



EMPLOYMENT TRIBUNALS

Claimant
Mrs J Little

v

Respondent
Terence Barker Limited

Heard at: Bury St Edmunds

On: 28 October 2019

Before: Employment Judge M Warren

Appearances:

For the Claimant: In person.

For the Respondent: Ms P Hall, Consultant.

JUDGMENT having been sent to the parties on 6 November 2019 and reasons having been requested, the following reasons are provided:

REASONS

Background

1. After a hearing on 28 October 2019, I gave an oral Judgment to the parties that day; Mrs Little succeeded in her claim and the respondent was ordered to pay her £2569.66. Mrs Little has written to the tribunal to say that she requested written reasons by an email she sent in October 2019. The tribunal is unable to trace such an email. However, I understand that a transcript of my oral Judgment has recently been requested by both Mrs Little and the police, in connection with potential criminal proceedings. A recording of my oral Judgment has been transcribed. What I have said is replicated below, with grammatical correction and the addition of the relevant law.

The Issues

2. This is a claim in breach of contract by Mrs Little. I identified the issues with the parties at the outset of the case, essentially it is about whether or not Mrs Little was guilty of a fundamental breach of contract, such that the respondent was entitled to dismiss her without notice. As I explained to the parties, it is not a case about the reasonable belief of the respondent, it is not about the fairness or otherwise of the procedure followed, nor is it about allegations of fraud discovered after Mrs Little's employment was terminated; reference to these matters in Mr Norton's witness statement are not relevant.

3. The allegations of misconduct, (or gross negligence as the respondent as referred to it in its correspondence) is that as financial controller, Mrs Little was responsible for uploading payments to a pension scheme. The respondent says that those payments were significantly in arrears, she had not been making them and that amounted to gross negligence. Mrs Little says that the respondent was very much aware of her ongoing difficulties with logging onto the pension company's website, with uploading information and making the payments. It seemed to me that either the respondent was aware, in which case it could hardly call Mrs Little's failings gross negligence, or the respondent was not aware and had been kept in the dark by Mrs Little, in which case it probably was gross misconduct.

Evidence

4. In terms of evidence, I have had before me today witness statements from Mrs Little and from Mr Norton, Managing Director of the respondent. I have a bundle, properly paginated and indexed prepared by the respondent's advisors. Mrs Little came along with some extra documents, although it appears these documents have in fact found their way into the bundle prepared by the respondent, (Mrs Little had an earlier version of the bundle which did not include them).

The Law

5. Although section 86 of the Employment Rights Act 1996 provides that certain minimum periods of notice must be given by an employer to an employee in order to lawfully terminate a contract of employment, (2 year's notice in the case of an employee with less than 2 year's service) a longer period of notice may be provided for in a contract of employment. A contract may entitle an employer to terminate without notice if the reason for termination is the conduct of the employee.
6. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.
7. Negligence is action or inaction which falls below the standards expected of a reasonably competent person, in breach of a duty of care, which causes loss. I am not aware of there being a concept of gross negligence, other than in the sphere of criminal law.

The Facts

8. Mrs Little's employment with the respondent began on 3 August 2017. She was a financial controller. The respondent's business is the manufacture of fuel tanks.

9. On 22 January 2019, (page 35) the accountants previously retained by the respondent to undertake its bookkeeping called BMA Accounting, (in particular, Mr Bryan Mayles) received an email from People's Pension to say that the respondent's payments were not up to date. From page 35 I can see that Mr Mayles forwarded the email to Mr Norton, who in turn forwarded it on to Mrs Little. Mrs Little's case is that the problems she was encountering accessing the website and uploading the payments was discussed with Mr Norton at that time. She says that they sat close together and this problem was a frequent topic of conversation, her attempts to upload without success were almost daily. The respondent's position is that this is not true.
10. On the 22 March 2019, an email was sent to a Joanne Mayles of BMA Accounting, informing them that the respondent's pension contributions were overdue.
11. On 29 May 2019, Mr Bryan Mayles forwarded to the respondent an email from People's Pension in which they say that the 22 March email had been sent to an email address of the respondent's which they say is the Accounts email to which Mrs Little has access. She does not dispute that that is correct.
12. On 8 April 2019, Mrs Little was suspended for reasons which had nothing to do with the pension payments. The respondent had discovered that customers were being sent requests for a change of account details to which payments were to be made. Mrs Little was suspended on suspicion of fraud, as confirmed in a letter sent a week later on 15 April, (page 38) which states that the reason for suspension was to investigate fraudulent email activity from her email account. In due course, it was discovered that these emails had nothing to do with Mrs Little; someone had accessed the respondent's account and had been sending out these emails to its customers.
13. Upon being suspended, Mrs Little resigned on 8 April 2019, giving three months' notice as required by her contract. Her contract terms and conditions are at page 25. These require 3 months' notice from an employee who has more than 1 months' service. For an employee who has completed a probationary period, but who has less than 5 years' service, the employer is required to give one month's notice. The contract refers to an employee handbook, the relevant part of the employee handbook is at page 33, which refers to the possibility of dismissing without notice in the event of gross misconduct and gross negligence.
14. On 12 April 2019, Mrs Little was sent a letter from the respondent stating that it was investigating professional competence and due care. Mr Norton's evidence was to suggest that this indicated that the People's Pension issue was the subject matter of investigation. I note at page 39 an email from Mr Mayles of BMA Accounting to People's Pension, copied to Mr Norton, in which he refers to having taken over the respondent's accounting and payroll function and after logging onto the People's Pension online account and discussion with support colleagues, he wrote that it would appear that employee data has not been uploaded since January 2019 and consequently no contributions had been paid. He wrote that it was his intention to remedy that as soon as possible.

