



EMPLOYMENT TRIBUNALS

Claimant: Miss R Duffill

Respondent: Greek Classic Gyros Limited

HELD AT: Hull

ON: 6 January 2020

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: In person

Respondent: Mr C Chalkiopoulos

JUDGMENT having been sent to the parties on 14 January 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, which are taken from a transcript of the oral decision delivered immediately upon the conclusion of the case:

REASONS

Unauthorised Deductions From Wages

1. Firstly, I should deal with the claims for outstanding monies. It is now accepted by the claimant, Ms Duffill, that she is not owed any further monies arising from the time she worked for the respondent company. On 15 July she received in her bank account a total sum of £760.76. And although it is unclear precisely how that has been calculated, it certainly covers any outstanding wages, notice pay and accrued holiday entitlement.
2. However, the claimant was dismissed with effect from 15 June of last year. She was paid weekly. She certainly should therefore have been paid before those monies were received into her account in the middle of July.

3. She had by that stage in fact not only raised a claim for outstanding sums in her appeal dated 14 June - which was never answered by the respondent - but she had also commenced her employment tribunal proceedings on 29 June.
4. So the due date for payment had expired without monies going into her account and therefore I make a declaration that there has been an unauthorised deduction from her wages as to the sum which was properly payable at the termination of employment which was not paid promptly at the proper time, even though it was paid later. So, although I make no award for compensation in respect of actual wages due there is a financial consequence to that declaration.
5. I accept the claimant's account that she delayed applying for Universal Credit because she was well aware that if she received the sums outstanding at the end of her employment that would affect her entitlement to benefits. But because she did not receive the monies when she should have done she had to apply for credit in any event. That application was then subject to the fact that in the middle of July she received a lump sum payment that reduced her entitlement.
6. Therefore under s.24 of the Employment Rights Act 1996, having declared that there has been an unauthorised deduction, I also consider that it would be just and equitable to order the respondent to compensate her for the further financial loss, that is the sum that was deducted from her credit entitlement so there is an award against the respondent of £298.47. That disposes of the separate monetary claims.

Unfair Dismissal

7. The heart of this complaint is an allegation of unfair dismissal and I have decided that the claimant was indeed unfairly dismissed.

Background

8. The claimant had worked for this business since July 2017. It is only latterly that she received written terms and conditions of employment. That was from the employer before the present respondent, and those written terms and conditions are dated September 2018. That appears to have been done in anticipation of and in order to regularise the claimant's employment position before the transfer to the respondent in January 2019. And of course, she transferred under the Transfer of Undertakings Protection of Employment Regulations so employment continued.
9. That was basically a 16 hour contract and she continued to work those hours after the transfer. There were no set days. She had worked three days a week. Under the new ownership she worked four days a week but still basically subject to 16 hours. If she worked over that time the arrangement had always been that she would take off time in lieu on another occasion, particularly during holidays when most convenient to coincide with her childcare arrangements.
10. So she had worked for the respondent from January. There were issues which she raised with regard to her payments, which I accept were genuine. Certainly,

the claimant did not receive full particulars of how her pay was calculated and there were issues about the calculation of holiday and the entitlement to be paid for bank holidays in addition to her normal holiday. There were also some issues regarding the claimant's concerns as to whether she would be fully insured to drive a second vehicle purchased by the respondent. But basically, apart from those problems she continued as before. Quite clearly her work in driving the van was integral to that part of the respondent's business, and indeed I am told in the evidence of Mr Chalkiopoulos that since the claimant was dismissed, that part of the business has effectively folded because it was entirely dependent upon her personal relationships with customers.

Termination

11. So that is the background. On 8 June, that was a Saturday, the claimant had not been paid on the Friday as she expected and she sent a text on the Saturday morning asking for payment. She also made a comment, the tone of which may indeed have been somewhat ill advised. I do not accept, however, that it is wholly out of order, as the Respondent says, for her to have asked that the new accountant - whom she described, somewhat ironically, as a "competent accountant" - should then ensure that she did receive proper wage slips for the whole period from January, when the respondents had taken over the business, up to that date so that she could understand precisely how and why she had been paid. It is of course a statutory obligation to provide itemised payslips.
12. The response to that email was almost immediately, 20 minutes later, a text dismissing her. That was followed up by email with a letter of termination. There was therefore, of course, no procedure followed.
13. The letter makes clear that the employment is to end as at 15 June. I accept that it may well have been Mr Chalkiopoulos' intention that he give two weeks' notice but that the second of those weeks be taken up with accrued holiday. He would have been entitled to give one week's notice to take a further one week before the end of employment. The letter however is quite clear. "We no longer require your services as of 15 June therefore your contract will be discontinued and you may consider the abovementioned date as your last date at work." So the effective date of termination is 15 June.

