



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108827/2019

5

Held in Glasgow on 29 November 2019

Employment Judge R Sorrell

10 Miss A Arthur

Claimant  
In Person

Angela McKee t/a Candy Land

Respondent  
Not present and  
Not represented

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

In accordance with Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 the Judgment of the Tribunal is that the claims for  
20 constructive unfair dismissal and unauthorised deductions from wages are well  
founded and are upheld.

#### Compensation

(i) The claimant was unfairly dismissed by the respondent and the  
respondent shall pay to the claimant the sum of **£5,409.53 (Five  
25 Thousand, Four Hundred and Nine Pounds and Fifty Three Pence)**.  
This is made up of a basic award of **£525.44 (Five Hundred and Twenty  
Five Pounds and Forty Four Pence)** and a compensatory award of  
**£4,884.09 (Four Thousand, Eight Hundred and Eighty Four Pounds  
and Nine pence)**.

30 The Employment Protection (Recoupment of Jobseekers Allowance and  
Income Support and Universal Credit) Regulations 1996 apply to this  
award. The prescribed element of the award is **£2,873.49 (Two  
Thousand, Eight Hundred and Seventy Three Pounds and Forty Nine**

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**Pence)** and relates to the period from 12 June 2019 to 29 November 2019. The monetary award exceeds the prescribed element by **£2,536.04 (Two Thousand, Five Hundred and Thirty Six Pounds and Four Pence).**

- 5 (ii) The claim for unauthorised deductions from wages is upheld and the respondent shall pay to the claimant the sum of **£65.68 (Sixty Five Pounds and Sixty Eight Pence).**

## REASONS

### Introduction

- 10 1. The claimant has lodged claims for constructive unfair dismissal and unauthorised deductions from wages. She sought compensation only.
2. The respondent did not enter a response to the claim and did not appear at this hearing. It was therefore explained to the claimant that this Final Hearing would proceed in the absence of a response to her claim and the respondent
- 15 in accordance with Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
3. As the claimant was a party litigant, the procedure for this hearing and the overriding objective was explained to her at the outset of the proceedings.
4. The claimant lodged a bundle of productions.

### 20 Findings in fact

5. The following facts have been admitted or found by the tribunal to be proven;
6. The claimant's date of birth is 19 November 1991.
7. The claimant commenced employment with the respondent on 10 April 2015 as a sales assistant and key holder. During her employment, she became a
- 25 supervisor but reverted back to a sales assistant role in April 2018 after informing the respondent that she was pregnant. She worked 16 hours a week and was paid the minimum wage for her sales assistant role. At the date of

the termination of her employment this was £8.21 per hour. Her wages were paid into her bank account.

8. The respondent company was a sweet shop which sold ice cream, cheesecakes and hot dogs. When the claimant commenced employment, there were about 10 staff. When she resigned from her employment, there were about 6 or 7 members of staff.
9. She signed a contract of employment at the start of her employment but was not provided with a copy of it. No revisions were made to it in accordance with the changes to her job title throughout her employment.
10. The claimant went on maternity leave in June 2018. She continued to receive wage slips up until November 2018. Between November 2018 and March 2019, she did not receive any wage slips. From April 2019 she received wage slips up until the termination of her employment.
11. The claimant has not received a P60 from the respondent for her earnings between April 2018 and March 2019. She was also not enrolled in a pension scheme by the respondent.
12. During her maternity leave, the claimant was in receipt of statutory maternity pay and universal credit.
13. The claimant received a universal credit statement on the 11<sup>th</sup> of each month. During her maternity leave she noticed that the statements were showing her income as nil. She did not think this meant anything was wrong because she was in receipt of maternity pay and thought that this did not count as income.
14. The claimant returned to work from maternity leave on 19 May 2019.
15. On 12 June 2019, the claimant again noticed that her universal credit statement showed her income as nil. She became concerned as her colleagues said that the respondent was struggling financially. She therefore contacted "HMRC" who advised that the respondent had not declared any earnings for the claimant since November 2018 and that as a result, she had

been overpaid in universal credit to the amount of £1,594.93. This was confirmed in writing to her on 11 July 2019. (D15-17)

16. This was not the first occasion during the claimant's employment with the respondent that there had been a tax issue with the claimant's wages as in 2017, the claimant had to contact "HMRC" to sort out an unexpected tax bill.

