



EMPLOYMENT TRIBUNALS

Claimant: Miss P Lindsay

Respondent: Flexi Agent Limited

Heard at: Manchester

On: 19 October 2020
3 November 2020
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr J Leader, Director

JUDGMENT

The judgment of the Tribunal is that the claimant's claims of :

1. Breach of contract in respect of notice pay and expenses
2. Unlawful deductions of wages in respect of holiday pay, arrears of wages and commission

succeed.

The claimant's compensation will be determined at a remedy hearing to be fixed.

REASONS

Introduction

1. The claimant brings claims for wrongful dismissal (notice pay), commission which she did not receive as a consequence of the alleged wrongful dismissal, arrears of pay, holiday pay and fuel expenses. The claimant said she was dismissed

because the respondent had accessed her personal emails via her work computer and discovered she had applied for other jobs.

2. The respondent submitted that the claimant was guilty of gross misconduct – they denied it was anything to do with her applying for other jobs or that they had accessed her emails: it was denigrated the firm to a new start. Accordingly, they said wrongful dismissal was justified. They also did not pay her arrears of pay, expenses and holiday pay, which they accepted was due, because they believed they could set off conveyancing fees they said the claimant owed them. In addition they said commission was not payable under the contract as the termination took place before commission was due but also because they put the claimant on garden leave and under their contract they did not pay commission during garden leave.

3. The respondent agreed that they did not have the right to set off the conveyancing fees and they did owe the claimant for arrears of pay/holiday pay. They stated the claimant had not submitted any fuel expenses or not submitted them on time and therefore that is why they had not paid her the fuel expenses.

4. The claimant's response to the respondent's submissions was that the fees for the conveyancing had been waived by the respondent at Christmas as a "thank you" for all her hard work, in particular as she ran the office more or less single-handed over the Christmas period.

Witnesses

5. I heard from the claimant in person and for the respondent Jack Leader, Director.

Credibility

I found Mr Leader not to be a credible witness for eg he maintained his position in respect of the conveyancing fees despite the clear email from Andrea Clarke, he continually maintained the claimant was put on garden leave when the documents showed she had been dismissed, this was also self serving as he believed if the claimant was on garden leave her commission claim would fail. Further Mr Leader denied that the claimant's conveyancing fees had been waived when there was clearly a text to that effect.

The claimant was a credible witness, the fact she went to the police and raised her issues about access to her personal emails corroborated her version of events. All her pre claim emails were consistent with the version of events she has put forward at tribunal.

The Issues

6. The issues for the Tribunal to decide were:

- (1) Was the claimant wrongfully dismissed or was she guilty of gross misconduct entitling the respondent to dismiss her summarily?

- (2) If the claimant was wrongfully dismissed, what notice pay was she entitled to?
- (3) If the claimant was wrongfully dismissed and her notice period would have extended her employment to the due date for commission to be paid, was she entitled to those commission payments or not?
- (4) Was the claimant entitled to be paid for holidays, sick pay and fuel expenses, or could the respondent set off the conveyancing fees they allege were due, if in fact those fees were due?

The Facts

7. The respondent is a new Estate Agency practice in the Southport area who are rapidly expanding. The claimant began working for the respondent as a Senior Sales Negotiator on 2 December 2019.

8. The claimant's performance was a matter of contention. I find that the claimant was a good performer. The text messages from the respondent support this and the amount in her pipeline. The claimant, however, had three days off sick. She was very ill and now thinks she may have had COVID-19. She did go into work because she was concerned that the respondent had employed somebody else while she was off sick and did not want to let the firm down, and in addition the claimant was receiving a lot of pressure from the respondent to return, for example being asked if she still wanted her job.

9. A probationary review meeting took place. The claimant believed this was because she had had sick leave. The respondent says it was because her performance was inadequate, including unauthorised absence and sickness periods. However, the respondent produced no evidence that the claimant was underperforming, nor did they produce any negative feedback from customers as alleged in their response form. The claimant brought evidence via Trust Pilot that clients had praised her.

10. I find the claimant was not a bad performer but that the respondent was concerned about her sickness absence. An example of the respondent praising the claimant was on 18 February. Mr Leader stated:

“Great to see the pipeline building in excess of six grand now. Well done and keep up the good work.”

11. Text messages over Christmas, for example, from Jack Leader stated:

“Jesus, well done Penny, we genuinely thought it was going to be quiet. We both appreciate the hard work you are putting in. Let us know if there's anything urgent. Congrats on your two new sales. Well done, speak soon.”

12. Another email stated:

“Well done Penny, good work, got some cracking news for you when you’re back too.”

