



EMPLOYMENT TRIBUNALS

Claimant: Miss J Beach

Respondent: Manor House Properties Limited

Heard at: Liverpool

On: 24 June 2019

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: In person

Respondent: Dr Samriti Goyal, Director

JUDGMENT having been sent to the parties on 5 July 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

Delay in the provision of reasons

These reasons were requested by the respondent on 11 July 2019. That request did not reach Judge Buzzard until 27 September 2019, resulting in a delay in the requested written reasons being produced.

Claims and Issues

1. The claimant in this case pursued three claims against the respondent, as follows:
 - 1.1. Unfair dismissal;
 - 1.2. Wrongful dismissal – specifically dismissal without notice; and
 - 1.3. Unlawful deduction from wages.

2. The respondent, when presenting their defence to the claimant's claims, made a counter claim against the claimant of breach of contract. This related to costs allegedly incurred as a result of the claimant's breach of her employment contract.

3. *Unfair Dismissal Claim*

3.1. At the outset of the hearing the claimant confirmed the dates of her employment with the respondent were from 14 May 2018 until her dismissal on 31 October 2018. This is consistent with the dates stated on the claimant's ET1. The Respondent agreed these dates.

3.2. Section 108 of the Employment Rights Act 1996 (as amended) requires a claimant to have not less than two years continuous service with an employer before they are entitled to complain of unfair dismissal. Based on the claimant's dates of employment, she was employed by the respondent for less than two years.

3.3. Accordingly, the claimant's claim of unfair dismissal was found to be outside the jurisdiction of this Tribunal and dismissed.

4. *Wrongful Dismissal Claim*

4.1. It is accepted by the respondent that the claimant was dismissed from her employment on 31 October 2018. The parties were agreed that the claimant's contractual notice entitlement at the date of dismissal was six weeks. Further, the parties confirmed that the claimant's gross pay was an average of £224 per week.

4.2. The respondent argued that the claimant had committed a fundamental breach of contract which meant that she was no longer entitled to enforce the terms of her contract. Specifically, the respondent argues that the claimant was not permitted to enforce her contractual entitlement to notice of termination.

4.3. The fundamental breach of contract the respondent relies on is an alleged act of gross misconduct. The claimant did not accept that she committed an act of gross misconduct.

4.4. If the claimant was guilty of an act of gross misconduct she was not entitled to notice of dismissal. If she did not commit an act of gross misconduct she was entitled to notice of dismissal.

5. *Unlawful Deductions Claim*

5.1. The claimant complains that two unlawful deductions were made from her pay as follows:

- 5.1.1. A deduction of £250 made by the respondent in respect of costs allegedly incurred as a result of the claimant making unauthorised changes to a spreadsheet; and
- 5.1.2. A deduction of £267 representing court fees allegedly incurred as a result of the claimant losing a proof of posting receipt.
- 5.2. The respondent accepted that these deductions were made. The respondent argued that the deductions were lawful. Specifically, the respondent asserted that the deductions were authorised by the claimant's contract of employment.
- 5.3. The relevant parts of s13 of the Employment Rights Act 1996 states:
- "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 a relevant provision of the worker's contract"*
- 5.4. The parties were agreed that the claimant's contract of employed, signed by the claimant in April 2018 (which is well before any contested deductions were made), contains, at clause 10.7, the following provision:
- "In the event that the employee is overpaid, or has engaged in any act of theft, or has breached the clause of a contract which results in a cost to the company, the company reserves the right to withhold payments to the employee in order to recuperate these monies."*
- 5.5. Whilst not unambiguous as to which contract the phrase "*breached the clause of a contract*" refers to, the parties were in agreement that the intention was understood that the respondent had a contractual right to make a deduction to recoup lost monies if a breach of her contract of employment by the claimant had caused the loss.
- 5.6. The dispute between the parties were as follows:
- 5.6.1. had the claimant breached her contract of employment? and if so
- 5.6.2. did that breach result in the respondent losing money?
- 5.7. These are both factual questions to be determined on the basis of the available evidence. The respondent relied on clause 5 of the claimant's contract of employment as the clause which the respondent argued the claimant had breached such that the right to make a deduction from her pay was triggered. Specifically, the respondent directed the Tribunal to the

following parts of clause 5.9 and clause 5.11, which the claimant agreed formed part of her contract:

“5.9 The Employee shall at all times:

5.9.1. Devote to the business...such reasonable time, skill and attention as shall be necessary for the proper performance of his employment capacity;

....

