



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Sylvester

**Respondent:** Talib Hussain t/a Mexborough Main Street Post Office

**HELD AT:** Sheffield

**ON:** 25 November 2019

**BEFORE:** Employment Judge Little

**REPRESENTATION:**

**Claimant:** Mr N Sylvester (husband)

**Respondent:** In person

**JUDGMENT** having been sent to the parties on 3 December 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

1. These reasons are given at the request of the respondent as set out in his email to the tribunal of 3 December 2019.
2. **The complaints**
  - 2.1 Mrs Sylvester had presented two claims to the tribunal. The first claim was presented on 8 February 2019 but was initially rejected as the claimant had given incorrect ACAS early conciliation details. Once that error was rectified, the claim was accepted on 15 February 2019. The complaint in this claim was in respect of unauthorised deduction from wages. There were three alleged deductions dating from September 2016, July 2018 and January 2019.
  - 2.2 The second claim was presented on 18 February 2019 and the complaint was unfair dismissal.

### 3 The issues

At the beginning of the hearing it was agreed that the following issues needed to be determined.

#### Unauthorised deduction from wages

- 3.1 Did the respondent make deductions from the claimant's wage in September 2016, July 2018 and January 2019? (In fact, the respondent accepted that these deductions had been made. It was also clarified at the beginning of the hearing that since the first claim had been presented the respondent had reimbursed to the claimant the sum of £281.88 which was the deduction made in January 2019.)
- 3.2 Was the complaint, in so far as it related to the September 2016 and July 2018 deductions, out of time? If so, should time be extended on the basis that it had not been reasonably practicable to present the claim in time?
- 3.3 If the tribunal did have jurisdiction to entertain the unauthorised deduction complaints, were those deductions unauthorised having regard to the Employment Rights Act 1996, s.13?

#### Unfair dismissal

- 3.4 Can the respondent show a potentially fair reason to dismiss?
  - 3.4.1 The respondent seeks to show that the reason for dismissal was the claimant's unauthorised absence and her alleged failure to keep in contact during that absence, which amounted to misconduct. The respondent was not relying upon any issues of alleged dishonesty or alleged threats and aggression from the claimant's husband.
- 3.5 If a potentially fair reason can be shown, was that actually fair having regard to the provisions of the Employment Rights Act 1996, s.98(4) and in particular: -
  - Was a reasonable investigation carried out by the respondent?
  - Did the respondent have a genuine belief in the misconduct and was that supported by sufficient evidence
  - Should the respondent been aware of the claimant making contact with the respondent's solicitor in the context of her absence from work?
  - Should the respondent's letter of 4 February 2019 have warned the claimant that dismissal was being considered?

- 3.6 If the dismissal was found to be procedurally unfair, would a fair procedure have made any difference and, if so, what?
- 3.7 If the dismissal should be found to be substantively unfair, did the claimant contribute to her own dismissal and if so, how should that be reflected in terms of remedy?

#### 4 **Evidence**

- 4.1 I have heard evidence from the claimant herself and from Mr Hussain.

#### 5 **Documents**

- 5.1 Mr Hussain had prepared a bundle which ran to 73 pages and the claimant had prepared a pack of documents which were not paginated but were described as 'Reference number 1 to 7'. There was some duplication between the two sets of documents.

#### 6 **The relevant facts**

- 6.1 The claimant's employment commenced on 17 June 2016. That was employment as a Post Office Counter Clerk. The claimant was not issued with a contract of employment or a statement of the main terms and conditions of her employment.
- 6.2 The respondent operates a system whereby each of the counter staff are assigned their own individual stock comprising cash, (notes and coins) and stamps. Each counter staff member had their own stock code.
- 6.3 In or about September 2016, there was an apparent shortfall in monies which the claimant had sent to the Post Office in Chesterfield. The claimant was required to make a repayment of £420 and that sum was deducted from her wages over a four-month period. Obviously, there was nothing in a written contract of employment which could have authorised that but nor is it contended that the claimant had, prior to that deduction, signified in writing, her agreement or consent to the making of it.
- 6.4 In or about July 2018, there was a further shortfall on the claimant's till and a deduction from the claimant's wages was made in the sum of £49.65. Again, the claimant had not, prior to that deduction, signified her writing or consent in written form.
- 6.5 On 30 November 2018, the respondent believed that the claimant's stock was down by £958.42. As a result, the respondent withheld the whole of the claimant's wages for December. Again, there was no prior written agreement that this could be done.