17. The claimant thereafter sent the respondent a message on 12 June 2019 as follows:-

*"I checked my statement online this morning for universal credit and it said I had 0.00 earnings so I phoned them to find out what happened as I'm back at work and do have earnings. I have been informed there is no records of any earnings for monthly take home earnings if I'm declared as 'not working' they'll obviously have to adjust their records to the correct home earnings. I clearly am working, they're due to pay me and no doubt it will all need to get worked out again and I'll have a bill to pay back to them. I don't have spare cash to back bills unexpectedly. Can you let me know what is happening today at the latest I need to get this sorted asap!"*

*Let me know if you want to phone me but it will tonight as I'm phoning hmrc and Acas myself to get this sorted. It has went on long enough now this was supposed to be sorted last year. Is this why I haven't received my P60 yet either as it's illegally past the date for that too that was went to be issued before or on the 31<sup>st</sup> May. Yes you messaged me yesterday asking for information and I gave you it straight away as I need all my stuff ASAP. I have a family and need to look to the future and unexpected bills is definitely not what we need." (D29-31)*

18. The respondent replied to the claimant's message as follow:-

*"Tried to call u to explain this to u, HMRC should also have informed you that it's them that's holding up the process, I paid the accountant who disappeared off the face of the earth. I have since been to three different accountants who didn't want to touch it as the previous had left a mess, I then got someone at the start of this year who had to fix the accounts before he could touch the*

wages side of things. The new accountant is asking me for information as he needs it to sort this problem I have phoned HMRC 3 times in the last 2 weeks to chase up the P11 for each employee old and new as this is required to complete last years, when u sent me the info yesterday I sent it on straight  
5 away to him so he could at least start. When I made the complaint they told me they would mark my request for P11 as urgent. This is something that I do not either and I understand your anger and frustration, I have just finished work and was about to phone u when u put the message on the page, this will be sorted but I can't confirm when. If u need any information or have any  
10 queries call me as it is easier to speak rather than message." (D31-33)

19. The respondent telephoned the claimant that night and repeated what she said in her message to the claimant. During the phone call the claimant became angry and upset with the respondent at what had happened and advised that in the circumstances she would not be returning to work. The  
15 respondent said she wanted her to stay but the claimant told her she had been waiting all day for her to contact her and that she was not happy to continue working for her as she was going to get a huge bill because of it and that she and her colleagues were all getting different stories from her.
20. The claimant's last working day was 10 June 2019. The respondent has not  
20 paid her for the four hours she worked on 9 June 2019 or for the four hours she worked on 10 June 2019.
21. The claimant received her last wage slip on 9 June 2019 (D1).
22. The effective date of termination of the claimant's employment was 12 June  
25 2019. She has not received her P45 from the respondent since the termination of her employment.
23. Since July 2019 the claimant has been in receipt of universal credit. Her partner works full time.
24. On 22 October 2019, the claimant commenced employment with DinoM8 as  
30 a receptionist on a zero hour contract. She is paid the minimum wage. At the date of this Hearing she has worked 34 hours and has been paid £279.14.

She continues to seek additional and regular employment as a sales assistant and has made a number of on-line job applications, most of which have not yet been responded to.

