



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Harvey

**Respondent:** Millers Hair & Beauty Ltd

**Heard at:** Bristol (by telephone) **On: 1 May 2020**

**Before:** Employment Judge Midgley

**Representation**

Claimant: In person, (supported by Mr G Harvey)

Respondent: Did not attend

The hearing was conducted by the parties attending by telephone. It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restriction)(England) Regulations 2020 and it was in accordance with the overriding objective to do so.

**JUDGMENT** having been sent to the parties on 6 May 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The claim and response

1. By a claim form presented on 11 September 2019, the claimant brought claims of unfair dismissal, unpaid notice and unpaid annual leave. The claim of unfair dismissal was struck out on 9 October 2019 because the claimant lack the two years' service required by s.108 ERA 1996.
2. The essence of the claim is that the claimant had been summarily dismissed without warning, was not paid notice pay or holiday pay and was not offered the right of appeal.
3. On 27 September 2019 the respondent presented a response (emailing photographs of the completed ET3). An extension of time was granted to enable the respondent to file the response in accordance with the Tribunal rules and the response was formally accepted on 5 November 2019. The respondent denied the claims, alleging that the claimant was a trainee provided under a contract of apprenticeship and that the respondent had

notified her the claimant and her college on 9 August 2019 that it was terminating her placement due to a poor work ethic and consistent tardiness. The respondent brought an employer's contract claim for 5.6 days annual leave which it alleged the claimant had taken beyond her contractual entitlement, arguing that she had taken 28 days and was entitled to 22.4 days.

4. On 22 December 2019, the claimant provided a response to the counterclaim in which she alleged that she was dismissed by text message on 13 August 2019. She denied the counterclaim relating to annual leave on the grounds that she had never been provided with a contract or written particulars of employment. On 11 December 2019 the claimant clarified in accordance with the Tribunal's order, that she had only taken 14 days annual leave in the leave year commencing in 2019.

**Procedure, hearing and evidence.**

5. The case was listed for an in person hearing, but in consequence of the Covid-19 pandemic was converted to a telephone hearing. The hearing was conducted using the BT Meet Me telephone conferencing service. I tried to connect the parties using the numbers provided. The claimant attended, the respondent did not. The respondent has not provided any explanation for its failure to attend, whether at the time of the hearing or in its correspondence with the Tribunal since.
6. The claimant was supported by her uncle, Mr G Harvey, although he did not answer questions or make submissions on her behalf.
7. Prior to the hearing the claimant had sent the following to the Tribunal (the Hearing Notice had required the parties to bring documents they relied upon to the hearing, but had not required them to be sent to the other party):

7.1. A letter consisting largely of statement with the following exhibits attached:

7.1.1. Exhibit A - a Reflections Training Academy Contract dated 30 July 2018 identifying Millers Hair as the employer and the claimant as the apprentice, by which the respondent agreed to employ the claimant and provide her with a written contract within 8 weeks. The hourly rate for the first year was £3.70 (based on a minimum of 30 hours a week) thereafter the applicable National Minimum Wage Rate.

7.1.2. Exhibit B - a screen shot of text messages from the claimant's phone showing the claimant asking on 12 August 2019 whether she should 'come in on Tuesday' or whether she was being fired, and the respondent (Mr Miller) replying that day "Reflections are finding you another salon" before responding to the claimant request for reason for her dismissal:

"Because you never do your jobs and we can't afford you anymore you need to go to a real salon where you will be trained properly."  
[sic]

7.1.3. Exhibit C - the claimant's bank statement showing she was paid

£63.00 by the respondent on 10 August 2019.

