



EMPLOYMENT TRIBUNALS

Claimant:

Ms J Frazer-Reid

v

Respondent:

Rampage Event Management
Limited

Heard at: Reading

On: 24 and 25 June 2019

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr N Murphy (Employee)

JUDGMENT

1. The Claimant was dismissed.
2. The Claimant was automatically unfairly dismissed contrary to section 104 of the Employment Rights Act 1996.
3. The Respondent is ordered to pay compensation to the Claimant for unfair dismissal in the sum of £25,832.92 comprising:

Basic Award	£1,467.00
Compensatory Award	£24,365.92

REASONS

1. In a claim form presented on 17 November 2017, the Claimant made a complaint of unfair dismissal. She also made a claim in respect of breach of contract and unpaid wages. The Respondent defended the Claimant's complaints.
2. The case was originally listed for a full merits hearing to take place on 20 July 2018. The hearing on that date was converted to a preliminary hearing at which case management was considered. Directions and orders were made for preparation for trial and the case was listed with a time allocation of four days. The parties produced an agreed draft list of issues which provided that the Claimant's complaint for breach of contract, the

Claimant's complaint in relation to constructive unfair dismissal and set out 11 points to be determined by the Tribunal. In respect of the allegation of constructive dismissal, the claim was put in the following way in the list of issues:

(4) Was the Respondent in fundamental breach of the contract of employment? The Claimant alleges that the Respondent was in breach of the implied term of trust and confidence thus the issue for the Tribunal is: Has the Claimant proven on the balance of probabilities that viewed objectively, the Respondent conducted itself in a manner calculated or likely to destroy the relationship of trust and confidence by the following alleged factors:

- (a) Failing to pay the Claimant's salary on the 10th day of each calendar month;*
- (b) Failing to provide the Claimant with wage slips;*
- (c) Failing to comply with its statutory obligation to provide the Claimant with a workplace pension;*
- (d) Making unlawful deductions from the Claimant's wages throughout her employment.*

(5) Did the Claimant, by her delay in resignation, her conduct during the course of her employment or otherwise affirm any such alleged fundamental breach of contract?

(6) Was the Claimant's resignation on 12 June 2017 in response to the alleged fundamental breach?

3. The Claimant gave evidence in support of her own case. The Claimant produced two versions of her witness statement. The first is dated 10 July and a second, which is dated 19 October 2018. The Respondent relied on the witness statement of Mr Michael Rimmer dated 4 July and statements from Mr Nigel Murphy, dated 4 July 2018 and 10 October 2018. I was also provided with a hearing bundle containing 224 pages of documents.
4. I made the following findings of fact in this case from the above sources.
5. The first point which I am asked to consider is whether the Respondent failed to pay the Claimant her salary on the 10th day of each calendar month.
6. The Claimant's case is that the Respondent and the Claimant agreed that she would be paid on the 10th day of each calendar month. The Claimant stated that this was agreed between her and the Respondent. The

Claimant's evidence was that this was confirmed in conversations that she had with Mr Murphy at the start of her employment. The Claimant also relied on a document which was produced by the Respondent which is referred to as the "staff briefing document". This document was created in April 2017. The document includes an instruction to employees and other workers that invoices and timesheets are to be received by the 7th of the month for approval. This is so that they can be paid by the 10th of the month. The document states that payments in respect of work done for Rampage was paid on the 10th of the month after the month worked and work done for Phillip Morris was paid on the 10th of the month two months after the event. That was due to the period of time that Phillip Morris took to make payment to the respondent.

