



EMPLOYMENT TRIBUNALS

Claimant:
Miss L Ross

v

Respondent:
Tantrum Hair Extensions Limited

Heard at: Reading

On: 4 June 2019

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mrs L Simpson (Director)

JUDGMENT

1. The Claimant's claim for damages for breach of contract (notice pay) succeeds. The Respondent is ordered to pay to the Claimant £643.28.
2. The Respondent has made an unauthorised deduction from the Claimant's wages. The Respondent is ordered to pay to the Claimant £380. This is the gross amount. If the Respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt.
3. The Respondent's employer's counterclaim is dismissed.

REASONS

1. In a claim form that was presented on 24 September 2018, the Claimant made a claim which appeared to be a claim for unfair dismissal and also complaints about notice pay, holiday pay and other payments. The claims that the Claimant was making were subsequently clarified and the Claimant is not in fact making any claim for unfair dismissal. She is also not making any claim in respect of holiday pay. What the Claimant's claims concern are:
 - 1.1 Whether in respect of the period from 30 July 2018 to 4 August 2018 she has not been paid wages of £380.00; and
 - 1.2 Whether she is entitled to the payment of £760.00 in respect of a notice period of two weeks; and

- 1.3 Whether she is entitled to recover the sum of £600.00 in respect of a training fee which was deducted from her wages in the first two weeks of her employment.
2. All of the Claimant's complaints are resisted by the Respondent. The Respondent in its response which was received at the Employment Tribunal on 26 October 2018 also made an employer's contract claim and in that contract claim, what the employer sought was an order that the Claimant pay damages to the employer in respect of a sum of £760.00 in relation to the cost of extra staff which had to be allocated to the salon to cover the Claimant's diary.
3. To a large extent, the facts in this case are not in dispute between the Claimant and the Respondent. However, there is one significant area of dispute between them and that arises from what happened on 4 August 2018.
4. What happened in this case appears to me to be as follows.
5. The Claimant's employment with the Respondent began in January 2016. She was initially employed on a rate of pay of £7.50 per hour. There is a dispute between the Claimant and Mrs Simpson as to whether the Claimant was provided with a copy of the Respondent's employee handbook. The relevant section of the employee handbook is to be found on the second page under the heading "*Probationary period and training*". The contents of that section make clear that the employees are on a three month probationary period and that in that time, they would receive full training on hair extensions and the cost of the training would be deducted from the wages by the employer at the start of the employment and held "*until the end of your employment*".
6. What the Claimant says is that this document was never provided to her at the beginning of her employment. Mrs Simpson disputes that saying that the handbook was provided to the Claimant at the beginning of her employment and in fact goes further and says that she went through the document with the Claimant as she does with all other new starters with the Respondent. Peculiarly, the Claimant does not actually dispute the content of the handbook. In fact, it seems to me that it is a compelling feature of this case that what the Claimant says is that she was told by one of her colleagues that her pay for the first two weeks is held back and that she would only be paid that money at the end of the first year. The Claimant says that she raised that issue with Mr Simpson and it was confirmed that that was the position.
7. What is peculiar about it is that in fact that is not what is stated in the employee handbook at all, because what the employee handbook refers to is the cost of training will be deducted from your wages by the employer "*at the start of your employment and held until the end of your employment*". In this case, the Claimant says that what she was told was that she would be paid it after a year and what the Respondent said happened in this

case is that she was repaid it after a year. The Claimant denies that she was repaid it after a year but I am satisfied that the Claimant's recollection in this regard is faulty. I come to that conclusion because Mrs Simpson has provided me with a sheaf of payslips for the Claimant and what they show is the Claimant's basic hours and also a sum of £50.00 in respect of expenses.

