



EMPLOYMENT TRIBUNALS

Claimant: Ms C Selzer-Smith
Respondent: Mr Geoff Banks
Heard at: Reading **On:** 16 May 2019
Before: Employment Judge Gumbiti-Zimuto
Representation:
For the Claimant: Mr Tom Kirk (Counsel)
For the Respondent: In person

JUDGMENT

1. The claimant's complaint of wrongful dismissal is dismissed upon withdrawal.
2. The claimant was unfairly dismissed.
3. The respondent is ordered to pay to the claimant the sum of £9,985.31 in compensation for unfair dismissal. Comprising of a basic award in the sum of £826.92 and a compensatory award in the sum of £9158.39.
4. The respondent made an unlawful deduction from the claimant's wages and the respondent is ordered to pay to the claimant the sum of £903.55.

REASONS

1. In a claim form presented on the 6 April 2018 the claimant made a complaint of unfair dismissal, unlawful deduction from wages and wrongful dismissal. The claimant has withdrawn the claim of wrongful dismissal which is dismissed upon withdrawal.
2. The claimant gave evidence in support of her own case. The respondent gave evidence in support of his case. The respondent also produced an unsigned undated document purporting to be a statement made by David French it contained not address for David French. The respondent made no direct reference to the statement and I have not taken it into account in reaching my decision. I was also provided with a trial bundle of with in

excess of 200 pages of documents, a supplementary bundle of 50 pages and some further documents. I made the following findings of fact.

3. The respondent is a licensed bookmaker who runs an online business. The claimant was initially employed by the respondent from 19 November 2015 as a Web Content Assistant. The respondent employed four people. The claimant was continuously employed by the respondent until her dismissal.
4. At the date of the claimant's dismissal she was employed under a contract of employment dated 22 April 2017. At the date of her dismissal the claimant's job title was Assistant Trader. The claimant's annual salary was £21,500 payable monthly.
5. From May 2017 until 6 December 2017 the respondent paid the claimant at the rate of £1666.66 per month resulting in a shortfall of £125 per month. There was a deduction in the claimant's wages in the sum of £903.55.
6. The claimant's contract provided for 28 days annual holiday entitlement.
7. In about December 2016 it had been agreed between the claimant and the respondent that the claimant could carry over five days of untaken annual leave into 2017. The claimant took 5 days annual leave in February 2017.
8. On 9 November 2017 the claimant wrote to the respondent confirming the number of days annual leave that she had taken that year.
9. On 10 November 2017 the respondent wrote to the claimant informing her that her "*recollection of when you had in fact taken holiday time is patchy and inaccurate*". The respondent also expressed concern that leave taken by the claimant in February had been removed from the work calendar. He continued, "*the manner in which you calculate holiday time is incorrect. If you are off for a week, that's a week's holiday time and not 5 days. You have taken 3 weeks and 5 days, you have two days left and can take those whenever it suits you.*" The respondent now accepts that his understanding in this regard was mistaken.
10. The claimant considered that the respondent was incorrect, and she raised a formal grievance. The claimant's calculation was that she had taken 11 days leave and so had 17 days holiday left.
11. The claimant set out her grievance in writing, in a letter dated 10 November 2017, and asked the respondent to confirm proposals for a grievance meeting. The grievance letter was left on the respondent's desk.
12. On the evening of the 10 November 2017 the claimant received several 'whatsapp' messages from the respondent. She describes them as "antagonistic and abrupt".

13. On 11 November 2017 the claimant received an email from the respondent. In the email the respondent told the claimant:

"I am very sorry to have to inform you that I have decided to cut staffing levels... the business cannot support four individuals and I have to make tough decisions here. Since you have resigned and then withdrawn recently, I adduce you're not totally happy with us and to be honest in trying to make a decision who to release that had to be given full weight.

Accordingly, I give notice of four weeks as per your contract. You are not entitled to any elements of redundancy, but as you have been an excellent member of my team, I am prepared to make the following offer, this will also deal with your issue of holiday, I believe you want to take more time off.