The Reason For Dismissal

14. Within that letter of dismissal Mr Chalkiopoulos gave a number of purported reasons for termination, but he accepts that what principally motivated his decision at that time was an allegation that the claimant had made inappropriate comments on social media, a Facebook account, approximately a week before allegedly saying he was a bad boss who made bad business decisions.
15. There is no evidence of that. There is no documentary evidence of anyone ever having printed out a Facebook page; there is no evidence corroborating that from anyone else who may have viewed that page, and the claimant of course denied it.

16. In her letter of appeal dated 14 June, which was never responded to, she invited the respondent to give the evidence of what she was supposed to have done: none has ever been produced, at the time the allegation was made or since. So even though now, some months down the line, it would be very difficult to reconstruct the Facebook account, this is a matter the claimant raised very early, within six days of being told that was the reason why she was being dismissed, and it was never explained to her in order to give her a chance to answer it. So I simply have no evidence whatsoever that there is in fact anything inappropriate stated on Facebook, certainly nothing to justify a dismissal.
17. The other reasons set out I similarly consider are insufficient to show that a reasonable employer would have terminated employment in these circumstances.
18. Firstly, there is an allegation that the money taken and the inventory had never been an exact match. The claimant accepts that and I have seen the document that she herself prepared which recorded this discrepancy. Under the previous employer the claimant had been instrumental in securing a card reader to allow customers to pay by card rather than to have inappropriate amounts of cash in the van from all locations. She accepts that there was not an exact tally between what was shown to have been received from customers and the money actually in the van. But the documents that have been produced by the respondent to substantiate this allegation in fact show on four occasions that there was in fact a surplus, albeit a relatively small amount. Mr Chalkiopoulos claimed that he wanted an exact correspondence between the reader and the takings, but that is not anything that a reasonable employer might consider justified dismissal, and certainly not without having taken steps to address the matter with the claimant to identify why there may have been discrepancies and to contemplate measures that might be taken to reduce the inexactitude,
19. The second reason is an allegation that the condition of the van was not acceptable. This primarily relates to an accident in which the claimant was involved but that was in February so some four months before termination. Her account, which I have no reason to doubt, was that she and another vehicle were both reversing and there was damage. I have seen photographs of that but the matter was dealt with without recourse to the insurers and there is certainly no suggestion that there was negligence on the part of Ms Duffill. Again, that matter was some months old so there is no justification for treating that as a reason for terminating employment.
20. A further allegation about the condition of the van appears to relate to damage to a lock of the second-hand vehicle, a further vehicle purchased by Mr Chalkiopoulos. Again, he frankly accepts he has no evidence that any damage was caused by negligence or mistreatment on the part of the claimant. This simply appears to be an existing fault on a used vehicle.
21. The third allegation is that the claimant never did the extra hours the business needed from her. It is accepted that Mr Chalkiopoulos wanted the claimant to work on five days a week. She was so integral to this part of the business so one quite understands that. But equally the claimant's contract was only for 16 hours,

she could only be required to work additional hours on an occasional basis as was necessary for the needs of the business and she could not be compelled to change her substantive hours. And indeed, I further accept in her evidence that in reality she worked additional hours in the course of the day for which she was not in fact paid. So again there is no evidence that there is any substantial breach of contract on her part or misconduct.

22. A further allegation is that she responded to a question in a rude way. Again, there is no clear evidence as to what is meant by that. Mr Chalkiopoulos refers to the reference to the new “competent” accountant as an example of rudeness but, as I have said, it may have been an ill-advised comment but it certainly does not justify termination of employment. In respect of any other matters where there might have been some disagreement between them, I accept the claimant’s evidence that these will have related to her concerns about whether or not she was being paid appropriately, receiving appropriate statutory wage slips and whether or not appropriate legal measures were in force to allow her to drive a second vehicle.