7. Mr Murphy in the evidence that he gave was unable to recall the discussion with the Claimant where it was agreed that the date of payment would be on the 10th of the month. He accepted however that it has always been the Respondent's aspiration to make the payments by the 10th of the month. He explained that the briefing document was nothing more than an aspiration. He denied that it evidenced in any respect a contractual requirement on the part of the Respondent.
8. Mr Murphy referred to the fact that the Claimant's contract of employment, a document which was provided to her sometime after her employment commenced and although the Claimant signed a copy of the contract, the Respondent never signed it.
9. There is a section 7 in the contract which deals with remuneration and benefits and the point is made by Mr Murphy that the contract does not make any reference to an obligation to pay the Claimant's wages by the 10th of the month; the contract is entirely silent on the point. Mr Murphy also relied on the fact that there is only one occasion when the Respondent did pay the Claimant and other staff on the 10th of the month. All the other payments were either made after that date and, on a few occasions, before that date. Mr Murphy asked me to find that the Claimant is wrong when she says that it was a contractual provision that she is paid on the 10th of the month because there was a lack of any corroboration of the Claimant's position from, for example, any grievances or emails expressing complaints or dissatisfaction and the point that he sought to make was that if the Claimant had really resigned her employment because of the late payment of her wages due under the contract, there would have been some evidence of that nature. I do not accept that point made by Mr Murphy because he also said in his evidence that he had conversations with the Claimant where she had expressed criticisms about the late payment of her wages. The late payment referring to the payments not made on 10th of the month.
10. Mr Murphy also conceded that there were a number of emails in the bundle where the Claimant in the discharge of her duties as an employee of the Respondent had expressed to a number of employees and/or self-employed persons employed on events by the Respondent that the date

for payment was the 10th of the month. Mr Murphy's point in relation to these numerous emails setting this out is that there is little assistance to be gained from them because they all post-date the creation of the staff briefing document in 2017. He is right in part but I note that there is an email written on 27 August 2014 by the Claimant to one of the Respondent's employees, a Mr Chris Cound, in which it was expressed that the payment date was the 10th of each month.

11. On the basis of the information that has been presented to me, I am satisfied that it was expressly agreed between the Claimant and the Respondent that the Claimant was to be paid on the 10th day of each calendar month. I am also satisfied that other than on one occasion, the Respondent has failed to comply with the requirement to pay her salary on the 10th day of each calendar month.
12. The Claimant complained that the Respondent failed to provide her with pay slips on a regular basis. Although the Respondent denied this in its response, Mr Murphy, during the course of the evidence that he gave, accepted that the Claimant had persistently asked for her pay slips and that there was an element of truth in the proposition that they were not provided. I am satisfied from the Claimant's evidence and the evidence which was given by Mr Murphy that, although the pay slips were easily obtained, in fact the Claimant was not on many occasions provided with copies of pay slips - she would either have to request a pay slip specifically or they were not provided at all.
13. The Respondent concedes that it failed to comply with its statutory obligations to provide the Claimant with the Workplace Pensions provisions and failed to comply with its duties in relation to automatic enrolment.
14. The final part of the Claimant's contention that there was a constructive dismissal arises from her complaint that the Respondent made unlawful deductions from her wages. The Claimant pointed out on a variety of pages, between page 8 and page 48, a summary of the timesheets that she completed during the course of her employment. What the Claimant says about those timesheets is that they set out the hours that she worked which once inputted into the appropriate software on the part of the Respondent should have generated a payment to the Claimant. Her evidence was quite simply that on many occasions the amount that she was paid was wrong. The Claimant drew my attention to one timesheet and one pay slip and they did not match.
15. Mr Murphy was asked about this. Mr Murphy was unable to explain it. Mr Murphy accepted in the course of his evidence that there was no reason why it should have happened. Mr Murphy then went on to state that there were occasions when it was necessary to reconcile the hours that the Claimant worked with the payments that had been made. He accepted that on many occasions he asked the Claimant to check that these figures were correct and where they were found to be incorrect he said the

payments were then made. He said that there was a process of catching up.