13. In respect of the dismissal, the claimant said that on the evening of Sunday 8 March 2020 she received a phone call from Mr Leader who said that he had been on her work computer and had seen in her emails that she had applied for jobs with HMRC and the police. The claimant asserted that this was from her personal Hotmail account and therefore he had illegally accessed her personal emails. These applications had not been undertaken via her work account. The claimant stated that Mr Leader said he did not want people working for him who were applying for jobs and she was being put on immediate garden leave.

14. The respondent said that they decided to dismiss the claimant because the new starter, Emma, told them that the claimant had been telling the new employee not to work for the respondent. The respondent produced a statement from the employee in question stating that the claimant had told her that they were not good employers, however they did not bring Emma to the Tribunal to give evidence and to be cross examined by the claimant. Accordingly, I do not attach any weight to that evidence. In respect of the allegation that she had slandered the firm to the new starter, the claimant said that they had had a conversation which was around the fact that she would have to work on Saturdays every so often which the individual was not that happy with. The claimant was adamant throughout that she liked her job and therefore she would have not denigrated the respondent to anybody. Again the claimant was credible in that she acknowledged a conversation but not its import.

15. Following the garden leave reference the respondent then emailed the claimant on 8 March and stated the claimant was dismissed with immediate effect. Accordingly I find the claimant was not put on garden leave but was dismissed.

16. I found the claimant to be a credible witness and explain above why I have found her a more credible witness than the respondent. Consequently I accept the claimant’s version of the reasons given for her dismissal ie the job applications Corroboration of the claimant's story is also to be gleaned from the fact that she spoke to the police about the matter of accessing her personal emails and did research on the internet regarding her data protection rights. The emails to the police were of 1 April 2020 therefore proximate to the dismissal. The claimant was advised by an officer from Merseyside Police regarding the legalities of accessing someone’s personal email account. On 9 April 2020 the claimant asked the police to take it further.

17. Further the claimant asked the respondent on 9 March 2020 to confirm the reasons for her dismissal to provide reasons for her dismissal and he refused to do so

18. One matter going to credibility is the claimant's reaction on receiving the respondent’s response form. It led her to question what the real reason was for her dismissal. She has not wavered from what she says Mr Leader told her on 8 March

but it has made her wonder what was the real reason the respondent wanted to dismiss her and she believes that it is possible that it could be because she was due so much commission. The claimant accepted her probationary period had been extended but believed that was because of her sickness absence.

19. There was a contract of employment, although I did not have a signed copy. The claimant did not dispute its terms and conditions. It did state at paragraph 2 that:

“The first three months of your employment would be probationary and this may be extended by the company at its discretion.

Your employment may be terminated by one week’s notice in writing on either side expiring at any time during or at the end of the probationary period.”

20. Regarding termination of employment it stated:

“Either party may terminate this contract at any time by giving the other notice in writing as follows: up to two years, one week etc.”

21. At 12.2 the contract stated:

“The company may at its sole discretion pay you basic salary in lieu of notice of termination of your employment.

22. At 12.3 the contract stated:

“Once notice of termination has been given by either party the company may at any time and for any periods require you to stop performing your job and/or exclude you from attending its premises and/or assign you to special projects (garden leave). Any period of garden leave shall not normally exceed four weeks. During any garden leave the company will provide your normal pay and benefits provided for in this agreement except for bonus, and you must remain available to undertake duties for the company during your normal hours of work. During any garden leave you will be deemed to have taken any holiday accrued but untaken before the beginning of the garden leave and any holiday accruing during the garden leave. During any period of garden leave you shall remain an employee of the company and bound by the terms of this agreement.”

23. At 13, regarding pay during absence, the contract stated:

“If you are absent from work due to sickness or injury the company does not have to pay you your contractual salary or provide benefits.”

24. At 13.3 the contracted stated:

“Payment during sickness absence is dependent upon you being genuinely sick and on you complying with procedures provided by the company.”

25. At 12.2 the contract stated:

“The company **can** require you to produce a medical certificate or undergo a medical examination at any time.”

26. At 16 the contract stated:

“At any time during your employment or upon its termination however so arising the company will be entitled to deduct from your salary or from any other payment due to you in respect of your employment any monies due from you to the company.”

27. The claimant's claims were for fuel expenses for February (£194.31) and for March (£50). The respondent stated they did not pay these in any event as the claimant had not submitted them on time. The claimant advised she could not submit them on time as she was sick at the time but she had submitted them as soon as possible thereafter. I accept that she did submit them she refers to this in other emails/texts.

