the claimant asked whether she was to wait for him to contact her or *"is it done?"*. The respondent replied that he wanted to look into this and did not want to have this conversation at that time. He did not want a confrontation.

p. The claimant did not return to work at the garage after this meeting. She continued to send text messages to the respondent about returning to work but had no reply.

q. On or around 5 May 2018, the claimant sought advice from ACAS in relation to the situation and, following their advice, sent the respondent an email about resolving the situation. The claimant received a text from the respondent the same day stating that he would let ACAS deal with it and asked her to collect her toolbox.

r. On 22 May 2018, the claimant met with Nigel Bennett of Kilmarnock College who informed her that the respondent had informed the

college that the respondent did not want the claimant to go back to work for him.

Relevant Law

11. Regulation 5 of the National Minimum Wage Regulations 2015 provides that:-

(1) The apprenticeship rate applies to a worker—

(a) who is employed under a contract of apprenticeship, apprenticeship agreement (within the meaning of section 32 *of the Apprenticeships, Skills, Children and Learning Act 2009) [or approved English apprenticeship agreement (within the meaning of section A1(3) of the Apprenticeship, Skills, Children and Learning Act 2009], or is treated as employed under a contract of apprenticeship, and*

(b) who is within the first 12 months after the commencement of that employment or under 19 years of age.

(2) A worker is treated as employed under a contract of apprenticeship if the worker is engaged—

(a) ...

(b) in Scotland, under Government arrangements known as Modern Apprenticeships;

(c) ...; or

(d) ...

12. Section 86 of the Employment Rights Act 1996 provides that:-

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) ...

(c) ...

13. Section 88 of the 1996 Act goes on to provide that:-

(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

(a) the employee is ready and willing to work but no work is provided for him by his employer,

(b) the employee is incapable of work because of sickness or injury,

(c) the employee is absent from work wholly or partly because of pregnancy or childbirth [or on adoption leave, [shared parental leave,] parental leave or paternity leave], or

(d) the employee is absent from work in accordance with the terms of his employment relating to holidays,

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

(2) Any payments made to the employee by his employer in respect of the relevant part of the period of notice (whether by way of sick pay, statutory

sick pay, maternity pay, statutory maternity pay, [paternity pay, [statutory paternity pay], adoption pay, statutory adoption pay,] [shared parental pay, statutory shared parental pay,] holiday pay or otherwise) go towards meeting the employer's liability under this section.

14. Section 221 makes provision for the calculation of a "week's pay" where an employee has normal working hours and section 224 of the 1996 Act makes provision for the calculation of a "week's pay" where an employee has no normal working hours.

15. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.

16. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(AxB)-C

Where –

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

Claimant's submissions

17. The claimant argued that she was entitled to the normal rate of pay under the National Minimum Wage legislation and not the apprentice rate because she was in the third year of her apprenticeship.

18. The claimant relied on a spreadsheet produced by her and included in the documents she provided to the Tribunal as showing that she was paid less than the National Minimum Wage rate which applied at the relevant times.

19. She was not told by the respondent that she was dismissed at the meeting on 25 April 2018 and was not informed of this until 22 May 2018. She was dismissed without notice.

Respondent's submissions

20. The respondent's agent produced written submissions supplemented these orally.

21. In respect of the claim for National Minimum Wage, reference was made to the terms of Regulation 5 of the National Minimum Wage Regulations 2015 and , in particular, the definition of apprentice in Regulation 5(2)(b) as including a Modern Apprenticeship which the claimant gave evidence was the scheme which applied to her.

22. It was pointed out that Regulation 5(1)(b) is not a reference to the first year of the apprenticeship but rather the first year of the relevant employment and that the claimant was clearly in her first year of her employment with the respondent.

23. In relation to the claim for breach of contract, the respondent's agent sought to argue that the claimant was dismissed on 25 April 2018 and that this was the clear understanding of the parties with reference to the audio recording.

24. It was submitted that the claimant was an employee with no normal working hours because the claimant was employed on a flexible arrangement as to the dates and times she worked, driven by customer demand.

25. In these circumstances, it was submitted that the formula for determining a "week's pay" under s224 of the 1996 Act applied. Using that formula and based on the claimant's earnings for the 12 weeks prior to 25 April 2018 then it was submitted that a "week's pay" for the claimant was £116.67.

26. The respondent went on to submit that section 86 of the 1996 Act provides for one week's notice given the claimant's length of service and that there was no basis to argue that it was reasonable for any longer period of notice to be provided.

27. It was, therefore, submitted that any compensation for breach of contract should be equivalent to one week's pay of £116.67.

28. The respondent went on to submit that applying the formula in Regulation 14 of the 1998 Regulations, the claimant was entitled to 1.747 weeks' holiday at the end of her employment which equalled £203.82 in holiday pay.

29. It was, therefore, submitted that the payment of £400 made on 25 April 2018 was in excess of the amount of holiday pay to which the claimant was entitled on the termination of her employment and that the excess sum was more than the wages which would have been payable to the claimant during any period of notice.

Decision

National Minimum Wage

30. The Tribunal agrees with the submissions made on behalf of the respondent that the Regulation 5 of the Minimum Wage Regulations 2015 applied to the claimant; she accepted that she was engaged under the Modern Apprenticeship scheme and she was within the first year of her employment with the respondent.

31. The Tribunal could not accept the claimant's submission that because she was in the third and not the first year of her apprenticeship that Regulation 5 did not, therefore, apply. The wording of Regulation 5 clearly states that it is the period of employment and not apprenticeship that is relevant.

32. In these circumstances, the apprenticeship rate of £3.70 an hour applied to the claimant and it was not in dispute that her hourly rate of pay was in excess of this.

