



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102176/2020 (A)

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Held via telephone conference call in Glasgow on 21 September 2020

Employment Judge J Young

10 Ms P Ritchie

Claimant
Represented by:
Ms D Flanigan -
Solicitor

15 South West Community Cycles

Respondent
No appearance and
No representation

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

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(1) the claimant was unfairly (constructively) dismissed by the respondent in terms of section 98 of the Employment Rights Act 1996 and the Employment Tribunal orders that the respondent shall pay to the claimant a monetary award of **Eight thousand two hundred and five pounds and fifty three pence**. The prescribed element is **£7205.53** and relates to the period from 7 January 2020 to 20 July 2020. The monetary award exceeds the prescribed element by **£828**

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(2) the claimant suffered unlawful deductions from wages contrary to the provisions of section 13 of the Employment Rights Act 1996 in the sum of **Nine thousand nine hundred and seventy eight pounds and thirty two pence** and the respondent is ordered to pay to the claimant the sum of **£9978.32**

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REASONS

1. The claimant presented a claim to the Employment Tribunal complaining that she had been unfairly (constructively) dismissed by the respondent and that she had been subject to unlawful deduction of wages.
- 5 2. No response was received from the respondent on the claim being intimated to them. In terms of Rule 21 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules of Procedure), where there is no response to a claim, an Employment Judge can either determine the claim on available material or order that a hearing
10 be fixed. In this case, a hearing was fixed for 21 September 2020 and in terms of Rule 21 (3), the respondents were given notice of that hearing by letter dated 19 August 2020. In terms of that letter, the respondent was entitled to attend the hearing but would only be able to participate to the extent permitted by the Employment Judge. That hearing was stated to be a 'final
15 hearing by telephone conference call' at 11.30am. At the hearing, no contact was made for or on behalf of the respondent. The claimant attended with her representative.
3. At the hearing, the claimant gave evidence. There was lodged an Inventory of Productions for the claimant containing documents marked C1-80. Also,
20 there was produced for the claimant further documents being (C81) a Schedule of Loss for the claimant; (C82) assessment letter for Universal Credit in respect of period 2 January – 1 February 2020; (C83) assessment letter for Universal Credit in respect of period 2 June – 1 July 2020; (C84) payslip of the claimant for the period 1 July to 31 July 2020 in the sum of
25 £677.81 gross and £517.43 net; (C85) bank statements of the claimant for the period 10 September 2018 – 5 March 2019; (C87) bank statements of the claimant for the period 8 March 2019 – 10 February 2020; (C88) payslip from Department of Work and Pensions for the claimant in the period 1 August –
30 31 August 2020 showing gross pay of £1751 and net pay of £1672.57. From the evidence given and documents produced, I was able to make findings in fact on the claims.

Findings in fact

4. The respondent is a Scottish Charitable Incorporated Organisation. From their cycle resource centre, they promote cycling and the provision of cycling services through rental, cycle maintenance and repair, and tuition. The claimant was employed as a cycle coach by the respondent in the period from 1 September 2017 until 7 January 2020 when she resigned. She recalled signing a statement of Terms and Conditions and job description. However, she did not receive a copy of that document and neither did she take a copy herself.
5. She did receive a Staff Handbook after a request in October 2018 (C43 – 80). This handbook provided information on various employment matters including amongst others procedures on “whistle-blowing”, grievance and discipline.
6. The claimant became concerned about certain issues and on 14 October 2018 intimated those concerns to the respondent under a document which she indicated should be ‘considered under the Whistleblowers Procedure as advised by the Peninsula Employee Handbook’. That document (C26 – 27) set out the issues of concern being generally concerns around financial matters; funding obligations; merging of separate projects; data protection and management practices. The document was sent to both the claimant’s manager and the chair of the respondent.
7. Thereafter, the claimant advised that the working environment became ‘confrontational’ and on one occasion she was told that she would be ‘kicked in’. She reported this matter to the police. By email of 30 October 2018 (C28), from the chair of the respondent, the claimant was advised that she was suspended on contractual pay to allow the respondent ‘to make investigation re misconduct’ which was advised as being ‘totally separate issues from your whistleblowing complaint’.
8. Despite the terms of the letter indicating that the claimant was suspended ‘on contractual pay’, she found pay to be erratic thereafter. She did not receive her whole contractual pay between October/December 2018.

