



EMPLOYMENT TRIBUNALS

Claimant: Miss H Miles

Respondent: Pride in Pets Limited

Heard: via Cloud Video Platform in the Midlands (East) Region

On: 8 October 2021

Before: Employment Judge Ayre, sitting alone

Representatives:

Claimant: In person

Respondent: Did not attend and was not represented.

JUDGMENT

1. The name of the respondent is amended to Pride in Pets Limited.
2. The claim for a statutory redundancy payment succeeds.
3. The respondent is ordered to pay a statutory redundancy payment of £777.48 to the claimant.

REASONS

Background

1. On 8 July 2021, following a period of early conciliation which started on 19 May 2021 and ended on 30 June 2021, the claimant brought a claim for a statutory redundancy payment.
2. The respondent submitted a response, stating that it defended the claim. The basis of the respondent's defence to the claim appeared to be that the respondent could not afford to pay a redundancy payment to the claimant. The respondent did not deny that the claimant was dismissed, or that the dismissal was by reason of redundancy.

The Proceedings and issues

3. The case was listed for a Final Hearing today. In advance of the hearing the claimant had sent in a witness statement and documents, which I have read. The respondent had not submitted any evidence.
4. The hearing was due to start at 2pm. The claimant was present at 2pm but the respondent was not in the hearing. I waited to give the respondent time to join. A member of Tribunal staff also telephoned the respondent twice. The first time someone answered the telephone and then immediately hung up. The second time the telephone was not answered. The member of Tribunal staff left a message.

5. At 2.26 pm, as the respondent was still not present, I decided to proceed with the hearing in the absence of the respondent, in accordance with Rule 47 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
6. I heard evidence from the claimant and considered the documents that she submitted. At the outset of the hearing I discussed with the claimant who the correct respondent should be, given that Samantha Cox was named as the respondent in the claim form. The claimant told me that her employer was Pride in Pets Limited, and I have therefore by agreement with the claimant changed the name of the employer to Pride in Pets Ltd.
7. The issues that fell to be determined at the hearing were as follows:-
 - a. Was the claimant dismissed?
 - b. Was the claimant's dismissal by reason of redundancy?
 - c. What sum is the claimant entitled to by way of statutory redundancy payment?

Findings of Fact

8. The claimant was employed by the respondent from 17 July 2017 until 30 November 2020 when she was dismissed by reason of redundancy. The respondent is a pet care provider that provides dog walking, cat care and other pet care services. Samantha Cox is the owner and director of the respondent.
9. The claimant was born on 3 April 1989 and was 32 years old when she was dismissed. She had three complete years' continuous employment.
10. Samantha Cox was named as the respondent on the claim form but the claimant accepted that Samantha Cox was not her employer and that she was in fact employed by the respondent.
11. The claimant initially worked as a Pet Care Provider, and in October 2019 was promoted to Assistant Manager and Pet Care Provider. From October 2019 onwards she was paid a fixed salary of £12,000 a year for 20 hours' work a week as Assistant Manager. In addition, she carried out pet care duties and was paid £9 an hour for those duties. Her hours of work and her pay varied from week to week depending on the need for pet care services, and she did not have normal hours of work.
12. She was paid monthly in arrears on the 10th day of the month. On 10th October 2019 she was paid £882.55 gross for the month of September. On 10th November 2019 she was paid £1,220.23 gross for the month of October, and on 10th December 2019 she was paid £1,220.86 gross for the month of November.
13. The claimant's P60 for the tax year ending 5 April 2020 showed that during that tax year she earned £13,476.34 gross from the respondent, which works out at £259.16 gross a week.
14. On 27 March 2020 the respondent's business closed due to the pandemic. All staff, including the claimant, were furloughed. The claimant remained on furlough until her employment terminated, although did carry out some work under the 'flexible furlough' scheme in August, September and November.
15. On 2nd November the respondent wrote to the claimant and the other employees telling them that the business would be closing on 30 November 2020. As a result of the closure of the business, there was no longer a need for an Assistant Manager or for any Pet Care Providers. The claimant's employment therefore terminated on 30 November 2020 by

reason of redundancy.

16. The claimant was not paid a statutory redundancy payment. She was given four weeks' notice of termination of her employment, which, given her length of service, was more than her statutory notice entitlement.
17. There was limited evidence before the Tribunal as to how the claimant's furlough pay had been calculated. The claimant did not know what 'reference salary' had been used to calculate her furlough payments, nor what the 'reference day' was. After March 2020 she did not receive any pay slips. Payments were made into her bank account each month, but it was not clear how the payments had been calculated or what tax, if any, had been deducted from them.
18. The claimant was told that, as her monthly pay varied, her furlough pay had been calculated on the basis of the earnings in the same period the previous year so that, for example, in April 2020 her furlough pay was based on her earnings in April 2019.