In that regard, I do dispute your argument, particularly as to the 11 day claim. You simply have no right to 'roll over' holiday from previous years, and you should be aware of this.

However, I am not going to ask you to work over the next four weeks. Instead you can take time off in lieu of your holiday claim. You will be on full pay of course. That extended notice period is effective immediately.

Additionally I shall supply excellent references. I hope you are agreeable that's a better way of going about things and you can get on with the painting job you told me you're working on.

All whatsapp messages must be deleted in respect of your privacy agreement. Please return your office keys. I shall make final payment on the 11th December. I will also make an interim payment on 6th December as I would not see you having to wait an extra week to be paid."

14. The claimant had not been given any prior warning of her dismissal or the need for staff cuts, there had been no consultation.
15. The claimant did not return to work.
16. The respondent wrote again to the claimant on the 6 December 2017 asking her whether she accepted his offer and she replied: *"sure no problem thanks."*
17. The claimant has applied for many jobs using recruitment websites. Whilst seeking employment the claimant also worked as self-employed doing cleaning, painting and decorating.

18. In his witness statement the respondent states that he *“terminated the employment contract with [the claimant] on the 11 November 2017, after less than two years of employment... the reason for termination was... to cut my staffing level due to a significant downturn in business.”* The respondent accepts in his witness statement that he did not give the claimant any warning. Commenting on the “antagonistic and abrupt” whatsapp messages the respondent says these *“contain a general exhortation to get on with the job as was expected of her”* in circumstances where the claimant had failed at her job.
19. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer. Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination. This period of continuous employment does not apply if the dismissal is for asserting a statutory right.
20. Section 98 ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason falls within subsection (2) if it is that the employee was redundant. Where the employer has fulfilled the requirement of showing a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.
21. Section 139 (1) ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.
22. Section 104 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right of his which is a relevant statutory right. It is immaterial whether or not the employee has the right, or whether or not

the right has been infringed. The claim to the right and that it has been infringed must be made in good faith. It is sufficient that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was. The rights conferred by the Working Time Regulations 1998 are a relevant statutory right. Regulation 13 of the Working Time Regulations 1998 provides for an entitlement to annual leave.

Conclusions:

23. Did the claimant, in raising a grievance about holiday pay on 10 November 2017, assert a statutory right for the purposes of section 104?

24. The claimant in her letter of the 10 November 2017 stated that she was entitled to holiday entitlement of 28 days under her contract of employment. The claimant was not relying on her rights emanating from the Working Time Regulations 1998 but from her contract of employment. The contractual right the claimant asserted matched the right contained in regulation 13 of the Working Time Regulations 1998 that provides that an employee is entitled to a period of leave in each leave year. It is sufficient that the claimant, without specifying the right, made it clear to the respondent the right claimed to have been infringed. I am satisfied that the claimant has asserted a statutory right in her letter of the 10 November 2017.

25. What was the reason for the claimant's dismissal?

26. A reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.

27. The respondent states that *"the reason for termination was... to cut my staffing level due to a significant downturn in business."* I do not accept that this was the reason for dismissing the claimant. There was no indication at all prior to the 11 November 2017 that the respondent needed to reduce staff. Only a few weeks earlier the respondent had entreated the claimant not to end her employment with him.

28. It is not in dispute that the respondent dismissed the claimant the morning after the letter of grievance was submitted. However, the respondent denies that the grievance letter was provided to him. I am satisfied that it was.

29. The claimant accepts that he received the claimant's email sent on 9 November 2017 to which he replied by email on 10 November 2017. However, in his email dismissing the claimant on 11 November 2017 the respondent refers to the *"the 11-day claim"*. The reference to 11 days appears not in the email of 9 November 2017 but in the claimant's grievance letter of the 10 November 2017. Further the grievance letter specifically states that it is a *"Formal Letter of Grievance"*. The word

grievance does not appear in the email of the 9 November 2017 and the way that it is drafted is as a document giving information. It begins: "*These are the dates I have taken holiday this year*". The dismissal email reads as though it is responding to a grievance: the passages, "*this will also deal with your issue of holiday*" and "*I hope you are agreeable that's a better way of going about things*" appear to be passages seeking out a resolution for a dispute about holiday. If the grievance letter had not been received by the respondent, he was responding to a grievance that had not yet materialised. I reject the suggestion that the respondent had not seen the grievance letter before the claimant was dismissed.

