



EMPLOYMENT TRIBUNALS

Claimant
Ms Barbara Yellow

Respondent
Tesco Stores Ltd ("Tesco")

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP)
EMPLOYMENT JUDGE GARNON (sitting alone)

On 11 January 2021

Appearances

For Claimant in person
For Respondent Ms A. Greenley of Counsel

JUDGMENT

The claims are not well founded and are dismissed

REASONS (bold print is my emphasis and italics are quotations)

1. The claimant was employed from November 2017 until she resigned by notice given on 26 April expiring on 2 May 2019. She lacks the continuity of employment to claim unfair dismissal. By a claim form presented on 29 August 2019, she claims the respondent (i) made unlawful deductions from her wages and/or breached her contract of employment by failing to pay her for hours she worked from home (ii) was in fundamental breach of contract entitling her to terminate which caused her to lose a bonus which would have become due on 23 May 2019 had her employment continued until then (iii) on the final day of her notice period failed to allow her to work and failed to pay her notwithstanding she was ready, willing and able to work .

2. The claimant was employed at the Thirsk Store where, 24 hours a day, some staff are working. She was contracted to work 21 core and up to 15.5 flexible additional hours per week, to be agreed with her manager with at least 24 hours notice prior to being worked. Tesco says she was either paid or took time off in lieu (as per her request) for any overtime she worked. The essence of the first dispute is the claimant asserts she not only **felt compelled** to answer promptly messages received outside her work hours but also **was required** to, while Tesco says managers may send messages when it suits them but are prepared to wait for an answer and never authorised pay for work from home .

3. At a preliminary hearing (PH) on 15 November 2019, Employment Judge Aspden directed the claimant, by **29 November 2019**, to provide further information of the dates on which she carried out work for which she has not been paid saying on each occasion, who asked her to do the work and when, the amount of unpaid work done and how much she believes she should have been paid. She refused the claimant permission to amend her claim to include failure to remunerate her at a rate not less than the national minimum wage and gave Tesco permission to file an amended response by **20 December 2019** to address the claim as clarified.

4. In reply the claimant provided a spreadsheet which contained an extensive record of conversations (some unrelated to work) she had with various people via email, WhatsApp and MSN. She included "time" and "cost" as headings in relation to some of the messages. Tesco's solicitors said it was unclear how this had been calculated and what work she was alleging she had undertaken outside of her usual hours based on these messages, so it was unable fully and properly to respond without the claimant confirming the dates and hours of work giving rise to the alleged unpaid wages, when they became properly payable, and the contractual provision she relied on to demonstrate an entitlement to the alleged sums. They said Tesco was only asking Employment Judge Aspden's orders were fully complied with.

5. Employment Judge Aspden had ordered each party by **14 February 2020** to provide to the other written statements from every person (including the claimant) it was proposed would give evidence and, seven days before the hearing, send to the Tribunal electronic versions in editable Word format. The claimant in emails had said she tried to prevent working these additional hours by following Tesco's internal process, however the calls, texts and e-mails continued requiring her to answer questions, or prepare spreadsheets whilst she was not at work. She said she **felt compelled** to complete this work as 90% of the requests came directly from the Store Manager, Ms Heidi Wanley-Keers, the most senior person in store. Her own line manager, Paul Wilson, Stock and Administration Manager for the Thirsk store confirmed the matter was raised by the claimant. She also had copies of texts she sent him about this. She claimed she had sent to Tesco over 320 examples costed at estimated time per item at £8.42 per hour giving a total of £ 1064.00.

6. The case was to have had a 1 day full merits hearing in person on 9 April 2020 but due to the Covid19 pandemic was converted to a telephone preliminary hearing which I conducted from home without the paper file. I cited Rule 2 of the Employment Tribunal Rules of Procedure 2013 (the overriding objective). I had not been provided with the claimant's statement only the Tesco's. In my written notes and orders I set out the applicable law starting with section 13 of the Employment Rights Act 1996 (the Act) which includes

(1) An employer shall not make a deduction from wages of a worker employed by him

*(3) Where the total amount of wages paid 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

7. I added "*properly payable*" means payable under her contract. The Court of Appeal in Agarwal-v-Cardiff University 2017 ICR 967 held the tribunal can determine questions of contractual interpretation, including whether a term should be implied, in the context of a wages claim.