- 7.1.4. Exhibit D - The claimant's pay slips of 5 August and 5 September 2019 showing wages "payable by cash" but no holiday pay in respect of annual leave.
  - 7.1.5. Exhibit E - A universal credit assessment for the period 29 August to 28 September 2019 detailing that the earnings reported by the claimant's employer were £187.20.
  - 7.1.6. Exhibit F - An email chain for the period 7 to 8 October 2019 consisting of a DSAR request made by Miss Harvey to Anthony Miller and Mr Miller's response stating "Go away I don't hold any information on you You are now blocked from contacting me apart from post."
8. In the statement the claimant denied that she had received the payments which were shown in the pay slips as having been paid in cash.
  9. On 11 December 2019 the claimant sent a further letter to the Tribunal in response to an order to clarify the dates of her employment and the days of leave she had taken. The letter stated that the claimant did not have a contract, but her employment had begun in August and that she had worked a week in hand and had been paid cash in hand until the respondent commenced BACS payments on 21 September 2018. The claimant attached the following to the letter:
    - 9.1. A screen shot of her Facebook page showing photos of treatments carried out on the respondent's clients by the claimant (hair colouring etc) from 14 August 2018, 31 August 2018 and 6 September 2018.
  10. As stated, the respondent did not attend the call, despite me calling both the numbers on the ET3. The respondent did not send any documents to Tribunal or the claimant.
  11. In light of the claimant's letter of 11 December 2019 in which she stated that she had never received a contract of employment, I deemed it appropriate of my own motion to add a claim under s.1 ERA 1996 and s.38 EA 2002 for failing to provide a written statement of employment particulars.

The claimant's evidence

12. The claimant gave evidence by affirmation and confirmed that the contents of her letters and exhibits were true to the best of her knowledge and belief. I found her to be a truthful and credible witness.
13. A Judgment in the claimant's favour was sent to the parties on 6 May 2020. On 11 May 2020 the respondent applied for written reasons. Regrettably, despite the hearing being recorded on BT Meet Me, it has not been possible to obtain a copy of the recording of the hearing in order to assist me in producing the written reasons (I was working from home during the Covid-19 pandemic and so had not made a recording myself).
14. There was some delay whilst that avenue was investigated until, on 22 June

2020, the decision was taken by the Regional Employment Judge that the reasons should be produced without the recording.

15. For reasons that are not clear, but most probably because file was marked "dormant" on 6 May 2020 in error, the file was not referred to me to advise me of that decision until November 2020. It is likely that this was a consequence of the effects of the backlog and skeleton staff that were caused by the Covid-19 pandemic. I therefore caused a letter to be written to the respondent apologising for the delay and enquiring whether written reasons were still required. On 24 November 2020 the respondent confirmed that they were. That decision was referred to me on 14 December 2020. I have therefore produced the reasons as soon as possible thereafter, but nevertheless apologise to the parties for any frustration or anxiety that has been caused by the delay.

### **The Issues**

16. The issues to be determined were as follows:

#### Holiday Pay

- 16.1. When was the claimant dismissed?
- 16.2. How many days of annual leave was the claimant entitled to?
- 16.3. How many days annual leave had she taken at the point of her dismissal?

#### Breach of contract (notice pay)

- 16.4. Does the respondent prove on the balance of probabilities that the claimant committed gross misconduct, so that the respondent was entitled to dismiss without notice, because he altered the Goldmine system to allocate sales that had been achieved by others to himself?

#### Failure to provide a statement of written employment particulars (s.38 EA 2002)

- 16.5. When the proceedings were begun was the respondent in breach of the duty in s.1 ERA 1996 to provide written particulars of employment?
- 16.6. If so, and if the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the tribunal must award two weeks' pay and may award four weeks' pay.
- 16.7. Would it be just and equitable to award four weeks' pay?

### **Background facts**

17. I make the following findings of fact on the balance of probabilities having regard to the evidence I heard, and the documentary evidence presented to me.

18. The respondent is a small limited company carrying on business a hair and beauty salon from premises in Bedminster. Mr Anthony Miller is the director.
19. The claimant was employed by the respondent as an apprentice in accordance with the terms of the apprenticeship agreement made between the Reflections Training Academy and the respondent on 20 July 2018. At the time of her employment the claimant was 17 (her birthday is 10 February 2001). She worked 4 days a week.
20. The claimant's employment began on Monday 6 August 2018 and ended on Tuesday 13 August 2019. The claimant had completed the ET1 showing that she commenced employment on 6 August 2019, but I find that was a typographical error. I reject the respondent's account that her employment began in October 2018 as (a) there was no evidence to support that contention, (b) it was contradicted by the claimant's evidence, (c) it was contradicted by the Facebook pages and (d) it was inconsistent with the increase in the claimant's hourly rate detailed below.
21. She was employed as an Apprentice in the respondent's Bedminster premises, working 32 hours a week at an hourly rate of £3.70. She was paid a week in hand in cash and provided with pay slips each month. In August 2019, in accordance with the terms of the contract, the claimant's hourly rate was increased to £3.90.
22. The claimant was not provided with a contract or written particulars of employment.
23. On 12 August 2019 the claimant texted Mr Miller asking whether she was required to work Tuesday 13 August or whether she was being dismissed. On 13 August Mr Miller texted the claimant (as described in Exhibit B above) and summarily dismissed her. The effective date of termination was therefore 13 August 2019. Mr Miller stated that the claimant did not do her jobs, but I accept the claimant's evidence that she had not received any written or formal warnings prior to her dismissal.
24. I further accepted the claimant's evidence that she had only taken 14 days annual leave.

