



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lowery

Respondent: Mr L Dhami t/a Yarm Post Office

HELD AT: Newcastle, by video

ON: 24 November 2020

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: In person

Respondent: No attendance (written representations made)

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant brought claims alleging that:
 - 1.1. She was entitled to a redundancy payment.
 - 1.2. The respondent breached her contract of employment by dismissing her without notice.
 - 1.3. The respondent failed to pay to her the amount due to her on termination for accrued but untaken holidays under the Working Time Regulations 1998 (WTR).
2. The respondent did not file a response to the claim. In correspondence sent to the Tribunal ahead of the hearing he said he had become aware of the case belatedly because he had not been collecting post from his former business premises. He did not ask for an extension of time to file a response. Ahead of this

hearing the respondent submitted a statement by email in which he said 'can I offer my humblest apologies for not being able to attend this hearing in person but I work in the Lakes and my students have got crucial practical assessments that I need to supervise on their Research Projects.' In that statement the respondent set out what I took to be the grounds on which he would wish to oppose the claimant's claims. He did not ask for the hearing, which was to take place by video, to be postponed. Employment Judge Martin considered the claimant's correspondence ahead of the hearing and informed the respondent that the contents of his statement would be considered at the hearing.

3. The issues for me to determine in relation to each of the claimant's claims were:

Breach of contract - notice

- (a) Was the claimant dismissed by the respondent; if so when?
- (b) If the claimant was dismissed, did the respondent give the claimant notice to terminate her employment?
- (c) How much notice was the claimant entitled to, taking into account section 86 of the Employment Rights Act 1996?

Redundancy payment

- (d) Was the claimant dismissed by the respondent; if so when?
- (e) Was the dismissal by reason of redundancy?
- (f) If so, what is the amount of the statutory redundancy payment due to the claimant?

Holiday pay

- (g) What was the claimant's leave year?
- (h) How much of the leave year had passed when the claimant's employment ended?
- (i) How much leave had accrued for the year by that date?
- (j) How much paid leave had the claimant taken in the year?
- (k) How many weeks/days remain unpaid?
- (l) What is the relevant weekly/daily rate of pay?

Legal framework

Breach of Contract: entitlement to notice

- 4. The Employment Rights Act 1996 (ERA) section 86 lays down minimum periods of notice which take effect as implied terms in a contract of employment. Under those provisions, an employee is entitled to one week's notice for each year of continuous employment, up to a maximum of twelve weeks' notice.
- 5. If an employer terminates employment by giving the employee less notice than they are entitled to, that is a breach of contract.
- 6. To constitute notice of termination notice must unambiguous. It is not enough for the respondent to indicate that an employee's job is at risk or that it may be terminated or even that it is probable that it will be terminated. Even if a date of possible termination is specified, it is no enough to say that termination on that

date is 'likely' or even probable. Nor is it enough to say that termination is inevitable if it is not clear from the notice when the termination is to take effect.

7. Where a claim of breach of contract is upheld, the Tribunal may award damages. The damages will be a sum equivalent to the wages which would have been earned, between the time of actual termination and the time which the contract might lawfully have been terminated (by due notice). However, the employee is under a duty to mitigate her loss and a claimant must give credit for any earnings from an alternative source during the notice period.

Statutory redundancy pay

8. An employee is entitled to a statutory redundancy payment if she a) is dismissed by reason of redundancy; and b) at the relevant date has at least two years' continuous employment with the employer.
9. Redundancy is defined in ERA s139. It includes dismissals that are wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. In respect of any claim for a redundancy payment referred to an Employment Tribunal, any dismissal is presumed to be by reason of redundancy unless the contrary is proved (ERA 1996 s163(2)).
10. The amount of a statutory redundancy payment is calculated in accordance with ERA 1996 s162. In essence, for each complete year of continuous employment ending with the 'relevant date' (up to a maximum of 20 years) the employee is entitled to one week's gross pay (as defined) multiplied by the age factor applicable to the year in question.
11. The 'relevant date' is usually the date upon which employment actually ends. Where, however, the employer has unlawfully given the employee less than the statutory minimum period of notice under ERA 1996 s 86, then the relevant date will be the date of expiry of that statutory minimum notice, running from the date on which the employer gave the actual, inadequate, notice to the employee (ERA 1996 s 145(6)).

