



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Edmondson

Respondent: Adnan Ashraf

Heard at: Manchester

On: 23 July 2018

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance

JUDGMENT having been sent to the parties on 9 August 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

INTRODUCTION

1. The claim was brought by way of a claim form dated 6th November 2018 in which the claimant complained of underpayment of wages from 1st November 2014 to 6th September 2018 in her role as a dental nurse at the respondent's dental practice. The claim was brought against Adnan Ashraf, Katherine Zhao, Nelson Centre Dental Practice and Suresh Balasubramaniam.

2. Adnan Ashraf submitted a response form of 19th December 2018 defending the proceedings. It stated that the claimant was unable to produce a contract which detailed her working hours and if there was any underpayment, this was the responsibility of the previous owners of the business.

ISSUES

3. At the preliminary hearing on 28th March 2019, Employment Judge Holmes dismissed the claim against Katherine Zhao, Nelson Centre Dental Practice and Suresh Balasubramaniam with the claimant's consent for the reasons set out in his note of that hearing.
4. In addition, Employment Judge Holmes told the claimant that if she continued with the unlawful deduction from wages claim under section 13 of the Employment Rights Act 1996 it would be out of time and the claimant would be limited to a two year clawback of any underpaid salary in accordance with section 23(4A) of the Employment Rights Act 1996.
5. Following this clarification, the claimant agreed to pursue her claim under the Employment Tribunal Extension of Jurisdiction Order 1994 against Adnan Ashraf. This order provides that proceedings can be brought to recover sums owed to a claimant on termination of employment, provided that the claim is brought within three months of the termination of employment.
6. The claimant voluntarily terminated her employment on 6 September 2018 and early conciliation began on 31 October 2018. The Employment Tribunal claim was submitted on 6 November 2018.
7. Therefore, the Tribunal has jurisdiction to hear the claim and the issue to be determined was whether there had been a breach of contract from 1 November 2014 – 6th September 2018.

EVIDENCE

8. Unfortunately the respondent was not in attendance at the hearing.
9. When the Tribunal administrative staff contacted the respondent by telephone at his Practice, the respondent told them that he knew that the hearing was listed for 23rd July 2019 but thought it was not going ahead because he had not received a witness statement from the claimant.
10. The respondent also confirmed he had received the email of 7 June 2019 from the Tribunal with the dismissal order. The Tribunal administrative staff pointed out that whilst the claim against the other respondents had been dismissed, it was clear from that Order that the case was still proceeding against him.
11. The respondent confirmed to the administrative staff that he would not be attending but did not ask for a postponement.
12. The claimant confirmed in evidence that she had posted both documents and statements through the door of the Practice and she had advised the respondent in emails that she had done so.

13. The Tribunal established that the only documents that were not available to the respondent at the last hearing, were statements in support of the claimant's case, an email from 2014 and WhatsApp messages.

14. Under Rule 47 of the Employment Tribunal Rules the Tribunal has the power to proceed in the absence of a party following consideration of any information before it and after making practicable enquiries about the reason for the party's absence. As a result of such consideration and enquiries, the Tribunal decided to proceed in the absence of the Respondent.

15. The Claimant provided signed witness statements from herself, Katherine Zhao and Suresh Balasubramaniam and the claimant gave evidence under oath. The Claimant also provided a bundle of documents that included contracts of employment and a breakdown of the underpayments.

RELEVANT LEGAL PRINCIPLES

16. Article 3(c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

“Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages , or for a sum due, in respect of personal injuries) if...(c) the claim arises or is outstanding on the termination of the employee's employment.”

17. Any such claim under Article 3(c) must be brought within 3 months of the termination of employment.

18. In **Lynch v Mitie Lindsay Ltd EAT/0224/03** the Employment Appeal Tribunal confirmed that the 1994 Order gives a claimant a free standing claim separate to any claim under Section 23 of the Employment Rights Act 1996 and that the separate limitation provisions applied. In that case the Employment Appeal Tribunal determined that the Tribunal did have jurisdiction to hear the claim for non payment of commission in 1998 and 1999 because the claimant had brought the claim within 3 months of his dismissal for redundancy in February 2002.

RELEVANT FINDINGS OF FACT

19. The claimant was a Dental Nurse with the respondent from 31st October 2001 until she voluntarily left employment on 6th September 2018.