The law

19. Section 162 of the Employment Rights Act 1996 ("**the Act**") provides that: -

"(1) The amount of a redundancy payment shall be calculated by –

- (a) Determining the period, ending with the relevant date, during which the employee has been continuously employed,*
- (b) Reckoning backwards from the end of that period the number of years of employment falling within that period, and*
- (c) Allowing the appropriate amount for each of those years of employment.*

(2) In subsection (1)(c) "the appropriate amount" means –

- (a) one and half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*
- (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two..."*

20. The 'relevant date' is, in most cases, the date upon which the contract of employment terminates (section 145(2) of the Act).

21. Section 163 of the Act states that: -

"(1) Any question arising under this Part as to –

- (a) The right of an employee to a redundancy payment, or*
- (b) The amount of a redundancy payment*

Shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy"

22. Where an employee does not have normal working hours, such as was the case with the claimant, then a week's pay is calculated under section 224 of the Act: -

"(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending –

- (a) Where the calculation date is the last day of a week, with that week, and*

(b) Otherwise, with the last complete week before the calculation date

23. The 'calculation date' is the date upon which the employee's week's pay is calculated and is either: -

- a. The date upon which the contract of employment ends, where the employee is dismissed with no notice or less than statutory notice (section 226(5)(b) of the Act); or
- b. In all other cases, the date on which notice would have been given by the employer to comply with the statutory minimum notice requirements (section 226(5) (c) and (6) of the Act.

24. The statutory minimum notice periods are set out in section 86 of the Act and, for an employee with three years' continuous employment, the statutory period of notice that the employer is required to give the employee is three weeks.

25. For employees on furlough, the definition of a week's pay was amended by the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 SI 2020/814 ("**the Regulations**"), which came into force on 31 July 2020. The aim of the Regulations is to ensure that employees who are furloughed receive statutory payments, including statutory redundancy payments, based on their 'normal' pay rather than the reduced furlough pay.

26. The Regulations apply where an employee is given notice of termination or is dismissed after the date on which the employee was furloughed. For employees who do not have normal working hours, a week's pay is calculated according to their 'reference salary' upon which furlough pay is claimed. Regulation 8 of the Regulations provides as follows: -

"(1) This regulation applies where E's working hours fell within the description in section 224(1) of the Act (no normal working hours for employee under employee's contract of employment) on the relevant date.

(2) The amount of a week's pay is the amount of E's average weekly remuneration in the relevant period.

(3) For the purposes of the calculation of E's average weekly remuneration –

(a) Subject to sub-paragraphs (c) and (d) the 'relevant period' means the period of twelve weeks ending

- (i) Where the calculation date is the last day of a week, with that week,*
- (ii) Otherwise, with the last complete week before the calculation date,*

(b) Where E is furloughed for any part of the relevant period, the amount of E's weekly remuneration attributable to being furloughed is the amount that would have been payable to E in accordance with the Coronavirus Job Retention Scheme if –

- (i) The amount was calculated in relation to E's reference salary,*
- (ii) For that purpose the full amount of E's reference salary had been used, and*
- (iii) The Scheme cap did not apply...*

(4) For the purposes of paragraph 3(b) –

(a) 'reference salary' has the meaning given in the Coronavirus Job Retention Scheme..."

27. The Schedule to the Coronavirus Job Retention Scheme Direction provides that, for an employee without normal working hours the reference salary is the higher of: -

- a. Wages earned in the corresponding calendar period in the previous year; or
- b. Average wages payable in the 2019/2020 tax year.

Conclusions

28. The claimant was dismissed by the respondent by reason of redundancy. She had three complete years' service at the relevant date and was aged 32. She is therefore entitled to three weeks' pay by way of redundancy payment.
29. The key question in this case is how to calculate a week's pay, given that the claimant did not have normal working hours and was on furlough in the weeks prior to her dismissal.
30. I find that the calculation date for the purposes of calculating the claimant's entitlement to a statutory redundancy payment is three weeks before the 30 November, namely the 9 November 2020. This is the date upon which the respondent would have had to give the claimant notice in order to provide her with the statutory minimum period of notice set out in section 86 of the Act.
31. Using the method set out in regulation 8 of the Regulations, I calculate that the relevant period in respect of which a week's pay is to be calculated is the twelve weeks ending at the end of the week before the 9th November 2020, which was a Monday.
32. The claimant was furloughed throughout the relevant period, and accordingly her weekly remuneration during this period should be calculated in accordance with regulation 8(3)(b) and 8(4) of the Regulations.
33. There was no evidence before me of either the gross furlough payments during the relevant period or of the actual reference salary used to calculate those payments. For the purposes of the statutory redundancy calculation therefore, I have used the claimant's gross pay for the 2019 – 2020 tax year, which was £13,476.34. Dividing this by 52 gives a gross weekly pay of £259.16.
34. I have used £259.16 as the relevant week's pay and multiplied this by three to give a total statutory redundancy payment of £777.48.
35. The claimant is therefore entitled to a statutory redundancy payment of £777.48 and the respondent is ordered to pay this sum to her.

Employment Judge Ayre
Date: 8 October 2021