



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Roff

**Respondent:** Carosa Limited t/a Farleigh Coaches

**Heard at:** London South                      **On:** 30<sup>th</sup> November 2020

**Before:** **EMPLOYMENT JUDGE BECKETT** (sitting alone)

## **Appearances**

For the Claimant: In person

For the Respondent: Mr J Brotherton (solicitor, non practising)

## **RESERVED JUDGMENT LIABILITY**

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant's claim in respect of unauthorised deductions from wages was out of time.
3. However, the claim in respect of breach of contract in respect of the wages is well-founded.
4. The Claim relating to holiday pay is to be decided upon further submissions at the remedy hearing.

## **REASONS**

### Issues to be determined

5. The Claimant claimed unfair dismissal, breach of contract (notice pay and holiday pay) and unauthorised deductions from wages.

6. The issues to be decided were agreed with the parties to be as follows:

#### Unfair Dismissal

7. What was the principal reason for the Claimant's dismissal and whether it was a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The Respondent asserted that it was a reason relating to the Claimant's conduct following her suspension, and her refusal to answer questions relating to her non attendance at work.
8. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the Respondent in all respects act within the band of reasonable responses? The Claimant stated that the dismissal was unfair because the Respondent did not provide any evidence in respect of the alleged misconduct, nor did they respond in any way to her requests for such evidence. Further, whilst they purported to follow a fair procedure, they did not in fact do so.
9. In respect of the Claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of the Respondent's decisions.

#### Breach of contract

10. Was the Claimant entitled to payment for accrued but untaken annual leave?
11. The Claimant stated that she had not taken any annual leave in 2018, and was therefore entitled to be paid in lieu. The Respondent questioned how that could have happened, and disputed that no leave was in fact taken.

#### Unauthorised deductions from wages

12. Further the Claimant argued that due to her excessive working hours, she was underpaid her agreed pay of £9 per hour.
13. The Respondent denied her claim that she ever worked longer hours than her usual 7 hours per day.

#### The Hearing

14. The Respondent contested the claim, stating that the Claimant was dismissed for gross misconduct, and that proper procedures were followed to do so.

15. The Claimant gave sworn evidence. The Respondent called sworn evidence from Mr Michael Gibbs, the operations manager.
16. I considered the documents from an agreed Bundle of Documents which the parties had introduced into evidence, including those that I ruled admissible on the morning of the hearing.

#### Preliminary matters

17. At the outset of the hearing, before I heard any evidence, I had to deal with preliminary issues.

#### Postponement application

18. The application to postpone to enable the Tribunal to hear evidence from Dan Smith, the company director, was refused. Mr Smith had not provided a statement, nor had he attended the Tribunal.
19. The Claimant opposed the application, on the basis that she had attended the hearing with her bundle of documents, was not represented, and had been able to prepare properly.
20. Upon questioning from me as to why no statement had been taken from Mr Smith, given that the Respondent had instructed solicitors from the outset, Mr Brotherton simply responded "incompetence".
21. I decided that the Respondent's application should be refused. A further delay would be detrimental to both parties. In considering the overriding objective and a fair hearing for both sides, I decided that any further delay could affect the witnesses' evidence and cause injustice. Mr Gibbs had been present at all material times with Mr Smith from the date of suspension to the decision to dismiss. He was able to deal with the issues arising from the claim, in light of his role as operations manager.

#### Application to adduce further documents

22. The Respondent had brought an additional bundle of documents to the Tribunal, which had not previously been disclosed to the Claimant. After hearing representations from both sides, I allowed the Respondent to add further pages, on the basis that there was no prejudice to the Claimant.
23. I refused to allow the Respondent to add a document entitled "witness statement of D Smith", which had been prepared for the disciplinary hearing, into the bundle.
24. Mr Smith had not made a statement for the Tribunal and had not attended.