## **The Law**

### Wrongful dismissal

25. The test to be applied does not require the Tribunal to assess the reasonableness of the employer's decision to dismiss but rather to answer the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (Enable Care and Home Support Ltd v Pearson EAT 0366/09)
26. An employer's right to summarily dismiss an employee is restricted to cases where there is repudiation or fundamental breach of contract by the employee (Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA). An act of gross misconduct is generally accepted to be an act which fundamentally undermines the employment contract or, put another

way, which amounts to repudiatory conduct by the employee going to the root of the contract (Wilson v Racher [1974] ICR 428, CA).

27. The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698, CA) and (Sandwell and anor v Westwood EAT 0032/09)
28. The non-statutory ACAS Guide, 'Discipline and grievances at work' ('the ACAS Guide'), includes the following relevant examples of gross misconduct:
  - 28.1. theft or fraud
  - 28.2. serious insubordination
  - 28.3. bringing the organisation into serious disrepute
  - 28.4. a serious breach of confidence

#### Annual Leave

29. All workers are entitled to 5.6 weeks' paid holiday in each leave year comprising four weeks' basic annual leave under Reg 13(1) Working Time Regulations 1998 SI 1998/1833 ("The Regulations") and 1.6 weeks' additional annual leave under Reg 13A(2), which amounts to a maximum aggregate of 28 days (Reg 13A(3)). Entitlement to additional annual leave under Reg 13A may not be 'cashed in' for a payment in lieu except where the worker's employment is terminated Reg 13A(6)(a).
30. The leave year begins either on the date specified in the contract or, if there is no contract or no provision identifying the leave year, on the date on which the worker was employed and each subsequent anniversary of that date (Reg 13(3)).
31. Regulation 13(9) provides that leave "may only be taken in the leave year in respect of which it is due." That statutory provision has been subject to considerable judicial scrutiny, which may be summarised as follows:
32. Leave derived from Regulation 13(1) which is not taken in the leave year in which it was owed due to sickness, may be rolled over to the following leave year, but additional leave under Regulation 13A may not - see Stringer and Ors v Revenue and Customs Commissioners; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] ICR 932, ECJ; and Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and another Case C-609/17, which confirmed the prior decision of the Employment Appeal Tribunal in Sood Enterprises Ltd v Healy [2013] ICR 1361 that, in the absence of a relevant agreement under Regulation 13A(7), the Working Time Directive ("The Directive") does not operate so as to carry over the additional 1.6 weeks' leave permitted under Regulation 13A.
33. In consequence, the Directive does not preclude national laws that fail to provide for a payment in lieu where a worker had been unable to take additional annual leave, which in the UK consists of the 1.6 weeks' annual leave granted by Reg 13A (see British Gas Trading Ltd v Lock and anor

[2017] ICR 1, CA).

34. In Podlasiak v Edinburgh Woollen Mill Ltd ET Case No.2701291/13 a tribunal at first instance found that the principle in Stringer is not restricted to sick workers but is of general application, and that the Working Time Regulations must be interpreted so as to give effect to the Directive. The IDS Brief at 4.157 notes that that decision is consistent with a recent line of cases where the domestic courts have adopted purposive interpretations of the Regulations so as to give effect to the Directive.
35. Reg 16 (1) provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which he or she is entitled under Reg 13 (basic leave) or Reg 13A (additional leave).
36. A 'week's pay' is calculated in accordance with ss.221-224 ERA, taking the average of hours and remuneration over a period of 12 weeks. All elements of a worker's normal remuneration must be taken into account when calculating holiday pay for the basic four weeks' leave (British Gas Trading Ltd v Lock and anor [2017] ICR 1, CA.)
37. A common misconception in relation to the Regulations is that the entitlement to annual leave is accrued. There is nothing in Regulation 13(1) or (2), or 13A which supports that contention. A worker is entitled, from his/her first day of work to the leave provided under Regulations 13 and 13A. Leave is subject to a pro rata only in circumstances where the leave year is identified in a relevant agreement (i.e. a contract) and the worker commences employment after that date (see Reg 13(5)). Leave under the Directive does accrue, as is detailed in the relevant case law of the ECJ, but that is of no application here.