Conclusion

23. So substantively none of these matters in my view establish a good reason for termination on the grounds of misconduct or any other substantial reason. And in any event, this is clearly procedurally unfair. None of these allegations were ever put to the claimant in writing, nor was she ever called to a meeting to be able to address them and that is in breach of the respondent’s own disciplinary policy which sets out the procedure where conduct is alleged and it is also of course a clear breach of the ACAS Code of Practice on disciplinary proceedings which require certain formal steps to be taken.
24. So on both those grounds, substantively and procedurally, I find this dismissal unfair. The respondent - and the burden is on them - have not established a potentially fair reason for dismissal on these facts. It is not something which was genuinely believed on reasonable grounds after all proper investigation which would justify dismissal for misconduct, and in any event the procedure is wholly and completely inadequate.

Remedy

25. I have already declared that I award compensation for financial loss in the sum of £298.47, that is pursuant to s.24(2) of the Employment Rights Act 1996; that is financial loss flowing from the late payment of the sums due on termination.
26. I have also determined the amount of appropriate compensation on the successful claim of unfair dismissal.
27. Firstly, there is a basic award for unfair dismissal. Because of the claimant’s age, that is one week’s pay for each year of completed continuous employment so that is two weeks’ pay basic award at £131.36 per week calculated on a 16 hour week which is £262.72.

28. The claimant is also entitled to be compensated for the losses flowing from her unfair dismissal. The date of termination was 15 June of last year, that is the date specified in the letter of termination dated 8 June. However, although it is not entirely clear how the final payment made in mid-July was calculated it does appear that in addition all the sums still outstanding up until 15 June, there has been account taken for a further full two weeks' notice pay. So it appears to me, doing the best I can in the circumstances, that I ought not to compensate the claimant for any time until the beginning of July. It appears she has already been paid by way of payment in lieu of notice up to that date.
29. But from 1 July of last year until the end of this month, January 2020, when the claimant expects to start work as a supply teacher, is of course seven months or more precisely I calculate it at 31 weeks. That means over that period of 31 weeks up to today's date and extending just for the further four weeks in the future to the end of this month there is a total loss of earnings of £4,072.16.
30. I also award the claimant a further sum of £300 to compensate her for what are called her loss of statutory rights. In any new job she starts she will have to have worked in for two years before she has the equivalent employment rights that she had earned by working in this business.
31. So the total compensatory award therefore is £4,372.16.
32. I have also said that I intend to and I do uplift that award because of the failure to comply with the ACAS Code of Practice on disciplinary proceedings. There has been a total failure of every element of that: the claimant was not informed in writing of what the charges against her were; she was not given the opportunity of answering those charges at a meeting and she was not given a right of appeal. I can uplift the award by as much as 25%. I have said I would not increase it by so much but ordinarily I would increase it by at least 10% even in the case of a small business as it is such a complete failure to follow any proper procedure. However, I do reduce it by as much as I can and therefore I think the appropriate uplift is in fact this case 7½%. That increases the total £4,372.16 by a further £327.91 bringing the total compensatory award up to £4,700.07 for unfair dismissal.
33. However, that is subject to what is called "recoupment". That is under the Employment Protection Recoupment of Benefits Regulations 1996. The claimant has been in receipt of Universal Credit and that is a benefit which is not deducted from the amount of compensation but is repayable to the Government. So the effect of this is that not all of the sum I award is payable immediately to the claimant. A large proportion of it is suspended pending recoupment directly from the respondent by the Government of the relevant sums paid in the period.
34. So the total monetary award for the unfair dismissal claim, that is the basic award and the uplifted compensation award is £4,962.79, but the prescribed element, that is the actual losses of earnings from 1 July of last year to today's date, 6 January 2020 is 27 weeks and is £3,546.72 and that sum, as I say, is suspended and such part of that is recovered by the Government is payable directly to them and any balance becomes payable to the claimant at that point.

35. In the short term the sum that is immediately due in addition to the £298.47 on the unfair dismissal claim is a further amount of £1,416.07, and as I say there will be a further amount payable in due course after recoupment.

Employment Judge Lancaster

Date 7th February 2020

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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