



# EMPLOYMENT TRIBUNALS

## Claimant

Miss H Jarvis

## Respondent

Swans Day Nurseries Limited

Held by CVP

On: 21 October 2020

Before: Employment Judge Manley

**Claimant:** Ms C Buckley, mother

**Respondent:** Mr R Luthra, Operations and Finance manager

## RESERVED JUDGMENT

- 1 The claimant has not been able to show that the respondent breached her contract of employment in such a way as to entitle her to resign without notice.
- 2 The respondent cannot rely on a contractual term about deductions under s13 (1) b) Employment Rights Act 1996.
- 3 The respondent is ordered to pay the sum of **£259.52** as unlawful deduction of wages.
- 4 The respondent is also ordered to pay the sum of **£158** as unlawful deduction of wages relating to accrued holiday pay.

## REASONS

### Introduction and issues

- 1 This matter was listed for a one-hour hearing and was held by CVP with the claimant also in attendance. I had a bundle of documents but not all were visible for reasons I did not understand. Ms Buckley therefore forwarded two email chains during the hearing.

- 2 The issues related to the unlawful deduction of wages claim brought by the claimant. She claimed for 9 days of work and 3 days for accrued holiday which she calculated to amount to £379.20.
- 3 The respondent accepted that there were 9 days pay outstanding but was of the view that there was only one day of accrued holidays. The sum due, Mr Luthra said, was £316. The respondent's case, in summary, is that it was entitled to deduct from that sum for payments made for staff cover because the claimant resigned without notice (amounting to a total of £433) and a damaged fob in the sum of £15. The respondent's case is that the claimant is entitled to no payment and, in fact, owes the respondent £132.
- 4 The issues were discussed at the outset of the hearing and can be summarised as follows:-
  - 1 Did the respondent commit breaches of the claimant's contract of employment which entitled her to resign without giving the contractual one month's notice?
  - 2 If so, is the respondent entitled to deduct from sums due to her the extra staff costs by relying on paragraph 20 of the apprenticeship agreement?
  - 3 What is the claimant's holiday entitlement?

### The Hearing

- 5 The hearing commenced at 11.00 am by CVP. As indicated I did not always have the documents referred to but they were then forwarded to me (and Mr Luthra). I did not hear evidence on oath as my deliberations depended, for the most part, on what had been put into writing and the interpretation of the contract.

### Facts

- 6 The facts were not always as straightforward as they at first appeared. The claimant commenced as a childcare apprentice for the respondent's day nursery on 14 January 2019. An agreement was signed between the claimant and the respondent. It is agreed that the contractual term was that the claimant would give one month's notice in writing after one month's employment.
- 7 The relevant part of paragraph 20 reads:-

*"Deductions from Wages*

*We reserve the right to require you to repay, either by deduction from your wages/salary or any other method acceptable to the Company:*

- *Any losses sustained by us in relation to our property or monies, or the property or monies of our clients, customers, visitors, or*

*other employees, during the course of your employment caused through your failure to follow our rules/procedures, failure to follow our instructions, your carelessness, your negligence, your recklessness, your omission, your wilful act or through any dishonesty on your part;”*

- 8 A number of issues arose during the claimant's employment. I was told that there was also an agreement made between the respondent and West Herts College where the claimant was undertaking some training. These were matters raised orally and in emails between the claimant and Mr Luthra and the claimant's mother and Mr Luthra.
- 9 The first matter was that there was an underpayment of wages in January. Mr Luthra believed this was rectified in mid February but it seems as if it was not finalised until 6 March.
- 10 The claimant also says that she did not receive timely payslips. Mr Luthra said that they were sent by email but there is nothing in writing to that effect. When the claimant asked for printed payslips I understand that they were provided.
- 11 There was an issue about a tax rebate which Mr Luthra may have thought was an overpayment but no deduction was made.
- 12 As an apprentice the claimant was required to undergo training. Initially, Mr Luthra did not agree to pay for external training but then agreed to pay for the claimant's first attempt. He said, in an email of 10 April 2019, that she would have to pay for any second attempt. The claimant also asked for time off in lieu (TOIL) if she attended first aid training on a Saturday as she was working 40 hours during the week. Mr Luthra indicated, at the time, in an email reply, that no such TOIL could be agreed, but said in the hearing that it could have been. The claimant believed that there was an agreement that 20% of her time would be off-site training but I have not seen a written term about that. It seems that no such off-site training was formally arranged.
- 13 Ms Buckley, the claimant's mother, consulted with the claimant's contact at West Herts college on her behalf and it was decided that the claimant would resign without notice on 11 April 2019, partly because she had felt intimidated in discussions with Mr Luthra. On the same day, she said she was resigning immediately. She then emailed confirming the resignation and setting out the alleged breaches of contract, including the pay and payslips issues, training issues and a disagreement about holiday entitlement.
- 14 We discussed holiday entitlement in the hearing. The respondent requires employees to take 17 days holiday per year when the nursery is closed and they can take 11 days holiday which they can chose. After discussion, it was agreed that the proportion of holiday to which the claimant is entitled was 28 days divided by 12 and multiplied by 3

for the three months worked, minus the 2 days she had taken in January. It was agreed this would be 5 days.