9. On 9 January 2019, the claimant received an email requesting information on a media platform that she had set up including details of the password. She did not know the author of the email and raised the issue with the chair of the respondent. No further action was taken on that request.
- 5 10. The claimant received a letter dated 15 February 2019 from consultants acting on behalf of the respondent to attend an investigative meeting to be held on 21 February 2019 to investigate certain matters being:-
- behaviours presented to other staff and volunteers;
 - accessing private information when you do not have authority to;

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 - being on company property without prior permission or following lone policy guidelines;
 - breach of company social media policy; and
 - ignoring previous correspondence asking you to make contact with ourselves’.
- 15 11. The meeting was to be conducted by a board member with an administrative officer in attendance. The claimant was advised that the possible outcomes of the meeting would be for the respondent to pursue formal disciplinary procedure or decide there were no grounds for such procedure. The request to attend the meeting was stated to be a ‘perfectly reasonable management
- 20 instruction’ and non-attendance would be treated as a ‘separate issue of misconduct’ (C30).
12. The claimant received this letter on 20 February 2019, it being posted on 18 February 2019 (C31).
13. On 21 February 2019 the claimant sent an email to the chair of the respondent
- 25 indicating that she had insufficient notice of the meeting on 21 February 2019 and so would not attend. She had spoken with her union representative prior to sending this email.

14. By letter of 22 February 2019 from the 'admin/finance officer' of the respondent (C32), the claimant was advised that there must have been 'a holdup with the Royal Mail' in relation to the letter of 15 February 2019 and advised that the claimant had a duty to make herself available on 21 February 2019 and as she had breached the terms of her suspension, that day could be treated as 'AWOL' which means that 'you have no entitlement to be paid until you make yourself available again'. It was stated that a further meeting in relation to the investigation would take place on Tuesday 5 March 2019 at 1pm which is 'when your paid employment will recommence'; that the non-attendance for 21 February 2019 would be treated as a 'separate issue of misconduct as advised in previous letters'; and that she had 'no legal entitlement to be represented or accompanied to the investigation meeting, this was why no right of representation was included in the invite letter'.
15. By email of 4 March 2019, the claimant advised that she was 'taking legal advice on the legality of attending the meeting tomorrow and will not be attending your meeting' (C33).
16. At this stage, the claimant had been in touch with her union representative and he contacted the respondent and entered into discussion with them on the issues affecting the claimant's employment. The claimant attended meetings with the respondent. No resolution was reached in those discussions and on 31 July 2019 (C34/35), the claimant's union representative sought from the respondent progress and information on the issues affecting the claimant's employment. He indicated that the claimant had not been paid since March 2019; that she had not resigned her post and neither had she been dismissed by the respondent. He indicated that he believed the respondents were engaged in an 'apparently quite deliberate attempt to frustrate my member's contract and confidence in your organisation'. He indicated that he hoped the organisation could reach a conciliated outcome.
17. In August 2019, the claimant received a payment from the respondent in the sum of £1416.61 direct to her Bank account. She received no payslip or other information from the respondent as to how this amount was calculated.

18. No response being made by the respondent to the claimant's union representative, she instituted a grievance against the respondent by letter of 5 September 2019 (C36). She stated that her grievance concerned:-

- 'that I have been suspended since 30 October;
- 5 • that SWCC has not investigated the allegations against me and has made no action to return me to work;
- that despite the terms of my suspension being on full pay, I have not been properly paid since February 2019;
- 10 • I have received some monies in late August 2019 but I have not received a pay advice slip'.

She sought a mutually convenient time for a hearing.