Continuous employment

12. The concept of continuous employment is relevant to the amount of notice an employee is entitled to and the amount of any statutory redundancy payment. The rules for determining the length of an employee's continuous employment are addressed in chapter I of part XIV the Employment Rights Act 1996.
13. Section 211 provides as follows:
 - (1) An employee's period of continuous employment for the purposes of any provision of this Act—
 - (a) (subject to [subsection] (3)) begins with the day on which the employee starts work, and

- (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.
14. Section 212(1) says: Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
15. Section 210(5) provides that a person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.
16. Section 218 provides that where a trade or business, or an undertaking, is transferred from one person (the transferor) to another the transferee)—(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of the period of employment. In other words, an employee's employment with the transferor counts towards her period of continuous employment with the transferee. Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 also achieves the same result.

Holiday pay

17. The Working Time Regulations 1998 (WTR) provide workers with a right to paid holiday. There are two elements to that right: a right to four weeks' leave in each leave year under reg 13 and, separately, a right to an additional 1.6 weeks' leave in each leave year under reg 13A.
18. A worker's leave year can be agreed between the employer and worker in a "relevant agreement", as defined in regulation 2. If there is no such agreement, a worker's leave year for these purposes begins on the date on which their employment begins and each subsequent anniversary of that date.
19. On termination of employment, a worker is entitled to a payment in lieu of leave that has accrued but remains untaken as at the termination date, by virtue of Reg 14. That provision says:
- 14(1) This regulation applies where— (a) a worker's employment is terminated during the course of his leave year, and (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.
- (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
- (3) The payment due under paragraph (2) shall be—... (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula— $(A \times B) - C$
where—
A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

Evidence and facts

20. I heard evidence from the claimant and considered the respondent's statement.

21. I make the following findings of fact.

22. The claimant was employed to work in the business or undertaking of Yarm Post Office from 12 June 2000. The claimant was employed as a counter clerk and office manager. In 2006 someone else took over the business and the claimant became employed by the new business owner in the same job. There was no break in the claimant's employment. Then on 7 March 2012 the respondent took over the business of Yarm Post Office and the claimant became employed by him in the same job. Again, there was no break in her employment. The claimant worked in the same job, in the same undertaking since June 2000 without any breaks other than for any sickness and holiday.

23. In his written statement submitted for this hearing the respondent says 'The employer against whom his action is taken actually hasn't existed as an entity since August 2020'. He also refers to 'Yarm PO Ltd'. There is, however, no record at Companies House of any company going by that name. The claimant told me she believed she was employed by the respondent personally and that her pay slips simply described her employer as 'Yarm Post Office' not Yarm Post Office Limited or Ltd. I am satisfied that the claimant was employed by Mr Dhami personally.

24. At the time of the events with which we are concerned the claimant was employed to work 9 hours per week, for which she earned £84.57 per week.

25. On 22 March 2020 Mr Dhami told the claimant and a colleague he could not employ them any more but soon after the position changed as Mr Dhami said he would see if he could furlough them. He confirmed that he could and from then until 17 July 2020 the claimant remained on furlough.

26. The claimant was aware that Mr Dhami was in discussion about the future of the Post Office. On 17 July 2020 the claimant received a text from Mr Dhami in which he said her employment was ending.

27. In his written statement submitted for this hearing the respondent refers to being in dispute with Post Office Limited. He refers to a process of arbitration and says 'I was providing every opportunity for [the claimant] to stay in employment as one of the options of arbitration could have been that PO Ltd could have continued to run Yarm PO centrally and taken on the existing employees under TUPE.' He says 'She actually received five months of wages that were much greater than any amount she would have received from working her notice.'

28. I am satisfied that at no point before 17 July did the respondent give the claimant notice to terminate her employment. Any conversations the respondent had with the claimant regarding the potential termination of her employment fell short of constituting notice to terminate employment.
29. The claimant was not paid anything in lieu of notice. Between her employment ending on 17 July 2020 and the date of this hearing she has not had any earnings or received any state benefits.
30. The respondent has not paid the claimant a redundancy payment.
31. Nor has the respondent paid the claimant anything in respect of accrued but untaken holidays. The claimant's holiday year ran from March to March each year. Between 7 March 2020 and 17 July 2020 she had taken no paid holidays.