- 6.6 I should add that although the respondent is not suggesting that the claimant was dishonest, the claimant herself strenuously denies that she was dishonest or that she was careless or negligent in respect of any of these apparently missing monies. The claimant pointed out to me that the Horizon system, which the Post Office uses, is notoriously inaccurate and I was told that many Sub-Postmasters were in dispute with the Post Office about apparent shortfalls which were disputed. Nevertheless, Mr Hussain describes the Horizon system as robust.
- 6.7 On 22 December 2018, the claimant's husband went to the Post Office and had a conversation with the respondent's son who is also involved in the Post Office. Mr Hussain's evidence is that it was not so much a conversation but rather that Mr Sylvester accosted his son outside the Post Office and made threats to the effect that Mr Sylvester would be bringing his sons to deal with the matter if the respondent continued to deduct monies from the claimant's wage. Although I have not heard evidence from Mr Sylvester, he was eager to tell me whilst representing his wife at this hearing that he had not made threats in that way, although he agreed that he had suggested that he and his sons would, in effect, picket the post office and inform all customers going in what Mr Hussain had done.
- 6.8 As a result of Mr Sylvester's intervention, Mr Hussain decided that it would be sensible to contact the police and this led to issues being raised as to whether or not there had been theft. In the event the police took no action.
- 6.9 On 27 December 2018, the claimant did not attend work. She sent a text to Mr Hussain informing him that she was not well.
- 6.10 On 2 January 2019, Mrs Sylvester wrote to Mr Hussain and a copy of that letter is in the bundle at page 65. Having checked her bank statement she was aware that her December pay had not been received and she informed Mr Hussain that if he was withholding it, that was illegal action by him. She asked him to let her know his intentions within the next seven working days.
- 6.11 The respondent had instructed a firm of solicitors, Amicus, to recover what Mr Hussain believed was a debt owed to him by the claimant. Those solicitors wrote to the claimant on 8 January 2019 and a copy of that letter is at page 67. Reference was made to a shortfall £958.42 which had then been reduced to £912.11 because of gains on the claimant's account. It was stated that this shortfall had occurred due to errors on the claimant's part. Noting that their client had already purported to recover £281.88 by not paying the claimant in December, the solicitors sought the claimant's proposals for paying the balance of £630.33.

- 6.12 Significantly, as far as the relevant matters in this case are concerned, the letter also included the following sentence -

“Please refrain from contacting our client, all correspondence should now be directed via our offices.”

- 6.13 On 4 February 2019 Mr Hussain wrote to the claimant. A copy of this letter is at page 68. Mr Hussain stated that his records showed that the claimant had been absent without authorisation since 20 December 2018 (this seems to be an error because the claimant had only been absent since 27 December). The letter went on to refer to the claimant having not complied with “our absence reporting policy” and accordingly, it was considered that the claimant was absent without authorisation. The letter went on to indicate that the claimant had failed to respond to a text which had been sent to her requesting her to come in and discuss the position. I should add that whilst, during the course of Mr Hussain’s evidence he read out this text message from his phone, the claimant’s evidence was that it had not been received. Mr Hussain doubted this because blue ticks were shown against the message on his phone which indicated that it had been read.
- 6.14 The respondent does not have a written absence reporting policy and Mr Hussain acknowledged this when giving evidence. However, he said that the claimant knew that it was necessary to keep in touch whilst absent and that she had done this when she had been absent previously.
- 6.15 On or about 6 February 2019, Mr Hussain reimbursed to the claimant the sum of £281.88 which had previously been deducted. His evidence was that his solicitors had previously advised him that he was entitled to withhold those monies. It appears that the respondent’s decision to make this reimbursement occurred during the course of ACAS early conciliation.
- 6.16 On 7 February 2019, Mrs Sylvester write to Amicus solicitors. A copy of this letter is at page 71 in the bundle. With that letter the claimant enclosed what she described as recent correspondence received from “your client”. I assume that this was Mr Hussain’s letter of 4 February. The claimant went on to write:

“Given the content of your letter dated 8 January 2019 expressly requesting that I ‘refrain from contacting our client all correspondence should now be directed via our offices’, please can you pass on this letter and its contents in response.”

- 6.17 The claimant went on to state that she had not received any contract of employment or copies of any company policies and procedures and so was unaware of any absence reporting policy. She also said that she had no record on her phone of receiving the text from Mr Hussain. The claimant also enclosed with that letter two Fit Notes. These are within the claimant’s documents described as Reference Number 5. The first fit note signed the claimant off for four weeks from 3 January 2019 because of

work related stress. The second fit note signed the claimant off for a further month from 1 February 2019.

