EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Denman-Brown**
Respondent: **Grassfields Ltd**

Heard at: **Nottingham** **on:** **26-27 July 2021**

Record of a Full Hearing heard by CVP

Before: **Employment Judge Blackwell (sitting alone)**

Representation
Claimant: **In person and Mrs Denman, Daughter**
Respondent: **Mr Capek, Employment Law Consultant**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The claim of less favourable treatment pursuant to Part Time Workers (Prevention of Unfavourable Treatment Regulations) 2000 are dismissed on withdrawal by the Claimant.

2. The claim of unlawful deduction from wages in respect of pension contributions is also dismissed on withdrawal by the Claimant.

3. The claims of unfair dismissal and entitlement to a redundancy payment succeed:-

    a) In that regard it would be just and equitable to award a Basic Award of £392.40.

    b) Further it would be just and equitable to make a Compensatory Award made up as follows: -

i. An award in respect of loss of statutory rights £250.00

ii. Loss of earnings from the 1 May 2020 to 30 April 2021, 48 weeks at £104.64 = £5022.72 plus 4 weeks at £105.42 = £421.68. Subtotal £5444.40. Total compensatory award £5694.40 but reduced in respect of ***Polkey*** there being an 80% chance that there would not have been a dismissal the compensatory award therefore becomes £4555.52.

iii. The claim pursuant to Section 38 of the Employment Act 2002 succeeds in the higher amount 4 x £130.80 = £523.20.

4. Therefore, in total the Respondents are ordered to pay to the Claimant the sum of £5471.12.

REASONS

1. Mrs Denman represented the Claimant, Mrs Denman-Brown, her daughter who she called to give evidence.

2. Mr Capek represented the Respondent and he called their Director, Mr Tchoudi to give evidence.

3. There was an agreed bundle of documents and references are to page numbers in that bundle.

4. Mr Capek gave both helpful written submissions and oral submissions and Mrs Denman relied upon oral submissions.

Introduction

5. Mrs Denman-Brown brought these proceedings by way of a claim form that was served on 2 July 2020. The matter then became before Employment Judge Dyal in respect of a case management discussion and also to determine whether the Respondents had leave to serve the response out of time. Judge Dyal permitted the service out of time and he very helpfully from paragraph 8 onwards set out the background to the issues to be determined. In particular in paragraph 12 he said as follow: -

12 "Secondly, the Respondent's position is that the Claimant's dismissal vanished because she was furloughed pursuant to the Coronavirus Job Retention Scheme. This is an interesting argument and one that in this case has some additional curiosities and complexities about it:

12.1 An aspect of the Claimant's unfair dismissal complaint is that, she says, instead of being made redundant, she should have been furloughed.

12.2 Mr Tchoudi says that the Claimant was furloughed. However, he accepts that the Respondent did not ever directly communicate this to the Claimant (this is itself odd as it is one of the requirements of the scheme was an agreement between employer and employee).

12.3 Mr Tchoudi says that he told an ACAS officer that the Respondent was going to furlough the Claimant and the ACAS officer said the information would be passed on to the Claimant. The Claimant says no such information was passed on.

12.4 In fact, the Claimant says that she had no idea that the Respondent had placed her on the scheme until very recently (in the last couple of weeks). She did not receive any payslips indicating the same until the last few days, and she did not notice money going into the bank account into which wages subsidised by the scheme were paid (because she no longer uses that account regularly).

12.5 Mr Tchoudi for his part says that there was a delay in furloughing the Claimant because of a misunderstanding with his accountant and as a result the Claimant was not paid anything pursuant to the scheme until September 2020".

6. On page 24 EJ Dyal set out the issue's paragraphs 1–5 relate to claims under the Part Time Workers (Prevention of Less Favourable Treatment Regulations) and these have been withdrawn.

7. The next issue is was the Claimant dismissed. The relevant evidence is as follows:

   On the 11 February 2020 Mr Tchoudi met the Claimant and a transcript of that discussion appears from page 74. On that page Mr Tchoudi says, "*And she came to me and she said she wants to cut some staff*" (he is referring to the other Director of the Company). He goes on *"Your one of them"* he goes on further *"We are going to pay you 2 months but from next month you are not going to be needed anymore"*.