30. The respondent accepts in his witness statement that he did not give the claimant any warning. The evening after the claimant provided the grievance letter to the respondent she was sent "*antagonistic and abrupt*" whatsapp messages. Commenting on the whatsapp messages the respondent says these "*contain a general exhortation to get on with the job as was expected of her*" in circumstances where the claimant had failed at her job. However, this was all supposed to be occurring at a time when the respondent was considering the claimant's continued employment in the light of the downturn in business. I do not accept this evidence from the respondent.
31. I am satisfied that the reason that the claimant was dismissed by the respondent was as a reaction to the claimant's grievance. The timing of the dismissal accompanied by the nature of the correspondence from the respondent to the claimant leads me to conclude that the reason for the claimant's dismissal was because she made the grievance. The claimant was dismissed because she asserted a statutory right. The claimant was not dismissed on the grounds of redundancy.
32. If the reason for the claimant's dismissal had been redundancy the claimant's dismissal would still have been unfair. The respondent dismissed the claimant without following any process or procedure at all. The claimant was given no warning about redundancy or consulted about ways to avoid her dismissal. The respondent employed four people at the relevant time and only gives a very brief explanation for the selection of the claimant for redundancy stating that the claimant "*was the highest paid employee in real terms but delivering the least in performance terms.*" This assertion is unsupported by any other evidence.
33. The ACAS Code of Practice on Disciplinary & Grievance Procedures 2015 applies to disciplinary and grievance procedures. The claimant was not dismissed for any disciplinary reason she was not dismissed for reasons of misconduct or poor performance. The Code does not apply to redundancies. In this case the ACAS code does not apply to the claimant's dismissal.
34. The respondent contended in his evidence that he dismissed the claimant with effect from 11 November 2017. This is clearly not the case as the claimant's dismissal was with notice given on that day. The claimant was

given four weeks' notice. The claimant was not dismissed and given pay in lieu of notice. In his dismissal letter the respondent told the claimant:

"I give notice of four weeks as per your contract. ...

I am not going to ask you to work over the next four weeks. Instead you can take time off in lieu of your holiday claim. You will be on full pay of course. That extended notice period is effective immediately."

35. The passage quoted makes clear that the claimant was dismissed with notice and was required to take any outstanding leave during the notice period. The claimant's employment terminated in the 11 December 2017.

Remedy

36. Basic award: The claimant's age at the effective date of termination of her employment was 26 years. The claimant's length of service is two years. The claimant's gross weekly pay was £413.46. The claimant is entitled to a basic award in the sum of £826.92.
37. Compensatory award: The claimant claims the sum of £5072.04 for the period of loss between the 11 December 2017 and 28 May 2018. This figure includes a claim for loss of statutory rights of £500; loss of pension in the sum of £81.60, and loss of salary in the sum of £8,182.80. The claimant gives credit for earnings in employment or self-employment in the period.
38. The claimant seeks an award for loss of earnings for 28 weeks from the period after 28 May 2018. The figure of 28 weeks takes into account the effect of section 124 (1ZA) ERA. The claimant claims loss of salary of £9546.60, loss of pension in the sum of £95.20. The claimant gives credit for earnings in employment or self-employment. The claimant claims the sum of £4086.35.
39. The respondent contends that the claimant has failed to mitigate her loss. I reject that. The respondent has not proved that the claimant failed to mitigate her loss. The claimant's evidence, which I accept, is that she has attempted to work as self-employed, she has also been in employment. The claimant has in my view taken reasonable steps to mitigate her loss.
40. I am of the view that the claimant is entitled to recover a compensatory award in the sum of £9,158.39.

Employment Judge Gumbiti-Zimuto

Date: 12 June 2019

22 July 2019

Sent to the parties on:

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For the Tribunals Office