



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms. D. Ramirez

AND

Respondent
My Little Hive Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 31 October 2019

EMPLOYMENT JUDGE Mason

Representation

For the Claimant: Mr. J. Mayall, solicitor

For the Respondent: No attendance or representation.

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal succeeds. The Claimant is awarded the sum of £5,910.07.
2. The Respondent breached the Claimant's contract of employment by failing to pay monies in lieu of her full notice entitlement (6 weeks) and is ordered to pay the Claimant £1,725.18.
3. The Claimant's claims for breach of contract/unlawful deduction from wages in respect of her December 2018 salary succeeds and the Respondent is ordered to pay the Claimant £1,246.00
4. The Respondent is ordered to pay the Claimant the sum of £1,980 plus vat by way of costs.

Oral reasons were given at the hearing but the Judge has elected to provide these in writing in view of the Respondent's lack of attendance and representation.

REASONS

Background

1. The Claimant was a Director, Shareholder and an employee of My Little Hive Ltd, a pre-school children's nursery based at St Mary of the Angels' Church, 26 Artesian Road, London W2 5DN. The only other Director of My Little Hive Ltd was Ms. Sabrina Dowlut who is now the sole director.
2. The Claimant claims that she was unfairly dismissed on 7 January 2019; that she is owed salary for December 2018; and that she is owed six week's pay in lieu of notice.
3. The Claimant contacted ACAS on 5 February 2019 and an Early Conciliation Certificate was issued on 5 March 2019. The named prospective Respondent was "My Little Hive (Sabrina Dowlut)".
4. On 12 March 2019, the Claimant presented this claim. On 13 May 2019, the Tribunal served the claim on My Little Hive at St .Mary of the Angels' Church, 26 Artesian Road, London W2 5DN with a covering letter in which My Little Hive was advised that if it wanted to defend the claim, a response must be received at the Tribunal by 10 June 2019.
5. On 7 June 2019, My Little Hive wrote to the Tribunal asking for an extension of 21 days (until 1 July 2019) to lodge a response. The Tribunal agreed.
6. On 28 June 2019, My Little Hive Limited wrote to the Tribunal advising (amongst other things) that it had been "*advised not to file and serve the Response Form ET3 until proper legal advice had been obtained*" and that it had been "*led to believe*" that by lodging an ET3 it would be "*conceding ground to defend a bogus claim by engaging with the Employment Tribunal who in reality has no jurisdiction or authority to adjudicate in this case of fraud, breach of fiduciary duty and theft*".
7. In light of this letter, the Tribunal postponed the full hearing fixed for 21 – 23 August 2019 and on 20 August 2019, REJ Wade made the following orders:
 - 7.1 the Claimant to respond to the letter of 28 June from My Little Hive Ltd; and
 - 7.2 My Little Hive was not entitled to participate in the litigation because it had not filed an ET3 "*but it may apply to file it out of time by 10 September 2019 explaining its delay and providing a draft ET3 along with the application.*"
8. On 3 September 2019, the Claimant's solicitors (WGS) complied with the order above (7.1) by writing to the Tribunal enclosing copies of correspondence between the parties in which the Claimant had previously responded to and refuted the allegations in the letter of 28 June.

9. On 23 September 2019, this case was listed for a one day hearing (today) and notice was sent to My Little Hive.
10. On 30 October 2019 (yesterday) at 16.30, My Little Hive Ltd sent a letter to the Tribunal enclosing a draft ET3. The letter purports to set out reasons for the ET3 not being filed in time. In summary, it says the Respondent is not obliged to “*engage in defending a fraudulent claim*” and by submitting an ET3, it may “*unwittingly waive its rights and position that the claim is a total scam and a fraud*”. In the draft ET3, the Respondent is named as My Little Hive Ltd.