*An ET cannot imply a term into any contract simply because it is "reasonable". There are four common reasons for implying terms. The first is to give effect to custom and practice which subsists in an industry. The next is to give "Business Efficacy" to a contract which without the implied term would be practically unworkable. The remaining two, which often overlap, are (a) to reflect the conduct of the parties and (b) to insert terms which are obviously what the parties intended but failed to say, sometimes called the "officious by-stander test". That test means if such a person had asked at the time the contract was made whether the parties understood the consequence of X would be Y, **both** would have answered " But of course ! ".*

*No matter how much an ET may empathise with the claimant, she is entitled to be paid for what she is **required** to do, not what she thinks her managers expect of her. However, if a requirement can be implied from the terms of the request, she may succeed. Her claim form says messages were sent to her personal phone and email address because at time reports were not available*

*on office PC's so she had to download them at home in her own time and act as a "helpdesk". Further when she objected to Mr Wilson about this he replied as the requests came from the Store Manager, he would not tell her to stop sending them. **He suggested the claimant ignore them, but as she says that would have been a bold step.** The crux of this part of her claim is some messages may be sent at all hours simply to get her to deal with them when she was at work, while other messages by their wording may ask for immediate attention. For my part, I would have no difficulty implying a term the latter should be remunerated. The document bundle sent electronically had a table, prepared by the claimant spread over many pages, of all email and What's App messages, in a font so small I can barely read it on screen, but I see some signs of requests for prompt replies. Some entries show a claim of zero. **What we need is a legible schedule showing the text of messages which, by their terms, demand a prompt answer.** The main claim is for work done from home and, laborious though it is, that cannot be decided without individual examination of the instances upon which a prompt reply was required.*

8. The claimant felt Tesco's representatives were being unreasonable. I understood her view that it was right to disclose every message but said she must focus on the ones which required her to work. Following the PH I conducted, she drafted a new schedule slimming down her claims.

9. Today, again working from home without the paper file, I pre read a statement from the claimant mainly about how unfairly she was treated, a statement from Mr Wilson and two from Ms Wanley-Keers. All gave sworn evidence. I have a 500 page document bundle. My findings of fact today largely accept the truth of both sides evidence. It is their interpretation which differs.

10. In January 2018, the claimant received a telephone call from her husband (who also worked at Tesco saying Ms Wanley-Keers has asked him if the claimant would apply for a newly created and unique role of Administration Colleague as in her previous role as a general customer assistant she had shown the integrity and skills required. She applied on 26 January 2018 and was interviewed on 13 February by Ms Wanley-Keers and Mr Wilson. They were unsure exactly how the new role would work and were open about this. It was part time but flexibility was required and she would be expected to work as and when required for business needs. They made clear the hours would differ weekly and she would be expected to manage her own workload, whilst keeping business needs a priority. She was enthusiastic and even said she would be available "24/7". She was experienced and willing to work flexibly, so given the job.

11. Mr Wilson has worked for Tesco for 16 years. He was the claimant's line manager from March 2018. She was offered the role in writing on 1 March. Her Terms and Conditions of Employment has a detailed section - Flexible additional hours - but , in her view ,did not say where and how these were to be worked.

