



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Jenkins
Respondent: United Car Parts Limited

Heard at: London South

On: 26 February 2020

Before: EMPLOYMENT JUDGE TRUSCOTT QC

Representation

Claimant: Miss L Jenkins, Claimant's daughter
Respondent: Mr A J Kara, appearing with the authority of the respondent

JUDGMENT

1. The claimant is entitled to £405 in respect of unpaid wages.
2. The claimant was unfairly dismissed by the respondent.
3. The claimant is entitled to compensation for unfair dismissal of £8087.56 made up as follows:

Pursuant to section 118(1)(a) of the Employment Rights Act 1996, the respondent is ordered to pay the claimant a basic award of £1215.

Pursuant to section 118(1)(b) of the employment Rights Act 1996 the claimant is awarded a compensatory award of £6872.56. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations do not apply to this award.

REASONS

PRELIMINARY

1. The respondent was represented by Mr AJ Kara. When he first appeared, he specifically said he was not a director of the respondent, but was a director of the correct respondent, Smart GL Limited. In the light of this the Tribunal required to be satisfied that he could appear on behalf of the respondent. After an adjournment, the Tribunal was sent a letter of authority for Mr Kara to appear for United Car Parts Ltd. The Tribunal accepted this although it did not accept the reservation contained in the mandate "as his former employee". The claimant was represented by her daughter. The claimant gave evidence on her own behalf. The respondent did not give evidence.

2. The claimant produced a bundle of documents to which reference will be made where necessary. The respondent produced a copy of the agreement to purchase the assets of MotorBitz Ltd. by Smart GL Ltd on 1 March 2016.

ISSUES

3. The issues, as determined by the case management hearing dated 27 September 2019 are:

Unfair dismissal

3.1 What was the reason for dismissal?

3.2 Was it a potentially fair reason?

3.3 Was it reasonable in all the circumstances?

Wrongful dismissal

3.4 Was the Claimant given the requisite notice of dismissal?

Unlawful deduction of wages

3.5 Has the Claimant been paid two weeks' wages for work done in April 2017?

4. It appeared to this Tribunal that the issue of whether the claimant had been dismissed should also be addressed, the parties were in agreement and the claimant confirmed that she was claiming constructive dismissal.

FINDINGS OF FACT

5. The claimant commenced employment with MotorBitz Ltd on 1 November 2013 as a delivery driver. The respondent put to her that she was self employed but the claimant disagreed. The Tribunal pointed out that this was an issue which ought to have been raised at an earlier stage in the proceedings, as it had been dealt with in the judgment dated 27 September 2019 and would not be entertained by this Tribunal.

6. The claimant is aged 60. She worked part time, as averaged out over two weeks, she worked 27 hours each week at £7.50 per hour.

7. On the insolvency of MotorBitz Ltd, the claimant's employment was transferred to the respondent (as determined in the judgment dated 27 September 2019).

8. There was a change of payment date for wages between March and April 2017 during which six weeks pay became due at the end of April 2017 but only four weeks was paid. The claimant seeks payment for those two weeks.

9. From 11 July 2017 to 19 November 2017, the claimant was absent from work as she had broken her foot. She was due to return to work on 20 November.

10. She received a letter dated 8 November 2017 from Max Car Parts [16] stating that any work she was offered would be on a self employed basis. This was unacceptable to the claimant and the next day she phoned her manager, Sue Moore and told her so.

11. The claimant was out of work and claimed for two years of loss. The respondent put to her that there were many jobs on the Medway industrial estate where she had worked and near where she lived but the claimant said they were not for part-time work.

LAW

12. An employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c) of the Employment Rights Act 1996 (ERA 1996)).

13. The test of whether there has been a repudiatory breach of contract is an objective one, see **Leeds Dental Team Ltd v. Rose** 2014 ICR 94 EAT.

14. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v. Sharp** [1978] ICR 221 CA, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. There comes a point, however, when delay will indicate affirmation.

15. In **Kaur v. Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 CA, the Court of Appeal listed five questions to ask in order to determine whether an employee was constructively dismissed:

- 1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- 2) Has he or she affirmed the contract since that act?
- 3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- 4) If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju** [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- 5) If so, did the employee resign in response (or partly in response) to that breach?

16. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

17. The list of potentially fair reasons is set out in section 98 of the Employment Rights Act.

18. In this first stage of determining the reason for the dismissal, the burden of proof is on the employer. But he does not at this point have to establish that the principal

reason did justify the dismissal, merely that it was the reason he in fact relied upon and that it was capable of justifying the dismissal. The question of whether it did in fact justify it will depend upon whether the tribunal is convinced that the employer acted reasonably in all the circumstances in treating the reason as sufficient, i.e. whether section 98(4)– (6) has been complied with.

19. In **West Midlands Co-operative Society Ltd v. Tipton** [1986] ICR 192 HL in a passage of the judgment of Lord Bridge, with whom Lords Roskill, Brandon, Brightman and Mackay concurred, justified this approach as follows:

“Under [s 98 of the Act of 1996] there are three questions which must be answered in determining whether a dismissal was fair or unfair:

(1) What was the reason (or principal reason) for the dismissal?

(2) Was that reason a reason falling within [subsection (2) of s 98] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held?

(3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?”

20. As to question (1), Cairns LJ said in **Abernethy v. Mott, Hay and Anderson** [1974] ICR 323 CA in a passage approved by Viscount Dilhorne in **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL.

“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness ...”

21. In **Kent County Council v. Gilham** [1985] ICR 233, CA, Griffiths LJ summed up the position as follows:

‘The hurdle over which the employer has to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to [ERA 1996 s 98(4)–(6)], and the question of reasonableness’.

DISCUSSION AND DECISION

22. There was no dispute that the claimant was due two weeks pay for April 2017 and the sum awarded is £405.

23. The claimant was an employee, she was offered work on a self employed basis which she refused. This constituted a material breach of her contract and is a constructive dismissal. The onus was on the respondent to establish the reason for the dismissal. No reason was given by the respondent. The Tribunal finds the dismissal unfair.

24. The claimant's statement of loss is not correctly calculated. The claimant is entitled to a basic award based on four years of continuous employment at 1 1/2 weeks for each year because of her age which is £1215.

25. In considering the amount of compensation to award, the Tribunal accepted that the claimant would find it more difficult to obtain part time work but considered that a claim for two years loss of earnings was too long. Although the Tribunal has no local knowledge, the claimant lives near a very large industrial estate where, reasonably assessed, she should have gained employment by the end of June 2018. She is entitled to a compensatory award of £6872.56 made up as follows:

Loss of statutory rights £250

Thirtytwo weeks loss of earnings which includes four weeks for unpaid notice, sixteen of which is calculated at £7.50 an hour £3240, sixteen of which is calculated at £7.83 an hour £3382.56.

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Employment Judge Truscott QC
Dated: 2 March 2020