28. . The claimant and sick pay of £346.15. The claimant gave evidence that Andrea Clarke, Mr Leader's Business Partner, had stated that she would be paid in full for the three days' sickness absence. Again, due to my findings on credibility I believe that Ms Clarke did tell the claimant this. In addition, of course, Ms Clarke did not give evidence and therefore any contention by the respondent that this was not the case could only be supported by Mr Leader's hearsay evidence.

29. The claimant gave evidence that she in fact had received the sick pay in February's pay cheque as advised by Andrea Clarke but then it had been clawed back from her final payment. The respondent said she had not sent in a medical certificate as required but the contract said it could be required so it was not mandatory. The claimant said she was never asked for one and it was in the self certification period. I find the respondent did not ask the claimant to provide a medical certificate.

30. The claimant was owed six days' pay which was £415.38 and she claimed a sales bonus of £6,000 referring to the email referenced above, and one week's pay for the termination of her employment.

31. Regarding the conveyancing fees there was a text message on 18 December from Andrea Clarke saying:

“I've just had an email from DC Law about your fee but I've told them no fee is payable. We've decided to wipe the fee as your Christmas present.”

32. The claimant claimed 3½ days' holiday pay at £69 per day gross, In addition, in relation to holidays the claimant asked for a day off at short notice as her mother had had a skin cancer operation and she wanted to spend some time with her and take her to a spa. Whilst Ms Clarke had agreed Mr Leader refused saying that if he let her take time off at short notice he would also have to let Rachel take time off at short notice.

33. Whilst the respondent produced paper evidence of the claimant's holiday, I did not find it convincing. If it was genuine I accepted the claimant's evidence that the permission was rescinded and therefore the claimant did not take that annual leave and the respondent had failed to cancel it. She had booked annual leave for 12-17 March however as she was dismissed before then she did not take that.

34. In respect of commission/bonus there was nothing in writing save the reference in the garden leave provisions. The claimant had been paid commission in the previous month for 2 of the 3 sales which she had completed by February.

The Law

Oral Promises

35. Obviously, an oral promise can be an express term or contract, however the problem will be establishing what that promise was and whether it was made at all. In this case the claimant relied on oral promises regarding her bonus which had led her to believe that the bonus was contractual and was not subject to any conditional arrangements such as, for example, that the person had to be in work at the date that the bonus was due to be paid.

36. In relation to express written terms the claimant did have a contract. In interpreting written terms an objective test is applied to the construction of written terms i.e. that the meaning is to be conveyed as to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract. This can mean that if a contract is badly drafted and its literal interpretation would lead to a result that clearly had never been intended by the partners it should be interpreted by taking into account the context and commercial background behind it.

37. There is however a general rule that extrinsic evidence is not admissible to help interpret a written contract unless it is ambiguous or does not cover all the matters on which the parties can be presumed to have agreed.

38. The contract can also include implied terms but express terms always take precedence over implied terms although it is possible that an implied term can qualify an express term in some circumstances.

39. In relation to the payment of a discretionary or contractual bonus in the context of a wrongful dismissal case where the individual is contractually entitled to a bonus or commission the court will estimate what he or she would have received during the damages period and include it in the award, **Addis v Gramophone Company Limited [1909]** House of Lords.

40. However, if the payment is discretionary it may be ignored, even if the employee had a reasonable expectation that it would be paid and it would in fact have been paid if he or she had continued to work during the damages period, **Lavarack [v Woods of Colchester Limited [1967]** Court of Appeal. However this case has subsequently been very narrowly interpreted. In **Horkulak v Cantor Fitzgerald International [2005]** Court of Appeal, the Court of Appeal held that although a clause in H's contract stated the employer may in its discretion pay a

bonus he was entitled to receive damages in respect of the amount that, but for his dismissal, he would probably have received. The court narrowly construed **Lavarack** as there was nothing to assume that the employer's discretion would have been exercised against the employee in a way in which no reasonable employer would exercise it.

41. The distinction between a contractual bonus and a discretionary bonus has been subject to much litigation. In **Clark v BET PLC and Another [1997]** the High Court found that despite the claimant's contract referring to the bonus as discretionary the employee was under an obligation to exercise that discretion in good faith. As a result the claimant was contractually entitled to participate in a bonus scheme providing an amount equivalent to a maximum of 60% of his salary.

42. The principle is that an employer will exercise a discretion rationally and in good faith.

Wrongful Dismissal

43. Any dismissal by the employer in breach of contract, whether constructive or express, will give rise to an action for wrongful dismissal at common law in circumstances where the dismissal was with no notice or inadequate notice, where summary dismissal was not justifiable i.e. the employee was not guilty of gross misconduct: dismissal in breach of a contractual disciplinary procedure

44. There are other examples but these are the two most relevant here.

45. A claim for wrongful dismissal is a breach of contract claim under the jurisdiction of the Tribunal by virtue of section 3 of the Employment Tribunal's Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claim has to arise or is outstanding on the termination of the employee's employment and relates to one of the following:

- (1) A claim for damages for breach of contract of employment or other contract connected with employment;
- (2) A claim for a sum due under such contract;
- (3) A claim for recovery of a sum in pursuance of any enactment relating to the terms and performance of such a contract.