5.9.3 Strictly observe the terms of the ‘confidentiality agreement’ which is attached as Schedule 1 in this agreement. Also observes any additional regulations regarding data protected and confidentiality that is a legal requirement.

....

5.11 The employee must document all the main activities of the business each week including but not exhaustively repairs carried out and/or scheduled, income received by the company, any rents overdue and the company bank balance at the end of the week. This must be transmitted to the directors on a weekly basis and can be transmitted by electronic means.”

6. Respondent’s Counterclaim

- 6.1. The respondent sought to make two counterclaims against the claimant. This is only possible in the Employment Tribunal if the claimant has pursued a claim of breach of contract against the respondent. It is noted that the claimant seeks to claim wrongful dismissal, which is in effect a claim of breach of contract.
- 6.2. The respondents counter claims relate to the same two alleged breaches used as a potential justification for the deductions about with the claimant has complained. Clause 10.7 of the claimant’s contract only authorises a deduction if there is a breach of contract by the claimant that has caused a cost to the respondent. Accordingly, if the deductions are found to have been authorised and lawful, the respondent’s counterclaims must succeed. If the deductions are found to be unlawful on the basis that there was not a breach of contract that caused a loss, the respondent’s counterclaims must fail.

7. Evidence

- 7.1. The claimant gave oral evidence on her own behalf. For the respondent evidence was presented by Dr Samriti Goyal, a Director of the respondent company.
- 7.2. The Tribunal also had the benefit of a small bundle of documents which included the claimant’s contract of employment. All these documents had been produced by the respondent. The claimant produced no documents to the hearing.

- 7.3. Partway through the hearing the respondent asked the Tribunal to view a CCTV recording (including audio) on Dr Samriti Goyal's i-pad. The purpose of this was to hear a recording of the claimant making a phone call, allegedly in breach of confidence. Appropriate steps to facilitate the viewing of the recording by all persons present in the Tribunal had not been made in advance of the hearing.
- 7.4. During a short break Dr Samriti Goyal produced a transcript of the relevant part of the recording which the respondent sought to rely on. The transcript included descriptions of what was occurring. This was the part that allegedly captured the claimant breaching the confidence of a tenant of the respondent. This transcript, produced by the respondent, was expressly accepted as accurate by the claimant. Given the content of the disputed phone call is contained in the recorded audio, and the audio had been distilled into an agreed transcript, there was no material benefit in viewing or listening to the recording itself. The transcript is so brief, and so central to the findings in this case, that it is appropriate to produce it in full below:

Agreed Transcript

(From when Julie Walks back into room followed by prospective tenant with Mike on speakerphone.)

Julie – your contract is your tenancy agreement Mike

Mike – but for my own safety

Julie – Pay your rent.

That's your safety. If we can come to a plan and agree it then brilliant that's all we need. So pay this today and come in through the week and I'll take you through your rent sheet so we know exactly where you're at.

Bye,bye, bye

(Julie hangs up)

Julie to new tenant –

The agreement is you should pay your rent. I don't understand.

(Throws hands up in air)

Sorry take a seat

8. Relevant Findings of Fact

- 8.1. The relevant findings of fact are summarised below. Where there was a dispute between the parties regarding relevant facts, that dispute is

highlighted, along with the finding made and the reasons for that finding. Where there is no explanation of the evidential basis for a finding set out below it is because the fact in question was not disputed in the hearing.

- 8.2. All factual disputes are determined on the balance of probabilities considering only the evidence that was heard and seen. This means that the most likely to be accurate account of a disputed fact was found to be the correct account.

