



EMPLOYMENT TRIBUNALS

Claimant: Ms J Wood

Respondent: Mrs S P Markey and Mr P W Markey t/a Flair Hairdressing Salon

Heard at: Liverpool

On: 15 and 16 April 2019

Before: Employment Judge T Vincent Ryan
Ms H D Price
Mrs J E Williams

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr P Maratos, Consultant

JUDGMENT having been sent to the parties on 26 April 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Issues:

In circumstances where the claimant, who lives with cardiac arrhythmia and varicose veins in her legs, was employed by the respondents, (Mrs Markey being her sister), from 4 June 2016 until her dismissal ostensibly for a reason related to her conduct on 20 May 2018, the parties agreed the following matters were issues to be decided by the Tribunal:

- 1.1 Whether the respondents, who accept that the claimant is a disabled person by the two conditions mentioned above, knew or ought reasonably to have known that at the material time during her employment;
- 1.2 The claimant was not employed for two years and this is not a claim of “ordinary” unfair dismissal. The issue around the dismissal (ostensibly for a reason related to conduct) was whether in fact the reason (or, if more than one, the principal reason) for the dismissal was that the claimant asserted the statutory right to receive itemised pay statements, auto-enrolled pension and to be paid the National Living Wage, holiday pay

and not to suffer unauthorised deductions from her wages; there is an issue as to whether the claimant asserted all or any of those rights;

- 1.3 If the dismissal was found to be unfair we were to decide upon matters relevant to the claimant's conduct that might impact any Award, including the risk faced by the claimant of her being fairly dismissed;
- 1.4 Whether certain of the claimant's absences from work arose in consequence of her disability and whether because of that the respondent treated her unfairly in dismissing her and in not following any formal procedure with her. Further issues relevant to this claim were the state of the respondent's knowledge of disability and whether what they did was a proportionate means of achieving a legitimate aim, to manage staff and so to address perceived "patterns of absenteeism";
- 1.5 Whether the respondents provided the claimant with a written statement of employment particulars;
- 1.6 Whether the respondents made unauthorised deductions from the claimant's wages where there are issues as to the hours worked by the claimant and the rate of pay due;
- 1.7 Whether the respondents failed to pay holiday pay due to the claimant, it being alleged that the respondents refused the claimant's requests for holidays;
- 1.8 Whether the respondents failed to follow an applicable code, namely the ACAS Code on disciplinary matters and if so the level of any appropriate uplift to an Award.

2. The Facts

- 2.1 The respondent is a small employer, Mr and Mrs Markey trading in partnership with a boutique and hairdressing salon. They do not have a HR Department or in-house professional expertise in personnel matters.
- 2.2 The claimant and Mrs Markey are sisters and they have endured a vexed relationship for quite some time. For reasons not relevant to this case they did not speak to each other for a period of some six years until a reconciliation of sorts, whereupon Mrs Markey offered the claimant employment. Sadly, as this litigation proved, any reconciliation was short-lived and the family disharmony is as bad now as ever, if indeed not worse; their mother gave evidence to the tribunal as a witness for the claimant and against Mrs Markey which was clearly a difficult and damaging experience. The three of them divulged personal details or made allegations against each other or just made very personal remarks that clearly showed a deeply dysfunctional sibling relationship involving deep animosity beyond the issues arising during the claimant's period of employment. Their mother's position was awkward but she too did not pull any punches about Mrs Markey. Fortunately, it is not for the tribunal to find facts as to the rights and wrongs of all that they said; we do find however that there was a history to the relationship that at least in part

informed and influenced what occurred during the employer/employee relationship.

