



EMPLOYMENT TRIBUNALS

Claimant: **Miss L CHENG**

Respondent: **COGNITION COMMUNICATIONS LIMITED**

Heard at: **Birmingham**

On: **11 December 2019**

Before: **Employment Judge McCluggage**

Representation

Claimant: In person

Respondent: Mr Witcherley (Managing Director)

JUDGMENT

1. The claim for holiday pay is dismissed upon withdrawal.
2. The claims for unlawful deduction and breach of contract are not well founded and is dismissed.

REASONS

Introduction

1. By an ET1 dated 24 July 2019 the Claimant brought claims for breach of contract, unlawful deduction and for unpaid holiday pay.
2. The claim for holiday pay had been agreed between the parties and was withdrawn.
3. The Claimant's employment started 21 January 2019 and ended on dismissal on 31 May 2019. The Claimant was employed as a Social Media Manager. She was

provided with a written contract of employment which in effect was silent as to notice for probationary employees, so meaning that the statutory minimum applied. Employees who successfully completed their probation would have been entitled to 1 month's notice.

4. While the Claimant was aggrieved about the manner of her dismissal, it was accepted that the tribunal had no jurisdiction in relation to the dismissal itself.
5. Rather the issue in the case turned over whether non-payment of a promise by Mr Witcherley at the time of dismissal to provide 1 months salary over her entitlement had led to a breach of contract or unlawful deduction.
6. It was not in dispute between the parties:
 - a. That a promise was made by Mr Witcherley on 31 May 2019 to pay an additional 1 month's salary.
 - b. That it was a term with legal effect.
7. The issues for the tribunal were:
 - a. Was the term promising the extra payment conditional upon (a) orderly handover and (b) professional conduct by the Claimant.
 - b. If so, was the Claimant in breach of the said conditions, so negating her entitlement to the extra payment?
8. The sum in dispute was £1,868.57.
9. I was provided with documents by both parties. Witness statements were adduced from both the Claimant and Mr Witcherley on behalf of the Respondent and both gave oral evidence.

Facts

10. The Claimant's job as Social Media Manager began on 21 January 2019
11. The Respondent company is a digital marketing agency.
12. Over time, the Respondent was not satisfied with the Claimant's performance in her role. Her probation was extended.

13. It is unnecessary for me to make findings on why the Respondent was dissatisfied with the Claimant and the procedure adopted by the Respondent in managing the Claimant in the final weeks of her employment. It was apparent during the hearing that the Claimant had various concerns over the Respondent's conduct.
14. By mid-May 2019 that the Claimant's line manager, Amy Rowe, was not content with the Claimant's performance and wished the Respondent to consider termination of her employment.
15. On 16 May 2019 Mr Witcherley had an initial meeting with the Claimant having been alerted to the issues by Ms Rowe.
16. Thereafter Mr Witcherley reviewed the Claimant's work and discussed matters with Ms Rowe further.
17. Mr Witcherley then decided that it would be better if the employment relationship ended. In oral evidence Mr Witcherley was careful to emphasise that this did not mean that the Claimant was a bad employee, merely that she did not fit with the Respondent's needs. This type of decision was one he had made many times over the years.
18. A further meeting was arranged for 23 May 2019.
19. On 23 May 2019 Mr Witcherly and the Claimant met as arranged. There were no other attendees. There were no contemporaneous notes taken of the meeting by either employee.
20. The purpose of the meeting from the Respondent's perspective was for Mr Witcherley to terminate the Claimant's employment.
21. The Claimant did not have advance notice of the purpose of the meeting.
22. The meeting took place in a meeting room at the Respondent's premises in city centre Birmingham.
23. The parties dispute precisely what was said at the meeting.
24. It was not disputed that Mr Witcherley told the Claimant she would be dismissed.

25. It was not disputed that Mr Witcherley told the Claimant she would be entitled to an additional payment of 1 months salary. This was described as being in the nature of a 'goodwill payment'.
26. While the Claimant was not contractually entitled to this, Mr Witcherley described the offer as a typical feature of the Respondent ending an employment relationship early, to promote goodwill and ensure an orderly end to the job. He described in oral evidence that it was a standard condition of the promise that the employee would be told the additional payment was conditional upon an orderly handover and professional conduct. He also said that the meeting lasted for 15 minutes.
27. In contrast, the Claimant described how the meeting lasted only 5 minutes. She was adamant that nothing was said about the 1 month payment being conditional upon orderly behaviour or professional conduct.
28. Both Mr Witcherley and the Claimant agreed that she did not have to work her notice but it was up to her. They also agreed that Mr Witcherley observed that this meant that she could get a new job and effectively earn the equivalent of 2 month's pay in the month ahead.
29. Mr Witcherley sent an email to staff noting the Claimant's departure in neutral terms and mentioning that she was to be paid a longer period of notice.
30. Deciding what was said in such circumstances at a meeting with no witnesses is inevitably a challenge for a Tribunal. Both witnesses gave their oral evidence on the content of the meeting in a convincing manner.
31. I concluded that on balance of probabilities, Mr Witcherley's evidence was to be preferred. This was because I considered that the Claimant's overall credibility was undermined by her evidence on what followed in terms of the alleged abuse of the computer system.
32. The Claimant left employment on the day of the meeting. She said goodbye to some fellow employees but did not provide a status update or a handover.
33. Prior to leaving, the Claimant deleted various work-related files she was able to access on the corporate "Google Drive", which is a well-known brand of cloud data

storage. In simple terms, cloud storage in a form of remote data storage. When folders are shared, this allows more than one member of staff to access and modify the file, which might typically be a Word or Excel document or social media posts.