19. The respondent responded by letter of 23 September 2019 (C37) which indicated that an 'impartial Face2Face Consultant from Peninsula will hear your grievance on Thursday 3 October 2019...'. The grievance hearing was
15 then postponed until 29 October 2019 to allow the claimant to have representation (C37-39).

20. By letter of 2 December 2019, the claimant wrote to the respondent referring to the grievance hearing on 29 October 2019 which she had attended with her representative. In that letter (C40), she indicated that she had received no
20 report albeit that the HR consultant had advised that the report had been completed and sent to the respondent 'approximately two weeks ago'. She indicated that she did not wish matters to be prolonged into another month 'in which I am not in receipt of any wages: remain on suspension and/or remain in a precarious employment position with regard to my employment status'.
25 She requested a response by 11 December 2019 otherwise she would require to take further advice on her position.

21. By email of 10 December 2019 to the respondent, the claimant's union representative made representation on her behalf stating his belief that the respondent was guilty of an unlawful deduction of wages, the ongoing

suspension was 'a deliberate act designed to frustrate the relationship' and that the claimant had not received a response to her comprehensive grievance. (C41).

22. No response was received from the respondent to the communications of 2
5 and 10 December 2019 and the claimant considered she had no alternative
but to resign. She sent a letter of 7 January 2020 to the respondent (C42)
intimating her resignation on the basis that the respondent had 'acted in a
manner which clearly breaches the employer/employee relationship and as
such I feel that I have been left with no alternative other than to resign with
10 immediate effect'. The particular conduct of which she complained was:

- 'Your failure to adequately resolve my suspension from work.
- Non payment of wages from March 2019.
- Lack of response to my grievance letter of 5 September 2019.
- Lack of any response to my letter dated 5 December 2019'.

15 23. In evidence, the claimant advised that she considered the respondent were
'trying to make things as difficult as possible in hope that I would walk away'.
She had remained in contact and available for meetings and work but had not
been able to get back to work and her name in the community had
deteriorated.

20 24. The claimant's gross weekly pay prior to suspension on 30 October 2018 ran
at the rate of £276 per week giving her a net pay of £250.38 per week. That
resulted in a net monthly pay of £1083.86 (C85).

25 25. Following suspension her monthly pay was reduced to £1049.64 for the
months of November and December 2018 and January 2019. She was then
paid £827.58 to 21 February 2019. (C85). Thereafter there were no payments
made to her until 22 August 2019 when a payment was made in the sum of
£1416.61. No further payments were made to her beyond the payment on 22
August 2019.

26. The bank statements also disclosed information regarding payments of Universal Credit from DWP which ran at the rate of £700 for April 2019 and then £329.74 paid on each of 7 June, 21 June, 22 July, 3 August, 22 August 2019 and then at the rate of £717.82 from October 2019 – February 2020.
5 The amount increased to £809 for June 2020.
27. The claimant was also a member of the NEST pension scheme with the respondent. Her gross pensionable weekly pay amounted to £276 per week with the employer's pension contribution being 3%. Her weekly pension contribution amounted to £8.28. There were attached to the schedule of loss
10 produced letters from the NEST pension scheme of 28 September 2017; 4 March 2018 and 30 May 2018.
28. The claimant commenced a new job on 20 July 2020 earning £345.71 net per week and is a member of that new employer's pension scheme into which her employer makes a contribution of 26.6%.

15 **Submissions**

29. Written submissions were lodged on the part of the claimant subsequent to the hearing of 21 September 2020. The submissions rehearsed the factual matters and made submissions on the relevant law.
30. It was submitted that section 13 (1) of the Employment Rights Act 1996 (ERA)
20 indicated that an employer should not make a deduction from the wages of a worker unless that was authorised by statutory provision or relevant agreement or that the worker had previously signified in writing agreement to the making of the deduction. There was no statutory provision or relevant agreement in this case.
- 25 31. It was emphasised that wages were 'properly payable' in terms of section 13 ERA while an employee may be suspended from work provided they were ready willing and able to work as required (**North West Anglia NHS Foundation Trust v Greg 2019 IRLR 570**). In this case, the claimant had always been available for work had she not been suspended.