8. Beginning on 13 April 2017 and continuing until a date in August 2017, there appears on the Claimant's payslips an additional £30.00 by way of expenses.
9. There are in fact 20 payslips where there is an additional £30.00 in addition to the £50.00 expenses, and there are two payslips where there are figures other than £80.00 – one is the sum of £32.00 and the other one is the sum of £48.00. In both of those weeks, it is shown that the Claimant is on leave. $22 \times £30$ comes to £660.00. $£660.00 / £7.50$ is the equivalent to 88 hours' work. It does not quite equate to the sums that the Claimant is claiming; it is either more than the £600.00 that the Claimant is claiming if all the payments from 13 April to the August date are taken into account. If only the £80.00 payments are counted however, it does come to £600.00.
10. In any event, I am satisfied from the evidence which was given by the parties, and I accept the evidence given by Mrs Simpson, that that was to represent the repayment. I note that the Claimant now does not recall things in that way but it seems to me that that is likely to be correct. Firstly, it is what the Claimant thought would happen; and secondly, there does not appear to have been any complaint by the Claimant at the end of the year when she continued working for the Respondent. I would have thought that she would have been aware of the fact that she was due to be receiving two weeks' pay after a year and when that money did not materialise, that she would have said something about it, and so in all the circumstances, it seems to me more likely than not that the £30.00 which is paid in addition to the expenses to the Claimant from 13 April until 9 September 2017 (it was a September date not an August date) is in fact the repayment of the training fees for two weeks, so that part of the Claimant's claim it seems to be must fail.
11. The next issue I have to determine is whether the Claimant is entitled to be paid in respect of the final weeks that she worked. The parties accept that the Claimant worked until 4 August and it is also agreed that the Claimant was not paid in respect of the work that she did between 30 July and 4 August. The issue is whether the Claimant ought to have the £380.00 deducted in order to reflect the cost to the Respondent of obtaining cover for the period after 4 August when the Claimant did not attend work. It seems to me first of all the determination of that question hinges upon what actually happened on 4 August because both parties agree that the Claimant handed in a written notice of termination of her employment on that day. The notice that the Claimant gave, gave the appropriate two weeks' notice.

12. The Claimant had signalled the fact that she would be resigning from her employment in a text that she sent to Mrs Simpson on 31 July. She indicated in that text message that she would be intending to resign her employment. There was some discussion by text as to whether or not they would meet in person, in the text exchange the Claimant indicated that she would prefer (and the significance here is that she was expressing a preference and not stating what she intended to do) not to have to work the notice period.
13. I should state as an aside that the Claimant at this time had some medical issues in relation to carpal tunnel syndrome in her hand and she was experiencing pain; she had been in contact with her mother in Scotland and was wanting to go back home, but also at the same time, the Claimant was renting property in Guildford and was committed to remain in that property until the end of the month.
14. When the Claimant goes to work on 2 August. The Claimant had a sick note. The Claimant does not appear to have relied on the sick note in order to avoid work. What the sick note says is that the Claimant may be fit for work, taking account of the following advice, and the advice is to amend her duties and make workplace adaptations and it was suggested that there be an occupational health assessment and it was also said that she would have problems associated with gripping and it was suggested that she not use pliers for a period of 4 – 6 weeks. The Claimant described how she had been suffering some pain and this was part of the motivation for her choosing to resign her employment.
15. The Claimant says that she handed this sick note to Mrs Simpson on Thursday 2 August 2018 but worked that day. What the Claimant says is that there was some discussion between them about the duties that the Claimant should perform. The Claimant says that in the period after indicating her desire to resign, she felt that she had committed herself to work for the Respondent and should attend work and so although she was in pain, she went to work on 2 August, 3 and also on 4.
16. Mrs Simpson denies this. Mrs Simpson says that she had no particular discussions with the Claimant about the resignation of her employment until the Saturday, 4 August. On 4 August, she provided the written notice of resignation.
17. What the Claimant says happened is simply that at the end of the day on 4 August 2018, Mr Simpson who is the partner of Mrs Simpson in the Respondent business, approached her and told her that she was not going to be required to work her two weeks' notice. What Mrs Simpson says is that the Claimant simply did not turn up for work on the Monday and therefore arrangements had to be made for the Claimant's duties to be covered.
18. Which of the two accounts is more likely to be correct?