16. Initially, Mr Murphy indicated that there were not numerous occasions, but conceded that it occurred. It was not clear to me whether, ultimately, he did accept that there were numerous occasions when this did occur. In any event, I am satisfied that it did happen on occasions as the Claimant has suggested.
17. I am therefore satisfied that the Claimant has, by the evidence that she has called and also by consideration of the evidence which has been called on behalf of the Respondent, been able to prove the matters set out in section 4 of the agreed list of issues, namely that the Respondent failed to pay the Claimant's salary on the 10th day of each month, that the Respondent failed to provide the Claimant with pay slips, that the Respondent failed to comply with its obligation to provide the Claimant with a Workplace Pension and that the Respondent made unlawful deductions from the Claimant's wages throughout her employment.
18. On 12 June 2017, the Claimant decided to work from home. During the course of 12 July 2017, the Claimant determined that she would resign her employment with the Respondent and she wrote to Mr Michael Rimmer following a dispute that she had had with him over the telephone concerning the fact that she was working from home. The letter that she wrote reads as follows:

"Mike –

Working from home has little to do with the journey time. When I am working late into the evenings and early mornings, there is little point in me driving all the way home which means that I am not in my home even between being away for events. I literally do not have any more time to give to Rampage. Additionally, even if I wanted to drive to and from Farnborough, half the time I would not be able to afford the fuel as every time I am paid, it all goes on the credit card bills I have to pay off which I have racked up every time I am not paid on time. The reason I am not currently living in Newbury is because my mortgage was declined because I am never paid on time. I am spending considerable amounts of my money on things needed for Rampage and yet I have no idea if these are even down as expenses on my pay. To not even have them paid back on time is not OK. I am currently getting into debt purely to work for Rampage and I do not see that changing any time soon.

Please accept this as my resignation. My last day of work will be 14 July.

Jo."

19. Mr Murphy was asked about the letter of resignation he was asked whether he accepted that the letter of resignation set out the Claimant's reasons for resignation of her position. Mr Murphy's evidence was it was

part of the reason. He said that there were also other reasons why the Claimant wanted to give up work which related to her lack of enthusiasm for continuing in the role that she did for the Respondent.

20. I am satisfied that the reason for the Claimant's resignation on 12 June was in response to the alleged breaches of contract. I am satisfied that these amount to a fundamental breach of contract.
21. I have to consider whether the Claimant delayed in resignation or whether, during the course of her employment, her conduct affirmed the fundamental breach. I am satisfied that there was no affirmation. Mr Murphy accepted that the Claimant continued to complain about delays in payment of salary, that the Claimant raised questions about wage slips. It is not in dispute that the Claimant did raise concerns about the failure to comply with the Workplace Pensions and that there were numerous occasions when the Claimant was required to reconcile her timesheets with the wages shown. I am satisfied that there was no affirmation of any fundamental breach by the Respondent.
22. In the circumstances, I am satisfied that the Claimant was constructively dismissed.
23. I have to consider whether the Claimant's dismissal was automatically unfair pursuant to section 104 of the Employment Rights Act 1996, that is:

"Was the reason or principal reason for the fundamental breach of contract by the Respondent that the Claimant had alleged that the employer had made unlawful deductions from her wages?"
24. I am satisfied that it was. It is clear that the Claimant was complaining about the payment of her salary being late each month and once the salary is paid late, there is an unlawful deduction from her wages.
25. There were numerous occasions when payments were made to the Claimant which were less than the amounts that ought to have been paid; that is a further unlawful deduction from the Claimant's wages.
26. Both of these matters were part of the reason why the Claimant resigned her employment. I am therefore satisfied that the Claimant's dismissal was for an automatically unfair reason pursuant to section 104 of the Employment Rights Act 1996.
27. I am asked to consider what losses the Claimant has proven as a result of the dismissal. It is said that if the Respondent had not been in fundamental breach and the Claimant had not resigned on 12 June, the Respondent would have been likely to have resigned the Claimant's employment for another reason in any event. Around 25 May, the Claimant indicated an intention to leave her employment with the Respondent because of its failure to pay her on time. The Respondent's position appears to be that what she indicated on 25 May was an intention to leave for personal

reasons. Whilst it is accepted that there was discussion about an intention to leave on 25 May, there is no evidence that I am able to accept that it was the claimant's intention to resign for reason other than that stated by the claimant that she was not being paid on time and it was causing her problems. It was not put to the Claimant that her reasons for leaving were anything other than those she expressed.