- 2.3 On 4 June 2016 the claimant was employed by the respondent at the boutique on Thursdays, Fridays and Saturdays of each week working from 9.00am until 5.00pm. At that point the agreed payment was £50 per day. The respondents duly paid the claimant.
- 2.4 The respondents did not issue a written statement of terms and conditions of employment to the claimant; throughout the employment they did not issue any wage slips to her either. Because of the size of the respondent's business and the sisterly relationship (such as it was) there was a flexible approach to the employment regime, for example the claimant was allowed unmonitored cigarette breaks; she could arrive before working hours and have her breakfast at work; she could leave work early either to walk her dog or to feed her dog. It was a pragmatic, easy-going relationship insofar as timekeeping was concerned, and that continued throughout the employment.
- 2.5 On 6 December 2016 the claimant was transferred to the respondent's hair salon where she was to work, as before, on Thursday, Friday and Saturday, 9.00am to 5.00pm, but in addition on a Tuesday. We find that the claimant worked four eight-hour shifts, and that is based upon the documentation that has been provided, including the respondent's declarations to HMRC because of which the respondent has been penalised and had to make back payments. We have also taken it from extracts of the witness evidence of both witnesses and the documentation. The claimant worked latterly for £7.50 per hour for eight hours for four days a week.
- 2.6 In addition to that there was a "tenant" (in hairdressing terms) in the salon, Julie Harding, who paid the claimant for some additional time spent cleaning. Over time the claimant's pay may have gone up to the National Living Wage, it is quoted as being the National Living Wage, and although payslips were not provided and deductions were not notified to her, we find that the claimant has been paid the wages that were due to her throughout her employment and all holiday pay that was due to her based on those hours and those days as we have described.
- 2.7 The claimant has had varicose veins and has cardiac arrhythmia which the respondent concedes amounted jointly to disabling conditions. The claimant has had time off for remedial surgery to her veins. She worked without any adjustment being made to practices or conditions at work. There is no evidence that she ever asked for adjustments. It was known to the respondent that the claimant could work regardless of those conditions and at times she worked well. The respondents did not receive any customer complaints, concerns or comments to suggest that the claimant was having difficulty fulfilling her duties. Also, it was known to the respondent that the claimant would walk her dog daily and had the habit of smoking. The symptoms that the claimant has described in her statement to us, particularly of the cardiac arrhythmia but also in respect

of the varicose veins pre-surgery, were not known to the respondent. The respondent herself says she has varicose veins and she had never considered it would amount to a disability. There is no evidence that the claimant ever complained or raised issues, drawing to the respondent's attention to those conditions to the extent that they were disabilities; the claimant had some hospital appointments and there was an absence which for surgery. There was no reason for the respondents to believe that the claimant's conditions had substantial adverse effects on the claimant's ability to carry out day-to-day activities, notwithstanding they knew that the claimant had some medical conditions.

- 2.8 For the purposes of a property rental in March 2018 the claimant requested of the respondent her pension autoenrollment details and income details including rate of pay, and confirmation that the payment matched the National Living Wage; she asked for a payslip. There is no evidence to suggest that the claimant ever made any written request for any of her statutory employment rights. She did not raise any grievances although it is possible on other occasions that the claimant asked for some such documentation for one reason or another. The claimant did not commence proceedings to enforce any statutory rights during her employment. During her employment the claimant did not allege to the respondents, or as far as they knew to any colleague, that the respondents had infringed a statutory right to which she was entitled. She requested documents to support an application for a rental property but when it was not forthcoming she did not assert an infringement of a statutory right.
- 2.9 On 20 April 2018 the claimant felt unwell and telephoned her mother in the early hours to say that she would not be attending work the next day; she asked her mother to let the respondent know.
- 2.10 On 21 April 2018 the claimant was absent from work, and Mrs Markey's mother telephoned her to say that the claimant was in hospital. Their mother did not know where the claimant was or what she was doing but she had assumed that the claimant had stayed home. She added the suggestion that the claimant was in hospital to appease Mrs Markey and she did so of her own initiative, believing that Mrs Markey would be intolerant of the claimant 's absence otherwise.
- 2.11 On that Saturday, later in the day, the respondent queried how the claimant was, and their mother admitted that she had told a lie and that the claimant had not been in hospital. She did not say that the claimant was ill at home where she had assumed, but she did say that it was a lie to say that the claimant had been at hospital. The respondent was dissatisfied with this and she suspected, then and later, that the claimant was meeting her personal partner and was absenting herself from work to do so. Mrs Markey gave us the impression that she disapproved of the claimant's partner and had reservations about him, not least because she repeatedly said that he had a criminal record and was out of prison on licence which she repeated with what we took by its tone to amount to disdain and suspicion in her voice.

