



EMPLOYMENT TRIBUNALS

Claimant: Mrs Sharon Webster

Respondent: Mrs Ellen Evans t/a Café V

Heard at: Birmingham Employment Tribunal (by CVP)

On: 13-15 April 2021

Before: Employment Judge Mark Butler

Representation

Claimant: In person

Respondent: Mr Gittins (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT

The decision of the Employment Tribunal is that:

The claims of unfair dismissal, wrongful dismissal/breach of contract (notice) and unauthorised deductions from wages do not succeed and are dismissed

The claim for unpaid annual leave succeeds, and the claimant is awarded the gross sum of £316.09

The claim for failure to provide a written statement of terms and conditions of employment succeeds. The claimant is awarded an additional 2 weeks gross pay, at the figure of £295.56.

The total sum awarded is the gross sum of £611.65. This will be subject to statutory deductions at source.

There was a request for written reasons made by the claimant, having received oral judgment at the hearing. These are those written reasons as requested. I can only apologise for the delay in getting these out to the parties. However, a heavy workload and annual leave has caused some quite significant delays.

REASONS

1. The claims in this case arise following the presentation of a claim form on 08 August 2019. The claimant brought a number of different complaints.
2. This case was initially listed to be heard at the Telford Employment Tribunal on 16 and 17 June 2020. However, because of the pandemic, and in line with the Employment Tribunal President's guidance, the hearing was converted to a telephone Preliminary Hearing on 16 June 2020, for case management purposes.
3. Following case management, the case was re-listed to be heard at Telford Employment Tribunal on 13,14 and 15 April 2021. However, given the ongoing pandemic, this case was converted to be heard remotely via CVP.
4. The matters to be determined in this case were confirmed by the parties at the beginning of this hearing to be those matters recorded by Employment Judge Dimbylow at the Preliminary Hearing on 16 June 2020.
5. I was assisted in this case by a bundle that ran to 263 pages.
6. The claimant gave evidence on her own behalf and had no further witnesses.
7. In addition to the respondent, who gave evidence on her behalf, I was further assisted by evidence given by:
 - a. Ms Sharon Edwards, who is an employee of the respondent;
 - b. Ms Dilys Davies, who gave evidence that she was a customer present in the café at the time of the alleged dismissal, and
 - c. Mr John Gregory, who is the uncle of the respondent and who also says he was present in the café at the time of the alleged dismissal.
8. There was a witness statement produced on behalf of Ms Lucy Broome. Sadly, Ms Broome had passed away between the period of having produced her statement and the final hearing date. It was not disputed by the claimant that Ms Broome was present in the café. Such weight was placed on Ms Broome's statement as I considered appropriate in these circumstances.

List of Issues

9. The list of issues are as recorded by EJ Dimbylow in the Record of Preliminary Hearing. I have cut and pasted these for convenience.

Time limits / limitation issues

- (i) Were all of the claimant's complaints presented within the time limits set out in sections 23(2) to (4) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; when the treatment complained about occurred; etc.

- (ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **20 April 2019** is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.
- (iii) How much pay is outstanding to be paid to the claimant?

Unauthorised deductions

- (iv) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying her in respect of holidays (as above and monies deducted for holidays in the final payment), overtime and tips and if so, how much was deducted and when?

Breach of contract - notice

- (v) It is not in dispute that the claimant's statutory entitlement was to 1 week's notice.
- (vi) Did the claimant resign without notice and forfeit the right to be paid her 1 week's notice?

Other claims

- (vii) Failure to provide a written statement of main terms and conditions of employment. The respondent accepts that no such statement was provided.

Remedy

- (viii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and were mentioned include:
 - a. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?
 - b. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Law

10. The burden of proof in relation to establishing that a dismissal has taken place rests on the claimant.
11. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.
12. Under s.13(3) ERA there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
13. Under s.27(1) of the ERA 'wages' means any sums payable to the worker in connection with their employment including holiday pay.
14. Section 23(2) states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of 5 payment of the wages. Where there are a series of deductions then s23(3) states that the time limit runs from the last deduction in that series.
15. The right to a written statement of the particulars of employment is provided for in section 1 of the Employment Rights Act 1996. The Tribunal may award between 2 and 4 weeks' pay for a failure to do so under the Employment Act 2002, provided that there is also a claim that succeeds listed in Schedule 5. A claim for deduction from wages is one such claim under that Schedule.

Findings of Fact and conclusions

I make the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. I do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

Employment/hours/tips/overtime/holiday pay entitlement

16. The claimant worked for the respondent on a permanent contract from 04 January 2018. She was initially employed to work up to 16 hours per week. The claimant would be regularly listed on the work rota across 4 days: 9am-2pm on Mondays, 11am-2pm on Wednesdays, 9am-2pm on Thursdays, and 9am-12pm on Fridays.
17. The holiday year of the respondent ran from 01 January – 31 December. That is clear from the document produced by the respondent's accountant on p.138.
18. The claimant was paid monthly for 64 hours of pay per month. This is confirmed by the pay slips on pp.28-35. The pay slips do not distinguish between holiday pay and wage for having worked. If the claimant was on holiday then she would continue to receive her pay as if she had worked. This is clear from the circumstances in this case. When the claimant did take leave, her pay was not reduced accordingly, but was maintained as if she had worked. In other words, her holiday pay covered the pay for hours which the claimant did not work due to being on leave. An example of this can be seen on the September 2019 payslip on pp.48-49.