28. It is conceded that the Claimant had a number of issues in relation to working for the Respondent but it seems to me that they all arose out of the problems that she was having relating to the timeliness of the payments that she was being given by the Respondent, and it was those matters that made her consider whether or not it was worth continuing to be employed by the Respondent. I am not satisfied that it has been shown that there was another reason which would have resulted in the Claimant leaving which was a personal reason unrelated to the fundamental breach.
29. There is no basis for me to reduce the Claimant's compensatory award on the grounds that she failed to raise a grievance or alternatively that she contributed to her dismissal.
30. Having regard to those findings of fact, I have also had to consider whether or not the Claimant has failed to mitigate her loss. The obligation to prove a failure to mitigate rests on the Respondent. There was a suggestion made by Mr Murphy that the Claimant could have sought employment with a company associated with the Respondent called Pladis – a customer of the Respondent. However, it soon became clear that this was not a realistic expectation for a number of reasons.
31. The first is that it was a company in the same industry as the Respondent and one of the things that the Respondent required the Claimant to do was to sign an agreement which although in all probability unenforceable required her not to gain employment, consultancy or any other capacity in a direct or indirect Rampage competitor for three months from the date of the agreement. The claimant was not to know that the agreement was likely unenforceable, she signed because it was a pre-requisite of being paid money she was owed. The Claimant would strictly speaking have been in breach of that clause in the contract that she made with the Respondent after her employment ended had she pursued this. I do not consider that the respondent can complain about a failure to mitigate during the period of this agreement. However, in practical terms, it was not realistic. It was not realistic because the contact that the Claimant had at the company left employment. The role itself was a sales role and it was not something that the Claimant was able to follow up. In practical terms, there was no role that the Claimant could take up with this company.
32. It was further contended by Mr Murphy that the Claimant could have sought employment in the events industry. However, what Mr Murphy failed to appreciate is that the Claimant had been looking for work in the events industry and continued to do so until she was able to secure

permanent full time employment in June 2018 at a significantly lower rate of pay.

33. The Respondent has not proved that the Claimant has failed to mitigate her losses.
34. What is the Claimant's loss as a result of the dismissal?
35. The Claimant is entitled to a basic award. The basic award in this case is agreed by the parties to be £1,467.00. In respect of compensatory award, the Respondent concedes that the Claimant is entitled to receive the loss of pension benefits and it is agreed that in any event, the Claimant should be awarded the sum of £1,446.48 in respect of lost pension benefits.
36. As to loss of earnings, applying the statutory test for the calculation of a week's pay contained within the Employment Rights Act, the Claimant's net salary was £35,678.46.
37. Her total loss of earnings from the effective date of termination to the date of Employment Tribunal hearing is £36,364.96.
38. The Claimant gives credit for a number of sums earned and was also able to secure full time employment on 11 June 2018 on a salary of £32,000.00 per year which was a net amount of £25,140.88.
39. The Claimant's net losses from the effective date of termination to the date of the Employment Tribunal hearing is therefore calculated at £17,150.65. I am satisfied that it is appropriate to make an award in this amount.
40. The Claimant's new job results in the Claimant continuing to have a loss of earnings and I consider that it is just and equitable to make an award for loss of salary for a future period of six months, equating to the sum of £5,268.79.
41. I therefore make a total compensatory award to the Claimant in the sum of £24,365.92.
42. The Claimant has made claims in respect of £8,879.89 and £5,568.56 in respect of credit card expenditure and savings and overdraft loans/. I am not satisfied that the Claimant is entitled to recover these sums. These are sums of actual expenditure by the Claimant. What the Claimant would have been entitled to recover would be the interest in relation to these sums or alternatively the overdraft charges or other bank charges which arise as a result of the failure to pay her wages on time. She is not entitled to claim these sums by way of breach of contract. To that extent, the Claimant's claim for breach of contract is therefore dismissed.
43. The Order of the Tribunal therefore is that the Claimant is unfairly dismissed and is entitled to an award for unfair dismissal in the sum of £25,832.92 comprising:

Basic Award	£1,467.00
Compensatory Award	£24,365.92

Employment Judge Gumbiti-Zimuto

Date: 3 July 2019

Judgment and Reasons

Sent to the parties on: .1 August 2019...

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For the Tribunal Office

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