25. The Claimant objected to its addition, stating that she had complied with the rules and after receiving information from the Tribunal regarding Covid 19, she had not brought any additional documents as she thought they would not be accepted.
26. Therefore, in the circumstances set out above, and in accordance with the overriding objective, I decided that it was unfair and potentially prejudicial to the Claimant to allow the Respondent to rely on that document, having already refused an application to postpone for Mr Smith to attend.

### Findings of facts

27. Based on the evidence heard and the submissions made, I found the following facts.
28. The Claimant worked for the Respondent from 8<sup>th</sup> January 2018 to 14<sup>th</sup> January 2020 as an office assistant.
29. The Respondent is a coach company based in Kent with around 14 employees. They provide coaches for school runs and other private hire. They employ drivers and administrative staff. The company had a staff handbook, which they had updated every one to two years.
30. The Claimant was never given an official job title, nor did she ever receive a contract of employment setting out her duties and entitlements. She was not given a copy of the staff handbook, and believed that it related to the coach drivers not the administrative team, and that it was incomplete and out of date. I accept that this was indeed the position. The Respondent could not provide any written contract, nor point to any job description.
31. She was told that her pay was £9 per hour, but this was never stated in writing. Further, her pay slips had no hourly rate, or indeed the hours worked, recorded on them.
32. Some pay slips were provided to the Tribunal. They showed that for certain weeks, the Claimant was paid £250 (Bundle page 65), and for others she was paid £315 (Bundle page 62). There was no difference in the working hours for those different weeks.
33. She worked in excess of 40 hours a week at times, but her pay did not reflect that. She was underpaid during many weeks of her employment. She complained but was told that there was insufficient money "in the pot". The Respondent was not able to provide any timesheets or explain the discrepancies in pay.
34. The Claimant's pay was increased to £360 for the week ending the 13<sup>th</sup> September 2019, which was at the rate of £9 per hour for 40 hours. That rate of pay continued until she was dismissed.

35. I find that the Claimant was working 40 hours per week, and was insufficiently remunerated for the weeks prior to 13<sup>th</sup> September 2019.
36. The Claimant was not aware of her holiday entitlement and had not in fact taken any leave during 2018. She accepted having taken days between Christmas and New Year in that year, however she had not taken a week or fortnight off at all, and had not been away that year. If she took time off for a medical appointment, she made up the time on the same date.
37. However, the Respondent company did not allow any employee to carry over any untaken leave into the following year.
38. The Claimant was not aware that she would be required to work between Christmas 2019 and New Year. She had gone into work in her own time on 30<sup>th</sup> December 2019, to ensure that she could start properly on her return on 3<sup>rd</sup> January 2020.
39. It is common ground that on 31<sup>st</sup> December the Claimant received a telephone call, first from the director's partner, and later from Mr Gibbs, operations manager. She was told that she should have been at work as it was a "normal" working week. This was contrary to her understanding and previous experience in the company.
40. I find that at the time, the end of 2019 into 2020 the Respondent company did not have a proper policy regarding annual leave, nor was there a formal method used to apply for and be granted leave. I accept the evidence of the Claimant that asking for leave was done verbally, with dates then placed on a wallchart in the office.
41. Mr Gibbs said that he had set up a procedure for the granting of leave, with a form that had to be completed. No such form was placed in the bundle. The Claimant did not request leave, and the Respondent did not encourage her to do so, or advise her of her entitlement to leave. I prefer the evidence of the Claimant on this issue.
42. Further it is accepted that the Claimant did not have to work between Christmas and New Year the previous years.
43. In the ET3 and repeated in the evidence of Mr Gibbs, the Respondent claimed that that the Claimant had not attended work on 30<sup>th</sup> and 31<sup>st</sup> December 2019, or the 2<sup>nd</sup> and 3<sup>rd</sup> January 2020.
44. However, in evidence Mr Gibbs accepted that she had gone into the office on 30<sup>th</sup> December, although he stated only for between an hour and a half and an hour and three quarters. He said that he had checked video footage, although he had not produced any evidence of the CCTV or the timings.