## **Discussion and conclusion**

### Wrongful dismissal

38. I am not persuaded on the balance of probabilities that the claimant committed gross misconduct. The burden is on the respondent and it has adduced no evidence to establish gross misconduct. The text messages identify matters which could be misconduct (not 'doing your jobs') but those matters do not amount to wilful or gross negligence, nor do they demonstrate a wilful intention not to be bound by the contractual terms of employment; there is no reference to warnings or repeated misconduct in the text message. Furthermore, the text message also points to reasons for dismissal unconnected with misconduct, namely the respondent's inability to train the claimant properly and an inability to pay her wages.
39. The claim of wrongful dismissal is therefore well founded and succeeds. The claimant is entitled to 1 week's notice pay. Her hourly rate increased to £6.15 on her 18 birthday (as the National Minimum Wage for apprentices over the age of 18 from 1 April 2019 was £6.15). Her gross weekly wage was therefore £6.15 x 32 = **£196.80** and the respondent is ordered to pay the claimant that sum.

### Unpaid Annual leave

40. The claimant was entitled to 22.4 days statutory annual leave (4/5ths of the entitlement given she worked 4 days a week). The claimant did not have a contract specifying the dates of her annual leave year, and therefore in accordance with Reg 13(3)(b) her leave year began on 6 August each year. She took 14 days annual leave in her first year of employment.
41. There were therefore 2 days of annual leave under Reg 13 and 6.4 days of annual leave under Reg 13A unused. 2 days of the Reg 13 annual leave therefore carried over to the second leave year which commenced on 6 August 2019. The Reg 13A leave did not carry over (applying Stringer and Lock.)
42. Consequently on 13 August 2019 the claimant was entitled to 2 days' leave from the leave year 2018/2019 and 22.4 days in respect of the leave year 2019/2020. She is therefore entitled to 6.1 weeks' annual leave (24.4 days / 4 days a week = 6.1 week)
43. Her weekly pay was £196.80 gross. Using a gross net calculator for 2019/2020 the claimant's gross annual pay was  $196.80 \times 52 = £10,233.60$  providing a weekly net pay of £191.96. Thus  $191.96 \times 6.1 = £1,170.96$ .
44. The claim for unpaid annual leave is well founded and the respondent is ordered to pay the claimant the net sum of **£1,170.96**.
45. I note that the Judgment sent to the parties on 6 May 2020 contains a different figure. I apologise for the error, and a certificate of correction correcting the figure is attached to this Judgment.
46. The respondent's contract claim related to overpayment of annual leave. No evidence was provided in support of it, and on the basis of the calculations above, I conclude that it is not well founded and is dismissed.

Written statement of employment particulars

47. The respondent did not provide the claimant with a written statement of employment particulars. I accept the claimant's evidence that she has provided to the tribunal all the documents in her possession relating to the terms of her contract and the respondent has not sought in any of its correspondence to challenge the claimant's account that she was not provided with one. There is no evidence before me to suggest that there are exceptional circumstances that would mean I should not award 2 weeks pay. Given that the claimant was an apprentice and was in a vulnerable position on low pay, that the agreement with the College required a contract to be provided within 8 weeks and the respondent failed to provide one, I am satisfied that it would be appropriate to award 4 weeks' pay.
48. The claim for failure to provide a written statement of employment particulars is therefore well founded and the respondent is ordered to pay the claimant 4 weeks' gross pay **£787.20 gross**.



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Employment Judge Midgley  
Date 15 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON  
11<sup>th</sup> January 2021  
By Mr J McCormick

FOR THE TRIBUNAL OFFICE