19. I found it particularly difficult to decide because I found both of the witnesses to be easily believable, credible people who appeared to give evidence in a straightforward and clear way. That does not of course help me because they say two very different things. So how can I resolve the difference between the account which is given by two apparently credible witnesses?
20. Hearsay evidence is permitted in civil proceedings. Section 1 of the Civil Evidence Act 1995 provides that *"The exclusionary rule in respect of hearsay in civil proceedings is removed"*. The effect of that then is that I can take into account hearsay evidence to the extent that it assists me in reaching my decision on this case. There is one significant piece of hearsay evidence which I have taken into account which has tipped the balance in favour of the Claimant and that is the fact that the Claimant on 4 August sent a text message to her mother. The text message it seems to me – firstly, is genuine, and secondly, the content of the text message is such as to suggest that the account which the Claimant has given today is an accurate account of what happened. The Claimant texted her mother who was enquiring of her what had happened at work that day; obviously in the knowledge that the Claimant was going to resign her employment that day. One of the questions that the mother asked is whether or not things ended on good terms or things went badly and the Claimant in her response to her mother told her mother that she was told by her employers that she would not have to work her notice out but she would be paid. It seems to me that if that is what happened, then the Claimant is clearly entitled to succeed and the counterclaim is to be defeated and the Claimant should recover not only her week's pay but she should also recover her two weeks' notice and that is what I decide in this case.
21. It seems to me that if I am satisfied that it was a genuine text message that was sent by the Claimant to her mother on that day, it is likely that she would have been accurately reporting to her mother what had happened at work that day. There is nothing in the content of the text message or the circumstances in which it comes to be created that suggest to me that there is any sense of artifice in it or that it was prepared in order to present a particular case.
22. I take that view having regard to earlier text messages which passed between the Claimant and Mrs Simpson in which the Claimant had indicated a preference not to have to work the notice period and as I have already indicated the significance for me is in the word 'preference' and having had the opportunity to see and hear the Claimant give evidence in this case, I am satisfied that she is a person who would have wanted to make sure that she did the right thing and would have been being absolutely truthful and accurate in saying that she would prefer not to work the notice period but I am also satisfied that she is somebody who, if she had said that she would work the notice period, would indeed have followed through with that and work out the notice period.

23. For those reasons, I am satisfied that the Claimant is entitled to recover the sum of £380.00 in respect of pay for the period 30 July 2018 to 4 August 2018 and I am also satisfied that she is entitled to recover two weeks' notice in respect of the notice period because she was told by Mr Simpson that she was not required to work and therefore the terms of her contract come into play.
24. In respect of the employer's contract claim, the claim would in any event have been defeated in this case because there was a failure to adduce evidence of the loss which is claimed. For the employer to be able to proceed in relation to the employer's contract claim, the employer would have to show that the employer has sustained a loss. It is not sufficient to say that somebody else had to cover the duties and if the duties were covered, it would have to be shown that the duties were covered in such a way that resulted in a loss to the employer and that would have to be quantified in some way. In this case, it was not, and so in any event on the evidence that has been presented to me, that part of the claim would have been defeated but it is defeated for a more fundamental reason in this case, which is that even if the Respondent had been able to show that there was a loss caused by providing cover for the Claimant's duties, that loss would not have arisen as a result of the Claimant's breach of contract because it was the Respondent that told the Claimant that she was not required to work her notice.
25. The Claimant is to recover the sum of £380.00 which is a gross payment. That sum will be satisfied if the Respondent pays to the Claimant the net amount and accounts the balance to the Inland Revenue. The Claimant is entitled to recover the sum of £643.28 in respect of notice pay.

Postscript:

26. The judgment set out above was given at the conclusion of the hearing in the presence of the parties. On 5 June Mrs Simpson sent an email to the employment tribunal. The email reads as follows:

"Hi, I attended a hearing yesterday regarding the case number above with judge Mr A. Gumbiti-Zimuto. He awarded the claimant 2 weeks notice at the hearing but has awarded the wrong amount of pay. As he stated during the hearing the claimant produced a doctors certificate that states she be unfit for certain duties at work and those duties that are all included in her job description as per contract! Therefore the claimant would have been placed on sick leave as per contract with the SSP rate for her two weeks notice. The judge did mention this during the case but at the end he forgot to change the 2 weeks notice pay to SSP. I would be grateful if this email could be passed on to Mr Gumbiti-Zimuto to be looked at urgently rather than holding this up with an appeal. I have spoken with my accountant and wages clerk this morning and to process this payment it has to be put through as SSP due to the doctors

certificate being produced by the claimant. If you need any further information please do not hesitate to contact me directly.”

27. I am now unable to recall the exchange that is referred to by Mrs Simpson or whether it is an accurate recounting of what was said. I am certain it is what Mrs Simpson understood me to say. However, it does not alter my decision in this case. The claimant worked the days she was not paid for. She was not sick and so SSP is not relevant for those days. In respect of the notice period, in the circumstances of this case, the claimant is entitled to be paid her notice pay: SSP is not relevant.

Employment Judge Gumbiti-Zimuto

Date: 3 July 2019

Judgment and Reasons

Sent to the parties on:12.07.19.....

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For the Tribunal Office

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