Procedure at the Hearing

11. The Claimant accepts that the correct name of the Respondent is My Little Hive Ltd and the documents (such as her contract of employment) supports this. I therefore amended the name of the Respondent to My Little Hive Ltd. Ms. Sabrina Dowlut (sole director of My Little Hive Ltd) attended the hearing and did not object.
12. However, Ms. Dowlut was adamant that she was not attending in order to represent My Little Hive Ltd. I therefore had no option but to conclude that the Respondent was not attending the hearing or represented. In accordance with **Rule 47** Employment Tribunals Rules of Procedure 2013 (the Tribunal Rules), if a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence. I enquired of Ms. Dowlut why she was not prepared to represent the Respondent; she told me she was prevented from doing so because there had been a “Board Resolution” to that effect. I pointed out that she was the only member of that Board, but she maintained her refusal. I could not identify any further enquiries that could be made and concluded that it was in the interests of justice to proceed with the hearing in the absence of the Respondent. Ms. Dowlut remained in the hearing room throughout but took no further part in the proceedings and did not ask or attempt to do so.
13. I then considered whether the Respondent should be allowed to lodge a response in accordance with the draft submitted. I took into consideration the relevant rules in the Tribunal Rules in particular:
 - 13.1 **Rule 5:** Extending or shortening time
“The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.”
 - 13.2 **Rule 6:** Irregularities and non-compliance
“A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render

void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

- (a) waiving or varying the requirement;
- (b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
- (c) barring or restricting a party's participation in the proceedings;
- (d) awarding costs in accordance with rules 74 to 84."

13.3 Rule 18: Rejection: form presented late

"(1) A response shall be rejected by the Tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).

(2) The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration."

13.4 Rule 20: Applications for extension of time for presenting response

(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

13.5 Rule 21: Effect of non-presentation or rejection of response, or case not contested

"(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge. "

13.6 Rule 42: Written representations

"The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing."

14. I concluded it was in the interests of justice to refuse to allow the response to be submitted out of time on the following basis:

14.1 The Respondent has clearly had notice of these proceedings since the outset. Whilst the Claimant named "My Little Hive" rather than "My Little Hive Ltd" in his application, I do not accept that this has caused any

- confusion on the Respondent's part. Ms. Dowlut is the sole director of that company, all correspondence has gone to the same address and the Tribunal has received correspondence from My Little Hive Ltd (such as the letter of 28 June and 30 October 2019).
- 14.2 The delay is significant. The Respondent has known about these proceedings since May 2019 and missed not only the initial deadline of 10 June 2019 but also the extended deadline of 1 July 2019 and it then failed to respond to REJ Wade's order that it may apply to file an out of time response by 10 September 2019. It was only the day before the full hearing at 16.30 that the Respondent finally made any attempt to apply to submit a response out of time.
- 14.3 In accordance with Rule 42 (above) the Tribunal is only obliged to consider *"any written representations from a party ..., if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing"*. The Respondent clearly failed to make such written representations within 7 days.
- 14.4 Various tribunal hearings have been cancelled to accommodate the Respondent's delay.
- 14.5 The Respondent's reasons for the delay are unacceptable and illogical. Whether or not a Tribunal has jurisdiction is for the Tribunal to decide; any concerns the Respondent may have had about jurisdiction could have been raised in a timely ET3; such concerns did not negate the obligation on the Respondent to lodge a response. If it was relying on erroneous advice, that is a matter between the Respondent and its advisers. Ms. Dowlut was unable or unwilling to give any further explanation at the hearing for reasons aired above.
15. I then proceeded with the hearing. The Claimant did not provide a witness statement and gave evidence orally (on oath) in response to my questions. I had no reason to doubt her credibility. Mr. Mayall provided some documents which I put in a bundle and paginated [1-36]. Having heard the Claimant's evidence, I adjourned to make my decision. After the adjournment, I gave my judgment (orally) with reasons and explained I would also give written reasons in view of the Respondent's lack of attendance.

The Issues

16. The issues which the Tribunal is required to determine are as follows:
- 16.1 Unfair Dismissal
- (i) When did the Claimant's employment commence?
 - (ii) Was the Claimant dismissed from her employment and, if so, what was the Claimant's effective date of termination?
 - (iii) If the Claimant was dismissed did the Respondent have a potentially fair reason for the dismissal?
 - (iv) Did the Respondent follow a fair and reasonable procedure in dismissing the Claimant?

16.2 Breach of contract/ Unlawful deduction from Wages and Extension of Jurisdiction claims

- (i) Was the Claimant dismissed without notice in circumstances where she was entitled to notice?
- (ii) If so, what was her contractual entitlement to notice?
- (iii) Did the Respondent fail to pay the Claimant her salary for December 2018? If so, how much is she entitled to?

