



EMPLOYMENT TRIBUNALS

Claimant: 1) Mrs B Davies
2) Mrs Vijayashankar

Respondent: Arthur & Associates Ltd

HELD AT: Cardiff **ON:** 20 June 2019

BEFORE: Employment Judge R Brace

REPRESENTATION:

Claimant: Mrs de Bono (1)
Mrs Vijayashankar (in person) (2)

Respondent: Mr M Arthur (Director of respondent)

JUDGMENT having been sent to the parties on 23 June 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:

WRITTEN REASONS

Background

1. The claims before me were ones of breach of contract and unfair dismissal. I heard evidence on behalf of the respondent from Mr Arthur (director of the respondent) and evidence from both claimants. The first claimant was represented by a lay representative, Mrs de Bono.
2. I had before me witness statements prepared by the claimants and Mr Arthur on behalf of the respondents and time was taken at the outset of the hearing to ensure that copies of all documentation relied upon by the parties were before me as the parties had not brought to the hearing additional copies.

Issues and Law

Breach of contract claims

3. Both the claimants in this case claim damages for breach of contract arising out of the termination of their employment by the respondent on 12 April 2018.
4. The breach of contract claims in respect of both claimants arises as the claimants claim that the respondent failed to allow the claimants to work out their notice periods and failed to make any payment in lieu of notice on termination of employment on 12 April 2018.
5. The damages arising from the breach of contract claimed by the first claimant, Mrs Davies, is limited to four weeks net pay, being her contractual notice period. Mrs Davies confirmed that since the issue of proceedings, the respondent has paid an amount equivalent to her four weeks' net pay.
6. The breach of contract claim from the second claimant, Mrs Vijayashankar, is however not limited to an amount equivalent to the pay she would have received during her notice period (which has now also been paid by the respondent since issue of proceedings). Mrs Vijayashankar's claim for damages includes additional losses she alleges flow from the respondent's breach; namely that she has been deprived of the right to statutory maternity pay, her employment having been terminated shy of her 25 weeks pregnancy. She claims that had the respondent allowed her to work out her notice, she would have been in employment at the point that she became eligible for statutory maternity pay and she is entitled to the difference between the maternity allowance she did receive and the statutory maternity pay that she would have received.
7. Mrs Vijayashankar accepts that had the respondent made a payment in lieu of notice on termination, there would have been no breach of contract by the respondent. She maintains however that the respondent did not exercise its discretion to pay in lieu forcing her to issue proceedings for damages for breach of contract.
8. With regard to the breach of contract claim, I have to consider whether or not on balance of probabilities
 - a. I am satisfied there is a contractual term in the claimants' contract of employment to the notice claimed; and
 - b. consider whether or not the respondent was entitled to pay in lieu of notice; and finally
 - c. I also have to consider whether or not the respondent did in fact pay in lieu of notice.
9. If I conclude that the respondent is entitled to make a payment in lieu of notice, I have to determine whether the respondent in fact exercised that discretion. If the respondent did not exercise that discretion at the point of termination, and did not allow the claimants to work out their notice period,

there will be a breach of contract and I have to assess damages flowing from that breach.

10. As indicated, both claimants have now been paid an amount equivalent to their net pay over their contractual notice period and if I concluded that this payment was a payment made by the respondent exercising its discretion to make a payment in lieu of notice, there will be no breach of contract and Mrs Vijayashankar's claim for losses over and above her four weeks net pay falls away.

Unfair Dismissal

11. Mrs Davies additionally claims unfair dismissal.
12. Mrs Vijayashankar is unable to claim unfair dismissal due to insufficient service.
13. With regard to Mrs Davies' unfair dismissal claim, I have to consider the reason for dismissal and whether or not that is a potentially fair reason for dismissal pursuant to s. 98(2) Employment Rights Act 1996. In this case, the respondent's position is that there was a redundancy situation brought on by the financial position of the company. The first claimant challenges that as the fair reason for dismissal. She said that there were no economic circumstances justifying the redundancy at 12 April 2018.
14. The next issue for me to consider, whether or not the parties have raised this, is whether the dismissal of the claimant for that reason was fair in all the circumstances under s. 98(4) Employment Rights Act 1996. In that regard I do take into account in dealing with litigants in person, albeit that the claimants are represented by Mrs Debono.
15. Taking into account I am dealing with the redundancy case the factors, suggested by the Employment Appeal Tribunal in Williams v Compair Maxam, 1982 ICR 156, that a reasonable employer might be expected to follow in making redundancy dismissals, have to be taken into account. I have to be mindful that it is not for me to impose my standards and decide whether the employer should have behaved differently. Instead I have to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted and the factors, as suggested in Compair Maxam, that a reasonable employer might be expected to consider include whether selection criteria is chosen objectively and fairly, whether employees are warned and consulted about redundancies and whether any alternative work is available. I also have to consider if they are with a union, whether the union's view was ought. I have no evidence before me that this was a unionised organisation and I have not considered that issue.
16. For the sake of completeness, in the case of Langston v Cranfield University 1998 IRLR 172, the EAT viewed it implicit, that unless the parties agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer. Failure to follow correct procedures is likely to make an ensuing

dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'.