### Relevant law

5 *Illegality*

25. A contract that is lawful when made can become illegal if it is performed in an illegal way and most commonly occurs in employment contracts when there is some form of tax evasion in the way an employee is paid. In **Hall v Woolston Hall Leisure Ltd 2001 ICR 99, CA** it was held that before the illegal performance could act as a bar to an employee's enforcement of their contract of employment, it was necessary to show both knowledge of and participation in the illegality on the part of the employee. This approach was endorsed in **Enfield Technical Services v Payne 2008 ICR 30**. In **Patel v Mirza 2016 UKSC 42** the Supreme Court set out a three stage test that requires consideration of the purpose of the prohibition transgressed and whether that will be enhanced by denial of the claim, the impact on any other relevant public policy and whether denial of the claim would be a proportionate response to the illegality.

15 *Constructive dismissal*

20 26. The law relating to constructive dismissal is contained in Section 95(1)(c) of the Employment Rights Act 1996 ( the "ERA"). In order to prove that she was constructively dismissed, the claimant must show that she terminated her contract with or without notice in circumstances in which she was entitled to terminate it (without notice) by reason of the employer's conduct and that that conduct was the reason for her terminating the contract.

25 27. The leading case relating to constructive dismissal is **Western Excavating (ECC) Limited v Sharp [1978] ICR221**, which states if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is

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entitled to treat herself as discharged from any further performance. If she does so, then she terminates the contract by reason of the employer's conduct and she is constructively dismissed.

28. As to whether the respondent company breached the implied duty of trust and confidence, this duty is set out in **Malik v BCCI [1997] IRLR462**. This states an employer (or employee) must not without reasonable cause act in a way that is calculated to or likely to seriously damage or destroy the trust and confidence on which the employment relationship is based or founded and that part of that duty owed by an employer to an employee is an implied obligation not to carry out their business in a corrupt or dishonest manner. The case of **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, is authority that the question of reasonable cause should be subject to an objective test.

29. The leading case relating to constructive dismissal as a reason for dismissal is **Berriman v Delabole Slate Limited [1985] ICR546**, which states that in the case of constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that led the employee to resign.

### **Fairness of the dismissal**

30. What has to be assessed in a constructive dismissal case is not whether the dismissal is "fair" to the employee in the way that is usually understood but whether the employer's reason for committing a fundamental breach of contract was, in the circumstances, sufficient to justify that breach. The Court of Appeal held in **Bournemouth University Higher Education Corporation ("supra")** that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there is a constructive dismissal, rather that it is something to be considered if the employer puts forward a potentially fair reason for dismissal when deciding whether dismissal was reasonable.

### **Compensation**

31. If the Tribunal finds that the claimant has been constructively unfairly dismissed, it can order reinstatement or alternatively award compensation. The claimant has indicated in this case that she does not seek reinstatement. Compensation is made up of a basic award and a compensatory award. The basic award is based on age, length of service and gross weekly wage. The basic award can be reduced if the Tribunal considers that the claimant's conduct was such that a reduction would be just and equitable.
32. The compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal, insofar as that loss is attributable to action taken by the employee. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate and a figure representing losses such as statutory rights and pension loss.
33. If the Tribunal finds that the employee's conduct has contributed to her dismissal, it can reduce the amount by such proportion as it considers just and equitable. If the dismissal is found to be unfair on procedural grounds, it may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed, that a fair dismissal would have occurred. This is known as a **Polkey** reduction.

*Wrongful Dismissal*

34. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee is able to recover damages in respect of the statutory or contractual notice period. Damages in a wrongful dismissal claim will be limited to the employee's losses occurring during the period between the date of dismissal and the date at which the contract could lawfully have been brought to an end by the employer in accordance with the notice period.
35. Section 86 of the Employment Rights Act 1996 sets out minimum periods of notice required to terminate a contract of employment. Where notice is given



by an employer, the notice required is one week for employees who have been continuously employed for at least one month, but less than two years and one week for each year of service for employees who have been continuously employed for two years or more, up to a maximum of 12 weeks for continuous employment of 12 years or more. If the contract provides for more notice, it is the longer notice period which prevails.

*Unauthorised deductions from wages*

36. The law relating to unauthorised deductions from wages is contained in Section 13 of the Employment Rights Act 1996 (the 'ERA').