Findings Relevant to the Claimant's Wrongful Dismissal Claim

- 8.3. The claimant was dismissed on 31 October 2018, having only worked since 14 May 2018. The claimant was dismissed for alleged gross misconduct. The alleged gross misconduct was a breach of confidence by the claimant.
- 8.4. At the time of the alleged breach of confidence the claimant was working in the respondent's office alone. She was engaged in a telephone call, on speakerphone, with a current tenant of the respondent, called Mike. Whilst dealing with that call somebody knocked on a window, seeking admission to the office. The person seeking admission was a prospective tenant for one of the respondent's residential premises.
- 8.5. The claimant admitted the prospective tenant to the office to wait. The claimant then continued the telephone call with Mike. The respondent asserts that the claimant continued the call on speakerphone, and as such the conversation was audible to the prospective tenant. The respondent submitted that this breached the confidentiality of Mike, and as such was a breach of contract by the claimant and gross misconduct.
- 8.6. It was point of dispute between the parties whether the conversation had continued on speakerphone. The claimant's evidence was that when the prospective tenant was shown into the office she had switched off the speakerphone from that point. The respondent disputed this, and asserted that the conversation must have continued on speakerphone because the office CCTV audio had captured both sides of the conversation. The agreed transcript of the recording, which covered only the captured audio of the call after the prospective tenant was present, record comments made by the claimant and the comments of Mike. If the claimant was not on speakerphone the recording could not have captured the comments of Mike. Accordingly, it is found that the respondent's evidence on this point is preferred, the call did continue on speakerphone.
- 8.7. The respondent asserts that in that brief transcribed recording the claimant breached her obligation of confidentiality to Mike.
- 8.8. The agreed transcript shows that Mike's full name was not used by the claimant. The respondent's position was that when Mike said "*but for my own safety*" he might have had a sufficiently recognisable voice for the prospective tenant to recognise and thus know who was talking. The prospective tenant was not at that time a tenant of the respondent, and it was accepted by the

respondent had never become a tenant of the respondent. The evidence was that the individual was a friend of one of the respondent's other tenants. That being noted there was no evidence presented or suggested that the prospective tenant had ever even met Mike, and thus could know him well enough to recognise his voice. It does not appear likely that the prospective tenant would have known who the claimant was talking to.

- 8.9. It is clear from the transcript that at best all that was disclosed that somebody called Mike was a tenant and had to pay rent. There was no specific discussion about rent arrears, let alone particular amounts of rent owed. There was no discussion about particular tenancy terms, other than that rent is payable, which is a term clearly within every tenancy agreement. There was no discussion about amounts of rent paid or payable, or dates when rent may be payable. In summary, nothing was said by either party during the transcribed part of the call that could be reasonably argued to be confidential, save perhaps that Mike was a tenant.
- 8.10. If the respondent's concerns were correct, and the prospective tenant already knew who Mike was, then this information would already be within the knowledge of the prospective tenant. In any event, the fact Mike was a tenant of the respondent does not appear to be information that is particularly confidential.
- 8.11. Accordingly, the claimant is not found to have been in breach of her contractual obligations regarding confidentiality when she continued that call to Mike on speakerphone whilst the prospective tenant was present. This finding is based on the content of agreed transcript of the call.
- 8.12. The respondent has two directors, Dr Goyal and Mr Nishant Goyal. The decision to dismiss the claimant for breaching confidentiality was made by Mr Goyal. Mr Goyal did not attend the hearing. No evidence was presented of what was in Mr Goyal's mind when decided to dismiss the claimant.
- 8.13. It was agreed between the parties that around three weeks prior the dismissal of the claimant, the claimant had been given, without any prior process, a detailed three-page formal written warning for a multitude of alleged infractions. The submissions made on behalf of the respondent were to the effect that the respondent's directors had been unhappy with the performance of the claimant since she had commenced employment with the respondent. The claimant had been paid at a higher rate than the respondent's directors considered usual for her role, and in return they were hoping the claimant would bring a greater level of competence and skills to the job. The respondent's submission was that the claimant had simply not performed to the level they hoped and expected, and she was, accordingly, disappointing them.
- 8.14. Following this warning, after a matter of days, the claimant was subjected to a disciplinary process, including a disciplinary hearing. This respondent had raised two further misconduct issues, and in addition a potential accusation

regarding missing money. When the alleged breach of confidentiality discussed above was identified, all other ongoing disciplinary action and concerns about the claimant were dropped by the respondent. In summary, the respondent, dissatisfied with the claimant's performance, pursued numerous disciplinary actions and steps, which were all dropped when the potential breach of confidence was identified.

