



EMPLOYMENT TRIBUNALS

Claimant: Miss S Joyce
Respondent: Mr M England
Heard at: Cardiff **On:** 7 January 2021
Before: Employment Judge S Jenkins
Ms L Owen
Mr P Charles

Representation:
Claimant: Mr G Morris (Partner)
Respondent: Not present or represented

JUDGMENT

The Claimant's claims of unfair dismissal, sexual harassment, payment in respect of accrued but untaken holiday, unauthorised deduction from wages, breach of contract and failure to provide a written statement of terms and particulars of employment all succeed.

The Respondent is ordered to pay the Claimant the following sums by way of compensation

Unfair dismissal:

Basic award:	£694.56
Compensatory award:	<u>£2,370.80</u>
Total:	£3,065.36

Sexual harassment, injury to feelings:	£8,800.00
--	-----------

Accrued but untaken holiday:	£463.04
------------------------------	---------

Unauthorised deduction from wages:	£159.75
------------------------------------	---------

Breach of contract:	£694.56
Failure to provide a written statement of particulars of employment:	<u>£926.08</u>
Total:	<u>£14,108.79</u>

REASONS

Background

1. The hearing was to deal with the Claimant's claims of unfair dismissal, sexual harassment, failure to pay in respect of accrued but untaken holiday, unauthorised deduction from wages, breach of contract and failure to provide a written statement of particulars of employment. The Judge had dealt with a Preliminary Hearing in this case on 21 November 2019 following which the Final Hearing had been due to take place in April 2020. That obviously had to be postponed due to the Covid-19 pandemic and instead a telephone hearing took place before Employment Judge Moore on 1 April 2020. She re-issued Case Management Directions and the hearing was then re-listed to take place on 7 and 8 January 2021.
2. Judge Moore's summary and the Tribunal file revealed that the Respondent had not complied with Orders at any time, and that was confirmed by the Claimant at this hearing. It seems that the Claimant had in fact failed to comply with Orders prior to the initially scheduled April hearing and had applied to postpone that hearing in March, prior to the hearing having to be postponed due to the pandemic.
3. On 30 December 2020, the Respondent emailed the Tribunal stating that he had had a positive Covid-19 test and therefore needed the case to be postponed. He was asked, by email on 31 December 2020, to provide evidence of the test and when it took place, which he did later that day, noting that the test took place on 28 December 2020. Following that, an email was sent to the Respondent, on 5 January 2021, noting the conversion of the hearing to a fully remote hearing by video and also noting that if the Respondent was not fit enough to attend he should provide a letter from his GP, but otherwise the hearing would proceed. That led to the Respondent sending a further email at 17:49 on 5 January saying that he was ill and that the hearing would have to be postponed.
4. The Tribunal sent a further email to the Respondent on 6 January 2021 at 15:37 noting the provisions of Rule 30A of the Employment Tribunals Rules of Procedure and the Presidential Guidance on seeking postponements. The email noted that the Respondent had not provided

any medical evidence to support his application and therefore that his application to postpone had been refused. The Respondent replied at 15:52 sending in a copy of a statement of fitness to work from his GP dated 5 January 2021, and stating that he was not fit for work.

5. That led to a further email from the Employment Tribunal at 16:19 noting that the Respondent had not provided the information required by the Presidential Guidance and, in particular, that the Fit Note said nothing about the Respondent's ability to participate in a hearing by video from his own home. The postponement application was therefore again refused.
6. The Tribunal heard nothing further from the Respondent following that email, although Mr Morris confirmed that the Respondent had sent several Facebook messages to the Claimant on the evening of 6 January 2021. In the event, the Claimant was not in attendance at the start of the hearing on 7 January 2021 at 10:00am, or at any time throughout the hearing which concluded in the afternoon. In the circumstances, bearing in mind the Respondent's previous attempts to postpone hearings, his failures to comply with Orders, and his apparent ability, notwithstanding the Covid-19 diagnosis to communicate with the Tribunal and the Claimant, it was considered appropriate to proceed with the hearing in his absence, exercising the power to do so under Rule 47.

Issues and Law

7. The issues, which encapsulated the prevailing law, for the Tribunal to decide in this hearing, were set out in paragraphs 12 to 20 of the Preliminary Hearing Order sent to the parties on 26 November 2019.

Findings

8. We heard evidence from the Claimant and from Mr Morris, her partner, in the form of written statements and answers to questions from the Tribunal. We also considered the documents contained in the bundle provided by the Claimant and viewed two brief video recordings of visits made by Mr Morris to the Respondent's premises. Our findings based on that evidence were as follows.
9. The Respondent is, or at least at the relevant times was, the proprietor of Café Cwtch in the Dare Valley County Park. The Claimant was employed there as a Café Assistant from 1 August 2016 until her employment was ended summarily on 12 September 2019. She was engaged for 30 hours per week and received the minimum wage, which at the time her employment ended meant that she was receiving £231.52 per week. Her earnings were not at the level which required income tax to be deducted.

