



EMPLOYMENT TRIBUNALS

Claimant: Ms Price
No representation

Respondent: Fatholan Namani
No representation

Heard at: Watford On: 18 June 2019

Before: Employment Judge Bartlett (sitting alone)

JUDGMENT

The claimant has suffered unlawful deductions from wages contrary to s13 of the Employment Rights Act 1996 in the amount of £323.17.

The claimant has been unfairly dismissed. She is entitled to a basic award in the amount of £3707.

The claimant is entitled to a compensatory award in the amount of £1292.68.

The respondent conceded that the claimant was owed one week's notice pay in the amount of £323.17. The claimant is entitled to a further 9 weeks' notice pay in the amount of £2908.53. The claimant is entitled to 10 week's unpaid notice pay totaling £3231.70.

The claimant is entitled to a payment of £250 in respect of loss of statutory rights arising from the unfair dismissal.

WRITTEN REASONS

Background

1. The claimant was employed by the respondent until 25 June 2018.
2. The claimant brought a claim for notice pay in the amount of £323.17 net per week. The respondent conceded that one week's notice pay was owed to the claimant.
3. The claimant brought claims for unlawful deductions from wages on the basis that her last salary payment was made on 22 June 2018 but her employment

was terminated on 25 June 2018. She claimed that she was paid one week in arrears.

4. The claimant claimed that she was unfairly dismissed on 25 June 2018. This date of dismissal was not disputed by the respondent. The claimant claims that she was dismissed by text message without prior warning. The claimant claims that there was no fair reason for her dismissal. The respondent asserts that the claimant was dismissed because he was under extreme financial pressure as the business was doing badly and he needed to control costs.

Background issue

5. At the hearing I explained to the parties that an individual can only bring an unfair dismissal claim if they have 2 years continuous service.
6. In the claimant's claim form she stated that her employment started in 2007. At the hearing she clarified that she thought her employment started on 5 September 2007.
7. The respondent's evidence was that he was in charge of the shop for approximately one year and the claimant was employed by him for approximately 6 to 7 months at the start of that period. Following questions from me the respondent stated that he acquired the shop by paying for the assignment of the lease. He brought the lease, fixtures and fittings and he brought it from the previous owner who ran the business. The respondent stated that he took over the customers and the people who worked there and that he ran the business as the previous owner had though he had to shut down parts of it and later the whole business. He operated it as a sole trader.
8. I find that the claimant's employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. This means that the claimant has continuous service from 5 September 2007 until the effective date of termination which was 25 June 2018. This is a period of ten years continuous service. Therefore, this tribunal has jurisdiction to hear the claimant's claim of unfair dismissal.

The Law

9. S13 ERA 1996 sets out the following:

"13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

S27 of the ERA sets out:

"27 Meaning of "wages" etc.

(1)In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise..."

Section 98 of the ERA 1996 sets out:

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)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.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)...

(4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)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

(b)shall be determined in accordance with equity and the substantial merits of the case."

Areas of dispute

10. The following facts were not disputed:

- 10.1. the claimant was dismissed by text message on 25 June 2018;
- 10.2. the claimant worked 40 hours per week;
- 10.3. the claimant's net pay was £323.17;
- 10.4. the final payment made to the claimant was on 22 June 2018 in the amount of £323.17;
- 10.5. the claimant was paid one week in arrears;
- 10.6. the claimant commenced full-time new employment on 24 July 2018.

Evidence

11. Neither party had prepared any witness statements. I took a short break and advised the parties to prepare a written witness statement or points about which they wanted to give evidence during this break.

12. Neither party was represented and I had to provide some prompts and help with cross-examination so that evidence could be elicited on the relevant matters.

13. The claimant's evidence was as follows:

- 13.1. she was paid one week in arrears. The respondent's bank statement

- showed a payment was made to her on 22 June 2018 and no further payments. She was owed the one week in hand;
- 13.2. she believed she was unfairly dismissed. Despite the respondent's claim that there was no job for her, there were signs placed in the shop advertising for staff;
 - 13.3. immediately before the dismissal she was on holiday and there was a mix up with the flights. The next first available flight was on Monday morning. She told her friend who tried to call the shop and also went round to speak to the respondent who said that everything was okay but on 25 June 2018 he texted her and told her not to come back;
 - 13.4. as soon as she came back she went to the shop to ask why and the respondent said that she stole products;
 - 13.5. she asked the respondent to write down why she had been sacked and he would not;
 - 13.6. her boyfriend was a witness to this;
 - 13.7. she was with the company for 11 years and she was shocked and depressed and had not had an interview for 11 years.
14. Mrs Elaine Taylor appeared as a witness for the claimant. Her evidence was as follows:
- 14.1. when the claimant returned from holiday there was a mix up with the flight. The claimant contacted her on Friday and asked her to tell the respondent. There was no answering machine at the shop but she went round on Sunday and put a note under the door and she went in on Monday morning to tell the respondent who told her that was no problem;
 - 14.2. the claimant went straight to the shop from the airport;
 - 14.3. she had text messages on her phone from the claimant saying he had sacked her;
 - 14.4. the claimant was given no warning.
15. Mr Ivor Jackson appeared as a witness for the claimant. His evidence was as follows:
- 15.1. the respondent hired people after the claimant was sacked.
16. The respondent appeared as a witness. His evidence was as follows:
- 16.1. the claimant was made two payments after she went on holiday. These payments covered her 4 ½ days holiday and one extra week payment;
 - 16.2. he accepted that the claimant was not given her notice and not given notice of the dismissal. He was suffering as he was under immense pressure and had physical pains. He was not prepared: he did not know if the claimant would work there after she served a notice;
 - 16.3. the reason for dismissal was purely financial and he did call her a few weeks after to apologise;
 - 16.4. he accepted that the claimant did come to the shop and wanted an explanation. He said that the cost of the business was so high he was not making any money. There was a big argument but he did not remember exactly what was said.
17. In cross-examination the respondent gave the following evidence:
- 17.1. it was put to him that if he had to shut the shop why did he employ two other people. His evidence was that other people had left and people came and went. Overall, the number of employees had reduced. The dismissal was to reduce cost;