- 8.15. The evidence suggests that the decision to dismiss was driven by a desire to remove the claimant because she was not performing to the hoped standard, rather than in response to a genuine concern that the claimant had breached confidence.

Findings relevant to the unlawful deductions claims

- 8.16. Two deductions were made from the claimant's final salary payment. The claimant claimed that these two deductions were unlawful deductions.
- 8.17. The respondent confirmed the reason for the deductions in an email to the claimant of 3 December 2018. This email was in the bundle of documents before the Tribunal. This, in summary, identifies the reasons as follows:
 - 8.17.1. the claimant had made mistakes on a spreadsheet; and
 - 8.17.2. the claimant had lost a proof of posting which caused a delay and loss of rent.

8.18. Spreadsheet deduction.

- 8.18.1. This relates to monies allegedly expended repairing a number of spreadsheets. It was the respondent's submission that the claimant had made changes to embedded formulas within the spreadsheets, that caused significant errors and problems. The respondent's evidence was that fixing the spreadsheet's embedded formulas incurred a significant cost. The respondent's evidence was that this cost was much greater than the £250 deduction made.
- 8.18.2. The claimant's evidence was that she had attempted to amend formulas in order to clearly highlight when figures were arrears, trying to make them show a minus when there were arrears. The claimant's evidence was she had made the changes in or around July 2018. The respondent's submission was that the claimant was told after the July changes not to touch the embedded formulas. The respondent further argued that despite this instruction the claimant had made further changes. The claimant's evidence was that she had not, after that time, deliberately changed any embedded formulas within the relevant spreadsheet.
- 8.18.3. Whether the claimant had made changes to the spreadsheet formulas after July 2018 was a disputed issue between the parties. There was no documentary evidence to suggest that any deliberate changes had been

made by the claimant after July 2018, although there was evidence suggesting that the claimant had made a number of errors on spreadsheets. The respondent, in emails sent contemporaneously, characterised the further issues with the spreadsheets as errors, not deliberate acts contrary to instructions. On balance, there was not evidence before the Tribunal that the claimant had deliberately acted contrary to instructions given to her.

- 8.18.4. The invoice for alleged monies expended in fixing the spreadsheet allegedly changed by the claimant was in the bundle. This cited simply “*consultancy fees and temporary help*” as a description of the work undertaken. It gave no indication what was being consulted on or what the temporary help was in relation to.

8.19. *Proof of Posting deduction*

- 8.19.1. There was no dispute that a proof of posting was lost. The loss of this proof of posting meant that a notice had to be re-served. The subsequent delay extended the time period during which a tenant who was not paying their rent was able to occupy premises. This caused the respondent to lose rental income for longer than otherwise would have been the case.
- 8.19.2. The evidence from the claimant was that she had obtained the proof of posting and put it on the file. It was the claimant's evidence that the file had then been taken away from the office to enable one of the directors to work on that file. It was some time after the file was returned to the office that the proof of posting was found to be missing.
- 8.19.3. The respondent's evidence was that the claimant had admitted losing the proof of posting. However, the respondent was unable to point to evidence to support that alleged admission having put in writing to the claimant at the time. The respondent did refer to the allegation forming part of the grounds for the formal written warning issued on 8 October 2019. The warning does not suggest that the claimant had admitted to the loss of the proof of posting. The warning was several months after the alleged loss.
- 8.19.4. As already noted, the respondent conceded that no process was followed prior to that warning being issued. The fact that the allegation was included as part of the basis for a formal written warning does not, where that warning was issued without any process or even the allegations being put to the claimant, cannot amount to evidence that the claimant had lost the proof of posting. In the absence of evidence that it was the claimant who lost the proof of posting, it is found that the respondent has not discharged the burden of showing that the claimant did lose the proof of posting.