12. Her most recent contract of employment states she is contracted to work 21 core hours per week paid £176.95 and flexible additional hours paid at £8.426 per hour. Her base location is shown as the Thirsk store. She would clock in and clock out and be paid in accordance with her clock in/out times including authorised overtime. Without this, it would be very difficult to determine the hours worked. She was given flexibility to choose which hours she wished to work on a weekly basis. She acted as note-taker for various meetings and there were occasions where the meetings took place during the night shift. She was given at least 24 hours notice and there was always an option for them to be rescheduled if she was unable to attend for a particular reason. She agreed to work longer hours on numerous occasions and was paid for all worked. In the past there have been colleagues who asked whether they can complete Tesco e-learning training modules at home. Mr Wilson always advised them to complete any training in-store to ensure they were paid.

13. Ms Wanley-Keers has worked for Tesco for around 29 years. She worked closely with the claimant as her role was to assist in keeping the store safe, legal and compliant. They had a good friendly working relationship. The claimant worked really well was very capable. There is an allocated budget for wages and overtime. If there was a business need for overtime, cost was not a problem. Tesco was more than willing to pay for any hours she had clocked in/out. Some weeks were busier than others eg, it was a lengthy job to review personnel files for around 250 staff in preparation for an internal audit. Her core 21 hours per week had been inputted onto the system and any additional flexible hours worked were paid. **Ms Wanley-Keers explained to me Tesco do have some contracts which authorise home working but the claimant's did not.**

14. The claimant's case is that from the start she was contacted by managers on her personal mobile phone. She never gave this number to be used it was just added. She was also included in What's App groups, and received calls from managers asking work related questions

15. The office she was in had three chairs and three PC's, only one of which connected to the internet so access to the files she used and e-mails was actually restricted to one PC. As 13 managers used this office plus the payroll clerk it was difficult to obtain files and reports she needed. Several times she commented on the difficulty. As she had no chair or desk to actually access the PC she needed, and when she did the internet connection was so poor reports and documents she tried to create or open would give an error message, she raised it with the IT department. They advised she use the company laptop and log onto the store Wifi. Mr Wilson told her the only company laptop was Jane Ripley's, the Excel subscription has expired so it was difficult to download any reports and it had no anti-virus protection installed. Mr Wilson also told her introducing a virus into Tesco IT systems using unauthorised equipment could be regarded as gross misconduct. On occasions he let her use his personal laptop but said it had cost him over £1000, and he was unhappy with other people using it. Also it was an Apple Mac and did not have a compatible office package for downloading reports. She started to bring her own laptop into work to ensure she got her job done however other managers then started to use this, which was unacceptable as it contained her personal information so she stopped bringing it to work.

16. She says **the final option** was to complete this work from home, download policies, create reports then e-mail them back to the work. Mr Wilson and Ms Wanley-Keers were aware this was how she was working and at times she told Mr Wilson she had to wait until she was home to complete information. Not once was she told not to do it.

17. She started to get frustrated and tried to discuss this with Mr Wilson. She addressed this in her end of year review too. Her statement says some things about Mr Wilson's mental health and personal financial problems then adds " *It was impossible to have a talk with him to resolve any issues. I attached an example of when I tried to speak to him, one he ignored and the second he directed me to the store manager.*" **The claimant did not speak directly to Ms Wanley-Keers** about any of the problems she had. When she told Mr Wilson she was being asked to work with excessive interruptions to her home life, his advice was to ignore texts and calls.

18. She said she felt compelled to answer as the people sending them were all higher ranked than her and, she felt, expected she was there to support them as per her flexible job description. He again advised her to ignore the calls as he did himself. She asked what about Ms Wanley-Keers calls, he replied he was not going to put his head on the block and tell her to stop, so the claimant had to deal with it herself.

19. Ms Wanley-Keers explained clearly she had several staff under her, delegated tasks to her more junior managers so could not know the claimant's problem unless she said so directly to her. However, in the past, so highly did Ms Wanley-Keers regard the claimant, that when she did complain about something a manager had done, Ms Wanley-Keers addressed the problem. The only part of the claimant's statement I do not accept is when she says "*I had experienced how the group of managers worked they worked as a pack turning on anyone who dared challenge them*".

20. She adds Ms Wanley-Keers was excessive in her contact, even offering the claimant her "cast offs", but it was difficult to deal with her texts as she did not want to anger or insult her, they were not "friends" as such, and did not associate outside work, so she tried to "*be polite and take the path of least resistance*".

21. Some parts of Ms Wanley-Keers statement are best quoted

WhatsApp is used to deliver work-related messages to a large number of colleagues; especially given most employees do not have work e-mail addresses. It is personal choice whether they wish to read/respond to any messages. We do not insist people reply within a set timeframe. There is always an option to block or remove people on their mobile phone.

12. I regularly communicated with Barbara outside of work via text messages and WhatsApp and I classed her as a friend. We had non-work related conversations, and conversations about work-related matters. Barbara and I were also participants in a WhatsApp group chat which included around 10 colleagues who formed part of the store forum group, along with Barbara being part of the Administration Assistant WhatsApp group which included contacts from 24 different stores. We also utilised WhatsApp whilst both in-store as a quick way of communication too. Barbara never raised a direct concern with myself around the level of contact and quite often initiated this on a personal level as well as work. Had I received that feedback then naturally we would have looked at different ways of communicating effectively. As of any concern raised by a staff member, I would look to resolve the issue immediately.

13. There was no expectation for Barbara to be available at all times and/or outside of her working hours. Ultimately, the responsibilities of her role were not critical to the operations of the store and therefore, there was never anything that was business critical or required urgent attention that meant Barbara needed to respond straight away. Furthermore, we did not expect Barbara to work more than 36.5 hours per week or more than 5 days a week, unless she chose to. Where she did work additional hours these were to be undertaken in the store.

Barbara was never authorised to work on reports at home or to undertake any work for Tesco at home. We do not have computer systems in place to support working at home; employees are not given a laptop and are not permitted to take work home due to risks of confidential/personal data being taken from the premises. Barbara was fully aware of how the payroll system worked and that she would only be paid when she clocked in and out. On information security and data privacy Barbara had completed this training.

Barbara did not formally raise any issues about any additional hours she worked and/or complain about the level of contact from managers ... She was well aware of how to make formal complaints, especially as she was a note-taker in on a number of grievance meetings.

22. Mr Wilson too says he does not expect colleagues reply to messages straight away. The claimant could have replied when she was next scheduled to work. She mentioned to him she was receiving messages from Ms Wanley-Keers and others outside of her working hours. He

accepts (i) he told her to ignore them if she was not at work and respond during her next shift (ii) she was required to produce reports weekly and had access to two laptops in-store, neither owned by Tesco, one being his Apple Mac. Although some work could be done remotely such as monitoring colleagues' training, she needed to be in-store to access to the information from the internal systems for the majority of her work. He cannot recall exactly when, but she spoke to him about the reports and said she was working on them at home. The parts of his evidence I do not accept are he told her (i) she should not be working at home and would not be paid (ii) she was not allowed to keep details on her personal laptop/computer due to data protection(iii) no colleagues are authorised to work from home as she was fully aware. He says she was given support "when possible". I accept she was never put under pressure to work more than her maximum hours or from home, but Mr Wilson must have realised she was. I put it to him his view was that if she did, "more fool her". He tentatively, and somewhat bashfully, agreed.

23. The claimant says she tried to prevent working these additional hours by *following internal process*, but the calls, texts and e-mail continued requiring her to answer questions, or prepare spreadsheets whilst not at work. Her interpretation of *following internal process* is going to her line manager, Mr Wilson. I put it to the claimant the policies were clear that any colleagues who raised concerns informally and found nothing happened, could go to the formal stage. Ms Wanley-Keers said there is a well publicised scheme called "protect-a-line" and or in-house HR she could have turned to. The claimant accepted that.

24. On 23 April 2019, the claimant was randomly selected for a staff search by Jane Harston (Checkouts Manager). She initially refused saying she was always getting searched. Immediately after the search she asked to speak in private to Mr Wilson about how she had been spoken to by Ms Harston. He explained random searches could take place at any time but the best way forward was for him to speak Ms Harston. Before he had an opportunity to, a decision was made for the matter to be investigated. The claimant was invited to an investigation meeting by letter on 26 April 2019 but tendered her resignation by letter on the same day, giving one weeks' notice. In Administration she was privy to highly confidential information and her access to the internal system was removed when she resigned as a precautionary measure. Whilst working her notice the claimant says Tesco *locked her out of her office* and failed to offer any suitable alternative work she had been trained on. She had to keep arriving at work and then being sent home in front of the other staff. Nevertheless she was paid. Tesco say during her notice period, the claimant was asked to work in the clothing department, which was seen to be a low risk area.

25. She was due to leave on 2 May 2019 but attended an investigation meeting on 30 April 2019. Although the matter would have progressed to a disciplinary hearing, due to her leaving soon a decision was made to close the matter.

26. After the meeting had finished the discussion was where she was going to work for the next three days. She was told to go home and she would be contacted. The next day, 1 May 2019, the claimant clocked in and was to report to Matty Neave. He had changed shifts, so she spoke to Barry Smart Barker asking what she was supposed to do. He said he did not know. She said all the stress was causing a flare-up of her irritable bowel and was really upsetting her. He replied if she was being made ill she should go home and he would get it sorted. She was paid for that day as it had been "part attended".

27. She contacted the reporting line that evening asking where she was working the next day. The line was not answered so she sent a text but got no reply. On receipt of her final payslip, 2

May had been marked down as sick despite her never calling in sick. She says Tesco prevented her working when they had no right to , so claims payment for that last day.

28. The claimant has produced a record of a text message which she sent to the Duty Manager's telephone on 1 May 2019 at 7.27pm. She relies on it to show that she was ready and willing to work on the last day of her employment. Ms Wanley-Keers says this would not have been received by Tesco as the Duty Manager's telephone number is linked to a landline number. She personally checked at that time if the phone exchange used by Tesco would forward texts to the duty manager logged in to the exchange. This does not happen.

29. Tesco's Sickness Absence Policy clearly states that "*when you're ready to come back to work you should phone the Duty/Store Manager or Team Leader the day before (where possible) to let them know that you are ready to come back to work*". I accept she sent the text which states "*...my irritable bowel has returned...*" and she "*...will try my best to attend...*" the next day. The text message does not confirm she is going to be fit for work the following day. Having not attended the Store on the morning of 2 May 2019 she was treated as on sick leave that day. Tesco's Sickness Absence Policy states "*if you started on or after 4 July 2004, you are subject to three day waiting. This means that you won't receive CSP for the first three working days of a period of sickness absence*". Accordingly, she was not paid for 2 May 2019.

30. During the investigation meeting on 30 April the claimant said she was not happy, and was told to put in a grievance, She raised a formal complaint by letter dated 7 May 2019 relating, in part, to being contacted by managers outside of her contracted hours of work. Ms Wanley-Keers received the complaint. Given she had not raised these issues with Ms Wanley-Keers previously, she was surprised at her complaint, but as it concerned herself referred it to be investigated by Kevin Meades, Lead Fresh Manager, as impartial. He spoke to Mr Wilson who said there was no expectation for her to respond to any electronic communications, from him or any other manager, immediately. An outcome was issued by letter. The key findings were (i) the staff search was random and in line with policy(ii) communication between a store and colleague in their own time is voluntary not expected (iii) no formal concerns had been raised during her employment. Ms Wanley-Keers is aware recommendations were made asking managers to document all conversations with colleagues, including those that were informal, going forward.

31. The claimant says for her health and wellbeing she was forced to resign, a matter of days before the bonus threshold was reached. Employment Judge Aspden and I at the PH's explained damages for wrongful dismissal are usually confined to the amount she would have earned during the period of notice Tesco would have been required to give had it terminated her contract. It was contractually required to give the claimant 4 weeks' notice, so if she was constructively dismissed she may have been entitled to the bonus, but even then and with Tesco having to give four week's notice, she does not qualify. The terms of the bonus scheme say if she is serving out a period of notice, she does not qualify even if the notice would expire after 23 May.

Submissions, Additional Law and Conclusions

32. The claimant felt compelled to complete work at home as 90% of the requests came directly Ms Wanley-Keers who was three levels above her and the most senior person in store. She also says home work was necessary because the equipment provided in the work place was not fit for purpose. She reiterates she was a low paid assistant not a manager but all managers used and called upon her services. Mr Wilson has confirmed the volume of texts was raised with him. It is clear he was aware of this work being completed and did nothing to prevent it. However, I cannot

read into her contract an express right to be paid for home working. I have looked through several messages and cannot find one which required an immediate reply or the claimant to work from home. I have no legal basis to imply a term she had a right be paid for home working.

33. The claimant asks for an apology from Tesco's for the way in which it treated her, and to ensure no-one else has to endure such unfair treatment. She says Tesco acknowledge the right to "disconnect" for all employees when not at work, but wants them to take steps to ensure this is included in their people policies. She says, currently, the 'flexible working contract' can be used to bully staff into answering their phones outside work. She is inclined to think if a question is sent the sender wants it dealt with then, not later, so, being highly conscientious she does. So would I, but most people would not. I would then ask "how do I get paid for this", she did not. There are remote contracts but they are different to the unique one she was on. When she was not given the equipment to do the job properly, she found ways around the problem, most people would not. I simply cannot find any express term, or lawful reason to imply a term, the work she did at home was "properly payable". Though I admire her dedication, her first claim fails.

34 An employee is constructively dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice because her employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge her from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd-v-Sharpe 1978 IRLR 27. The conduct must be more than just unreasonable to constitute a fundamental breach. The obligation on an employer to pay wages properly due is so fundamental that breaches of this duty are likely to be treated as repudiatory. However, as not were properly due but unpaid, there is no breach at all.

35. WA Gould (Pearmak) Ltd-v-McConnell 1995 IRLR 516 held an employer is under an implied duty to reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. In that case, two salesmen were constructively dismissed when their employer failed to deal with their grievance over changes to sales methods, which had the effect of reducing their salaries. However, the salesmen concerned were "blocked" from even seeing the relevant manager by his PA. There is no obligation on an employee to use the grievance procedure before resigning, Seligman and Latz-v-McHugh 1979 IRLR 130 but if there are procedures for raising a grievance, the employee cannot complain the employer has failed to deal with a grievance if she omits to use them Hamilton-v-Tandburg Television. The claimant went no further than an informal complaint to Mr Wilson, though she knew she could have taken it to Ms Wanley-Keers, and further if necessary.

36. Where the employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence explained in Woods v WM Car Services (Peterborough) Ltd 1981 IRLR 347 as "*a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.*" The House of Lords in Malik-v-BCCI held the conduct must be **objectively considered**. Ms Greenley rightly says this has not been the claimant's pleaded case, but even if it had been, objectively, while Mr Wilson's handling of her informal complaints

is not to be complimented, it falls far short of a repudiatory breach. The claimant's last words in her submissions were "*I was treated unfairly , I was wrongfully dismissed*". The latter does not, in law, follow from the former.

37. I agree with the view Employment Judge Aspden expressed as to the bonus because it is very common for such payments to depend on the employee being in employment and/or not under notice at a given date, so even if there were a constructive dismissal this claim would fail

38. On 1 May, she clocked in but left shortly after due to sickness. Had she presented herself at Tesco on the morning of 2 May and said "*I'm here, find me a job to do*", I would have upheld this claim. She did not and an objective construction of the policies and communications shows she was still on sick and not entitled to payment.

39. While fully accepting the claimant behaved conscientiously and honourably throughout, all her claims must fail.

Employment Judge T.M. Garnon

Judgment authorised by the Employment Judge on 14 January 2021.