



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Ross

**Respondent:** Sedge Funding Limited

## REASONS OF THE EMPLOYMENT TRIBUNAL

**Held at:** Newcastle upon Tyne Hearing Centre  
**On:** 19<sup>th</sup> January 2021 & 8<sup>th</sup> February 2021 (by CVP)

**Before:** Employment Judge Martin

**Members:**

### *Appearances*

**For the Claimant:** Mr S Kitson (Counsel)  
**For the Respondent:** Mr R Dos Santos (Operations Manager)

## REASONS

### Introduction

1. The claimant gave evidence on her own behalf. Mr Roger Dos Santos Operations Manager, Mr Wayne Sedgwick, Mr Peter Sedgwick directors of the company gave evidence on behalf of the respondent. Mr Daniel Beals employee of the respondent company provided a witness statement but did not attend to give evidence.
2. The tribunal was provided with a bundle of documents by the claimant and a bundle of documents by the respondent marked Appendix A and B. The respondent produced a couple of additional documents during the course of the hearing being the claimant's last payslip and P45.

### The law

3. The tribunal considered the following law:-

Section 86(1) the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more:-

- (a) is not less than one week's notice if his period of continuous employment is less than two years;
- (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years.

Section 97(1) of the Employment Rights Act 1996. In this part "the effective date of termination":-

- (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires;
- (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

Article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994. "Proceedings may be brought before an employment tribunal in respect of a claim of an employee of the recovery of damages or any other sum if

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

Section 13(3) of the Employment Rights Act 1996 "where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."

Regulation 14(1) of the Working Time Regulations 1998 "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"

Regulation 14(2) WTR 1998 "where the proportion 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 accordance of lieu of leave."

The issues

4. In relation to the complaint of breach of contract and notice pay, the tribunal had to consider whether the claimant was in fundamental breach of contract and whether the respondent was entitled to dismiss the claimant without notice. In that regard the tribunal had to consider what was the breach of contract and whether the respondent was entitled to dismiss the claimant for that breach without any notice.
5. The tribunal also had to consider whether the respondent could dismiss the claimant without notice anyway during the probationary period.
6. The tribunal then had to go on to consider what, if any, notice was due and owing to the claimant and, if so, in what amount.
7. In relation to the complaint of holiday pay, the tribunal had to consider what was the holiday year, what holidays had been taken and what holidays if any were outstanding, if so in what amount.
8. In respect of the complaint of unlawful deduction from wages, the tribunal had to consider what was the date of dismissal, whether the claimant was due any wages up to the date of dismissal and, if so, for what period and in what amount.
9. During the course of the hearing the claimant withdrew part of her claim for unlawful deduction from wages. However, she is still pursuing her claim regarding wages up to the dates she asserts she was dismissed, namely wages for the period between 10<sup>th</sup> August – 10<sup>th</sup> September 2019.

#### Findings of fact

10. The respondent is a small company providing advice on business loans to small medium sized businesses (SMEs).
11. The claimant was employed by the respondent as a business consultant. She commenced her employment on 29<sup>th</sup> June 2020. Her gross monthly earnings were £2,000 and her net monthly earnings were £1,589.04.
12. Her contract of employment stated at paragraph 4 that she was employed on a probationary period with an initial trial period of up to eight weeks. The contract is signed by the claimant on 29<sup>th</sup> June. She admits that she read it, although she thought she just scanned it.
13. The claimant says that she was not told she was employed on an eight-week trial period. The e-mails sent to the claimant making the job offer made no reference to a probationary period. The e-mails sent by the claimant give her e-mail address as [jross70@outlook.com](mailto:jross70@outlook.com). She accepts that the contract did refer to a probationary period, albeit that she was unaware of it or had not registered it at the time.
14. The claimant's role was to contact customers to sell the CBILS scheme which is the Coronavirus business loans scheme. She was given a database of potential customers to contact.