Findings of fact

- 17. In August 2014, the Claimant established and registered the Respondent company. It was agreed that the Claimant and Ms. Dowlut would be directors and have equal shares (50/50).
- 18. The Respondent started trading at the end of September 2015 and I accept the Claimant's evidence that from this point on, she became an employee paid at the rate of £500 per month. At the beginning of April 2016, she signed a Contract of Employment [bundle 1-8]. This provides that her employment began on 1 April 2016 but I accept the Claimant's evidence that in reality it started sooner, in September 2015.
- 19. The Contract of Employment also provides (para.22) that the Claimant was entitled to a notice period of a minimum of 6 weeks after more than two years' employment
- 20. By December 2018, the Claimant's monthly gross pay was £1,246.40 [payslips October and November 2018, bundle 9 and 10]. Her weekly pay was £287.53.
- 21. The Respondent failed to pay pension contributions to NEST (National Employment Savings Trust) for the period 1 November 2018 to 15 April 2019 in the sum of £137.12 (£24.93 per month). This is evidenced by correspondence from NEST in the bundle [pages 11-14].
- 22. In about April 2018 the Claimant became disheartened at work and her relationship with Ms. Dowlet deteriorated.
- 23. On about 5 or 6 December 2018, OFSTED reported that the Respondent needed to make improvements. The Claimant and Ms. Dowlet met on 14 December 2018 to discuss the situation and on 16 December 2018, the Claimant wrote to Ms. Dowlet [bundle 8A] to say she would be working 3 days a week, £8,000 should be paid to (each of) the shareholders and that she would remain a director.
- 24. The Respondent then closed over the Christmas period,

25. The Claimant was not paid her December 2018 salary which was due on 5 January 2019. She was unable to check the business account as she was “locked out” and it is reasonable to assume that it was Ms. Dowlut who locked her out.
26. On 7 January 2019, the Claimant attended work in the usual way. I accept her evidence that Ms. Dowlut accused her of theft and told her to leave the premises and not come back and to seek legal advice.
27. On 8 January 2019, the Claimant was removed as a statutory director and Secretary of the Respondent. The Claimant was unaware of this at the time and it was done without her knowledge or consent. Logically, this must have been done by Ms. Dowlut as the only other director.
28. Also on 8 January 2019, at around 10.30 pm, a letter from the Respondent was hand delivered to the Claimant at her home accusing her of theft and threatening to report her to the police for fraud [19]. Enclosed with this letter was a draft application for an injunction against the Claimant [20-25].
29. On 5 February 2019, the Claimant contacted ACAS and on 12 March 2019 she presented this claim.
30. The Claimant started new employment with Kids Inc Nurseries on 16 April 2019 at the rate of £8,250 per annum [contract pages 15-17] and her net monthly pay in May 2019 was £986.57 (gross £1,047.22). Until then, she was supported by friends and family. There is a shortfall between her old salary with the Respondent and her new salary of £45.86 per week and she estimates (and I accept) that it will take her until the end of the year to make good the shortfall. She has not received any state benefits.

The Law

Unfair dismissal claim

31. Reason for dismissal

31.1 Section 98 (1) ERA:

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

- (i) the reason (or if more than one the principal reason) for the dismissal;
- (ii) that 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.

31.2 Section 98(2) ERA:

“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.”*

32. Reasonableness of Dismissal:

32.1 Section 98(4) ERA:

Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

- (i) 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 the s98(2) reason relied on as a sufficient reason for dismissing the employee; and
- (ii) shall be determined in accordance with equity and the substantial merits of the case.

32.2 Range of reasonable responses

- (i) In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards.
- (ii) The Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether procedure was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
- (iii) In many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

33. Unfair dismissal Compensation:

- 33.1 In addition to a Basic Award (s.119 ERA), **Section 123(1) ERA** provides for a Compensatory Award: “... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*”.

33.2 Mitigation:

S.123(4) ERA requires a Claimant to mitigate their loss and a Claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation.