- 15 The claimant also agreed that she had taken 2 and a half hours as sick leave and the deduction for that would be £9.88.
- 16 After she left the claimant returned her uniform and fob. The respondent allege that the fob was damaged and the claimant has signed a document agreeing to pay for loss or damage of the fob. Although it is disputed that the fob was damaged, the claimant is not pursuing this.
- 17 Because the claimant left abruptly, the respondent had to engage temporary staff at a cost of £286.80 and pay extra hours to an existing employee at a cost of £164.20. It does not appear to be disputed that this was the cost to the respondent.

### **The law**

- 18 The Employment Rights Act 1996 (ERA) makes provision for a number of basic employment rights. Section 8 provides that for itemised pay statements to be provided to an employee “*at or before the time at which any payment is made*”.
- 19 Section 13 confers the right not to suffer unlawful deductions of wages. Section 13 (1) reads:-  
  
*“An employer shall not make a deduction from wages of a wrker employed by him unless –*  
*a)*  
*b) the worker has previously signified in writing his agreement or consent to the making of the deduction”.*
- 20 I must also consider some of the terms, express and implied, of the agreement between the parties which made the contract. In assessing whether the respondent breached the contract, I should consider the circumstances in which any such breach would entitle the claimant to resign without giving the contractual period of notice.

### **Conclusions**

- 21 This is a matter without an easy answer. When breaches of contract are argued, it is right that attempts to remedy any breach must also be taken into account. It can also be difficult to assess what is a term of a contract and what might amount to an expectation that does not have contractual force.
- 22 The first thing for me to decide was whether there were breaches of contract by the respondent which entitled the claimant to resign without notice. The claimant points to a problem with her January pay. Strictly speaking, the failure to pay the correct amount would amount to a

breach unless it is an error. However it occurred, the error was corrected albeit rather later than Mr Luthra believed. The claimant was also entitled to pay statements, as a matter of statute and contract. I accept that she might not always have had them on time but do not accept at the time she resigned there was any outstanding difficulty.

- 23 Several of the claimant's concerns related to training and I can understand these concerns. What is less clear is whether these have any contractual force. The respondent eventually offered to pay for one course, although the issue of TOIL was not resolved before the claimant left. I have not been taken to any contractual term about 20% off-site training and, in any event, the evidence does not indicate a refusal to allow this but a failure to arrange it. I completely understand that the claimant had concerns and her actions were supported by her contact at West Herts college. However, I am not satisfied that there were any significant breaches of contract at the point that she resigned. Clearly, there were continuing disagreements but the pay issue was resolved.
- 24 The relevant express term on notice is agreed. The claimant was required to give one month's notice. The other express term relied upon by the respondent is a little more difficult to analyse. I must consider whether the words in paragraph 20 of the agreement (see paragraph 7 above) can be applied to the situation here (the failure to give notice) and whether they comply with section 13 (1) b) ERA. I do not accept that this term does allow the respondent to make the deduction it seeks to make. The term does not spell out clearly that the failure to give notice will lead to a deduction. The paragraph is more accurately described as one which is meant to apply to various matters of behaviour during employment rather than a failure to give notice upon termination. The reference to "*rules/procedures*" does not suggest the contractual agreement on notice.
- 25 So, the claimant's failure to give notice by reference to alleged breaches is itself a breach, because the respondent's breaches were minor or had been resolved. However, she is entitled to be paid for the days she worked before leaving (less the sick time) and holidays. She has the right not to suffer deductions because the respondent cannot rely on the contractual term.
- 26 The sums due are as follows. The sum of £284.40 (9 x 8 x £3.95) as unpaid wages minus £9.88 amounts to £274.52 minus £15 for the fob is £259.52.
- 27 The claimant is entitled to 5 days pay for accrued holidays in the sum of £158.

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**Employment Judge Manley**

**Dated 27 October 2020**

**JUDGMENT SENT TO THE PARTIES ON**

**27/10/2020**

**AND ENTERED IN THE REGISTER**

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**FOR SECRETARY OF THE TRIBUNAL**