8. Then on 24 February at page 95 an email to which I will return Mrs Denman-Brown wrote an email to Mr Tchoudi headed 'Grievance'. He replied at page 96 and amongst other things he said, *"We have reviewed other departments and roles for you but due to the financial state of business we had to come to our decision to let you go. As per our discussion you will be paid 2 months' salary and are welcome to come into work during this time, the decision is yours to make, your 2 months' salary will be paid which ever you choose. We wish you well in your future endeavours and thank you for your time with us".*

9. In my Judgment the letter of 28 February was clearly a letter of dismissal. In effect it gave Mrs Denman-Brown the choice of Garden Leave or working out her notice period thus the contract of employment came to end having regard to that letter on 30 April 2020 and that is the effective date of termination.

10. The parties can of course reverse a dismissal; however, it cannot be done

unilaterally and thus the employee must agree to the terms of what would in effect be a reinstatement. There is no evidence whatsoever that Mrs Denman-Brown was ever asked to revive the contract of employment. Mr Capek in my view has conflated two things in his submissions. The first is the requirement of the Coronavirus Job Retention Scheme for the employee to agree to be furloughed. However, the contract of employment had come to an end on 30 April and as Mr Tchoudi concedes he never communicated with to Mrs Denman-Brown after that date.

11. Mr Capek also submits that it would be inconvenient for both parties if a dismissal is found because the parties would have to unravel the furlough payments that had been made to Mrs Denman-Brown. I accept that it will be inconvenient but that is not a relevant factor in determining whether there was a dismissal. I am therefore clearly of the view that there was a dismissal and the contract of employment came to an end on 30 April 2020. The reason for dismissal is not in dispute, namely redundancy, and it is a potentially fair reason within the meaning of Section 98(1) and (2) of the Employment Rights Act 1996.

12. The next question therefore is was that dismissal unfair? The Respondents own procedure as set out in their handbook is at pages 51 and 52 paragraphs 4-10 apply and they set out a structure of a fair redundancy process. Not one of those paragraphs was applied, indeed no other procedure was followed either. It must therefore follow that the dismissal was procedurally unfair.

13. The next issue to be determined is therefore whether an adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair proceed been followed or would have been dismissed in time anyway. See ***Polkey v AE Dayton Services Ltd [1987] UKHL*** at page 8. Employment Judge Dyal also helpfully referred the parties to the case of ***Software 2000 Ltd v Andrews [2007] ICR 825*** at paragraph 52. The Tribunals task is set out as follows: -

    'It is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal'.

14. What then is the relevant evidence? At paragraph 3 of Mr Tchoudi's evidence, "*At the time of the onset of the Covid crisis in March 2020 we employed a total of 21 staff including myself distributed between 3 departments, design/production, marketing/customer service and shipping. The current situation as at 29 April 2021 is that 5 employees have since left but not on account of redundancy, 12 are still actively employed and 4, including Beth, remain on furlough. Most of our production has now been transferred to Nigeria".* He went on in answer to the Tribunal to state that it was his intention to make a further 7 employees i.e. in addition to Mrs Denman-Brown redundant but he did not do so because the furlough scheme came along and he placed all of those employees on that scheme.

15. Returning to Judge Dyal's summary at paragraph 13 he stated, "*The Claimant's*

considered position is that so far as she is concerned she was not properly furloughed because nothing was said to reinstate her employment after dismissal and there was no agreement between her and the Respondent that she be furloughed" (I find it a fact that that sentence is correct). EJ Dyal went on "*As I understand it she would have agreed to being re-employed and furloughed had she been asked, but she was not asked. Since she was not asked, she's anxious not to breach the rules of the scheme and pretend that she was properly furloughed. She is, therefore, willing to repay the money to the Respondent which it paid her purportedly pursuant to the scheme. Naturally, she would then seek to replace that money with compensation for unfair dismissal. In the unfair dismissal claim part of her argument will be, that instead of being dismissed, she should have been furloughed".* Mr Capek put that paragraph to Mrs Denman-Brown, and she confirmed that it was an accurate record and that it was truthful. Thus, it seems to me that there is a high probability that if a fair procedure had been followed and that fair procedure would have taken some weeks, the arrival of the Coronavirus Job Retention Scheme would have meant that the employment would have continued but with Mrs Denman-Brown being furloughed. I would place that probability at 80%.