Claims for monies in lieu of notice and arrears of salary

- 34. Unlawful deductions from wages:
S13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages and Ss.23-26 ERA 1996 sets out provisions relating to complaints to employment tribunal.
- 35. Breach of Contract
- 35.1 Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Employment Tribunal jurisdiction to hear claims for damages for breach of contract provided the claims arose or are outstanding on termination of the contract of employment and have been brought in time.
- 35.2 Monies in lieu of notice claim
If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

Conclusions

Unfair dismissal

- 36. I have found that the Claimant's employment with the Respondent commenced in September 2015.
- 37. I conclude that her employment ended on 7 January 2019 and that the reason her employment came to an end is because she was dismissed. Whilst Ms. Dowlut did not use the word "dismissed" it is very clear from the following that this was her intention (and the Claimant's understanding):
- 37.1 The Claimant was told by Ms. Dowlut on 7 January 2019 to leave the premises and not to return.
- 37.2 On 8 January 2019, the Claimant was removed without her consent as a statutory Director and as Secretary,
- 37.3 The Claimant was not paid her December 2018 salary.
- 37.4 The Claimant was "locked out" of the business account.
- 38. With regard to the Respondent's reason for terminating the Claimant's conduct, having considered the correspondence, I conclude that the reason was the Claimant's (alleged) conduct which is a potentially fair reason. However, and in any event, the dismissal was clearly unfair procedurally as the Respondent failed to follow any disciplinary procedure. Therefore the procedure and the decision to dismiss fell outside the band of reasonable responses.

39. As I have not made any findings of culpability on the Claimant's part, I conclude it would not be right to reduce compensation in accordance with **Polkey** or on account of any contribution to her own dismissal.

40. Unfair dismissal award: the Claimant is awarded:

40.1 Basic Award:

The Claimant was aged 58 at the effective date of termination (7 January 2019) and she had 3 years continuous service; her weekly pay was £287.53. The statutory multiplier is 4.5. $4.5 \times £287.53 = £1,275.89$

40.2 Compensatory Award:

(i) 7 January 2019 to 18 February 2019:

Nil: covered by wrongful dismissal damages

(ii) 19 February 2019 to 15 April 2019:

8 weeks x £287.53= £2,300.24

(iii) 16 April 2019 to 31 December 2019:

37 weeks x £45.86 = £1,696.82

(iv) Loss of pension: £24.95 x 3.5 months = £ 137.12

(v) Loss of statutory rights: £ 500.00

(vi) Total Compensatory Award: £4,634.18

40.3 Total unfair dismissal award **£5,910.07**

41. Breach of Contract/unlawful deductions

41.1 By failing to give the Claimant due contractual notice of termination of her employment (6 weeks), the Respondent was in breach of contract and its failure to make a payment in lieu was an unlawful deduction from her wages. The Claimant is awarded **£1,725.18**.

41.2 By not paying the Claimant her December 2018 salary, the Respondent was in breach of contract and made an unlawful deduction from her wages. The Claimant is awarded **£1,246.00**

42. Costs

42.1 Mr. Mayall made a costs application on behalf of the Claimant and provided me with a schedule of costs incurred. I am satisfied that the Respondent's conduct falls within Rule 76(1)(a) as its conduct has been unreasonable. It failed to comply with the initial deadline for an ET3, asked for and was granted an extension which it still failed to meet and then only the evening before the full merits hearing, made an application for submission of a late ET3, the specified reasons for the delay being without merit.

42.2 I therefore have a duty to consider making an award but also have a discretion whether to actually make the award. I concluded this was a case where it is appropriate to make a costs order given the Respondent's persistent failure to submit an ET3 and the consequent delays.

42.3 I considered Mr. Mayall's schedule and discussed it with him. Mr Mayall is claiming £200 (plus vat) per hour and after adjusting downwards the amount claimed for attendance at the hearing, I considered the amount

claimed reasonable and proportionate and I ordered the Respondent to pay the Claimant the sum of £1,980 plus vat by way of costs.

43. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which I have identified as being relevant to the claim are at paragraph 16; all of these issues which it was necessary for me to determine have been determined; the findings of fact relevant to these issues are at paragraphs 17-30; a statement of the applicable law is at paragraphs 31-35; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 36-41.

Signed by _____ on 1 November 2019
Employment Judge Mason

Judgment sent to Parties on
4 November 2019