20. In April 2013, Katherine Zhao and Suresh Balasubramaniam took over ownership of the dental practice and the claimant's employment was subject to a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. In accordance with the 2013 contract of employment, the claimant worked 24 hours per week.

21. The claimant went on maternity leave in December 2013 and returned to work in October 2014. On her return to work the claimant sought a reduction in her weekly working hours to 22.5 hours.

22. The owners agreed to the claimant's request and an email was subsequently sent to the payroll provider, erroneously stating that the claimant's hours were now 21.75 hours per week. There was no variation to the 2013 contract of employment

23. The claimant was unaware of the content of this email but knew her weekly pay would be reduced and assumed she was being paid for 22.5 hours.

24. In 2017 the claimant signed a new contract of employment that stated her weekly working hours were 22.5.

25. In April 2018 Adnan Ashraf took over ownership of the Practice and again the claimant's employment transferred under the TUPE legislation.

26. From April 2018 the claimant was in dispute with the respondent over the payment of her salary. It was as a result of this dispute that the claimant discovered that she had only received pay for 21.75 hours per week from October 2014 instead of the agreed 22.5 hours.

27. The claimant subsequently contacted Katherine Zhao and Suresh Balasubramaniam who confirmed that the email in 2014 contained an error and the claimant should have been paid for 22.5 hours.

28. Katherine Zhao and Suresh Balasubramaniam contacted their accountants and provided the claimant with details of the underpayment. The total amount calculated was £2329.75.

29. Katherine Zhao and Suresh Balasubramaniam contacted the respondent on 20th September 2018 and informed him of the underpayment and his liability to pay the claimant as the new owner of the business. The respondent was also informed that on payment to the claimant, he could recover the amount from Katherine Zhao and Suresh Balasubramaniam in accordance with the terms of the sale purchase agreement.

30. The respondent refused to pay the claimant the underpayment because he contended there was no underpayment and in any event, the previous owners were liable in accordance with the terms of the sale purchase agreement.

DISCUSSION AND CONCLUSIONS

31. The evidence provided by the respondent was an incomplete statement; a copy of the 2013 contract and a copy of the sale purchase agreement. There are no documents or evidence from the respondent to directly dispute the claimant's evidence or the payroll calculations.

32. The 2017 contract is an updated version of the claimant's terms and conditions that had been agreed with the claimant on her return from maternity leave in October 2014.

33. The previous owners of the business accept that the email sent in 2014 contained an error and the claimant worked 22.5 hours per week from October 2014 and was entitled to be paid for those hours.

34. The respondent, as the new owner of the business is liable to reimburse the claimant for the underpayment. The terms of the sale purchase agreement entitle the respondent to seek reimbursement of this payment from the previous owners after the payment has been made to the claimant.

35. The spreadsheet provided details the underpayments which amount to £2,329.75.

36. The Tribunal finds that the claim is well-founded and orders that the respondent pay the claimant £1584.23.

37. Damages for breach of contract are to put a claimant in the position they would have been had the contract been performed. Had the claimant been paid in accordance with her contract of employment the amount of the underpayment would have been subject to tax and national insurance. Therefore the amount awarded by the Tribunal is the net amount, account having been taken of the likely tax and national insurance that the claimant would have paid.

38. At the conclusion of the hearing the claimant made an application for a costs and/or preparation time order under Rule 75 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

39. The Tribunal made no order for costs or preparation time because the Tribunal was not of the view that the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings had been conducted.

40. The respondent had submitted his response in accordance with the timescale set out at Rule 16, unlike the previous owners of the business, who were named as respondents, but did not submit a response.

41. The respondent attended at the preliminary hearing on 28th March 2019 with a statement and documentary evidence and disputed the claim. At paragraph 7 of the Order produced by Employment Judge Holmes it was accepted by the Tribunal that there was a central factual issue between the parties that would need to be determined by the Tribunal. The claimant requested a postponement of the hearing so that she could obtain further evidence to that which she had brought with her to that hearing.

42. Whilst the parties were given the option to amend their witness statements, this was not an order made by the Tribunal. The respondent did not attend at the final hearing of the claim but this did not prevent the Tribunal from determining the claim and making the subsequent award.

Employment Judge Ainscough

Date 9th September 2019

REASONS SENT TO THE PARTIES ON

16 September 2019
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.