16. **Remedy**

(a) **Basic Award**

Turning now to the consequences of that decision it is common ground that the basic award should be £392.40 calculated as follows:

Mrs Denman-Brown has 3 years of continuous service and she was at all relevant times between the ages of 21 and 41 and her weekly wages was £130.80 giving a figure of £392.40

(b) **As Compensatory Award**.

Mrs Denman-Brown accepted in cross examination and in answer to the Tribunal that her loss of wages was limited to the period of 1 May 2020 to 30 April 2021. Given my findings as to ***Polkey*** therefore what Mrs Denman-Brown has lost would have been the furlough payment under the scheme. The figures are agreed namely 48 weeks at £104.64 and 4 weeks at £105.42 that gives a total £5444.40. In respect of the loss of statutory rights I award the sum of £250.00 giving a total of the compensatory award of £5694.40. That falls to be reduced by 20% and gives a final compensatory award of £4555.52.

17. The next matter for consideration is whether there should be an uplift in accordance with Section 207 of TUCLAR [1992]. Mrs Denman-Brown argues that there has been a breach of the ACAS code. The ACAS guide is the Discipline and Grievances at Work Code issued in 2019. At paragraph 4.21 there is a paragraph headed 'What is a grievance and why have a procedure'. It states, "*anybody working in an organisation may at some time have problems or concerns about their work, working conditions or relationships with colleagues that they wish to talk about with management. They want the grievance to be addressed and if possible, resolved*".

18. It then goes on to give a list of matters that might cause grievances and it seems to me that none of the matters are those raised by Mrs Denman-Brown in her grievance letter, well the letter headed 'Grievance' at page 95. I agree with Mr Capek that, in fact, it is a request for clarification of her employment position and further pointing out to Mr Tchoudi that the procedure in the handbook to which I have referred has not been followed. In my Judgment therefore there should be no uplift because the grievance procedure was not intended to apply to the complaint made by Mrs Denman-Brown.

19. **Unlawful Deductions from Wages**

I turn now to the issues set out at paragraph 13a of EJ Dyal's issues as set out on page 25. In the original schedule of loss of 5 March 2021 submitted by Mrs Denman there is an entry as follows: "shortfall on period of employment and furlough and giving a total sum of £888.86". I asked Mrs Denman overnight to set out how that figure had been calculated and how it sat with issue 13a. In fact, she submitted a supplementary schedule of loss which demonstrated that £436.00 of that loss related to alleged short payments occurring throughout the calendar year of 2018, the latest being 28 November 2018.

20. Section 23 subsection 2 of the Employment Rights Act 1996 requires such claims to be brought within 3 months of the alleged unlawful deduction. In other words, all of these claims should have been brought by not later than February 2019 they are therefore months out of date. Further there is no explanation in Mrs Denman-Brown's witness statement as to the reason for the delay, I therefore find that the Tribunal does not have jurisdiction to hear those elements of the claim.

21. The second part of the supplementary schedule of loss relates to the furloughed payments and I have dealt with those above and the figures are agreed as between the parties.

22. **Failure to Provide Written Particulars**

The final matter is the failure to give written particulars of employment pursuant to Section 1 of the 1996 Act. The Respondents accept that no particulars were given to Mrs Denman-Brown. Mrs Denman-Brown's evidence was that she had asked for a contract on a number of occasions and she had witnessed other employees doing the same. I accept that evidence and therefore it seems to me that it would be just and equitable to award the higher amount i.e. 4 weeks wages in accordance with Section 38(3) of the Employment Act 2002.

Employment Judge Blackwell

Date: 9 August 2021

JUDGMENT SENT TO THE PARTIES ON

12 August 2021

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