15. During the claimant's first week of her employment, the respondent's contract with their call centre was terminated. It was to be replaced by another call centre.
16. The claimant said that the respondent did not comply with the COVID rules on social distancing and handwashing. The respondent says that it was complying with those rules and had rules in place. The respondent says it was undertaking a vigorous cleaning programme.
17. The claimant said that she tried to get further contacts to generate new work and was proactive in doing so. The respondent said that the claimant was given a database and plenty of clients to contact.
18. It is common ground that, by the time the claimant's employment terminated five weeks after she commenced her employment, she had not secured any sales or contracts.
19. The claimant said that, during the early weeks of her employment, she was helping the respondent with their website. She amended some spelling mistakes. She says that she also amended a spelling mistake on an internal poster. The respondent says that the claimant defaced that poster and defaced another one. She claimant denies damaging either of the posters. This alleged incident arose around the first week or so of the claimant's employment. No action was taken against her at the time.
20. The respondent says that the claimant refused to wear her uniform. The claimant, on the other hand, says that she did wear her uniform when she was asked by the respondent to do so.
21. The respondent says that Mr Dos Santos was the claimant's manager. She says that she was not aware he was her manager until later on in her employment when she was told by Mr Dos Santos that he was her direct line manager.
22. The claimant says that, in the last few days of her employment, she felt she was being treated differently and felt that she was being ignored. For example she said that the respondent directors were not giving her any eye contact. She acknowledged that the respondent may not have been particularly happy with her performance. The respondent said that the claimant was employed in a sales role and, at this stage, she had produced no sales and indeed did not produce any sales during the course of her employment.
23. The respondent says that, on 31<sup>st</sup> July 2020, it met to discuss concerns about the claimant's performance.
24. On 3<sup>rd</sup> August 2020 Mr Wayne Sedgwick, one of the directors said that he was feeling a little under the weather. The claimant was concerned that he might bring COVID into the office. She looked to book herself a COVID test which she managed to do for later that day.
25. A meeting took place with the claimant on 3<sup>rd</sup> August 2020. Mr Dos Santos, who conducted that meeting in which he says the claimant was dismissed, does not

refer to that meeting at all in his witness statement. When he was questioned about the meeting by the tribunal, he indicated that it referred to matters in his report which he said he had produced by the time of that meeting. He said his witness statement referred to the report.

26. The claimant says that she was called into a meeting with Mr Dos Santos because she said that Mr Dos Santos was not happy that she was leaving early to take a COVID test. She says she was told that she was suspended. The claimant admits that she was told that there was a problem with her work, but that Mr Dos Santos did not go into any detail with her. She said that he did not go through any of the matters, which he suggests are referred to in his report which is undated and marked performance report and in the respondent's bundle. Mr Dos Santos said in evidence that, at that meeting he went through that report with the claimant and dismissed her immediately. The claimant however says that, although it was mentioned to her there was a problem with her work, she was told she was suspended and understood this was because she was leaving early to get a COVID test.
27. On 7<sup>th</sup> August 2020 at 14:29 Mr Dos Santos sent an e-mail to Mr Sedgwick referring to the claimant's performance. It states "As discussed Jill has failed her initial trial and has been fired. Please prepare her P45. Please find attached requested report. Then it then goes on to ask him "to advise on any changes he would like me to make if you think I've missed anything out".
28. The report is undated and refers to Jill Ross performance report. It states that her performance recently has come into question in a number of areas and goes on to refer to a number of issues with how the systems work and the number of calls which are being made by her. It refers to the claimant sending out e-mails and not following systems and protocols. It also talks about her target on calls. It states that she should be making 95 recorded calls a day and sets out the number of calls which they say she has made during that period; which number of calls is substantially below that target – they actually refer to calls in June but appear to have meant July and August. The report goes on to indicate that there has been extra monitoring of calls over the last few days and that the amount of calls has dropped dramatically. The performance report then goes on to refer to a number of occasions when the claimant has apparently been negative towards targets, instructions and guidance given by Mr Dos Santos and the impact of that on the team. The report also goes on to indicate that the claimant appears to have a problem with following guidance and instructions. The final paragraph indicates that, at the beginning of her employment, she refused to wear the staff uniform and defaced/removed fixtures and fittings of company property in the office.
29. The e-mail of 7<sup>th</sup> August was sent to Mr Peter Sedgwick.
30. On the same day, 7<sup>th</sup> August, Mr Peter Sedgwick e-mailed the claimant at 15:59. The e-mail was sent to [jsross@outlook.com](mailto:jsross@outlook.com). The email is at page 12 of the bundle. It states "It is with great regret that I must inform you that I am terminating your employment with us in accordance with the probationary period of the employment contract". It then goes on to state that "there has been a significant number of concerns raised including the following: significantly below the expected

number of daily calls; not following the company protocols such as sending a customer an e-mail and cancelling the deal without any follow-up call; and calls and performance dropping further when there is no management in the room". It states "the termination of employment is with immediate effect and there is no requirement to return to the office"