32. Reference was made to the case of **Western Excavating Limited v Sharpe 1978 IRLR 27** as regards the test for constructive dismissal. It was emphasised that the duty of mutual trust and confidence was implied into every contract and that an employer should not without proper and reasonable cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**). The question of whether the employer has committed a fundamental breach of the contract is to be judged according to an objective test and not by the range of reasonable responses (**Bournemouth Higher Education Corporation v Buckland 2010 ICR 908 CA**).
33. It was also submitted that the tribunal's function was to look at the employer's conduct as a whole in assessing whether there had been a breach of contract. A course of conduct could cumulatively amount to a fundamental breach.
34. Failure to deal with an employer's grievance could in certain circumstances amount to a fundamental breach of contract (**W A Goold (Pearmak) Ltd v McConnell & another [1995] IRLR 516**). In this case, a grievance had been properly articulated to the respondent.
35. In essence, it was submitted that the respondent's conduct in failure to make payment of wages properly due and failing to deal with the claimant's grievance once she had been suspended constituted a repudiatory breach of the claimant's contract of employment and so she was entitled to resign.
36. In this case, no potentially fair reason had been pled for dismissal and the dismissal was unfair. She should be awarded compensation. An award should also be made for unauthorised deduction of wages.

Conclusions

37. The claimant claims that she has been constructively dismissed as described in section 95 (1) (c) of the Employment Rights Act 1996. This states that there is a dismissal where the employee terminates the contract in

circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

38. The case of **Western Excavating** cited in the written submission for the claimant makes it clear that the employer's conduct must be a repudiatory breach of contract: 'a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract'. It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract.
39. The employee must then satisfy the tribunal that it was this breach that led to the decision to resign and not other factors.
40. Finally, if there is a delay between the conduct and the resignation, the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.
41. A claimant can rely on an implied term of the contract commonly called 'trust and confidence'. A breach of this term will commonly be a fundamental breach. This was as defined in **Malik v Bank of Credit and Commerce** again cited in the submission for the claimant where it was said that an employer shall not 'without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.
42. A fundamental term of any contract is the right to be paid. The claimant was suspended on 30 October 2018. The email indicating suspension stated that she was to be on 'contractual pay'. At that time, her contractual pay ran at the rate of £1083.86. Subsequently for the months of November/December 2018 and then January 2019, her pay was reduced to £1049.44. An amount was then paid to the claimant on 28 February 2019 of £827.58. She received no pay in March, April, May, June and July 2019 and then unexpectedly a payment on 22 August 2019 of £1416.61. No further payments were made to her thereafter through to her resignation on 7 January 2020.

43. In February/March 2019, arrangements were being made for a meeting with the claimant. There was an issue over representation for the claimant at that time but it would appear that meetings took place with the claimant's trade union representative and the claimant and from the information available, there appeared to be no good reason why a payment was not being made to the claimant in this period when discussions ensued. The payment of £1416.61 in August 2019 was not vouched by the respondent by any payslip or other information and it is not clear how that payment was made up.
44. On 5 September 2019, the claimant lodged a formal grievance with regard to her suspension; failure to follow that procedure through; and not being paid. A hearing on that grievance was arranged for 29 October 2019 between the claimant and respondent (through the services of a consultant) but no response was received from the respondent on the outcome of that meeting.
45. Despite representation from the claimant in December 2019, the respondent did not engage with the claimant in intimating any outcome of the grievance meeting or making any arrangements for pay to be restored. On 7 January 2020 the claimant resigned giving her reasons as a failure to resolve the suspension; non payment of wages from March 2019 and lack of response to the grievance that had been raised.
46. There was a failure by the respondent to attend to a fundamental term of the contract namely payment of wages throughout the period of suspension. The claimant had been advised that she would be suspended 'on contractual pay'. There had been engagement by her representative and discussion with the respondent on the suspension without any resolution being reached by the respondent.
47. Additionally, there had been a failure by the respondent to deal adequately with the grievance raised by the claimant. As was submitted under reference to **W A Goold (Pearmak) Ltd**, failure to deal with a grievance can amount to a fundamental breach of contract. The grievance procedure for the respondent is set out in page 31 of their Staff Handbook. In terms of the procedure, in the event that an employee feels aggrieved at any matter