- 6.18 The claimant went on to write that she was due to return to her doctor on 28 February 2019 and would update the solicitors as to whether she was fit to return to work at that time or, failing that, would provide a further fit note. Writing in the letter to the solicitor but on the basis, that it would be read by the respondent the claimant concluded:

“This (the further fit note) will be via your solicitor as requested.”

- 6.19 Mr Hussain does not dispute that the claimant wrote to his solicitor in these terms. However, he says that the claimant was only required to write to the solicitor about the “debt” not about her sickness absence and return to work issues. In any event, Mr Hussain’s evidence is that his solicitors did not, at the material time, either inform him of this communication from the claimant still less provide a copy to him. Mr Hussain said that he believed that was because the solicitor was on holiday. Mr Hussain says that it was not until 20 February 2019 that his solicitors informed him of this letter and its enclosures.

- 6.20 So it was that on 15 February 2019 Mr Hussain wrote to the claimant to inform her that she was dismissed. A copy of this letter appears at page 72. Mr Hussain referred to his earlier letter and went on to state that a week after receiving that letter the claimant had not contacted him. He believed that she had been absent without authorisation since 20 December 2018.

- 6.21 The letter concluded:

“As you have failed to return to work or make contact as requested in my letter, I am left with no alternative to end your reemployment with Main Street Post Office, Mexborough.”

- 6.22 The claimant was not offered an appeal process.

## 7 Conclusions

### 7.1 The wages complaints

- 7.1.1 As the most recent deduction was subsequently paid to the claimant, it is only the two earlier deductions which are before the tribunal. There is clearly a time issue. The first deduction dates from August or September 2016. The Employment Rights Act 1996 s.23(2) provides that an Employment Tribunal shall not consider a complaint about deduction from wages unless it is presented before the end of the period of three months beginning with the date of the deduction. However, if a tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of that period, the tribunal may consider the complaint if it is

presented within such further period of time as the tribunal considers reasonable.

- 7.1.2 Applying the normal time limit to the 2016 deduction means that a claim about it should have been presented by November 2016. In fact, the complaint was not presented until February 2019, which is over two years late.
- 7.1.3 With regard to the July 2018 deduction, this occurred on 10 July 2018 and so the normal three-month period will expire on 9 October 2018. However, this complaint was also presented in February 2019 and so is also late, although, in this case, by four months.
- 7.1.4 In terms of reasonable practicability, the claimant's evidence is that she did not present her claim until February 2019 because it was only when she went to see a Citizen's Advice Bureau after being dismissed that she was told that an Employment Tribunal could deal with such matters.
- 7.1.5 On the basis that the claimant is an intelligent woman with experience of the world of work and having regard to the type of work the claimant has undertaken, I consider that it would have been reasonably practicable for the claimant to have discovered that if she was aggrieved about deductions made from her wages, she could take the matter to an Employment Tribunal.
- 7.1.6 In these circumstances I conclude that I do not have jurisdiction to deal with the outstanding deductions complaints.

## 7.2 The unfair dismissal complaint

- 7.2.1 As noted above, the reason for the claimant being dismissed was that she had "failed to return to work or make contact as requested". Clearly the claimant had not returned to work but the essential question is whether she had failed to make contact.
- 7.2.2 It is common ground that the claimant did not reply directly to Mr Hussain in response to his letter of 4 February 2019. However, it is equally clear that the claimant did make a response albeit to the respondent's solicitor. There was a degree of ambiguity in the sense that the solicitors letter (8 January) had said 'do not contact Mr Hussain, write to us', to paraphrase. Whereas Mr Hussain's subsequent letter of 4 February said that the claimant should contact him.
- 7.2.3 As also noted above, Mr Hussain has contended that the claimant should have understood that the solicitors were only dealing with the debt issue and so it was only in relation to that issue that the claimant should have responded only to them and in respect of

other matters, in particular, her return to work and health situation, the response should have been directed to Mr Hussain.