15. Subsequently on 23 April, (page 41) a letter to the respondent's address, (addressed to Mrs Joanne Mayles) gave formal written notice that the respondent was in arrears with pension contributions and made reference to a potential fixed penalty of £400.
16. In an email of 24 May 2019, (page 44) and a second email, (page 44a) Mrs Little chases the respondent for her wages. In a letter at page 43, Mr Norton referred to Mrs Little having tendered her resignation, he invited her to withdraw her resignation and stated that if she did not do so, they would accept her resignation effective from 8 May 2019.
17. Subsequently on 27 May 2019, Mrs Little submitted a grievance, (page 45). It is two and a half pages long and complains about the matters for which she was said to have been investigated, i.e. the potential fraud and about the fact that she had not been paid as she should have been.
18. Subsequent to that on 28 May 2019, Mr Norton wrote to Mrs Little, (page 48). He confirmed that the respondent had uncovered no wrongdoing on her part in respect of the potentially fraudulent emails; the respondent had been compromised by a sophisticated form of hacking. He went on however to write:

“Our investigation has unfortunately uncovered a serious issue with the People's Pension contributions. Pension contributions remain outstanding from January, February and March although monthly file upload and overdue pension contribution reminders were sent to Accounts@TBtanks.co.uk no action was taken to remedy the overdue account. As a result the People's Pension has reported Terence Barker Limited to the Pension Regulator. This could have serious personal implications for all the directors of the company as they could face legal proceedings and fines for failing to comply with the Pension Act 2008. The company could also face fines and/or penalties.”
19. The letter then goes on to say that Mrs Little is therefore guilty of gross negligence which is tantamount to gross misconduct and she was therefore dismissed from her role as financial controller effective immediately and that her last day of employment was 27 May.
20. Lastly, I note an email in response of 28 May from Mrs Little, in which she writes to Mr Norton that he was well aware that she had ongoing issues with logging onto People's Pension and refers to somebody called Jo being aware of this and working alongside her and discussing it with Mr Norton. This person called Jo was from a firm that was providing her with payroll training.

Conclusions

21. I accept the evidence of Mrs Little that Mr Norton knew from 22 January onwards that there were problems uploading payments to the People's Pension website. First and most importantly, there is of course the email itself of that date forwarded to Mr Norton and then forwarded by him to claimant. It seems to me not credible that this then did not become the subject matter of discussion between the financial controller and the managing director.

22. Furthermore, Mrs Little's email of 28 May corroborates her case that the respondent was well aware of the ongoing difficulties. In oral evidence I am afraid Mr Norton's evidence was unconvincing. When asked whether he had discussed these matters, his answer was, "not really". I also note the reference to somebody called Jo who was aware of these matters. The very fact that the respondent did not go to Mrs Little for her comments on the allegations, effectively prevented it from pursuing the matter with this individual and establishing whether these were matters the respondents were aware of and of course, Jo is not here to give evidence in the Tribunal.
23. I find that on the balance of probabilities, it is more likely than not that the People's Pension issue was something the respondent was aware of ongoing. I find that the respondent had thought that it was going to get rid of Mrs Little on the fraudulence allegations, but discovered that was not possible. They called in their accountants, Mr and Mrs Mayles, to again take over the bookkeeping function. It seems to me likely that this was an ongoing arrangement they wanted to continue with, they decided that they did not want Mrs Little back, looked for another reason to remove her and came up with the People's Pension issue. It is a remarkable co-incidence that the matter is crystalised when Mrs Little chases for payment of her wages.
24. I find that Mrs Little was not in fundamental breach of her contract of employment, she was not guilty of gross misconduct nor negligence. The problem with People's Pension was a known ongoing technical issue with uploading. It was not a consequence of her misconduct or her negligence. She made her employer aware of the issue. Mrs Little is therefore entitled to one months' notice, for the respondent was entitled lawfully to terminate her employment, even during Mrs Little's own 3 month notice period, by giving her one months' notice. She is therefore entitled to Judgment in the amount claimed for one month, £2,569.65 which is a net figure. This is the amount that should be paid to Mrs Little. The respondent will be responsible for paying the Income Tax and National Insurance thereon.

Employment Judge M Warren

Date: 2 November 2020

Judgment sent to the parties on

2 November 20

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For the Tribunal office