- 17.2. it was put to him that he sacked the wrong person and should have kept the claimant. The respondent's evidence was that there was a disagreement about how the business was being run;
- 17.3. it was put to him that he accused the claimant of stealing and he denied he had said that.
18. The only written document provided by either party in this case was a printout of the respondent's bank statement for the period 1 June 2018 to 30 June 2018. It set out two payments to the claimant in the amount of £323.17 on 15 June 2018 and 22 June 2018.

Decision

Unlawful deduction from wages/one week's arrears of pay

19. It was undisputed that the last payment was made to the claimant on 22 June 2018 which preceded her dismissal. It was also undisputed that she was paid one week in arrears. The respondent's position was that he had made 2 payments to the claimant. However, given the date of the last payment and that pay was paid in arrears an argument that the claimant was paid her final week's pay is unsustainable. At one point the respondent claimed that the claimant was on holiday for 2 weeks but was only entitled to 4.5 days holiday and therefore as she received 2 payments when she was on holiday she was not owed notice pay. However, there was no evidence except for the respondent's oral evidence that the claimant took two weeks holiday. The evidence from the claimant was that she took one week's holiday. I do not accept the respondent's evidence as he was unclear on the dates when the claimant was on holiday whereas the claimant was clear about the dates. Further, even if he had been successful in establishing the claimant had received additional holiday pay there is no set off in relation to unlawful deductions from wages.
20. Therefore I find that the claimant has suffered an unlawful deduction of wages in the amount of one week's pay.

Notice Pay

21. It was not disputed that the claimant's employment was terminated immediately and without notice. Given my findings above that the claimant had continuous service of 10 years. She is entitled to statutory notice pay pursuant to s86 of the ERA in the total amount of £3231.70.

Unfair dismissal

22. It was not disputed that the claimant was dismissed without warning by text message. This is a procedurally unfair dismissal.
23. The claimant claims that she was not dismissed for a fair reason. Her evidence was that she believed this was because of the difficulties with her flight initially but then when she spoke to the respondent on the day of dismissal he had accused her of stealing.
24. The respondent's evidence was that he dismissed the claimant because he could not afford to continue to pay her wages. He accepted that other employees remained employed after the claimant's employment and that some

employees were recruited and left. The respondent's evidence was that the shop had been closed and he was left owing a lot of money to people. He was not bankrupt.

25. The burden of proof lies on the respondent to show that there was a fair reason for the dismissal. I find that the reasons put forward by the respondent cannot and do not amount to a fair reason for dismissal. I have considered whether the claimant was redundant and whether this was a fair reason for her dismissal. Whilst I accept the respondent's evidence that the business has closed since the claimant's dismissal I have not been persuaded by the evidence that at the time of the claimant's dismissal the requirements (set out in s139 ERA) of the business for employees to carry out work of the particular kind carried out by the claimant had ceased or diminished. There was uncontested evidence that employees were still employed and that employees were later recruited to the business. None of the other reasons given by the respondent can amount to a fair reason.

26. I find that there is no basis on which to make a reduction under Polkey.

27. I find that the claimant did not contribute to the dismissal.

28. The claimant's claim for compensation is limited to the 4 weeks from the effective date of termination as she found new full-time employment after this date.

29. I have decided not to make an uplift to the compensatory award. The respondent was new to running the business. He expressed his lack of knowledge about how to go about dismissing an individual. The business was small and it is clear that there were some financial difficulties which eventually led to its closure. I accept that the respondent could and should have taken some advice on how to approach the situation. However taking all the circumstances into account I have decided it is not appropriate to make an uplift despite the total failure to follow a process when dismissing the claimant.

30. The claimant is entitled to compensation of £250 for loss of her statutory rights.

Employment Judge **Bartlett**
6 September 2019

JUDGMENT SENT TO THE PARTIES ON

.....18.09.19.....

.....
FOR THE TRIBUNAL OFFICE