31. In his evidence to the tribunal, Mr Peter Sedgwick was unable to explain why he sent an e-mail on 7<sup>th</sup> August to terminate the claimant's employment if it had already been terminated on 3<sup>rd</sup> August by Mr Dos Santos; nor was he able to explain why, if it had been terminated already, he did not simply confirm the position. Mr Dos Santos was also unable to explain in evidence why that e-mail had been sent by Mr Peter Sedgwick, if as alleged by him, he had already dismissed the claimant on 3 August.
32. The claimant said that she understood that she had been suspended and was waiting to hear from the respondent. She says that she did not contact the respondent until after the August pay date and had not heard from them at all during August. She said that the respondent had not indicated when it wanted to meet with her and understood they would contact her. She did not contact them. She said that she had asked her union about this. She said they had told her to wait for the respondent to contact her as the respondent had suspended her.
33. The claimant said that when she logged into her NEST account, she noted that no pension contribution had been made, so she contacted HMRC. It was at that stage she was told by HMRC that they had been told she was no longer working for the company since 7<sup>th</sup> August 2020.
34. On 7<sup>th</sup> September 2020 the claimant e-mailed the respondent. The e-mail is at page 9. She asked if they could e-mail her August payslip and outstanding salary payment. Mr Peter Sedgwick then replies on the same day. He indicates he had to clarify her tax code with HMRC and that payment's now been sent. He says he is posting the payslip and P45.
35. The claimant then e-mails again on 10<sup>th</sup> September asking what he means by issuing her P45. She refers to the fact that she was suspended on 3<sup>rd</sup> August for poor performance pending an investigation and that she would be contacted by 4<sup>th</sup> August but heard nothing from them. She states that there must surely be some process or discussion around the allegation. She goes on to ask if she has been dismissed from the company and, if so on, what date as she has had no notification whatsoever. Peter Sedgwick then replies that he sent the attached e-mail of 7<sup>th</sup> August. He states that her employment was terminated a month ago. Those documents are at pages 8 and 9 of the bundle A. The claimant then e-mails back on 18<sup>th</sup> September indicating that she was not aware that she had been verbally dismissed and that the e-mail of 7<sup>th</sup> August was sent to the wrong address. She says that she never received that e-mail. She states that she was therefore not informed of her dismissal until 10<sup>th</sup> September. She asks to be paid up to that date and asks for one week's notice pay (page 10 of the bundle).

36. In her evidence the claimant said that she thought the reason she'd been suspended was because she took time off to take a COVID test because of problems with her performance.
37. The claimant's P45, which was subsequently produced in these proceedings states that the date of termination is 7<sup>th</sup> August 2020.
38. In evidence, Mr Dos Santos and Mr Sedgwick indicated that the claimant had defaced company property and not worn her uniform in the early weeks or so of her employment. Neither of them were able to explain why they did not take any action at that time in relation to those matters, if they considered them to be acts of gross misconduct, as they were now suggesting.
39. The other matters raised by the respondent as acts of gross misconduct are matters relating to the claimant's performance and capability in her role. Mr Sedgwick suggested that they were acts of gross misconduct, but was not able to point to any documentation to suggest that acts relating to performance could amount to matters for which an employee could be summarily dismissed as an act of gross misconduct. He was not able to refer the tribunal to any of the respondent's documents which indicated that the claimant could be immediately dismissed as an act of gross misconduct for failing to perform in her role.