45. In the phone call made by Mr Gibbs on 31<sup>st</sup> December 2019, he told the Claimant not to come into work until the Friday, which was 3<sup>rd</sup> January 2020. She was therefore directed not to attend that same day, or on 2<sup>nd</sup> January.
46. In a text message sent on 3<sup>rd</sup> January 2020 by the Claimant to Mr Smith, she apologised for the misunderstanding (Bundle page 34). The response sent by Mr Smith on the same date was that there would be a meeting to discuss her misconduct on Friday with him and Mr Gibbs.
47. It is accepted that on 3<sup>rd</sup> January the Claimant attended work early, and then asked to record the meeting with Mr Gibbs and Mr Smith. She recorded the initial request. She felt intimidated by them and wanted a record. The request was refused.
48. The Claimant was given a choice of staying for the informal chat, or having a formal meeting. She chose the latter. When she did so, Mr Gibbs stood up, puffed out his chest in an intimidating manner and immediately told her that she was suspended, and she had to return the company telephone and keys. She returned her telephone and keys, and left the office. I accept the Claimant's evidence regarding this meeting.
49. On that same day the Claimant received a letter suspending her (Bundle page 36). She was particularly concerned by an allegation within that letter regarding her previous behaviour and accountability (item D). She asked for details regarding this, as she had not had any issues at work before. Mr Gibbs accepted that he did not provide any details in respect of this aspect before the Claimant was dismissed.
50. In evidence to the Tribunal, Mr Gibbs stated there were "many things that cropped up", in respect of her attitude towards other staff, her timekeeping and payments being made to clients that were not authorised. He was unable to provide any evidence relating to those allegations, and it is of note that this aspect was not relied upon for the dismissal.
51. In response to the suspension letter, the Claimant sent a lengthy email setting out requests for information as to why she had been suspended and asking for further time to prepare. It is accepted that the Respondent did not consider her requests to delay the meeting for evidence to be provided or for her to arrange for a representative to attend with her. She therefore did not attend the first planned meeting on 6<sup>th</sup> January 2020.
52. The Respondent simply delayed the meeting by 48 hours, but did not address her issues, nor did they provide any details about the allegations.
53. When Mr Gibbs was asked at the Tribunal why he had not allowed time for the Claimant to prepare or get a representative, he stated that he "just wanted to get the situation under control and dealt with". He later stated that the incidents were fresh in their minds and that he wanted to "get it done and move forward". The Respondent did not comply with the disciplinary procedure, in that no documents or information were provided following the

request from the Claimant, and the Claimant was not given adequate time to prepare, and I find that the reason for that was indeed that they just wanted the situation to be dealt with.

54. Further the Respondent did not check the CCTV until after the claim was made to the Tribunal. This would have assisted in providing some evidence as to when the Claimant had attended work, and for how long.
55. The meeting took place on 8<sup>th</sup> January 2020. Again, prior to the meeting, the Claimant had set out in detail in a further email the reasons that she could not attend. She again asked for further information as to why she was suspended, and the basis of the disciplinary proceedings. She asked what dates were being relied upon for her absence from work, and what previous behaviour was being raised by the Respondent.
56. The Respondent did not reply to this email, nor did they consider her request to delay the meeting so she could arrange an appropriate representative to attend. Mr Gibbs admitted in evidence that he did not consider postponing the meeting that day.
57. The Claimant had been able to arrange for a Trade Union representative to assist her, but had not had any replies to her reasonable requests for details.
58. I find that it was reasonable in light of the particular circumstances of this case, where the Claimant had been intimidated by Mr Gibbs, that she did not attend those further meetings.
59. The meeting did go ahead in the absence of the Claimant and she was dismissed for gross misconduct. In the letter delivered by hand to her home address the following morning (Bundle page 46), she was advised of her right to appeal.
60. In that letter the Respondent cited eight reasons leading to its decision to dismiss for gross misconduct. The first reason was that she was absent without permission. Thereafter they relied upon the findings including that she was aggressive and refused to comment when asked to do so", that she "refused to explain her actions", that "there was consequent damage to company business" and that she had been "totally unwilling to speak to [the company] both informally and formally" (Bundle pages 51 and 52).
61. I do not accept the contention that it was the Claimant, and not the Respondent, who was aggressive. I find that the Claimant was intimidated at the meeting on 3<sup>rd</sup> January 2020. I also find, looking at the emails sent by the Claimant, and indeed the first contact via text message, that the Claimant was willing to speak to the Respondent; she simply asked for information and time to do so.
62. The Claimant indicated by a further email that she wanted to appeal, and repeated her requests for details of the allegations, and time to prepare. She advised the Respondent that she could not attend an appeal without knowing