46. Certain contractual claims are expressly exempt from the Tribunal's jurisdiction:

- (1) A claim for the recovery of damages in respect of personal injury;
- (2) A claim for breach of a contractual term regarding living accommodation;
- (3) A claim for breach of a contractual term regarding intellectual property;
- (4) A claim for breach of a contractual term imposing an obligation of confidence or breach of a covenant in restraint of trade.

47. Damages for a breach of contract in this situation is the period of notice that should have been given by the employer. It will be either be the contractual notice period or, in the absence of that, the statutory period set out in section 86(1) of the Employment Rights Act 1996.

Unlawful Deduction of Wages

48. Part 2 of the Employment Rights Act 1996 sets out the statutory requirements for an unlawful deduction of wages claim. Section 27(1) defines wages as “any sum payable to the worker in connection with his employment”. Wages includes commission payments. Expenses, however are excluded but these can be recovered as a breach of contract.

49. Under section 13(1) of the 1996 Act, “A worker has the right not to suffer unauthorised deductions”. A deduction is defined in the following terms:

“Where the total amount of wages payable on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated...as a deduction made by the employer from the worker’s wages on that occasion.”

50. The deduction referred to in “after deductions” refers to the statutory deductions such as tax and national insurance.

51. The question of what is properly payable has to be determined by the Tribunal on normal contractual principles.

52. In addition, the payment in question must be capable of quantification in order to constitute wages properly payable under section 13(3).

53. A counterclaim cannot be made against an unlawful deductions claim: it can only be made in the Tribunal against a breach of contract claim.

54. An authorised deduction is as follows:

- (1) The deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract.
- (2) The worker has previously signified in writing his or her agreement to the deduction.

55. In respect of the contractual authorisation point (section 13(2) of the 1996 Act), these must be written contractual terms of which the employer has given the worker a copy before the deduction is made, or whose existence and effect the employer has notified to the worker in writing before the deduction is made. A penalty clause cannot be a lawful deduction as the deduction must be lawful at common law.

Conclusions

56. As I find the claimant a more credible witness I make the following findings.

Notice Pay

57. The claimant was entitled to her notice pay as it was plainly not gross misconduct for the claimant to apply for other jobs. I find that was the reason for dismissal.

Sick Pay

58. I find the claimant had an agreement with Andrea Clarke that she would be paid for her sickness absence, accordingly that claim succeeds.

Holiday pay

59. Regarding holiday pay, the respondent has agreed that the claimant was entitled to holiday pay. My finding of fact is that the claimant did not take the day's holiday that the respondent has recorded as it was refused by Mr Leader, and she did not take the booked holiday in March as she had already been dismissed by then.

Expenses

60. I find that the claimant was entitled to these expenses. The respondent's only argument was that she had not submitted her details. The claimant was not obliged to submit each expenses claim within the same month as it was incurred, just by the 26th of the month. Accordingly, by the time her salary was due she had submitted the claims for February and March.

Commission

61. Although the respondent was at pains to argue that the claimant had been put on garden leave, I find that although the respondent mentioned garden leave on 8 March they quickly changed their mind and actually summarily dismissed the claimant. Accordingly, the provision of the contract regarding garden leave did not apply and whilst 12.3 said whilst on garden leave the company would only pay normal pay and benefits except for bonus, this did not apply as the claimant was not on garden leave, and further it was not a "bonus" but commission that the claimant was entitled to.

62. The question arises, however, as to whether an individual is entitled to commission earned on termination by way of wrongful dismissal. I find the claimant's commission was contractual she worked in an industry where it was the main method of payment salary being at minimum wage levels. Further it was clear from the emails that commission on sales was payable and she had actually been paid it the previous month. Accordingly, the claimant's commission is potentially payable.

63. Further as there was no commission agreement referred to in the contract nor in any separate agreement, there was no contractual provision limiting the claimant's entitlement to commission on termination for eg There was no contractual provision saying that commission would not be payable on termination (save arguably for the garden leave provision but I have found that did not apply). Accordingly, the claimant is entitled to her commission.

64. As there was insufficient evidence to decide how much commission the claimant was entitled to, I advised the parties that I would leave the determination of the sums owed until the remedy hearing.

Employment Judge Feeney

Date: 23 November 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 November 2020

FOR THE TRIBUNAL OFFICE

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