10. The Claimant's evidence, which we accepted, was that she had been subjected to inappropriate comments of a sexual nature from the Respondent from early on in her employment up to July 2019, which was effectively when she was last in work as she was off sick for the last few weeks of her employment. These were comments of a sexual nature although did not involve any physical actions on the part of the Respondent. The comments continued after the Claimant had pointed out certain matters to the Respondent which made them particularly unwelcome. As a result of those comments, the Claimant was fearful, did not wish to go to work, and cried frequently on being picked up from work.
11. The only other matter of fact that we need to record relating to matters prior to the events of July, August and September 2019 is that, in about July 2019, a written warning appears to have been issued to the Claimant by the Respondent in respect of her performance. There was no evidence before us of that, and it did not appear to have been issued following any form of disciplinary procedure. We noted that the Claimant disagreed that any form of warning could ever have been justified but she did confirm that one had been issued to her.
12. Moving to the Summer of 2019, an issue arose regarding the Claimant's holidays. She had booked a week off but was required by the Respondent to work instead of taking holiday, which she accepted that she would do. However the issue arose again towards the end of July when the Claimant had again booked a week's holiday but was told by the Respondent she needed to work three shifts towards the end of that week. On this occasion the Claimant indicated that she could not work those particular days, which led to the Respondent insisting that she should work and to him writing a letter to her indicating that she was required to work.
13. That, along with the other matters occurring in the workplace, led to the Claimant being absent from work and being certified as being unfit by her GP to work due to work related stress. The sick note was provided to the Respondent by way of a personal visit by Mr Morris. However, upon being subsequently questioned by the Claimant as to her statutory sick pay, the Respondent said that the sick note was not acceptable as it was not an original document. The Claimant confirmed that it was indeed the original that had been provided, and we accepted that a valid sick note had been produced and submitted to the Respondent.
14. The failure to pay sick pay led to several messages being sent to the Respondent by the Claimant during August 2019. These complained about the lack of payment, but also complained about the lack of a written contract which the Claimant indicated she needed to take to an interview she had with the benefits agency. The Claimant also complained about not being enrolled in a pension scheme.

15. Ultimately, the Claimant sought advice from ACAS and, as a result of that, prepared a letter to be given to the Respondent pursuing payment of the statutory sick pay. That letter was delivered by Mr Morris to the café on the afternoon of 10 September 2019. Mr Morris videoed his attendance to provide evidence of the delivery of the letter, and the video shows a not very pleasant, but relatively minor, exchange between Mr Morris and the Respondent. This involved the Respondent complaining about being filmed, Mr Morris responding that he was only doing it for his protection, and led to the Respondent ushering Mr Morris out of the door and an exchange of words between the two of them.
16. Later that afternoon the Respondent prepared, and sent in the post, a letter to the Claimant dated 10 September 2019 in which he noted, "*as your boyfriend is still coming to the café and behaving in a threatening manner, we have no option but to terminate your employment immediately*". The Claimant received that letter some two days later, which was when her employment formally ended.
17. The Claimant was successful in obtaining another job after being unemployed for some eight weeks, and her new job involved greater payment than she was receiving from the Respondent.
18. The other findings of relevance to the Claimant's claims were that we were satisfied that the Claimant had ten days' accrued holiday which she had not taken prior to the termination of her employment relating to the holiday year from April 2019 to March 2020. We also concluded that the Claimant was entitled to three weeks' statutory sick pay, although against this would need to be set a one-off payment that the Respondent made to the Claimant in the month of August of £123.00.
19. We noted that there was no agreement, whether written or verbal, between the Claimant and the Respondent with regard to the amount of notice to which she was entitled, which meant that the statutory requirement, of one week per year of service was applicable.
20. No contract, or more accurately no written statement of particulars of employment, was ever provided to the Claimant by the Respondent. We noted that the Respondent in his ET3 Response said that he provided a contract to the Claimant at the outset of her employment, but the evidence of the messages in the bundle, where the Claimant pressed the Respondent to provide the contract in December 2019, with which the Respondent engaged, confirmed that the Respondent had not provided such a document. We also noted that the Claimant had pressed the Respondent about pension scheme membership, and that whilst the Claimant's earnings appeared to be below the threshold for automatic

enrolment in a pension scheme she was entitled to be opted in and, if opted in, would have been entitled to contributions from the Respondent at the rate of 3% of her salary. We concluded that the Claimant's emails were evidence of her desire to be opted in to a pension scheme.