the details of the allegations that led to her dismissal (Bundle page 55 and 57).

63. The appeal was heard in her absence and the dismissal was upheld. By that time, the Claimant had started proceedings in the Tribunal.

64. I find the evidence of the Claimant credible and consistent. I accept her reasons for not attending the meetings on 6<sup>th</sup> or 8<sup>th</sup> January 2020. The Respondent was not able to explain why the reasonable requests made by the Claimant had not been answered. Mr Gibbs initially said that he had replied, however when asked specific questions about his alleged replies, he conceded that he had in fact not done so.

#### Law relating to unfair dismissal

65. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 14<sup>th</sup> January 2019.

66. Section 98 of the 1996 Act deals with the fairness of dismissals.

67. Section 98(4) provides:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case”.

68. In respect of misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Home Stores v Burchill 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee’s guilt.

69. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

70. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.



Conclusions

71. The first issue is what was the principal reason for dismissal. I find that the reason is misconduct based on the Respondent's belief that the Claimant had taken unauthorised leave from work. Conduct is a permissible reason for dismissal.
72. In closing submissions, the Respondent argued that the principle reason was in fact the Claimant's behaviour in refusing to answer questions as to why she had not been at work on the relevant dates. I reject that argument. It is clear from the documents provided and the evidence heard that the principle reason was the unauthorised leave. That was the reason for the informal meeting to discuss misconduct as drafted in the text prior to the Claimant's refusal to answer questions at that meeting.
73. The next question is the three stages in the BHS v Burchell case. First, did the Respondent genuinely believe that the Claimant committed the misconduct, that is that she did not attend work on the relevant dates, and had not been granted leave. I find that they did, although only in respect of the morning of 31<sup>st</sup> December.
74. Second, was that belief held on reasonable grounds? The burden of proof in respect of this overall question of fairness is neutral. I must consider the reasonableness of the Respondent's conduct, not the injustice to the Claimant.
75. I find that the belief was not held on reasonable grounds. The company had expected the Claimant to be at work on that date, and had therefore telephoned her to find out why she was not. However, after that, they had found out that she had attended the previous day, and it was the Respondent who told the Claimant not to come into work again that week.
76. Third, was there a fair and reasonable investigation? I find that there was not. Mr Gibbs checked the CCTV for 30<sup>th</sup> December. However, his evidence was that he had done so when the Tribunal claim had been made. Further, the Respondent included in the allegations a date upon which they had told the Claimant not to attend. There was no further investigation.
77. The Claimant had told the Respondent that it was a misunderstanding. The Respondent did not raise any issues regarding her attendance or work prior to December 31<sup>st</sup> 2019. I make it clear, that it is immaterial how the Tribunal would have handled the events or what decision it would have made. I do not, nor am I entitled to, substitute my own view for that of the reasonable employer.
78. As regards procedure generally, I find that the procedure followed was not reasonable. The Claimant was suspended immediately, and then a hearing was arranged for the next working day. No details of the allegations made were included in the letter. When such details were requested, the Respondent failed to provide them. The rescheduled meeting was 48 hours

later, again affording the Claimant no time or opportunity to deal with the allegations made.