The claimant physically worked for 56 hours, but was paid for 64 hours. 8 hours of this pay must therefore have been paid as holiday pay for the days in September on which the claimant was on leave.

19. At some point during the middle of June 2018, the claimant's working hours were increased to 18 hours per week. Her hours of work had changed to Monday 9am-2pm, Tuesday 9am-2pm, Thursday 9am-2pm and Friday 9am-12pm. It was accepted by the respondent that this change had taken place, and that this was the arrangement until the claimant left employment.
20. Actual hours worked, and holiday leave, were to be recorded in the work diary, which was kept next to the till in the café. This was then used to calculate the actual pay that the claimant should have received. From which it could be calculated whether the claimant had been overpaid or whether there was any overtime payments owed based on the pay received and the hours actually worked. This diary was also used to calculate whether any holiday pay was owed, and whether any other payments to the claimant were required.
21. The claimant was aware that it was partly, if not primarily, her responsibility to write down her hours in the work diary. The claimant did not always populate the diary with her hours, and Mrs Edwards often did not populate the diary with the claimant's hours either. The claimant was aware that the diary needed to be accurate in order to calculate the overtime payments she was owed, if any, as well as holiday pay entitlement and any other payments.
22. The claimant would receive cash payments to cover pay for hours that had not been received in her monthly payment. The claimant did not keep a clear contemporaneous note of what payments were received. The only document that was supplied to the tribunal was the document at p.121 of the bundle, which was created for the purposes of these proceedings.
23. The claimant's record of her working hours on her home calendar is not accurate. The claimant accepted this under cross examination. And repeated this acceptance in her closing submissions. The claimant's calculation of her overtime payments owed contained at pp.170-171 were based on these records from the claimant's home calendar, and therefore the figures on that document likewise cannot be considered accurate.
24. The claimant did receive a payment of £100 in September 2019. This is recorded to cover a payment owed of £78.30. This was for 10 hours of pay owed to the claimant (see p.171). This is a plausible conclusion given that the claimant at that time was being paid £7.83 per hour, and these figures were added to the work calendar at the time against the claimant's initials. Although the claimant submitted that this was a loan that she received, it is more plausible that this was a payment for hours worked given that there is no evidence presented of repaying any such loan, and the second of the figures would be an accurate figure for 10 hours of work by the claimant.
25. The work calendar presented in this case is not an accurate record of all the hours worked by the claimant across the entire period in question. In part, this record was destroyed in error by Ms Edwards and the claimant whilst undertaking a spring cleaning. This is unchallenged evidence of Mrs Edwards. This most notably affects the period January 2018-July 2018.
26. However, the work diary does present an accurate recording of the hours worked by the claimant during the period January 2019-April 2019. As well as providing an accurate record of the holidays taken during this same period.

27. The days that the claimant presented invoices for childcare services are not all days that the claimant was working. There were invoices presented for days which the claimant accepted under cross examination that she was not working. These invoices provide a record of services contracted for, rather than evidencing days on which she worked.
28. For the period 01 January 2019- 25 April 2019, the claimant worked a total of 260.75 hours. This was split up as follows:
- In January, she worked 80 hours
 - In February, she worked 75 hours 15 mins
 - In March, she worked 67 hours
 - In April, she worked 38.5 hours.
29. For the period 01 January – 25 April 2019, the claimant received pay for 247.5 hours (but with a deduction for overpaid holiday pay), which was paid as follows:
- In January, 64 hours
 - In February, 64 hours
 - In March, 64 hours
 - In April 55.5 hours, although this has been subject to a deduction of £98.52, which is equivalent to 12 hours holiday pay at £8.21 per hour (the then applicable national minimum wage rate).
30. During the period 01 January 2019-25 April 2019, the claimant received cash payments for overtime totaling £150 (see pp.170-171).
31. For the period July 2018-31 December 2018, the claimant took 42 hours holiday leave.
32. The claimant likely took some holiday leave between January 2018 and July 2018, however, there is no record available. There is no evidence adduced by the claimant in respect of the first 6 months, although she accepts, and it is plausible, that some holidays were taken. This causes difficulty for the claimant in that her claim for unpaid holiday pay during this period is too uncertain.
33. From the period 01 January 2019 – 25 April 2019, the claimant received 24 hours holiday pay. These were recorded in the works diary (pp.64-112) as being across the following dates:
- Friday March 21 2019- 5 hours
 - Friday March 22 2019- 3 hours
 - Tuesday 2 April- must be 5 hours (9-2 given that is her Tuesday shift)
 - Thursday 4 April – 9-2- 5 hours
 - Friday 05 April- must be 3 hours
 - Friday 19 April 2019- must be 3 hours
- TOTAL: 24 HOURS
34. During the period 01 January-25 April 2019, based on a working week of 18 hours per week, the claimant was entitled to holiday entitlement equivalent to 32.5 hours per week.
35. There was no contractual agreement between the parties in relation to division and entitlement to tips.
36. The tips collected at the café during 2018 was in the region of £230. The claimant was given a share of these tips, which amounted to £70. And in response the

claimant indicated that she would put the money towards a puppy. Important in supporting this finding was that the claimant did not dispute the contention that she was going to use her tips towards buying a puppy when it was put to her under cross examination. This is consistent with the witness statement of Ms Edwards, at paragraph 7. On balance, it was more likely than not that the claimant likely received the tips, and made this comment in return.