Conclusions

Breach of contract – notice pay

32. The claimant was entitled, under section 86 of ERA 1996, to be given notice by the respondent if he wished to terminate her employment. The respondent terminated the claimant's employment without notice on 17 July 2020. The failure to give notice was a breach of contract by the respondent.
33. The claimant's complaint that the respondent breached her contract of employment by terminating it without notice is, therefore, well founded.
34. The claimant was employed by the respondent from 7 March 2012, when he took over the business of Yarm Post Office. Because there was a transfer of a business or an undertaking from one person (the transferor) to the respondent, section 218 of ERA 1996 applies. This means the period of the claimant's employment in the business or undertaking at the time of the transfer counts as a period of employment with the respondent and the transfer does not break the continuity of the period of employment. The period of the claimant's employment in the business or undertaking of Yarm Post Office began on 12 June 2000 and is presumed to have been continuous. The claimant's period of continuous employment with the respondent is, therefore, treated as having started on 12 June 2000 rather than 7 March 2012. In other words, an employee's employment with the transferor counts towards her period of continuous employment with the transferee for the purposes of her entitlement to notice pay (and redundancy pay).
35. As the claimant had been continuously employed for more than 12 years as at 12 July 2020, she was entitled, under section 86 of ERA 1996, to be given 12 weeks' notice by the respondent if he wished to terminate her employment.
36. Had the contract been terminated lawfully (ie with 12 weeks' notice), the claimant would have received a further 12 weeks' pay. The claimant earned £84.57 per week at the time of her dismissal. Had she been given her contractual notice she would have been entitled to be paid her full weekly pay in the notice period. The

claimant has not had any earnings during the period of 12 weeks after her employment ended. Therefore, I award damages of £1014.84 equivalent to 12 weeks' pay.

Redundancy payment

37. The claimant was dismissed by the respondent. Her dismissal is presumed to be by way of redundancy. Even if there was no statutory presumption of redundancy, I would have found in this case that the claimant was dismissed by reason of redundancy because the reason she was dismissed is that the respondent stopped operating the business and no longer needed any employees.
38. The claimant is, therefore, entitled to a redundancy payment under the Employment Rights Act 1996.
39. As recorded above, the claimant's period of continuous employment began on 12 June 2000, when she first started working in the business of Yarm Post Office. The claimant was dismissed without notice on 17 July 2020. Therefore, by the time of her dismissal she had 20 complete years' continuous employment.
40. The claimant was 62 years of age when her employment ended. She is therefore entitled to a redundancy payment equivalent to 1.5 weeks' pay for each of her 20 years of continuous employment (ie 30 weeks' pay in total).
41. A week's pay for the claimant was £84.57. She is therefore entitled to a redundancy payment of £2,537.10.

Holiday pay

42. The claimant's holiday year ran from 7 March each year. Between 7 March 2020 and the date her employment ended (17 July 2020), the claimant took no leave under the WTR.
43. Under WTR reg 14 the claimant was entitled to a payment on termination in respect of her untaken leave. The respondent has not paid the claimant what is owing to her. The claimant's complaint that the respondent failed to pay to her the sum due under regulation 14 of the Working Time Regulations 1998 in respect of accrued but untaken annual leave is, therefore, well founded.
44. As at the date her employment ended, 133 days (ie 36%) of the leave year had passed. Over the course of a full leave year, the claimant was entitled to 5.6 weeks' leave. At the date of termination she had accrued 36% of that entitlement ie 2 weeks. Applying the formula in regulation 14(3), the claimant would be entitled to two weeks' pay. However, she told me she was only claiming £84.57 ie 1 week's pay. Therefore, I ordered the respondent to pay to the claimant £84.57.

ACAS code

45. The respondent has criticised the claimant, saying she has 'failed to follow the recommended processes and procedures for de-escalation and resolution through communication between the parties themselves, then acas before landing in the court of the EET.'
46. If it appears to the Tribunal that an employee has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures the tribunal may decrease certain awards (including those of the type I have made in these proceedings) by up to 25% if it considers it just and equitable in all the circumstances to do so (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992). In relation to grievances about workplace matters, the Code says 'If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.' However, the Code makes it clear that it does not apply to redundancy dismissals. That being the case, it is inapplicable in this case. In any event, it, arguably, does not apply to individuals who are no longer employed. Furthermore, even if the Code was applicable, it was in no sense unreasonable for the claimant to bring Tribunal proceedings without first lodging a formal grievance with the respondent. There can have been no doubt that the claimant was entitled to notice, a statutory redundancy payment and holiday pay. Payment was due on termination or, at the latest, the next pay date after termination. As at the date of the hearing the respondent still had not paid to the claimant what was due to her by law. The respondent seems to be suggesting that the claimant should have entered into negotiations to compromise her rights and that it was unreasonable for the claimant to enforce her rights. I disagree. There was no unreasonableness on the part of the claimant. She was entitled to seek a remedy through the Tribunal for the breaches of her rights.
47. The respondent also refers to communicating with ACAS. If the respondent is suggesting that the claimant failed to comply with section 18A of the Employment Tribunals Act 1996 then I disagree. Section 18A says 'Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.' The claimant complied with that requirement, as is evidenced by the fact that she was provided with an Early Conciliation certificate (number R1 93247/20/81). Prospective claimants are not required to do any more than that. In particular, there is no requirement that they engage in conciliation with a proposed respondent.

Employment Judge Aspden

Date 19 March 2021