relating to work, they should raise the matter and will then be invited to a meeting at which the grievance would be investigated. This procedure advised that an employee would be 'notified of the decision normally in writing normally within 10 working days of the meeting including your right of appeal'.

5 In this case there was a meeting on the grievance on 29 October 2019 but no outcome intimated to the claimant by 7 January 2020 when she resigned. Having raised a grievance and having the matter heard, it was incumbent on the respondent to respond either within the time limit they had specified for themselves or if justified within a reasonable period thereafter. They did
10 neither. In those circumstances, it would be considered that failure to deal with the grievance allied to the non payment of wages amounted to a fundamental breach of contract by breach of (a) the implied term of trust and confidence and (b) the express term of payment of wages.

48. Separately s 13 of the Employment Rights Act 1996 provides that an employer
15 should not make a deduction from a worker's wages except in certain specified circumstances. The suspension of the claimant in this case was on "contractual pay" and the obligation for payment continued until resignation. For a lengthy period, the claimant was not paid at that rate.

49. In all those circumstances therefore, the claims of unfair constructive
20 dismissal and unlawful deduction from wages succeed.

Remedy

50. In this case, the claimant seeks a monetary award in respect of unlawful deduction of wages and compensation in respect of her unfair dismissal.

Wages

25 51. In respect of the underpayment from 30 October 2018 (date of suspension) until 21 February 2019, the underpaid amount is £127.83.

52. The claimant was then not paid any wages for the period 21 February 2019 until 7 January 2020, but there was a payment of £1416.61 made to her on 22 August 2020.

53. The unauthorised deduction of her wages from 21 February 2019 until 7 January 2020 therefore amounts to £250.38 (net weekly wage) x 45 weeks = £11,267.10 - £1,416.61 = £9,850.49.

54. The total deduction is £9,850.49 + £127.83 = £9,978.32.

5 **Unfair dismissal**

55. In relation to the unfair dismissal, compensation comprises a basic award and a compensatory award. In addressing compensation, the Tribunal's task is to assess the loss flowing from the dismissal. Usually that requires an assessment of how long the employee would have been employed but for the dismissal. If an employer contends that the employee may have been fairly dismissed so that employment would not have continued indefinitely then evidence to that effect should be produced. No such evidence was available here.

56. In relation to the basic award, the claimant's date of birth was 12 September 1970; the period of her employment from 1 September 2017 – 7 January 2020 and given her age and length of service, the entitlement to a basic award is 3 x £276 (gross pay per week) = £828.

57. In relation to the compensatory award, the claimant started her new job on 20 July 2020 when her loss ceased. That would seem a reasonable period of time for the claimant to have gained further employment. The wage loss over the period 8 January 2020 to 20 July 2020 comprised a period of 27.86 weeks at £250.38 per week being £6974.87. In the same period, compensation in respect of lack of pension contributions amounted to £230.66.

58. The combination of basic award and compensatory award therefore amounts to £8033.53.

59. The claimant was in receipt of benefits by way of universal credit in the period 8 January to 20 July 2020 and so the Employment Protection (Recoupment of Benefits) Regulations 1996 as amended apply. The prescribed period is the period between 8 January and 20 July 2020. The judgment contains information as regards recoupment and advises of the amount by which the

monetary award exceeds the prescribed element in terms of the appropriate regulations.

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Employment Judge: Jim Young
Date of Judgment: 16 October 2020
Entered in register: 23 November 2020
and copied to parties

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