37. The claimant at no point during her employment received a written contract or written statement of particulars. This was accepted by Mrs Evans.

Conclusion of the contract

38. On 25 April 2019, the claimant was working a shift with Mrs Evans. Mrs Davies, Ms Broom and Mr Gregory were all present in the café on this date, at the time of the alleged argument between the claimant and Mrs Evans. In reaching this finding I have paid attention to the consistency given in the witness evidence of each of the three named persons. Further, Mrs Davies gave clear evidence on this point, and anchored it to a personal memory. It was not put to Mrs Davies by the claimant that she was not present. It was not in dispute between the parties that Ms Broom was present. Although I am mindful that Ms Broom was not able to be cross-examined, at paragraph 3 of her witness statement she places others within the café. Although the claimant disputes that Mr Gregory was present, my finding is that more likely than not he was present. His evidence on this matter was clear and consistent with the other witness evidence. The claimant contends that Mr Gregory was delivering catering at a function, but despite perusing the order forms of the respondent, did not identify any such evidence to support what she said. All this supports the finding I make.
39. There was no heated argument between the claimant and Mrs Evans. There was no shouting by Mrs Evans. In making this finding, I note that this is the consistent evidence of the three other persons present in the café at the time of the alleged heated argument. Two of those witnesses can properly be described as independent and objective observers and have nothing to gain from giving anything other than an accurate account of what they witnessed (although again I note that Ms Broom was not able to be present to be cross-examined). If there had been shouting, given the size of the café, then it would have been expected that at least one of those witnesses present would have heard it and recalled it. The evidence I have had before me supports that there was no shouting and no raising of voices.
40. A discussion did take place between the claimant and Mrs Evans. This did concern holiday entitlement. At which point Mrs Evans left the kitchen area and phoned her accountant. Having completed the phone call with her accountant, Mrs Evans continued the discussion with the claimant, at which point the claimant picked up her things and walked out. The claimant in effect resigned through her actions.
41. Mrs Evans expected the claimant to return to complete her shift once she had had some time and space. This is supported by the diary entry on p.112, in that nobody was called in to cover the remainder of the shift, over the lunch time period, in circumstances where there was only Mrs Evans now present and working. This is a plausible conclusion to reach based on those circumstances.

Conclusions

42. The burden rests on the claimant to establish that she had been dismissed by Mrs Evans. However, my findings are that the claimant was not dismissed, but

instead resigned from her post. The claimant did not bring a claim based on constructive dismissal in the alternative. The claims of unfair dismissal and wrongful dismissal/breach of contract are dismissed on that basis.

43. In relation to a claim brought for tips, there is simply no evidence brought by the claimant to support this part of her claim. There is no contractual terms relating to tips, nor is there any evidence to support that tips fell within the concept of wages payable. There was no agreement reached in relation to tips. Further, the claimant has not adduced any evidence to establish what she says she was owed. There is simply no evidence brought by the claimant in relation to tips owed, and therefore this part of her claim must fail. And even if I am wrong on that, the claimant received a payment that covered a share of the tips that would have satisfied any legal obligations placed on the respondent, if any did exist.
44. Turning to the pay situation. The claimant fails to satisfy the burden that rests on her in respect to unauthorised deductions from her wages or unpaid holiday pay during the period 01 January 2018 and 31 December 2018.
45. However, she does succeed in relation to unpaid holiday pay during the period 01 January 2019- 25 April 2019.
46. The claimant received all pay and overtime pay owed to her during the period 01 January 2019-25 April 2019, and received 6 hours more pay than she was entitled to based on her working hours. This additional 6 hour payment, given the way that payments were made by the respondent, must therefore have been pay for holiday leave taken. However, that is the extent of any holiday pay the claimant received during this period.
47. The claimant is therefore owed 32.5 hours holiday pay (based on an 18 hour week) + 12 hours holiday pay (which was wrongfully clawed back as overpaid holiday pay) – 6 hours holiday pay (which has been received as per the paragraph above). The claimant is therefore entitled to holiday pay of 38.5 hours, at her hourly rate at the time of £8.21 per hour. This is the gross sum of £316.09.
48. The claimant did not receive a written statement of particulars. In the circumstances, considering the size of the employer, and that the employer has now sought to rectify this position, amongst other factors, this tribunal awards the claimant an additional 2 weeks gross pay, which is the gross sum of £295.56.

Employment Judge **Mark Butler**

12 July 2021

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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