- 2.12 The claimant attended hospital for surgery on her veins in May and was absent from work from 9-15 May 2018. She then returned to work. The respondent believed, rightly or wrongly at that point, that the claimant's troublesome varicose vein having been treated it was no longer a problem.
- 2.13 On Saturday 19 May 2018 the claimant said to the respondent that she thought she had a blood clot in her leg and she would work during the day but that after the last appointment at the shop, at about 3.00pm, she was going to take herself off to the hospital. Mrs Markey told Ms Wood not to wait and allowed her to leave earlier, at 1.00pm; Mr Markey offered her a lift to the hospital which she did not take up. Mrs Markey wished the claimant well and asked that she let her know how she got on at the hospital.
- 2.14 The claimant attended hospital on 19 May but she did not return to work. The claimant says that she thought Mrs Markey expected her to return to work. Mrs Markey was suspicious. Her suspicion was that again the claimant might have been meeting her partner. She was suspicious in part because the claimant had said she thought she had a clot that needed medical attention yet she was prepared to wait until 3.00pm in the day to seek medical attention. For whatever reasons, right or wrong, the respondent was suspicious, and Mrs Markey and her husband telephoned the hospital at least twice on the Saturday evening to check whether Ms Wood had been there. She was told that there was no vascular clinic and whatever other information the hospital gave Mrs Markey believed that the claimant had not been at the hospital at all on 19 May. We doubt very much that the hospital staff gave out any detailed patient information but Mrs Markey may have been told that the claimant was not there at the hospital; whatever she was told Mrs Markey's belief and understanding was that the claimant had not visited the hospital on that day. She then repeatedly telephoned the claimant over the course of Saturday evening/Saturday night to enquire as to her whereabouts, and possibly even her wellbeing; her priority, bordering on an obsession at that time, was to ascertain the claimant's whereabouts during the working day in question. The claimant did not pick up the calls nor did she return the missed calls. She was aware of them however.
- 2.15 At 7.00am on Sunday 20 May the respondent visited the claimant's house. She dismissed the claimant orally, loudly and assertively. The effective date of termination was therefore 20 May 2018. We have three versions of what was said:
- 2.15.1 The claimant says that Mrs Markey threw £40 at her and said, "you're a liar; you're sacked; you haven't been to hospital";
- 2.15.2 The claimant's partner heard the words "you liar; you're sacked"; and
- 2.15.3 Mrs Markey's evidence is she said, "you're not coming back to work; you've lied twice; here's £40 for the day's work".

We are unable to say which version is the most accurate, but what is evident from all three versions is that during a short and heated conversation Mrs Markey effectively said that the claimant had been dishonest to her and that her employment had ended, and she made a payment.

- 2.16 Mrs Markey believed that Ms Wood had lied to her. That was the reason for the dismissal. She was fed up with the claimant considering her to be unreliable. The principal reason for that was her belief, rightly or wrongly, that the claimant had been dishonest about her whereabouts when absent from work and that she was absenting herself from work to see her partner, which she felt was developing into a pattern of absenteeism.
- 2.17 Mrs Markey and/or her husband telephoned the hospital again on that Sunday to again check whether the claimant had been in hospital on 19 May. It clearly bothered and angered Mrs Markey that the claimant was absent from work on Saturday, that she did not appear to Mrs Markey to have been at the hospital, that she did not answer or return her calls, and that there appeared to be a pattern of absenteeism that the respondent related to the claimant's relationship with her partner. As I say, rightly or wrongly we are satisfied that is what Mrs Markey believed and had in mind at the time of the dismissal.
- 2.18 Mrs Markey then contacted ACAS; she received advice on employment rights and responsibilities; she was advised on potential wording of a dismissal letter stating a somewhat non-committal reason for dismissal: "not satisfied with suitability". She then wrote to the claimant on 23 May 2018 in those terms to confirm dismissal.

3. The Law

- 3.1 Section 1 Employment Rights Act 1996 (ERA) requires an employer to provide an employee with a written statement of employment particulars no later than two months after commencement of employment. The required particulars are set out in s.1 (4) ERA.
- 3.2 Section 8 ERA gives employees the right to receive a written itemised pay statement at or before the time at which any payment of wages is made to them. The remedy for failure to so provide to an award equivalent to the un-notified deductions.
- 3.3 Section 13 ERA gives employees the right not to suffer unauthorised deductions from wages where authority is either statutory, contractual or is the subject of a signed prior authority from the employee.
- 3.4 The Working Time Directive 1998 provides for entitlement to paid holidays and give employees and workers the right to be paid, at the end of employment/assignment, a sum equivalent to unpaid accrued holiday entitlement.
- 3.5 Section 104 ERA provides that an employee who is dismissed shall be regarded as having been unfairly dismissed ("automatic unfair dismissal")

if the reason (or, if more than one, the principal reason) for the dismissal is that the employee has litigated to enforce a relevant statutory right, or alleged that the employer has infringed a right of theirs which is such a right. The employee must therefore bring proceedings and/or make the said allegation. Either way what is required to make out this claim is more than a request for one of the documents suggested by paragraphs 3.1 – 3.2, and the post-employment claim that wages and holiday pay have not been paid. Even if proceedings had been brought or such allegations made during employment, the reason for the dismissal is the key.

- 3.6 Section 15 Equality Act 2010 (EA) gives disabled people protection from discrimination arising from disability. Specifically, it is a form of discrimination to treat a disabled person unfavourably because of something arising in consequence of disability. The tribunal must determine what the “something” is that arises in consequence of the disability and what was the “unfavourable treatment”, if any; subject to that the key is “because” in that there must be a causal connection between the treatment and the “something”. There is a defence to this claim where the treatment was a proportionate means of achieving a legitimate aim. In any event s.15 EA does not apply in circumstances where the alleged discriminator did not know, and could not reasonably have been expected to know, that the person was disabled.