- 7.2.4 I do not think that it is necessary to assess whether Mrs Sylvester should have dissected and analysed the solicitors letter with a view to her deciding whether the injunction about contacting Mr Hussain was general, or specific to the debt issue. Nor do I consider that Mr Hussain's subsequent letter, apparently contradicting what the solicitors could have been saying, was sufficient to lead to the claimant, as a lay person, to the conclusion that she should now write to Mr Hussain with the fit notes.
- 7.2.5 I find that it was perfectly understandable that the claimant acted in the way that she did.
- 7.2.6 It is then most regrettable that the respondent's solicitor failed within a reasonable time to inform it's client that a response from the claimant had been received. The fact that the claimant's response was not on the issue of the debt is not excuse.
- 7.2.7 It follows that Mr Hussain's decision to dismiss was fundamentally flawed because it was based upon a misunderstanding.
- 7.2.8 I consider that a reasonable employer once it had discovered that it had dismissed in ignorance of a significant document – the claimant's repose to the solicitor – that the dismissal would have been revoked and the process restarted. However, that did not happen here.
- 7.2.9 A subsidiary reason for my finding that this was an unfair dismissal is that, when writing to the claimant on 4 February 2019, Mr Hussain gave no indication that if the claimant failed to contact him by 11 February 2019, the result would be dismissal without more ado, which is what actually happened. I find that a reasonable employer who believed that it had not received a response to that type of letter would have written a subsequent letter to the employee pointing that out and inviting the employee to a meeting with a warning that dismissal was one of the outcomes that could ensue. If the respondent had done this in this case it would no doubt have given the claimant the opportunity to explain that she had not failed to respond because she had written to the solicitor.

7.3 Would the claimant have been dismissed in any event subsequently because of other matters?

- 7.3.1 This is an argument put forward by Mr Hussain. He suggests that the claimant would, in any event, have been dismissed by reason of long term ill health absence or because of disciplinary action which might have been taken about the shortfall. Whilst a tribunal is often required to speculate about what might have happened in



the future, there is before me insufficient information or evidence to suggest that there was a possibility, or probability, of the claimant being dismissed because of long term absence. Whilst there is a further fit note in the bundle which signed the claimant off until 21 April 2019, it may well be that the claimant's dismissal adversely affected her health. On the face of it, the reason for her being signed off, stress, appears to be related to the work situation rather than being a long-term condition which would inevitably have led ultimately to a capability dismissal.

7.3.2 On the question of a disciplinary process, this is obviously at odds with the respondent's case that it was not suspected that the claimant had been dishonest. Again, I have no material before me on which I could base a sensible assessment of how any disciplinary process, which at the time had not even started, might ultimately have played out.

7.3.3 In these circumstances I do not consider that it would be appropriate to reduce, or limit, the claimant's compensation for unfair dismissal.

#### 7.4 Contribution.

7.4.1 I find that the claimant did not contribute to her own dismissal. Writing to the solicitor rather than the respondent was reasonable and clearly the claimant could not help being ill.

7.4.2 It is unclear whether the respondent is suggesting that Mr Sylvester's interaction with Mr Hussain's son is a relevant matter. As I have not heard evidence from either Mr Sylvester nor Mr Hussain's son I am not of course able to make any findings of fact. However, even if Mr Sylvester's conduct was inappropriate, that would not be conduct of the claimant herself and so could not be taken into account when considering her remedy.

#### 7.5 Remedy

7.5.1 The claimant had prepared a Schedule of Loss. The sums which I awarded are set out in the judgment. I accepted the claimant's calculation of the basic award as being correct and felt that £300 was an appropriate figure for the loss of statutory rights.

7.5.2 In terms of the award for loss of earnings, the claimant was seeking a period of 26 weeks running from the effective date of termination to 19 August 2019 when she obtained new employment, also in a Sub Post Office. The claimant explained that she had felt fit enough to start looking for work at the end of April 2019 but did not do so and it seems that the new job may have arisen because someone approached her, rather than the claimant taking the initiative. In these circumstances I concluded that if the claimant had properly

mitigated her loss she could have obtained a new job within a period of 20 weeks and so I limited the award for loss of earnings to that.

7.5.3 I considered that it was appropriate to apply an uplift under the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992, s.207A. Such an uplift can be made where a respondent employer has failed to comply with a relevant ACAS Code, in this case the Code of Practice on Disciplinary and Grievance Procedures 2015. I found that there were significant breaches. The claimant had not been notified that dismissal was being contemplated; the claimant was not therefore invited to a meeting with the specific purpose of discussing what the respondent believed to be her failings or misconduct and no right of appeal was offered. I considered that the breaches were of sufficient magnitude to justify an uplift of 25 percent.

7.5.4 I also made an additional award to the claimant under the provisions of the Employment Act 2002 s.38, in circumstances where the respondent had completely failed in its obligation under the Employment Rights Act 1996 to provide a written statement of the main terms and conditions of employment. As there was no contract or as far as I am aware, letter of appointment, I considered that a higher award of four weeks' pay was appropriate.

Employment Judge Little

Date 11<sup>th</sup> December 2019