Findings

17. In relation to the breach of contract claim, I am dealing in this judgment with the claims of both claimants.
18. Both employees were engaged under similar/the same contract of employment, the terms of which are set out in the contract provided by Mrs Vijayashankar. Mrs Davies and Arthur agreed that Mrs Davies was employed under essentially the same terms.
19. Clause 19 of that contract of employment provided as follows:

"The employee's entitlement to notice from the employer shall be four weeks, and where the company requires the employee immediate removal from the company, the company is entitled to require making payment of four weeks' pay in lieu of notice".
20. The respondent is a limited company of which Mr Arthur is a director. It assists organizations to reach conclusions on tax affairs with HMRC. Due to the nature of its clients the company operated on a payment on account basis for future work. This was successful to an extent but, due to a change of circumstances, there was a downturn in business, and by February 2018 Mr Arthur determined the solvency of the respondent was in question.
21. In or around February 2018 he advised staff that he would need to consider the solvency of the company and potential redundancy but there was at that point a commitment to staff to continue. By 11 April 2018 Mr Arthur determined that the company would need to cease trading and called an announcement meeting on 12 April 2018.
22. At that point in time, Mr Arthur believed that Mrs Davies was not in the office and spoke initially to only two employees he believed to be in the office. Unbeknownst to Mr Arthur, Mrs Davies was present. Notwithstanding that error, all employees were told at some point on 12 April 2018 that the company would cease trading with immediate effect.
23. All staff were paid wages up to that date, but no further payment was made to any employee. There was no selection criteria applied as all employees were made redundant or effectively made redundant on that date as the company ceased trading. Equally there was no consultation with staff with regard to alternatives to redundancy.
24. Some staff were allowed to retain company equipment and were allowed to use the company premises. It is possible that some staff also approached company clients, but there was no evidence before me that any work was undertaken by those individuals on behalf of the company at any point post 12

April 2018 save for Mrs Vijayashankar who, on a contract basis, prepared the year end accounts for the company.

25. At termination staff had been paid to date but no notice monies were paid by the company. Furthermore, the respondent did not exercise its discretion to pay in lieu of notice.
26. As a result, both claimants issued proceedings for breach of contract and unfair dismissal. Subsequently Mrs Vijayashankar was advised as she did not have sufficient continuity for her unfair dismissal or indeed redundancy payment claim, and therefore the claim only left alive for Mrs Vijayashankar was her breach of contract claim.
27. Since issue of proceedings, the respondent has paid to both claimants an amount equal to four weeks net pay.

Conclusions

Breach of contract

28. I have concluded that both claimants succeed in respect of their breach of contract claims which are well founded. Had the respondent exercised its contractual right to pay in lieu of notice at the point of termination, there would be no breach of contract.
29. The respondent did not exercise that contractual right however. It did not make a payment to either claimant in lieu of notice and therefore was in breach of the claimant's contract of employment. The payment made by the respondent to the claimants, after issue of proceedings was not the respondent exercising the pay in lieu of notice clause, but the respondent seeking to discharge its potential liability for the claimants' breach of contract claims.
30. The first claimant, Mrs Davies has been paid in total the amount that she is due in respect of damages in respect of her breach of contract claim, being four weeks net pay which she would have earned had she been entitled to work out her notice. No further amounts are due and owing to her in respect of her breach of contract claims.
31. The second claimant, Mrs Vijayashankar, has also been paid four weeks net pay. This is the measure of damages that she also is entitled to in respect of salary that she would have earned during her notice period.
32. The position in respect of Vijayashankar is more complicated however. Had the respondent exercised its discretion to pay in lieu of notice at the point of termination, there would be no breach of contract and Mrs Vijayashankar would have no damages claim. The respondent would have lawfully terminated the contract and exercised its discretion to pay Mrs Vijayashankar four weeks net pay in lieu of allowing her to work out her notice.