34. The Claimant's evidence was that she only deleted files from her own personal folder and that this would not have effected files in 'shared folders'.
35. At 12.09 hrs on 24 May 2019 Ms Rowe emailed Mr Witcherley saying that the Claimant "had deleted all comms" and had not left a status update or handover.
36. At 14.15 on 24 May 2019 Mrs Lindsey Witcherley, a co-director of the Respondent, emailed Ms Rowe copying in Mr Witcherley to say that a document called the "Cognition Social Plan" had been deleted from the system and that a further "load of docs" had been deleted, having only checked the Client folder so far.
37. Mr Witcherley described to me, and I accepted, that there was a "Client Folder" to which multiple members of staff would have access, and further, that various shared documents had been deleted from this folder. He said that his company had worked with Google Drive for many years and he was very familiar with the system. He emphasised that the Claimant was 'tech savvy' and knew what she was doing.
38. The Respondent had to call in its computer consultants to recover the documents.
39. Within the documents produced as part of the evidence were 2 pages evidencing the documents deleted by the Claimant. These showed a history of files within the Google Drive "bin". This showed 24 files deleted from the Respondent's "Clients Folder" on 23 May 2019 by the Claimant.
40. As Mr Witcherley explained in his own oral evidence, the documents included "JLRE Strategy" which stood for "Jaguar LandRover Strategy", a document concerning the Respondent's business for an extremely valuable client both financially and reputationally. The "Cognition Social Plan" was the Respondent's own social media strategy document. While other documents, for example, involved older social media posts, I accepted that it was necessary to retain these and they might be used again or form the basis for other posts.
41. I found the Claimant's oral evidence difficult to follow as to why she would have deleted all of these files. She sought to explain that she did so because the documents were old material or no longer important. However, this did not

adequately explain why a 'live' Jaguar LandRover document would have been deleted or the Cognition Social Plan. I did not accept that she had merely deleted a version of these documents within her own individual folder within Google Drive, as the print out showed they had been deleted from the "Clients Folder".

42. Ultimately, I concluded that the Claimant had deleted these documents deliberately and probably had done so spitefully in frustration that she had just been dismissed.

Law

43. Given the parties agreed the essential promise and that it constituted a term of the employment relationship, there is little legal principle for me to consider.

44. The case is brought as a breach of contract case.

45. In terms of an allegation of breach of contract and in determining what amounts to a term of a contract, I must consider what was said from an objective vantagepoint, be satisfied that there is consideration and that the promise was intended to be binding.

46. A contract and a variation of the same requires there to be a meeting of the minds, an intention to be bound and reasonable certainty of terms.

47. Where there are contingent promissory conditions in a contract (for example, a requirement of good behaviour before a bonus is payable) may be analysed as a condition precedent to the other's contractual obligation.

48. In relation to a claim for the same amount as an unlawful deduction, it did occur to me that the one month's promised notice is probably equivalent to a payment in lieu of wages and so a failure to pay would be unlikely to constitute an unlawful deduction pursuant to Delaney v. Staples [1992] IRLR 191.

Analysis and conclusions

49. Though the one month's notice was described as being made in 'goodwill' it was in my judgement, from an objective analysis, to be regarded as being legally binding. It had that character given the consideration provided by the requirement for the Claimant to act in a professional manner.

50. The promise in effect supplanted the Claimant's statutory notice entitlement and in effect constituted a variation to the her contract of employment. The Claimant did not successfully complete her probationary period and so was otherwise entitled to 1 week's statutory notice.
51. It follows from the findings of fact made above (see paragraphs 26 and 31) that while Mr Witcherley promised a one month salary goodwill payment, this was on condition of a handover and professional behaviour. I consider that the behaviour expected of the Claimant was properly regarded as a condition precedent to the Respondent's obligation to pay the 1 month's wages in lieu.
52. The Claimant's conduct in deleting computer files without good reason and to the potential detriment of the Respondent's business constituted a breach of this obligation and so the Respondent's obligation to pay the month's salary did not therefore arise.
53. There was thus no breach of contract on the part of the Respondent.
54. For the avoidance of doubt, while there was an allegation in correspondence of the Claimant telling co-workers that she had been dismissed constituting misconduct, this was not advanced at the hearing and I would have regarded it as unmeritorious.
55. If I am incorrect about whether non-payment of the month's salary potentially constituted an "unlawful deduction" as an alternative to breach of contract then I conclude that the monies were not "properly payable" under section 13 of the Employment Rights Act 1996 given the payment's conditional nature and the Claimant's failure to satisfy the conditions.
56. The evidence was silent as to whether the Claimant was paid her 1 week's statutory minimum notice and I did not hear argument as to whether that would or should have been payable. I can note that it ordinarily would have been regarded as payable and would not be conditional upon good behaviour or a handover. The Claimant would at this stage potentially have a remedy in the county court if she was not paid a week's wages which was her statutory entitlement.
57. I note in conclusion that the Respondent could have avoided much of the dispute which has led to this litigation by having a properly evidenced meeting and written proof of the conditions applied to a promise such as that made by Mr Witcherley. It is unsurprising that an employee may be mistaken as to the content of a meeting

bearing bad news, given an upset person may be less likely to recall events accurately.

Employment Judge McCluggage
23 December 2019