4. Application of Law to Facts

- 4.1 Based on those findings of fact our conclusions in respect of the claims are set out below, and this is the unanimous judgment of the Tribunal.
- 4.2 In respect of the claim of automatically unfair dismissal for asserting a statutory right we find that the principal reason for dismissal was Mrs Markey’s belief, mistaken or not, that the claimant was dishonest about her absence from work on two occasions. The claimant may have asked more than once for a wage slip and for details of an auto-enrolled pension (and she certainly did once) but there is no evidence that she ever asserted a statutory right or any infringement of one. The dismissal was not in any sense related to itemised pay statements, or entitlement to auto-enrolled pension, to be paid the National Living Wage, holiday pay or the right not to suffer unauthorised deductions from the claimant’s wages.
- 4.3 Whereas the claim fails the Tribunal notes that the dismissal would, probably (and certainly procedurally), have been an “ordinary” unfair dismissal if the claimant had enjoyed the right not to be unfairly dismissed; she did not. The dismissal was carried out just short of the time where she would have had protection. She was entitled to one week’s notice, and if that was added to her period of employment it would take her to, at latest, 27 May 2018 whereas her second anniversary of commencement was 4th June 2018.
- 4.4 The respondents concede, with hindsight, that the claimant was a disabled person at the material time as she contends. They did not know this nor could they reasonably have known it during the employment relationship. We are not sure that the claimant was aware that she

satisfied the statutory definition of disability or ever considered herself to be disabled prior to her dismissal.

- 4.5 What arose in consequence of the disability was absences from work with occasional need to attend hospital. The alleged unfavourable treatment was dismissal, which is clearly unfavourable, and dismissal without procedure which is also unfavourable. The unfavourable treatment so described was not because of the claimant's disability related absences or need to attend hospital; it was because of the belief that the claimant had not attended hospital, had lied to the claimant as to why she was absent and her whereabouts. The reason for the dismissal, and the reason that the respondents did not follow any recognisable procedure, was the belief that the claimant had lied on this and other occasions, exacerbated by her failure to answer or return Mrs Markey's calls which angered Mrs Markey and heightened her suspicions. The decision to dismiss her may have been accelerated by knowledge and understanding of the significance of the claimant's lack of two years' employment and protection against unfair dismissal. The decision to dismiss her was not because the claimant had disability absences from work or had to go to hospital; it was because Mrs Markey believed she had not been to hospital and she had lied. Mrs Markey advised the claimant to go to the hospital earlier than the claimant intended on 19 May and wished her well; Mr Markey offered her a lift; those factors seem to counter the claimant's allegations.
- 4.6 In relation to the unauthorised deductions from wages claim we made findings of fact about the claimant's contractual hours and rates of pay. She has accepted that she was paid for those hours; what she is claiming for was in respect of her being at work an hour before and an hour after her agreed hours. We find that they those hours were not contractual hours although she may have come early on some days and she may have left late some days; she also arrived late and left early some days. The hours that the claimant is claiming for were not her contracted hours and they were not overtime hours.
- 4.7 The holiday pay claim fails on the same basis. Holiday pay was paid in full based on the claimant's proven contractual hours.
- 4.8 The claimant was not given any payslips itemising the payments due to her and the deductions made. That claim was conceded by Mrs Markey at the hearing. The remedy for that claim is the amount that was deducted that ought to have been notified to the claimant; it is not money that she would otherwise ever have received but it is money that was taken from her ostensibly to pay to HMRC. We know it has now been paid to HMRC by the respondents but paid late and with penalties. The sum due to the claimant is the amount that was deducted from her wages without notification on payslips, being the sum for which the respondents have had to account to HMRC (less any fine and penalty).
- 4.9 We have looked through the available documentation provided by the respondents and it is not clear that any of the figures shown are the

correct figure representing the un-notified deductions of tax and national insurance contributions.

- 4.10 The respondent failed to provide a written statement of terms and conditions. We can make that declaration but we cannot make an award in respect of it because under Schedule 5 of the Employment Act 2002 failure to provide payslips is not one of the claims that triggers an award for failing to provide a written statement. I will stand corrected if Mr Mensah wants to submit on that, but section 38 of the Employment Act, Schedule 5 provides that if there is no written statement of terms and conditions and any one of several claims succeeds then the tribunal may award a payment of two or four weeks' pay. Those claims are trade union related ones (which we can ignore), unfair dismissal (which has failed), discrimination (which has failed) and unauthorised deduction from wages (which has failed).
- 4.11 The only claim that succeeds in respect of which an award may be made is in respect of the respondents' failure to provide wage slips. That is a matter that is to be clarified and Orders have been made in that respect.

Employment Judge T Vincent Ryan

Date: 16.05.19

REASONS SENT TO THE PARTIES ON
24 May 2019

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