79. Finally, the question is whether the dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for the Claimant not attending work in the circumstances outlined above? I find that they could not. Essentially Mrs Roff was dismissed for failing to attend work on the morning of December 31<sup>st</sup> only.
80. I find that no reasonable employer in the Respondent's position would have refused to provide even basic details of the alleged misconduct. Further, the Respondent acted unreasonably in refusing to move the dates of the meetings to allow the Claimant to obtain a representative.
81. I do not consider the fact of her non attendance at the meetings significant. She had attended the first arranged meeting, and had been intimidated. She gave the Respondent clear reasons for her non attendance at the further meetings, which I found to be reasonable.
82. I have considered the size of the Respondent's undertaking. This is a small employer, with some 14 or so employees. However, the Respondent was aware that the policies were needed as they had drafted and updated a staff handbook. That handbook, however, was not provided to staff.
83. Within the range of reasonable responses, the Respondent's size and resources do not excuse the unfairness in management's actions in this case.
84. No reasonable employer would have dismissed for being absent for less than one day in the circumstances, where the employer had not told the employee that they were required to attend on that date.
85. I find, therefore that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

#### Unauthorised deductions from wages and breach of contract

##### Wages

86. In respect of a claim for unauthorised deductions from wages, the Claimant is out of time. The final date in the series of dates complained of was not within 3 months of her dismissal. There is no relevant ACAS extension to apply.
87. I do not extend the time limit as it was reasonably practicable for the Claimant to present a claim in time. The Claimant had raised the issue of underpayment with the Respondent on a number of occasions. Further the Claimant, upon being suspended, immediately researched her legal rights. There was no reason that this could not have been done when the unauthorised deductions were made.

88. However, it does amount to a breach of contract claim. Under section 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an industrial tribunal in respect of a claim of an employee for the recovery of damages or any other sum, if the claim arises or is outstanding on the termination of the employee's employment.
89. In closing submissions I heard from the Respondent on this point, as Mr Brotherton addressed the Tribunal if I were to find the claim was not out of time. Those submissions have been considered.
90. The Claimant's pay fluctuated for no reason that the Respondent could explain. As outlined above, she was entitled to £9 per hour and did not receive full pay until September 2019.
91. From September 2019 the Respondent paid the Claimant £360 per week. This supports the evidence of the Claimant, that she had complained about being underpaid regularly, and was thereafter paid her proper wages.
92. Therefore, this breach of contract claim is also successful.

#### Notice period

93. The Claimant brought a breach of contract claim in respect of her entitlement to notice. The Respondent states that it was entitled to dismiss her without notice for gross misconduct for her unauthorised absence from work.
94. I must decide if the Claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the Claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made about the Claimant's conduct, I must decide for myself whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.
95. I have set out my findings about the actions of each party above. I find that the Claimant was not guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.
96. She was therefore entitled to notice pay. Her complaint of breach of contract is successful.

#### Holiday pay

97. In respect of holiday pay, the Tribunal will hear further submissions at the remedy hearing, if this claim is pursued.

98. The Claimant stated that she did not take her full leave allowance in 2018 or 2019. She was not aware of her entitlement to leave.
99. Regulation 13 of the Working Time Regulations 1998 provides that, in the absence of any written agreement, the worker's leave year begins on the date on which the employment begins and each subsequent anniversary of that date. Therefore, the Claimant's leave year would start on 8<sup>th</sup> January each year.
100. Under regulation 13(9) leave to which a worker is entitled may only be taken in the leave year in respect of which it is due.
101. If the position is as set out above, the Claimant would only be entitled to the relevant proportion of leave which arose between 8<sup>th</sup> January and 14<sup>th</sup> January 2020.
102. However, in King v The Sash Window Workshop Ltd [2017] EUECJ C-214/16 the European Court of Justice decided that national provisions or practices are precluded that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive [leave years] because his employer refused to remunerate that leave.
103. Having dealt with the issue of workers who were not certain as to payment of annual leave days, the Court stated that "it must be noted that any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave".
104. I did not ask parties to deal with this particular aspect of carrying leave over, and would ask the parties to prepare submissions in respect of these issues to be dealt with at the remedy hearing.

### Remedy

105. Remedy is to be decided at a further hearing.

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**Employment Judge Beckett**

Dated: 7 December 2020