10 This states: "An employer shall not make a deduction from wages of a worker employed by him unless:-

- (i) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract [Section 13(1)(a)]; or
- 15 (ii) The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)]."

Section 13 (2) states: "In this section "relevant provision," in relation to a worker's contract, means a provision of the contract comprised –

- 20 (i) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]
- (ii) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 13(2)(b)].

25 Section 13 (3) states that: "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of

this Part as a deduction made by the employer from the worker's wages on that occasion."

**Issues to be determined by the tribunal**

37. The tribunal identified the following issues required to be determined:-

- 5 a. Is the contract of employment enforceable?
- b. Did the claimant resign because of an act or omission by the respondent?
- c. Did that conduct by the respondent amount to a fundamental breach of contract?
- 10 d. Has the claimant affirmed the contract following the breach?
- e. Is the reason for dismissal the reason for the respondent's breach of contract that led the claimant to resign?
- f. Was the respondent's reason for committing a fundamental breach of contract in the circumstances sufficient to justify that breach?
- 15 g. If the claimant was unfairly dismissed, what remedy is appropriate?
- h. If compensation is to be awarded, how much should be awarded?
- i. Did the claimant cause or contribute to the dismissal and if so, is it just and equitable to reduce compensation?
- j. Has there been a breach of contract by the respondent arising from  
20 the termination of the claimant's contract in failing to pay adequate notice?
- k. Has the employee suffered a loss as a result of the breach?
- l. Has the respondent made unlawful deductions from the claimant's wages?

25 **Conclusion**

38. Overall, I found the claimant to be a credible witness who gave consistent and reliable evidence which was largely corroborated by the documentary evidence lodged.

*Illegality*

5 39. I found that the claimant could enforce her contract as I considered that the  
illegality in performance of her contract had arisen from the respondent's  
failure to declare the claimant's income from November 2018 until the  
termination of her employment. In reaching this view I have applied the three  
stage test in the authority of **Patel ("supra")** and found that the denial of the  
10 claimant's claim would not have any significant impact on tax evasion in the  
UK, that the denial of her claim would only adversely impact the claimant and  
benefit the respondent and that it would therefore be a disproportionate  
response to the illegality.

15 40. I have also taken account of the approach taken in **Hall ("supra")** and **Enfield  
("supra")** and did not consider that the claimant had knowledge of and  
participated in this illegality. This is because whilst the claimant accepted that  
she should have realised sooner that the respondent was not declaring her  
income, I accepted her evidence as plausible that as she was on maternity  
leave she naively thought that this did not count as income.

20 *Constructive Dismissal*

41. I found that there had been a breach of contract by the respondent in that she  
had not declared the claimant's earnings to "HMRC" from November 2018  
until the termination of the claimant's employment on 12 June 2019 and that  
in accordance with **Malik v BCCI ("supra")**, the respondent had breached  
25 the implied term of mutual trust and confidence. This is because in applying  
**Bournemouth University Higher Education Corporation ("supra")**, I  
considered there was no reasonable cause for the respondent not to declare  
the claimant's earnings and that part of this duty owed by an employer to an  
employee is an implied obligation not to carry out their business in a corrupt  
30 or dishonest manner.