9. Conclusions

9.1. *Wrongful Dismissal (lack of notice)*

- 9.1.1. If the claimant's performance was substandard that would potentially be a fair reason to dismiss her, but that does not mean that dismissal can breach the claimant's contract by being a summary dismissal. In short, like any employee, if she was dismissed for performance or capability reasons the claimant would be entitled to contractual notice of dismissal.
- 9.1.2. Given the finding that there was no breach of confidentiality, the breach of contract that the respondent relied on to negate the claimant's right to notice is found not to have occurred. Accordingly, the claimant was entitled to notice of dismissal, and failure to give notice entitles her to make a claim for payment equal to the amount of her potential notice pay.
- 9.1.3. Following recent changes to the law, notice pay is now always taxable income. Accordingly, the claimant is awarded a sum equal to her gross salary which would have been payable during her notice period. The claimant is obliged to declare this income to the Inland Revenue as post-employment notice pay. The Inland Revenue will determine what, if any, tax is due to be paid by the claimant.
- 9.1.4. It was agreed that the claimant's gross pay was £224 a week and that she was entitled to six weeks' notice. Accordingly, the claimant's gross notice pay entitlement is a total of £1,344.

9.2. *Unlawful Deduction connected to spreadsheets*

- 9.2.1. If the claimant makes mistakes and they are honest mistakes, that is not a breach of any implied term in employment contracts. The express contract terms highlighted by the respondent do not require the claimant not to make mistakes, or to perform to any particular standard. They require her to devote sufficient time, and use her "*best skills*" (clause 5.9.2, which was not highlighted by the respondent but was within the bundle). Nothing presented in evidence suggested that the claimant was not devoting enough time or using her best skills in the performance of her duties.
- 9.2.2. As the claimant is not found to have breached her contract in relation to the spreadsheets, it follows that this deduction is not found to have been authorised by the claimant's contract of employment. Accordingly, it was an unlawful deduction.
- 9.2.3. In any event, the respondent did not present clear evidence that the fees incurred were causally related to anything the claimant had done by way of changing formulas on spreadsheets. Accordingly, even if the respondent established that the claimant had deliberately changed the

spreadsheets contrary to instructions, and that amounted to a breach by the claimant of her contract of employment, the failure to produce evidence of the costs that flowed from that alleged breach means the respondent's deduction would not have been found to be lawful.

9.3. *Unlawful Deduction connected to a lost proof of postage*

- 9.3.1. Given the claimant is not found to have lost the proof of posting, it cannot be the case that the claimant breached her contract of employment by losing the proof of posting. In the absence of a finding that the claimant breached her contract of employment, the deduction cannot have been authorised.
- 9.3.2. In any event, it is not clear what contract clause would be breached even if the claimant had lost the proof of posting. The clauses of the claimant's contract of employment that the respondent highlighted would not be breached by the claimant losing a document, unless that loss was because the claimant had not devoted enough time or used her best skills to avoid the loss. No evidence about the circumstances of the alleged loss by the claimant was presented.
- 9.3.3. This deduction made by the respondent is not found to have been authorised by the claimant's contract of employment, and was, accordingly, unlawful.

9.4. *Counterclaims*

- 9.4.1. The respondent in this case made two counterclaims, alleging breaches of contract by the claimant. The counterclaims relied on the same two alleged breaches of contract that were relied on by the respondent as authorising the deductions from the claimant's pay discussed above.
- 9.4.2. For all the same reasons given above as to why the claimant had not breached her contract of employment, the respondent's counterclaims cannot succeed. The claimant did not breach her contract of employment. Accordingly, the respondent's claim for compensation for breach of contract is dismissed.

Employment Judge Buzzard

4 October 2019

REASONS SENT TO THE PARTIES ON

16 October 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.