33. However it did not terminate the contract in accordance with its terms, but did so without giving notice or paying salary in lieu of notice and therefore I have to consider whether or not she is entitled to any further damages flowing from the breach, in addition to her salary monies.
34. Having concluded that the company have breached the contract of employment, I have concluded that Mrs Vijayashankar is entitled to further damages which flow from that breach. Had Mrs Vijayashankar been allowed to work out her notice, her employment would have ended on 10 May 2018 and she would therefore been in employment at the date that she became eligible to Statutory Maternity Pay ("SMP"). She is therefore entitled to damages being the differential between the SMP that she would have received and the Maternity Allowance that she actually received.
35. Mrs Vijayashankar limits that damages claim to an amount equal to payment she should have received in respect of the first six weeks SMP being 90% of normal pay. However I have to take into account the fact that the claimant would have received and did receive an amount in respect of Maternity Allowance over that period which needs to be deducted from any SMP (at the rate of 90% of pay). I do not have those figures before me today and as a result I am not able to issue a monetary Judgment for what that amount would be.
36. I will order that Mrs Vijayashankar is to provide a Schedule of Loss detailing the differential between the Maternity Allowance she did receive for the first 6 weeks and SMP i.e. 90% of her full pay, that she would have become eligible to receive had the contract been terminated lawfully.

Unfair Dismissal

37. Turning now to Mrs Davies' unfair dismissal claim, I accepted that the respondent was in a difficult financial position at April 2018, and when one looks at the solvency of a limited company, one doesn't simply look at what cash is in the bank account as at that point in time, there are a number of assessments when determining the solvency of the company, including the amount of creditors that the organization has and whether liabilities exceed assets.
38. I accepted the evidence of Mr Arthur that there were ongoing liabilities for the respondent, with clients having paid money on account without an ability of the company to meet the contracts expected of them which could have led to significant breach of contract claims. I accepted the conclusion that the respondent was in an insolvency position, I have no evidence before me to contradict that position. I therefore accepted Mr Arthur's evidence that as of 12 April 2018 the decision was properly made to cease trading at that point in time.
39. I therefore concluded that the dismissal of both Mrs Vijayashankar and Mrs Davies as at 12 April 2018 was for a reason related to redundancy. I found no evidence to find that the respondent had continued trading for any length of time beyond 12 April 2018 and that the respondent had in fact ceased trading

for clients on that date. I concluded that it might have been the case that some individuals had taken on personal responsibilities working for clients but I saw no evidence before me to demonstrate that the respondent had continued trading beyond 12 April 2018 or in any event not much beyond 12 April 2018. I therefore have to consider whether the procedure adopted for dealing with the dismissal of Mrs Davies was fair and reasonable in all the circumstances of the case.

40. I do not consider there is an issue with regard to selection criteria. There was an immediate cessation of trade and there was no application of selection criteria where some employees were allowed to continue working or working for period of time. Rather the respondent ceased trading and all employees had their employment terminated.
41. The critical issue in this case is whether or not employees were warned or consulted about the redundancy. I do accept that the situation of the respondent was flagged up in advance of 12 April 2018, but on 12 April 2018, a decision was made on that day by Mr Arthur to cease trading. As at 12 April 2018, there had been no further consultation since February 2018 when employees were first warned about impending problems and there was no dialogue or any form of consultation on 12 April 2018.
42. I then have to consider whether or not any consultation could have taken place which would have had any effect and I am concerned that any consultation that could have arisen would have been exceptionally limited and the dismissal would have arisen in any event.
43. No alternative work was available.
44. In terms of consultation, I concluded that it would have been a reasonable step to have held a redundancy meeting, over the course of that week or in the weeks running up to the date that the decision to cease trading was made. There was no consultation, and this led to as a result this was this led to a lack of procedure and in turn unfairness to Mrs Davies.
45. Notwithstanding that, the length of time that it would have taken for Mr Arthur to have followed a formal consultation process, taking into account his insolvency situation would have been exceptionally limited, and he would have had days but no more than a week to have properly consulted over this and on that basis, whilst I find the unfair dismissal claim is well founded, damages would be limited to a basic award which is equivalent to the statutory redundancy payment which I have calculated to be two weeks gross pay and taking into account the age of Mrs Davies as a factor multiplier of 1.5. I also award a week's pay by way of compensatory amount to consider the length of time that the respondents could have consulted.
46. I have therefore limited the unfair dismissal compensation to £244.88, rather than the sum equivalent to one month pay by way of compensation that the claimant has sought, together with one week's net pay.

47. This is equivalent to the statutory redundancy pay which I concluded that the first claimant would have been entitled to in any event. I have not ordered a basic award and statutory redundancy payment.

Employment Judge R Brace

Date: 23 July 2019

JUDGMENT SENT TO THE PARTIES ON

28 July 2019

FOR THE TRIBUNAL OFFICE

Note

These are the written reasons of the oral judgment provided on the day of the hearing on 20 June 2019.

There has been a successful application by the respondent, for the reconsideration of the breach of contract claim brought by the second claimant, Mrs Vijayashankar, since the oral judgment. The reconsideration judgment will apply in relation to the breach of contract claim brought by the second respondent but is not reflected within these Written Reasons.