33. The claimant's complaint that she was not paid in accordance with the minimum wage is, therefore, not well founded and is dismissed.

Breach of contract

34. It was not in dispute that the claimant was dismissed without notice and it was also not in dispute that the correct amount of notice would have been 1 week.

35. On the face of it, therefore, the claimant would be entitled to compensation for this breach of contract equal to one week's wages.

36. The central issue to be determined by the Tribunal was whether the payment made to the claimant on 25 April 2018 was capable of satisfying her entitlement to pay in lieu of notice in addition to any other payment to which she would have been entitled at that time.

37. It was certainly the case that the respondent did not categorise the payment made on 25 April or any part of it as pay in lieu of notice when the payment was made. However, that does not mean that it was not capable of doing so if the respondent had paid the claimant more than she was due for the holiday pay which the £400 payment was described as at the time.

38. In order to determine this issue, there were a number of sub-issues for the Tribunal to determine.

39. First, there was the question of when the claimant was dismissed as this was relevant to what entitlement she had to holiday pay.

40. The Tribunal could not agree with the respondent's position that he dismissed the claimant on 25 April 2018; there were no clear and unambiguous words of dismissal uttered by the respondent during the meeting between him and the claimant on that day.

41. Indeed, the manner in which matters were left clearly suggested that the employment relationship was continuing; the claimant expressly asked whether she was to wait to hear from the respondent or whether *"it"* was *"done"*. In the Tribunal's view the claimant was clearly asking if her employment was

at an end and the respondent had the opportunity at that point to very clearly confirm that the claimant was dismissed. He did not do so and, rather, indicated that he wanted to look into matters further.

42. It is correct to say that the respondent did ask the claimant to leave the garage but these comments had to be viewed in the context of the respondent seeking to bring an end to the meeting and the fact that he clearly did not want to continue discussing the issues around holiday pay and minimum wage. The Tribunal was not prepared to interpret such comments as amounting to the termination of the claimant's contract especially given how the meeting ended as described above.

43. It was not specifically suggested on behalf of the respondent that, if the claimant was not dismissed on 25 April 2018, she was dismissed on 5 May 2018 when the respondent asked her to collect her toolbox. If this was the respondent's position then the Tribunal would not have been prepared to find that such a request was capable of amounting to dismissal given that this could not be interpreted as anything other than a request for the claimant to collect her toolbox.

44. Similarly, the Tribunal did not consider that this request assisted the respondent in arguing that the claimant had been dismissed on 25 April 2018 given the Tribunal's findings regarding the conclusion of the meeting on 25 April as set out above.

45. The only time in which the claimant was clearly and unambiguously told that her employment with the respondent had come to an end was on 22 May 2018. It was not even the respondent who told her but, rather, this was communicated to her via Nigel Bennett of Kilmarnock College.

46. The Tribunal, therefore, finds that the claimant was dismissed on 22 May 2018.

47. The second sub-issue is the question whether or not the claimant had normal working hours and, depending on the answer to that question, what was a "week's pay".

48. The respondent submitted that the claimant worked under a flexible arrangement but this was not borne out by the spreadsheets produced by both the claimant and the respondent to show the claimant's working pattern.

49. Both these documents clearly showed a regular working pattern in which the claimant worked for the respondent 5 days a week (including her one day in college). Although the claimant's finishing times varied, these were part of the agreement as to her hours reflecting her childcare responsibilities.

50. Insofar as there were days on which the claimant did not work, the Tribunal did not consider that these were evidence of some arrangement between the claimant and the respondent that she worked on a flexible basis or that the terms of the contract agreed between the parties allowed for the respondent to not provide work or vary when the claimant worked.

51. On behalf of the respondent, the Tribunal's attention was drawn to days on which work was not offered and about which the claimant did not complain. This was not a regular occurrence and the Tribunal was not prepared to infer that this established that there was an agreement that work would not be offered. These instances could just as easily amount to breaches of contract by the respondent which the claimant had waived.

52. In these circumstances, the Tribunal was not prepared to find that the claimant did not have normal working hours and so s224 of the 1996 Act does not apply.

53. The provisions of s221 of the 1996 Act, therefore, apply. The amount of pay due under the contract did not vary with the amount of work done; the claimant was paid £40 a day regardless of the hours she worked and she worked 5 days a week. In these circumstances, a "week's pay" would be £200.

54. The third sub-issue was the amount of holiday pay owed to the claimant at the termination of her employment.

55. Based on the Tribunal's finding that the claimant was dismissed on 22 May 2018 and applying the formula in Regulation 14 of the 1998 Regulations, the Tribunal calculates the holiday pay due to the claimant as follows:-

    a. A is 5.6 weeks

    b. B is 146 days divided by 365 = 0.4

    c. C is 0

    d. The calculation is therefore (5.6x0.4)-0 = 2.24 weeks

    e. The amount of holiday pay owed to the claimant on the termination of her employment would be £448

56. In these circumstances, the sum paid to the claimant on 25 April 2018 was not capable of satisfying the claimant's entitlement to compensation for the failure to provide her with the correct notice of dismissal as it was not in excess of the holiday pay due to her on termination.

57. The Tribunal, therefore, finds that the claimant was dismissed without notice, that the payment made to her on 25 April 2018 was not, nor did it include, a payment in lieu of notice and so she is entitled to compensation for breach of contract in relation to the failure by the respondent to give her notice of dismissal equivalent to one week's pay. The respondent is, therefore, ordered to pay the claimant the sum of £200.

Employment Judge: P O'Donnell
Date of Judgment: 19 November 2018
Entered in register: 22 November 2018
and copied to parties