42. I further found that in terms of the authority of **Morrow v Safeway Stores plc 2002 IRLR 9 EAT**, as the respondent's conduct amounted to a breach of the implied term of trust and confidence, that this was a fundamental breach of contract by the respondent.
- 5 43. I am satisfied on these facts that the claimant did not affirm her contract of employment after the breach by the respondent because she notified the respondent of her resignation on the same day as she was informed by "HMRC" that the respondent had not declared her earnings since November 2018. I therefore found in terms of **Berriman**, that the reason for the dismissal was the reason for the respondent's breach of contract that led the claimant to resign.
- 10 44. In view of all the evidence in the round, I found that the respondent's reason for committing a fundamental breach of contract was insufficient to justify that breach. This is because it is clear from her message of 12 June 2019 in response to the claimant that the respondent was aware of her legal obligations as an employer to declare her employees' income to "HMRC." Yet, she failed to meet that legal obligation in respect of the claimant over a significant period of time with no cogent reason for doing so and rather than take responsibility for that and act upon it, she simply attributed her own failings to that of "HMRC" and her accountants. This was also not the first occasion during her employment with the respondent that the claimant had to contact "HMRC" and resolve tax issues arising from her wages.
- 15 20 45. Taking into account all of the above circumstances and in applying the law to these facts, I have concluded that the claimant was constructively unfairly dismissed without notice.
- 25 46. For all these reasons, the dismissal was unfair.

47. I also accepted the claimant's evidence as true that she was not paid for her last two days of work on 9 and 10 June 2019 which was consistent with her being paid on a weekly basis and corroborated her final wage slip that she lodged for the period 3 to 9 June 2019 and issued on 14 June 2019.

5 **Compensation**

48. The claimant was seeking compensation only.

*Notice Payment*

49. In accordance with the claimant's length of service and Section 86 of the 'ERA,' she is entitled to a notice payment of 4 weeks net pay. This is  
10 calculated at 4 weeks x net weekly pay at the date of dismissal as 4 x £131.36  
= £525.44.

*Basic award*

50. In respect of the basic award, the calculations are based on the claimant's age, length of service and her gross weekly wage. The claimant's gross  
15 weekly wage at the date of dismissal is £131.36. This is calculated at 4 weeks  
x £131.36 = £525.44. On these findings, I took the view that the claimant's  
conduct did not contribute to her dismissal and therefore it would not be just  
and equitable to make the reduction to the basic award.

*Compensatory award*

20 51. I considered that there should be compensation for loss of earnings up to the  
date on which the claimant secured alternative employment. There should  
also be compensation for loss of statutory rights. In respect of future loss  
regarding the difference between the claimant's income with the respondent  
and her current employment, I took the view that 20 weeks was a reasonable  
25 period on account of the difficulties the claimant has already encountered in  
securing additional and more regular employment. I further found that the  
claimant has mitigated her losses because she gave credible evidence in that  
since securing her alternative employment, she continues to be active in  
seeking to obtain additional and more regular employment. Furthermore, a

reduction to this award on the basis that the claimant's conduct had contributed to her dismissal would not be just and equitable on these facts.

52. The tribunal has calculated the compensation as follows. The compensatory award is made up of net loss of earnings from 12 June 2019 to 22 October 2019 at 19 weeks x £131.36 = £2,495.84 and the difference in the claimant's total income in respect of her new employment at DinoM8 of £279.14 between 22 October 2019 and the date of this hearing (279.14 divided by 5 weeks = 55.83) which is calculated as £377.65 (131.36 – 55.83 = 75.53 x 5 weeks). In respect of future loss, the tribunal has awarded 20 weeks x £75.53 = £1,510.60. The claimant's notice pay has not been deducted from this figure as she was dismissed without notice. This gives a total of £4,384.09. (2,495.84 + 377.65 + 1510.60) The claimant is awarded £500 for loss of her statutory rights. The total compensatory award is therefore £4,884.09 (2,495.84 + 377.65 + 1510.60 + 500).

15 *Unauthorised deductions from wages*

53. This has been calculated on the basis that the claimant worked on 9 and 10 June 2019 for four hours each day. She was paid the minimum wage of £8.21 per hour and this equates to a total net payment of £65.68 (8.21 x 8 hours)

*Recoupment regulations*

54. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. In the meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds, if any, the prescribed element. The balance, if any, falls to be paid once the respondent has received the notice from the Department for Work and Pensions.

Employment Judge:	R Sorrell
10 Date of Judgement:	19 December 2019
Entered in Register, Copied to Parties:	20 December 2019