Conclusions

21. Applying our findings to the issues identified, we considered the Claimant's claims in order.

Unfair dismissal

22. We first had to consider whether the Respondent had satisfied us that it had dismissed the Claimant for a potentially fair reason falling within Section 98(1)(a) or (b) of the Employment Rights Act 1996. We noted the content of the letter quoted above, which confirmed that the reason for dismissal was what was said to have been the Claimant's partner's threatening and abusive behaviour. We considered that this meant that the Respondent had established that its reason for dismissal was as specified, which potentially amounted to dismissal for some other substantial reason justifying the dismissal of an employee in the circumstances, falling within section 98(1)(b) of the Act.
23. Turning to consider whether dismissal for that reason was, in fact, fair, we concluded that it was not. First, as a matter of fact we did not consider that Mr Morris was in any way threatening or abusive when he visited the café on 10 September 2019. He was merely delivering, and obtaining evidence of delivery of, the letter pursuing payment of the statutory sick pay due to the Claimant in circumstances where she did not feel comfortable delivering it. However, in any event, even if Mr Morris had been threatening and abusive, we considered that a reasonable employer would not have considered that there was no option other than to terminate the Claimant's employment.
24. There had been no prior warning to Mr Morris that he should not attend the premises and, had the Respondent been concerned about Mr Morris's behaviour, he could have made clear that he was not permitted to enter, and that if he did so there could be consequences for the Claimant's employment. However, to act without warning or notice was not, in our view, the act of a reasonable employer and therefore we concluded that the dismissal was unfair.

Sexual harassment

25. The Respondent's conduct, in the form of his comments to the Claimant of a sexual nature, did happen as we have noted above. We also noted that that conduct was unwanted on the part of the Claimant.
26. We then had to consider whether the conduct had the purpose or effect of violating the Claimant's dignity. As the Respondent was not present, we were not able to question him about his motives, and were not therefore able to say whether his conduct had the purpose of violating the Claimant's dignity. However, in our view the Respondent's conduct very clearly had the effect of violating the Claimant's dignity, and we therefore concluded that a claim of sexual harassment under 26 of the Equality Act 2010 was made out.

Accrued but untaken holiday

27. As we have noted, the Claimant was entitled to ten days' holiday which were outstanding at the conclusion of her employment. She had not been paid in respect of those holidays and therefore her claim in respect of unpaid holiday was made out.

Unauthorised deduction from wages

28. As we have noted above, the Claimant was entitled to three weeks' SSP at the sum of £94.25 per week which was not paid. We did note however, as we have noted above, that a sum of £123.00 was to be set against that sum.

Breach of contract

29. We did not consider that there was any form of breach of contract by the Claimant, let alone a repudiatory breach which would have justified her immediate dismissal. The termination of her employment by the Respondent was therefore a breach of contract and the Claimant's claim in that regard was made out.

Failure to provide written statement of particulars of employment

30. As we have noted, no such document was provided to the Claimant by the Respondent during the course of her employment. Section 38 of the

Employment Act 2002 provides that where a Tribunal makes an award in respect of claims to which proceedings relate (which we have done) and when those proceedings were begun the employer was in breach of his duty to provide the written statement of particulars of employment under Section 1 of the Employment Rights Act 1996, then the Tribunal must increase the award by the minimum amount of two weeks' pay and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount of four weeks' pay. The only exception to that is where the Tribunal considers that there are exceptional circumstances which could make an award or increase under the sub-section unjust or inequitable.

31. In that regard, we did not consider that there were any exceptional circumstances which justified no award. In fact, we noted that the Respondent had not provided the Claimant with the required statement despite saying in its Response that it had done so, despite receiving several reminders from the Claimant that she needed such a statement and in circumstances where she would suffer as a result. In the circumstances we considered it just and equitable to award the higher amount of four weeks' pay in respect of this matter.

Compensation amounts

32. Turning to the calculation of specific sums of compensation in respect of the claims are conclusions were as follows.

Unfair dismissal

Basic award:	£231.52 x 3 = £694.56
Compensatory award:	
Loss of earnings for 8 weeks	= £1,852.16
Loss of pension contribution for 8 weeks	= £55.60
Loss of statutory rights (2 weeks' pay)	= <u>£463.04</u>
Total compensatory award	= £2,370.80
Total unfair dismissal award	= <u>£3,065.36</u>

Sexual harassment

We considered that the Respondent's acts fell within, although we concluded only just within, the lower "Vento" band of awards as directed by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102. We noted that there was no physical element of conduct on the part of the Respondent but that the verbal

harassment had continued over a fairly lengthy period. We noted that the impact on the Claimant of the Respondent's behaviour had been material and therefore we considered it appropriate to place our award of injury to feelings at the top of the lower Vento band, leading to an award in that regard of £8,800.00.

Holiday pay

In respect of the ten days' accrued untaken holiday the award of compensation amounts to £463.04

Unauthorised deductions from wages

The amount of statutory sick pay due, less the payment of £123.00 made by the Respondent in August 2019, led to a total sum of £159.75.

Breach of contract

Three weeks at £231.52 per week led to an award of £694.56.

Failure to provide written statement of particulars of employment

Four weeks' pay at £231.52 led to an award of £926.08.

33. In total therefore the sums to be paid by the Respondent to the Claimant amounted to £14,108.79.

Employment Judge S Jenkins
Dated: 18 January 2021

JUDGMENT SENT TO THE PARTIES ON 19 January 2021

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS