



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Christine Patch

AND

Respondent

Yasmin Mobalegh-Hosseini
T/A The Beauty Retreat

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By VHS) **ON** 5 January 2021

EMPLOYMENT JUDGE J BAX

Representation

For the Claimant: Mrs G Patch (solicitor)

For the Respondent: Ms Mobalegh-Hosseini (in person)

JUDGMENT

1. The Claimant's claim for breach of contract, in respect of notice pay, succeeds.
2. The Respondent is ordered to pay the Claimant the sum £632.86 net.

REASONS

1. In this case the Claimant, Miss Patch, brought a claim of breach of contract in relation to notice.

Background

2. The Claimant notified ACAS of disputes with 'The Beauty Retreat' and Yasmin Mobalegh-Hosseini on 16 March 2020 and the certificates were issued on 16 April 2020. The Claimant presented her claim on 14 May 2020.

3. At the start of the hearing the identity of the Respondent was discussed. It was confirmed that 'The Beauty Retreat' was not a legal entity, but was a trading name of Yasmin Mobalegh-Hosseini. It was agreed that the identity of the correct Respondent was Yasmin Mobalegh-Hosseini T/A The Beauty Retreat and the names were amended accordingly.
4. Discussion then took place about the issues in the case. The issues were confirmed as being: (1) whether there was a mutual termination of the contract of employment, (2) whether there had been an agreement to shorten the notice period, (3) whether the Claimant had been guilty of gross misconduct on 13 January 2020, so that the Respondent was entitled to summarily dismiss her, and (4) whether the Claimant had mitigated her loss.
5. During the hearing, the solicitor for the Claimant confirmed that the claim was in relation to notice pay only and that she was not bringing a claim for unlawful deductions from wages.

The evidence

6. I heard from the Claimant and from her father, Mr Patch on her behalf. I heard from Ms Mobalegh-Hosseini and Ms Powell for the Respondent.
7. I have been provided with an 87 page bundle of documents, any reference in square brackets is a reference to a page in that bundle.
8. There was a degree of conflict on the evidence.

The facts

9. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
10. The Claimant commenced work for the Respondent on 28 October 2019 as a beauty therapist. Prior to starting work the Claimant was informed that her hours of work would be 10-7 Mondays, 10-8 Thursdays, 10-8 Fridays and 10-5 Saturdays [p36].
11. The Claimant's contract of employment [p38-46], which she signed on 7 November 2019, had the following terms:
 - (a) At clause 1.4, "Your employment with us is subject to the completion of a 3 month probationary period. We will review your performance and

suitability for continued employment throughout your probationary period...”

- (b) At clause 1.5, “We retain the right to terminate your employment at any time subject to general rights of termination.”
 - (c) At clause 4.1, the Claimant’s normal working pattern was Monday, Thursday, Friday and alternate Saturdays.
 - (d) At clause 6.1, the Claimant’s rate of pay was £8.50 per hour.
 - (e) Clause 6.3 provided, “Where any losses are sustained in relation to the property or money of the business, client, visitor or other employee, during the course of your employment caused by your negligence, recklessness or through serious breach of our rules or any dishonesty on your part, we reserve the right to require you to repay any of the said losses either by deduction from salary or other method acceptable to us.”
 - (f) Under clause 9.1, “If you are absent from work for any reason and your absence has not previously been authorised you must notify the Owner by 7 am on each day of your absence... Your shift hours may be changed to make up for lost time on your return to work.”
 - (g) If the Claimant was absent due to sickness, she was entitled to statutory sick pay, but would not be paid for the first 3 days off.
 - (h) Clause 12.1 provided that the employer, “... may terminate this Agreement at any time in writing with not less than 4 weeks notice.
 - (i) Clause 12.4 provided, “Nothing in this agreement prevents us from terminating your employment summarily or otherwise in the event of any serious breach by you of the terms of your employment or in any event of any act of or acts of gross misconduct by you. Your employment may be terminated at any time by mutual consent.”
12. During the course of the Claimant’s employment, she underwent probation reviews with Ms Mobalegh-Hosseini, during which concerns were raised, in particular in relation to customer service.
13. On 9 January 2020, the Claimant, at the end of her shift, was asked to speak to Ms Mobalegh-Hosseini. Ms Mobalegh-Hosseini told her that she was still not happy with the Claimant’s customer service and that she could not have her continue working at the Beauty Retreat and that her probation period was being terminated. The Claimant was asked if she thought it was fair and replied OK.
14. Ms Mobalegh-Hosseini then discussed the notice period. There was a dispute between the parties as to what was discussed. The Respondent said that she said that she was concerned that the reputation of the business would be damaged if a longer notice period was worked and she asked if the Claimant would be happy with a week, to which she replied yes. The Claimant says that she was told that she would be given a week’s notice

- out of courtesy to which she replied 'yes' and that she was not told that her contract provided for 4 weeks.
15. The Respondent relied upon typed notes which she said she completed from handwritten notes sometime after the meeting. I was not provided with the handwritten notes.
 16. I preferred the Claimant's version of events. The Claimant's version was more consistent with the Respondent's text message on 13 January 2020, as set out later, and it was also consistent with the Claimant's e-mail in which she says she was given a week's notice.
 17. The Claimant did not agree to a shorter notice period, she was unaware at the time that she was entitled to 4 weeks' notice and her saying 'yes', was simply confirmation that she understood, not that she agreed to a shorter period. There was no evidence as to what the Claimant would gain as a result of a variation.
 18. The Claimant was told that her final day of work would be 16 January 2020. If the Claimant had been given 4 weeks' notice, it would have expired on 6 February 2020.
 19. On 10 January 2020, the Claimant attended work.
 20. On Sunday 12 January 2020, the Claimant was sick after dinner, but hoped that it was a one-off and would feel better the next day. The next morning, on 13 January 2020, about an hour before she was due to start work, she was physically sick again. She sent Ms Mobalegh-Hosseini a message saying that she had not been well that morning and did not feel well enough to come in. She also said that she thought that she might feel better in the morning but was still sick. I did not accept that the Claimant deliberately delayed in reporting that she was sick, and she contacted the Respondent as soon as she was physically sick on 13 January 2020. The Claimant did not attend work that day.
 21. Ms Mobalegh-Hosseini responded with a text message [p59], informing the Claimant that it was too late notice to call in sick, as she did not have enough time to rearrange clients and Corrina was also sick. She expected that the Claimant would tell her sooner. She also said, "I did give you a weeks notice out of courtesy but this now means I cannot have you work the full notice so do not come in on Thursday."
 22. The Claimant responded by e-mail [p60 to 61], in which she said, "You terminated my employment with a week's verbal notice on Thursday 9th January 2020 advising that my 'customer service' was inadequate... I have therefore taken urgent employment advice: according to my contract of

employment, clause 12.1 you are required to provide me with written notice of not less than four weeks.”

23. On 14 January 2020, Ms Mobalegh-Hosseini replied [p60] and said that on 9 January they had discussed her performance which resulted in a mutual agreement to terminate her employment. She also said, “As you are aware you are in your probationary period, for which the statutory requirement for notice is one week. Under Clause 1.4 of your contract, it is stated that your employment with us is subject to completion of a three-month probationary period. In addition, under clause 12.4, it is stated that your employment may be terminated at any time by mutual consent, which it was, with you agreeing to one week’s notice.” Reference was also made to clause 9.1 of the contract.
24. It was agreed between the parties that if the Claimant had worked until 6 February 2020, she would have worked a further 99 hours, which would have paid £810.36 net.
25. Between 20 January 2020 and 3 February 2020, the Claimant earned £177.50 at Tropic Beauty.
26. The Claimant also decided to operate her own beauty business, ‘Christine’s Beauty’, on a more commercial footing and invested in further equipment. I accepted the Claimant’s evidence that she made a loss of £172 up to 10 February 2020, and up to March 2020 a loss of £85. As part of that business the Claimant obtained work through ‘Treatwell’, for which she paid a commission. I also accepted that the Claimant had to stop working due to the Covid-19 national Lockdown. Although the Claimant operated the business it did not make a profit at any stage. The Claimant accepted in evidence, that if she had been given the correct notice period, she would have started the business in any event.

The law

27. Under paragraph 3 of the Employment Tribunals (Extension of Jurisdiction England and Wales) Order 1994 an employee may bring a claim for breach of contract, which provides

“3 Extension of jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) *the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

(b) *the claim is not one to which article 5 applies; and*

(c) *the claim arises or is outstanding on the termination of the employee's employment."*

28. Whether there has been a termination by mutual agreement or a dismissal by the employer is a question of both fact and law. The principles to be considered in such circumstances were set out by the Court of Appeal in Martin v Glynwed Distribution Ltd [1983] ICR 511, CA. Sir John Donaldson MR said that: 'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?". If the answer is the employer, there was a dismissal.' He went on to hold that this question was one of fact for the tribunal to decide in the circumstances of the particular case. However, in Birch and anor v University of Liverpool [1985] ICR 470, CA, the Court of Appeal added that the legal interpretation of those facts, i.e. whether they amount to a dismissal or a consensual termination, is a question of law. Slade LJ's opinion was that the authorities required one to look at the realities of the facts rather than the form of the relevant transactions in deciding whether the contract has been terminated by the employer.

29. In Francis v Pertemps Recruitment Partnership Ltd EATS 0003/13, the EAT concluded that the employee's employment was not terminated by agreement where both options put to him by the employer involved his dismissal. The EAT overturned the tribunal's decision, holding that F was not given the choice between staying in employment with the respondent and his employment being terminated; both options involved his dismissal, albeit on different terms. The EAT concluded that the crucial issue was who brought the contract to an end, and where, as in that case, an employee is given two options, both of which involve dismissal, the only sensible conclusion is that the dismissal is intended by the person offering those options.

30. In order to vary a contract, there needs to be an offer by one party to the other, an acceptance of the offer, an intention to create legal relations and consideration for the variation. Consideration is something of value which passes between the parties when the contract is performed. It does not need to have a monetary value.

31. In determining whether the employee's act is sufficient to dismiss summarily the EAT in Sandwell & West Birmingham Hospital NHS Trust v Westwood UKEAT/0032/09 summarised the principles as follows:

"[110] ... In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. ...

[111] Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see Wilson v Racher [1974] ICR 428, CA per Edmund Davies LJ at p 432 (citing Harman LJ in Pepper v Webb [1969] 2 All ER 216, [1969] 1 WLR 514 at 517) "Now what will justify an instant dismissal? – something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract" and at p 433 where he cites Russell LJ in Pepper (p 518) that the conduct "must be taken as conduct repudiatory of the contract justifying summary dismissal". In the disobedience case of Laws v London Chronicle (indicator Newspapers) Ltd [1959] 2 All ER 285, [1959] 1 WLR 698 at p 710 Evershed MR said "the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions". So the conduct must be a deliberate and wilful contradiction of the contractual terms.

[112] Alternatively it must amount to very considerable negligence, historically summarised as "gross negligence". A relatively modern example of "gross negligence", as considered in relation to "gross misconduct", is to be found in Dietman v LB Brent [1987] IRLR 259, [1987] ICR 737 at p 759."

32. The measure of damages, for such a breach of contract, is the amount of net wages the Claimant would have earned in her notice period.
33. The Claimant is under a duty to mitigate her losses and any pay earned in the notice period must be deducted. However, it is the Respondent who must prove that the Claimant has failed to mitigate her loss.
34. It is a general principle of contract law that the innocent party can recover, as a legitimate head of damage, expenses reasonably incurred in an attempt to mitigate losses, even if the attempt is unsuccessful (Wilson v United Counties Bank [1920] AC 102, HL). However, in a pure breach of contract case, it is necessary to look more carefully at whether the expense can properly be attributed to the breach, rather than to the fact (or manner) of the dismissal itself. If the employee would have incurred the expense even in the event of a lawful dismissal, then it cannot properly be characterised as damages for wrongful dismissal.

Conclusions

Was the Claimant dismissed or was there a mutual termination of employment?

35. On 9 January 2020, Ms Mobalegh-Hosseini approached the Claimant and told her that she could not have her working for her anymore and was terminating her probationary period. She subsequently asked if the Claimant thought that was fair. Ms Mobalegh-Hosseini told the Claimant that her employment was being ended. The Claimant was not given a choice in the matter. Asking the Claimant whether she thought that the decision was fair, is not the same as the Claimant agreeing that she should be dismissed. The contract was ended by Ms Mobalegh-Hosseini at the point she told the Claimant that her contract would be terminated.

Was there an agreement to vary the period of notice to one week?

36. I preferred the evidence of the Claimant. She was told that as a courtesy she would be given a week's notice. To which she responded 'yes'. The Respondent sought to argue that this was agreement to vary the contract. I rejected that submission. The Claimant by saying yes was acknowledging what she had been told, rather than agreeing to a shorter notice period. Further there was no consideration for the Claimant to vary the contract and forgo 3 weeks of her notice period.

37. I rejected the Respondent's submission that the Claimant waived any breach. The Claimant was unaware of position and did not understand that she was entitled to 4 weeks' notice until 13 January 2020, when she looked at her contract.

38. The Claimant did not agree to vary the contract and the correct notice period was 4 weeks.

39. The Claimant did not waive the breach by the Respondent.

Was the Respondent entitled to summarily dismiss the Claimant on 13 January 2020?

40. The Claimant did not simply fail to attend work, she contacted Ms Mobalegh-Hosseini before she was due to start work. The contract of employment specified that absences should be notified before 7am, however the Claimant was physically sick shortly before she was due to leave for work. The Claimant thought that she would feel better after having slept, however that proved incorrect. The Claimant informed Ms Mobalegh-Hosseini that she had been unwell. The Claimant had to take into account

the risk of making other people ill. There was no indication that she would not attend on 16 January 2020.

41. The Respondent asked me to take into account that notice had been given and there had been performance issues. However, the Claimant was dismissed for not notifying the Respondent of her absence before 7am and although it caused problems for the Respondent it was not deliberate or wilful by the Claimant. I was not satisfied that the Respondent proved that this was a deliberate flouting of the essential contractual conditions. It was not deliberate or wilful and was not gross misconduct.

42. The Respondent was not entitled to summarily dismiss the Claimant.

What would the Claimant have earned if she had worked her correct notice period for the Respondent?

43. If the Claimant had worked her correct notice period, she would have earned an additional £810.36.

Did the Claimant mitigate her loss and what if any deductions should be made from her notice pay?

44. The Claimant obtained work from Tropic Beauty and during the notice period earned £177.50, which must be deducted from the notice pay.

45. The Claimant sought to recover losses from setting up her business, however she accepted she would have set up the business even if she had been given the correct notice period. Therefore, any losses cannot be said to flow from the breach, rather they flow from the fact of termination. Accordingly, no additional sum should be added in respect of setting up her business.

46. The Respondent sought to argue that commission from 'Treatwell' should also be deducted, however it formed part of the business of 'Christine's Beauty', no profit had been returned at all and therefore no further deductions should be made.

47. The Claimant mitigated her loss by undertaking work with Tropic Beauty and setting up her own business.

How much notice pay should the Claimant receive?

48. The Respondent was in breach of contract by failing to give 4 weeks' notice. In order to put the Claimant in the position she would have been in, if the contract been properly fulfilled, the money earned from Tropic Beauty must

be deducted from the £810.36 she otherwise would have earned in the correct notice period. The Claimant was therefore awarded £632.86.

49. The Claimant sought interest on the sum, however interest is within the discretion of the Tribunal and given the low level of interest rates and taking into account the circumstances of the case such an award is not appropriate.

Employment Judge Bax

Date: 17 February 2021

Reasons sent to Parties: 23 February 2021

FOR THE TRIBUNAL OFFICE