### Conclusions

40. This tribunal prefers the claimant's evidence of the meeting on 3<sup>rd</sup> August. Her evidence was clear and credible and consistent with various documents produced by the respondent, in particular the e-mail sent by the respondent to the claimant on 7<sup>th</sup> August and the claimant's P45. The email is consistent with the P45. Mr Dos Santos was the other key witness to that crucial meeting. Significantly, his witness statement makes no reference whatsoever to what happened at that meeting on 3<sup>rd</sup> August even though that is the most crucial matter of fact in this case. He was unable to provide any viable explanation as to why he failed to make any reference to that meeting in his witness statement for these proceedings.
41. The tribunal finds that the respondent did intend to dismiss the claimant because of concerns about her performance. They purported to do so on 7<sup>th</sup> August 2020. However the e-mail sent to the claimant dismissing her was sent in error by the respondent to the wrong e-mail address, even though they had her correct e-mail address.
42. This tribunal finds that the claimant was not dismissed on 3<sup>rd</sup> August 2020. The Tribunal accepts her evidence that she was suspended on that day and not dismissed. Further the claimant was not dismissed on 7<sup>th</sup> August 2020, albeit that the respondent purported to do so as she did not receive that e-mail until 10<sup>th</sup> September. She was thereby dismissed on 10<sup>th</sup> September, when she actually received the e-mail of 7<sup>th</sup> August on that date.
43. The tribunal does not find that there is any evidence that the claimant is guilty of gross misconduct. The tribunal accepts that, defacing of company property in certain circumstances could amount to gross misconduct, but in the circumstances

of this case, it did not do so. In any event, the respondent itself clearly did not consider those acts to be serious matters at that time, as on their own case the defacing of company property occurred about a week or so into the claimant's employment. The respondent did not take any action to discipline the claimant nor did they suggest they considered dismissing her at that stage.

44. The tribunal find that the reason that the claimant was dismissed was because of performance and not for gross misconduct. Therefore the respondent was not entitled to immediately dismiss her without giving her notice, irrespective of what it says in the contract of employment. Section 86 of the Employment Rights Act makes it clear an employee is entitled to notice unless it is an act of gross misconduct which this tribunal does not find to be the case. Therefore the respondent was not entitled to dismiss the claimant without notice.
45. The tribunal accept that the respondent could have dismissed the claimant for performance issues in her probationary period, but any dismissal would have to be with notice.
46. As the claimant was not aware of her dismissal until 10<sup>th</sup> September 2020, that is the effective date of her dismissal.
47. Accordingly the claimant is therefore entitled to all wages and holiday pay up 10<sup>th</sup> September. The claimant accepted, during the course of these proceedings, that she had been paid all her wages and holiday pay up to 7<sup>th</sup> August.
48. The claimant is entitled to an additional 1.7 days holiday from 7<sup>th</sup> August until 10<sup>th</sup> September. She is also entitled to her wages from 10<sup>th</sup> August to 10<sup>th</sup> September.
49. Accordingly the claimant's claim of breach of contract (notice pay) is well founded and the claimant is awarded the sum of £461.54.
50. The claimant's complaint of unlawful deduction from wages is also well-founded and she is awarded wages for the period 10<sup>th</sup> August – 10<sup>th</sup> September 2020 in the sum of £461.54.
51. The claimant's complaint of breach of the Working Time Regulations (Holiday Pay) is also well-founded and she is awarded 1.75 days holiday in the sum of £263.73.
52. The tribunal does not consider that the respondent followed the ACAS Code of Conduct. There was no investigation into the matters regarding the claimant's performance nor into any other issues relating to her conduct. There was no meeting with her to discuss those matters or give her any opportunity to respond. She was given no right of appeal. However, the tribunal acknowledges that, for employees with less than two years' service, a formal process does not need to be followed in the same way as is noted in their own probationary period policy. The Tribunal has also taken into account that this is a small company. It has therefore limited the uplift for failure to follow the ACAS Code of Practice to 20%.



53. Accordingly the claimant is awarded an uplift on the failure to follow the ACAS Code of Conduct in relation to the breach of contract claim only in the sum of £50.31.

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**EMPLOYMENT JUDGE MARTIN**

**REASONS SIGNED BY EMPLOYMENT  
JUDGE ON 4 May 2021**